Document:-

A/CN.4/SR.1951

Summary record of the 1951st 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

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 expressed 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.

Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, 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 RAPPORTEUR[3] (*concluded*)

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)

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] (*concluded*)

1. Mr. ROUKOUNAS said that the draft articles which the Commission was preparing on the basis of the excellent reports of the Special Rapporteur, especially the provisions on such controversial matters as the scope of the principle of the inviolability of the diplomatic bag, would serve as a work of reference.

2. In their comments on draft article 36, several members of the Commission had rightly referred to the principle of good faith, which should be mentioned in the commentary to that article.

3. In article 36, paragraph 1, on which opinion was far from unanimous, the Commission might simply state the principle of inviolability of the diplomatic bag, without going into details of the kinds of examination from which it was exempt, and emphasize that the exemption was justified by the need to protect the confidential nature of its contents. The paragraph might thus be amended to read:

> "1. The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained and shall be exempt from examination affecting the confidential character of its contents."

4. Article 36, paragraph 2, offered a realistic solution. In particular, it was right that the transit State, which should not be regarded simply as a post office box, should also be able to take action in the case covered by that paragraph. But the receiving State and the transit State should be able to request the sending State to open the bag on the spot, before initiating the procedure for its return.

5. Although the Special Rapporteur had improved the wording of draft article 41, that article was still unnecessary. Provisions on the non-recognition of States had their place in a convention such as the 1975 Vienna Convention on the Representation of States, but not in draft articles on the status of the diplomatic courier and the diplomatic bag. Two paragraphs on the subject was certainly excessive. Besides, to cover it completely the Commission would also have to deal with the case in which the transit State was not recognized by the host State.

6. As shown by the new wording of draft article 43, the idea of allowing some flexibility in the application of the present articles, so that they could be accepted by the largest possible number of States, was gaining support. But unfortunately, by giving States full freedom, the words "or at any time thereafter" in paragraph 1 might lead to what was known as "uncertainty of the law". Such wording did, of course, appear in article 298, paragraph 1, of the 1982 United Nations Convention on the Law of the Sea and in article X, section 39, of the Convention on the Privileges and Immunities of the Specialized Agencies. In the first case, however, the article in question could not serve as a model because its subject-matter was entirely different; and in the second, the effect of the wording used was to broaden the scope of privileges and immunities recognized in other instruments, whereas in the draft articles under consideration the wording in question was used in a restrictive context. It should therefore be deleted.

7. In view of the links between draft article 43 and draft article 36, the latter provision did not appear to allow as much flexibility in the application of the principle of inviolability as, for example, article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Thus, if a State party to the 1963 Vienna Convention agreed to apply to the consular bag the régime provided for in the draft articles, it would have less room for manœuvre than under that Convention. That was a point that should be taken into consideration.

8. Mr. DÍAZ GONZÁLEZ said that, in the Spanish text of draft article 36, paragraph 1, the words "wherever it may be" should be rendered as *dondequiera que esté* or *dondequiera que se encuentre,* rather than *allí donde se encuentre.* In the last clause of

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[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.

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

paragraph 1, the word "indirectly" should be added after the words "directly or", as proposed by several members of the Commission. But it must be understood that, if the receiving State or the transit State had "serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use ...", as provided in paragraph 2, that would be because it had already carried out an examination, either directly or indirectly, for example by using dogs trained to detect the presence of drugs.

9. The purpose of paragraph 1 was not so much to state the principle of the inviolability of the diplomatic bag as to safeguard freedom of communication between the State and its missions abroad and to protect the confidential character of the contents of the diplomatic bag. It was difficult to see how a diplomatic bag accompanied by a diplomatic courier could be exempt from the X-ray examination carried out at airports to prevent acts of terrorism, when the hand luggage of heads of mission and even of ambassadors was subjected to that examination, which could not be regarded as a violation of the bag. It would therefore be necessary to find balanced wording that would ensure respect for the confidential nature of communications between a State and its missions, while at the same time guaranteeing the security of the receiving State and also of means of transport.

