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**Summary record of the 1842nd meeting**

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

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## 1842nd MEETING

Monday, 18 June 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)\* (A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)**

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup>  
(continued)

ARTICLE 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 31 (Indication of status of the diplomatic bag)

ARTICLE 32 (Content of the diplomatic bag)

ARTICLE 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 34 (Status of the diplomatic bag dispatched by postal services or other means) *and*

ARTICLE 35 (General facilities accorded to the diplomatic bag)<sup>5</sup> (continued)

1. Mr. RAZAFINDRALAMBO said that the draft articles under consideration were of particular importance to countries which could not afford the services of a professional diplomatic courier and were obliged, in the words of article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, to "employ all appropriate means" of communication to maintain liaison

\* Resumed from the 1832nd meeting.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1830th meeting, para. 1.

with their diplomatic and consular missions. In the case of the diplomatic bag, airlines were probably the means mainly used. But that means of transport was far from presenting the same guarantees of protection and security as conveyance by diplomatic courier, and the Special Rapporteur had been right in saying that "the increasing significance of the status of the diplomatic bag has also to be considered from the point of view of the widespread practice of using diplomatic bags not accompanied by diplomatic couriers" (A/CN.4/374 and Add.1-4, para. 246). The importance of that status was also clear from the title of the topic, which referred to the status of both the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Thus the second aspect of the topic needed to be examined just as carefully as the first.

2. The practice, confirmed by the four codification conventions, of entrusting the bag to the captain of a commercial aircraft, was far from satisfactory according to the experience of certain sending States. First of all, it meant that the bag was entrusted *intuitu personae* to a particular airline pilot, because that pilot must carry official documents. But some diplomatic bags sent to distant missions had to cross several continents, pass through a number of airports and change airlines. In those circumstances it was not possible to entrust the bag to the captain of an aircraft covering only the first part of the journey. Even if there was no change of aircraft there might be a change of crew: between Paris and Antananarivo, for example, the crew was changed three times. Thus it was open to question whether the captain of an aircraft would hand over the diplomatic bag to his replacement. At each such transfer, the responsibilities became less clear; the bag might be treated as an ordinary package and relegated to some corner of the aircraft.

3. Sending States which could not have recourse to pilots *intuitu personae* had to resort to means which did not appear to fall into any of the categories mentioned by the Special Rapporteur (*ibid.*, para. 217), but rather to come under draft article 34. They did not entrust the diplomatic bag to airline pilots, but sent it as air freight with an air transport company. That was common practice in most third world countries, whose experience was anything but encouraging. There were many examples of diplomatic bags entrusted to air transport companies which had been found cut open and emptied of their contents at an airport. One air transport company to which the diplomatic bag of the Malagasy Embassy in Paris had been entrusted had claimed to have lost it on the road to Orly Airport. For mainly financial reasons, however, some countries were obliged to resort to such means, at least for sending non-confidential official documents. As Chief Akinjide had stressed (1825th meeting), the African countries were obliged, even for South-South relations, to pass through the main European capitals. Some European countries, either by reason of their geographical position or as a result of their historical role in colonial times, had become almost obligatory transit points. It should be added that that state of affairs did not present only disadvantages for the African countries, considering the policy of cultural and economic interest which the European countries con-

tinued to pursue, particularly with their former colonies. In any case, for the countries of the third world, the provisions relating to the status of the unaccompanied diplomatic bag were of particular importance.

4. In draft article 30, the Special Rapporteur dealt not only with the status of the captain of a commercial aircraft or the master of a merchant ship, but also with that of an authorized member of the crew, which was an innovation in relation to the codification conventions. But the status of an authorized member of the crew did not derive from any significant State practice, and it seemed hardly worth considering, since only two situations could arise. In the first case, the captain might not be able to take charge of the diplomatic bag on departure and the sending State would have to employ a different means of communication. In the second case, the captain accepted responsibility for the diplomatic bag and there would seem to be no reason why he should subsequently hand it over to a mere member of the crew, unless there was a change of crew; but even in that case, it was to his replacement that he should entrust the bag. Consequently, the possibility of entrusting the bag to a member of the crew of an aircraft or ship should be eliminated.