10. On article 36, paragraph 2, he shared the view of many other members of the Commission that it should be provided that the receiving State could request that the bag be opened in the presence of a member of the mission of the sending State. The words "to its place of origin" should be replaced by "to the sending State", since the place of origin of the bag might be in a transit State.

11. Draft article 42 was unnecessary because it would have no effect. The instrument which the Commission was preparing was intended only to complement, not to replace, the relevant articles of the codification conventions, and it was very probable that many States would prefer to continue applying the provisions of those conventions, which were sufficiently explicit. Moreover, paragraph 2 of article 42 provided that the present articles were "without prejudice to other international agreements in force as between States Parties to them". That was self-evident: only the States which concluded international agreements could decide not to apply them or to terminate them.

12. The draft articles on the diplomatic courier and the diplomatic bag could not in any sense become a *Magna Carta* and it would be presumptuous of the Commission to provide, in article 42, paragraph 3, that States could conclude international agreements on the topic or modify the provisions of the present articles only if such modifications were in conformity with article 6 of the draft. In fact, States were free to conclude any agreement they wished, provided that it was not contrary to the rules of *jus cogens* or in conflict with the international legal order.

13. The CHAIRMAN, speaking as a member of the Commission, said that it was not enough to state the principle of the inviolability of the diplomatic bag *in abstracto*. It was also necessary to take account of the fact that, since the diplomatic bag was sometimes used for wrongful purposes, States tended more and more to apply that principle restrictively in practice. The Commission should therefore be realistic; for although the bag had to be protected, it should not be protected everywhere and at all times.

14. The principle of the inviolability of the diplomatic bag was stated forcefully in draft article 36, paragraph 1, but the exceptions to that principle provided for in paragraph 2 were not stated forcefully enough. That paragraph did not mention the State from whose territory the diplomatic mission of a foreign State dispatched a diplomatic bag; but if there was any doubt about its contents, should that State not be able to refuse to allow the bag to be sent to its destination? The position of that State, which was in fact the State of origin of the bag, did not seem to have been taken into account in the draft articles, since according to the definition in article 3, paragraph 1 (3), the term "sending State" applied only to a State "dispatching a diplomatic bag to or from its missions, consular posts or delegations". It should also be expressly provided that the receiving State or the transit State could request that the bag be examined.

15. Article 36 should be redrafted so as to achieve a better balance between paragraph 1, which stated the principle of the inviolability of the diplomatic bag, and paragraph 2, which listed the exceptions to that principle.

16. Mr. YANKOV (Special Rapporteur), summing up the debate, said that the revised texts of draft articles 36, 37, 39 and 41 to 43 represented an attempt to expedite completion of the first reading of the draft articles. The approach to draft article 36 was based on the comprehensive and uniform character of the bag, and the main object of that article was to provide equal status and equal legal protection, having regard to the inviolability of all types of bag. On the other hand, the purpose of draft articles 42 and 43 was to provide a measure of flexibility with a view to wider acceptance of the draft articles by States.

17. The two elements of draft article 36—inviolability of the bag and remedies against abuses—had to be considered in the light of the interests of sending, receiving and transit States. Accordingly, the provision in paragraph 1 that "The diplomatic bag shall be inviolable wherever it may be; it shall not be opened or detained ..." meant that no act, including examination of the bag, which might prejudice the confidential nature of its contents should be carried out. Inviolability inevitably required that the bag should not be opened or detained. While it was true that the 1961 Vienna Convention on Diplomatic Relations made no mention of inviolability in article 27, paragraph 3, the word "inviolable" was used both in article 27, paragraph 2, and in article 24 of that Convention. In his view, therefore, the word "inviolable" was quite proper in the context of the legal protection of the diplomatic bag. Moreover, "inviolable" did not mean "untouchable", and Mr. Sucharitkul (1949th meeting) had rightly spoken of the

relativity of the concept. Inviolability, in the context of the draft articles, meant the proper legal protection of the contents of the diplomatic bag as defined in article 3, paragraph 1 (2).

18. The reference to direct examination of the diplomatic bag in the last clause of draft article 36, paragraph 1, meant any kind of direct examination by physical contact, other than by electronic or mechanical devices, which might be prejudicial to confidentiality. The addition of the word "indirectly" had been suggested; he was not quite certain whether that would be appropriate, but the suggestion could be considered in the Drafting Committee. As to the reference to "electronic or other mechanical devices", the draft articles were bound to take account of technological developments.

19. Mr. Roukounas had referred to the principle of good faith: had that always been the rule in international relations the world would be a far better place, but sometimes the norm was bad faith. Unfortunately there was no guarantee that routine examination by screening might not be prejudicial to the diplomatic bag.

20. The purpose of article 36, paragraph 2, was to ensure that all bags received uniform treatment, having due regard to the legitimate interests of the sending, receiving and transit States. That paragraph was broadly in keeping with State practice: in cases of doubt, both parties generally preferred not to open the bag, but to return it to its place of origin. It had none the less been suggested that paragraph 2 should provide for the possibility of requesting that the bag be opened or screened. The disadvantage of that suggestion was that it would mean reverting to the formula of the 1963 Vienna Convention on Consular Relations, which would then apply to all types of diplomatic bag.

21. He agreed that, in draft article 37, it would be preferable to bring the French text into line with the codification conventions and translate the word "cartage" by *transport*, rather than *camionnage*. At the end of the article, the words "other specific services rendered" should be replaced by "similar services rendered".

22. It had rightly been pointed out that the reference to *force majeure* in the title of draft article 39 applied only to paragraph 2 and not to paragraph 1. He therefore suggested that the title should be amended to read "Protective measures in circumstances preventing delivery of the diplomatic bag or in case of *force majeure*", which would cover both paragraphs. The expressions "appropriate measures" and "necessary facilities", which appeared in paragraphs 1 and 2 respectively, had also been questioned. In his view, both expressions were appropriate in their context; but in paragraph 2, the words "to the extent practicable" could perhaps be inserted before the word "extend".

23. The usefulness of draft article 41, or at least of paragraph 2 of that article, had been questioned by some members. Although he did not feel very strongly on the matter, he thought there were certain elements worth preserving in article 41. It certainly served a purpose, since it dealt with a situation that was not very rare: for example, the United States of America—where the Headquarters of the United Nations was situated—did not have diplomatic relations with all of the 159 Member States of the Organization.

24. Mr. Riphagen (1948th meeting) had suggested that a definition of the term "host State" should be reintroduced into the draft. Such a definition had, of course, been included in the original text of draft article 3,[5] but had been deleted following the adoption of a broader definition of the term "receiving State", which included the host State.[6] That being so, he suggested that the Commission should not go back on its decision, but should insert into the text of paragraph 2 of draft article 41 a form of words to explain that a host State was a State which had in its territory the sending State's mission to an international organization or delegation to an international conference.

25. Mr. Balanda (1950th meeting) had asked whether it would not be appropriate to refer in article 41 to the suspension of diplomatic relations as well as to their non-existence. But the term "non-existence" could well cover both severance and suspension, since for the time being relations would be non-existent. It would be very difficult to deal with the problems of suspension and severance of diplomatic relations in the text of the article. The best course would be to explain in the commentary that the term "non-existence" was meant to cover those situations.

26. The disclaimer provision in paragraph 2 had been criticized by Mr. Tomuschat (*ibid.*) as unnecessary. But the point was one on which Governments were very sensitive and it was desirable to specify that the granting of certain facilities and immunities did not of itself imply recognition. The provision in paragraph 2 was perhaps not one that would solve many problems, but it would certainly not do any harm.

27. The opening words of draft article 42, "The present articles shall complement the provisions ...", introduced the concept of complementarity, which had both vertical and horizontal aspects. Vertically, the draft articles would serve to give more precise meaning and practical value to the provisions of the diplomatic conventions relating to the diplomatic courier and the diplomatic bag. Horizontally, the draft articles would add new elements to the existing law on the subject. Ever since he had submitted his preliminary report on the topic,[7] he had expressed the view that the draft articles should not be considered in isolation from the four codification conventions. The relationship between the draft articles and other conventions or international agreements, dealt with in draft article 42, had to be considered *ratione materiae* on two main levels: first, in respect of the four codification conventions adopted

[5] See paragraph 1 (6) of draft article 3 submitted at the Commission's thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), pp. 160-161, footnote 680).