5. Paragraph 4 of draft article 30 dealt with the delivery of the bag by the captain to members of the diplomatic mission of the sending State, but did not mention the case of delivery of the bag to the captain by the mission for transport to the sending State. Paragraph 4 should be amended to make good that omission. In addition, the obligations of the receiving State should be specified.

6. The indication of the status of the diplomatic bag provided for in draft article 31 was necessary, though it was not sufficient to prevent the commission of offences against the diplomatic bag not accompanied by diplomatic courier. The precautions taken to identify the bag were intended mainly to prevent confusion with an ordinary package and to ensure respect for the privileges and immunities attaching to it. In fact, the identifying marks only facilitated the task of those whose business it was to violate the secrecy of the official correspondence of the sending State.

7. The wording of draft article 31 was modelled on that of the corresponding provisions of the four codification conventions and called for comment only in so far as the Special Rapporteur had departed from those texts. Whereas article 27 of the 1961 Vienna Convention required only that the packages constituting the diplomatic bag "must bear visible external marks of their character", draft article 31, paragraph 2, required that the packages constituting the diplomatic bag, if unaccompanied by diplomatic courier, "shall also bear a visible indication of their destination and consignee, as well as of any intermediary points on the route or transfer points". While it seemed obvious that the destination and consignee must be indicated, it was more difficult to see the practical need to indicate "any intermediary points on the route or transfer points". Some airlines in fact took different routes according to the day and the flight number, and those routes were not always known in advance. It followed that the indication of intermediary points and transfer points was not essential. As to para-

graph 3, he wondered why it was made obligatory to determine the maximum size or weight of the diplomatic bag; it would suffice if that were made optional.

8. Draft article 32, which dealt with the content of the diplomatic bag, was very important, because it was designed to prevent abuses and protect the interests of the receiving State or of a transit State in so far as the bag was not automatically transferred. The Special Rapporteur had rightly not followed the examples of the codification conventions by including provisions on verification of the contents of the bag. Such verification was, indeed, linked with the principle of the inviolability of the diplomatic bag—a fundamental principle which was stated in draft article 36 and intended to ensure the secrecy of official correspondence. In view of technological progress, however, that principle was in danger of becoming a dead letter, at least in regard to unaccompanied bags. It therefore seemed doubtful whether there was any practical need to impose on sending States specific measures for the prevention of abuses and the punishment of offences against the provisions of article 32, paragraph 1. Moreover, transit and receiving States were not obliged to take similar measures to prevent unaccompanied bags from being opened, emptied of their contents or lost while passing through their territory. In addition, if abuses calculated to injure the interests of the sending State were committed, the laws in force in that State would probably already be producing a deterrent effect by providing for appropriate civil, penal or administrative sanctions against offenders. Draft article 32 should therefore include a provision on the responsibility of transit and receiving States in the event of loss or breaking open of the diplomatic bag in their territory. In any case, the last clause of article 32, paragraph 2, concerning prosecution and punishment, did not seem necessary.

9. Draft article 33, on the status of the diplomatic bag entrusted to the captain of an aircraft, the master of a ship or an authorized member of the crew, seemed unnecessary because it only referred back to the status of the diplomatic bag in general. It might have been better to draft the title of part III in more precise terms such as "General status of the diplomatic bag" or "Status of the diplomatic bag whether or not accompanied". Another solution would be to include an article 30 *bis* entitled "Scope of the present articles", providing that "the present articles apply to the diplomatic bag whether or not accompanied by diplomatic courier".

10. Draft article 34, on the status of the diplomatic bag dispatched by postal services or other means, was undoubtedly of practical importance. It covered the case of bags sent by air, without being entrusted to the captain of an aircraft, or dispatched by post. Dispatch by the postal service had the disadvantage of being subject to the operation of that service without, it appeared, any preferential treatment. Admittedly, the postal authorities of the receiving State or transit State were required, at the end of paragraph 2, to "facilitate the safe and expeditious transmission of the diplomatic bag", but that was a wish rather than an obligation; such a provision could have no real influence on the conduct or respon-

sibility of the States concerned. Those States were dependent on the quality of their postal services and, in the event of a postal strike, could not guarantee the forwarding of the diplomatic bag or even ensure that it did not remain undelivered. The same applied to dispatch by ordinary surface, air or maritime transport, except that the risks were even greater. There again, the obligations of the transit State or receiving State laid down in article 40 should be more general and not cover only the cases of *force majeure* and fortuitous event. It seemed unacceptable that an unaccompanied diplomatic bag sent by post or other means could disappear without the responsibility of the transit or receiving State being specifically engaged.

11. Lastly, with regard to draft article 35, on the general facilities accorded to the diplomatic bag, he suggested following the relevant provisions of the Vienna Conventions on diplomatic and consular relations and adding to the French text, after the words *toutes les facilités voulues*, the words *pour le transport et la remise rapide et en toute sécurité de la valise diplomatique*.

12. Mr. FRANCIS said he agreed with much of what had been said by the previous speaker. The first of the draft articles under discussion, article 30, made provision for the diplomatic bag being conveyed by the captain of a commercial aircraft, the master of a merchant ship or an "authorized member of the crew". There had been some discussion as to whether a member of the crew should be specifically mentioned. It was true that article 27 of the 1961 Vienna Convention on Diplomatic Relations mentioned only "the captain of a commercial aircraft", but there had been developments since 1961 which warranted making the provision considerably broader. The Special Rapporteur had mentioned in his report at least one case of a diplomatic courier and a diplomatic bag being carried by lorry (A/CN.4/374 and Add.1-4, para. 234).

13. From a practical point of view, it would be unwise to limit the custody of the diplomatic bag to the captain of a commercial aircraft or the master of a merchant ship. From his own experience, he could say that the captain of a small aircraft would himself take charge of the diplomatic bag; but on a larger aircraft, delegation to a crew member would be possible. Furthermore, in some countries, including his own, it was quite a common practice to entrust the bag to an agent of the airline concerned, who passed it on to the captain or authorized crew member. Thus it was necessary to make the provisions of article 30 broad and flexible enough to cover all those possibilities. He accordingly supported the formula in paragraph 1 of article 30, reading: "The captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command...".

14. As to paragraph 4, he agreed with Mr. Razafindralambo on the need to fill a gap in the text, which referred only to direct delivery of the diplomatic bag to "members of the diplomatic mission of the sending State". In draft article 3 (Use of terms), paragraph 1 (2) defined a "diplomatic bag" as including not only "a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961", but also "a consular bag within the meaning of the Vienna Convention on

Consular Relations of 24 April 1963". The term "mission" was defined in paragraph 1 (6) as including diplomatic missions, special missions and permanent missions; it did not include a consular post, which was defined separately in paragraph 1 (7). Thus the effect of the present text of draft article 30, paragraph 4, would be to exclude members of consular posts from benefiting from the facilities for free and direct delivery of the consular bag. In order to avoid that probably unintended result, he suggested the insertion of the words "or consular post" after the words "delivery of the diplomatic bag to members of the diplomatic mission".

15. In examining the group of articles under consideration, it should be borne in mind that, as pointed out by a number of speakers, most developing countries did not have professional diplomatic couriers. They were therefore obliged to rely on other means of transport for the dispatch of diplomatic bags.