[6] See paragraph (13) of the commentary to article 3, provisionally adopted by the Commission at its thirty-fifth session (*Yearbook ... 1983*, vol. II (Part Two), p. 56).

[7] *Yearbook ... 1980*, vol. II (Part One), p. 231, document A/CN.4/335; see especially section III.

under the auspices of the United Nations, which were the subject-matter of paragraph 1; and secondly, in respect of bilateral consular or other agreements, which were the subject-matter of paragraph 2.

28. The relationship could also be considered *ratione temporis,* in respect of future international agreements relating to the status of the diplomatic courier and the diplomatic bag: that was the subject-matter of paragraph 3. Mr. Francis, Mr. Jagota, Mr. Tomuschat and Mr. McCaffrey (*ibid.*), as well as several other members, had expressed doubts about the usefulness of that paragraph on the ground that its content was already covered by article 6, paragraph 2 (*b*). But paragraph 2 (*b*) of article 6 covered the general principle of reciprocity, whereas paragraph 3 of draft article 42 related to future agreements in the field of diplomatic law.

29. The purpose of draft article 43 was to introduce a certain flexibility in order to secure wider acceptance of the draft articles. That practical purpose was served by giving States more options, corresponding to the position each State took in regard to the four codification conventions. During the discussion, the provisions of article 43 had been criticized on the ground that they would open the door to a multiplicity of régimes. The fact was that the multiplicity of régimes already existed under the four codification conventions, which, in particular, established two different régimes for the diplomatic bag. All that article 43 did was to take account of the existing situation by giving States an opportunity to choose the field of application of the régime established by the draft articles. Mr. Tomuschat thought that article 43 created a complicated situation, but in fact the situation was complicated already.

30. He would not dwell on the drafting points made during the discussion, except to say that the Drafting Committee would certainly give careful consideration to Mr. Ogiso's suggestion (1949th meeting, para. 38) that the concluding words of article 43, paragraph 1, "to which it wishes the provisions to apply", should be replaced by the negative formulation "to which it does not wish the provisions to apply".

31. He proposed that the draft articles be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

32. Mr. KOROMA said that he wished to clarify a point concerning draft article 36 and the notion of inviolability. Reference had been made to the incident at Stansted Airport in the United Kingdom, where a crate alleged to have been a diplomatic bag had been found to contain a man. One reason why the crate had been opened by the British authorities was that it did not meet the requirements for a diplomatic bag; in particular, it did not bear the visible external marks required under article 24. Thus the true position was that the crate opened by the British authorities had not been a diplomatic bag at all. It was undesirable to perpetuate the myth that there had been an attempt to carry a human being in a diplomatic bag.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer to the Drafting Committee the revised texts of draft articles 36, 37, 39 and 41 to 43 submitted by the Special Rapporteur, for consideration in the light of the comments and suggestions made during the discussion.

It was so agreed.[8]

The meeting rose at 11.25 a.m.

[8] For consideration of the texts proposed by the Drafting Committee (new articles 28 to 33), see 1980th meeting, paras. 52-109.

1952nd MEETING

Monday, 26 May 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Carero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Illueca, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Yankov.

State responsibility (A/CN.4/389,[1] A/CN.4/397 and Add.1,[2] A/CN.4/L.398, sect. C, ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

"Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)[3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 5 AND ANNEX

1. The CHAIRMAN invited the Special Rapporteur to introduce his seventh report on the topic (A/CN.4/397 and Add.1), as well as the articles of part 3 of the draft, which read as follows:

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

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980,* vol. II (Part Two), pp. 30 *et seq.*

Articles 1 to 5 of part 2 of the draft (Content, forms and degrees of international responsibiity), which were provisionally adopted by the Commission at its thirty-fifth and thirty-seventh sessions, appear in *Yearbook ... 1985,* vol. II (Part Two), pp. 24-25. For the texts of the remaining draft articles of part 2, articles 6 to 16, referred to the Drafting Committee by the Commission at its thirty-sixth and thirty-seventh sessions, *ibid.,* pp. 20-21, footnote 66.