16. He had some drafting suggestions to make regarding part III of the draft articles. In the first place, the title "Status of the diplomatic bag" did not adequately cover the contents of that part, and he suggested that it should be expanded to read: "Content, characteristics and status of the diplomatic bag". As to the order of the draft articles, he suggested that the article on the content of the diplomatic bag should be placed first; the next article would deal with the characteristics of the bag; and next would follow article 36, on the inviolability of the diplomatic bag. In view of the fundamental character of that provision, it should precede the remaining articles in part III.

17. In draft article 32, the language of paragraph 1 needed to be strengthened. Since the purpose was to prevent abuses, it would be preferable not to use the formula "may contain"; he suggested that the paragraph should begin with a specific statement to the effect that the contents of the diplomatic bag must be intended exclusively for official use. The provision could then go on to say that the diplomatic bag "may contain official correspondence...". As to paragraph 2, he agreed with those members who had suggested the deletion of the last clause "and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag".

18. Lastly, in draft article 34, paragraph 1, he suggested that the words "shall comply" should be replaced by the more appropriate words "shall conform".

19. Mr. NI said that, generally speaking, he approved of draft article 30, though some parts of it were rather cumbersome. As had already been pointed out in the Commission and in the Sixth Committee of the General Assembly, it was necessary to fill certain gaps in the four codification conventions by introducing provisions in that draft article, but those provisions should not be too long. In paragraph 1, the Special Rapporteur had tried to describe clearly the incoming and outgoing movements of the diplomatic bag. But the paragraph was too long, and it was much less clear than the first sentence of paragraph 1 of the corresponding articles of the four codification conventions, which were not open to any misun-

derstanding. Paragraph 1 of draft article 30 provided that, besides the captain of an aircraft or master of a ship, “an authorized member of the crew under his command may be employed for the custody, transportation and delivery of the diplomatic bag”—a provision which appeared unnecessary. Although no such provision was included in the codification conventions, the possibility of entrusting the bag to an authorized member of the crew was not, in fact, excluded. In practice that was always done and the receipt was signed on behalf of the captain. Draft article 30 would raise the question whether the member of the crew was under the captain’s command and whether he was authorized. Furthermore, the term “employed” in paragraph 1 was not as satisfactory as the term “entrusted”, which appeared in the four codification conventions and in paragraph 2 of draft article 30.

20. Paragraphs 2 and 3 could be combined, which would not only simplify the drafting, but would be in conformity with the four codification conventions. The fact that the captain or master was not considered to be a diplomatic courier had been made clear in debate during the formulation of the codification conventions. The delivery of the diplomatic bag was not his only task. If he committed an unlawful act during the performance of other duties, he was subject to arrest or detention. It would be inconceivable for him to enjoy privileges and immunities simply because he had been entrusted with a diplomatic bag. It was in his capacity as captain or master that he was entitled to due respect and appropriate assistance, not because he was carrying a diplomatic bag.

21. According to paragraph 4 of draft article 30, the authorities of the receiving State must accord facilities to the person who came to take possession of the bag, so that he could have access to the aircraft or ship. Those facilities did not appear to extend to the captain or master, but the safe handing over of the inviolable diplomatic bag in itself facilitated the completion of his task. In their corresponding articles, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States provided that “by arrangement with the appropriate ... authorities” of the receiving State, the person sent should be able to take possession of the bag directly and freely from the captain. The 1961 Vienna Convention on Diplomatic Relations did not contain even that short phrase, but its omission had never caused any difficulties. Nevertheless, to affirm the obligation of the receiving State to provide assistance, paragraph 4 could be retained, but in simplified form. The person to be given access to the aircraft or ship could be a staff member of the embassy, consulate or mission of the sending State. That particular was not specified in paragraph 4.

22. The status of the diplomatic bag, which was an important instrument for free communication by States for official purposes, was the core of the whole set of draft articles. The increasing importance of the status of the diplomatic bag was also shown by the very widespread practice of sending bags unaccompanied by a

diplomatic courier. Consequently, it was necessary to formulate new rules maintaining a balance between the rights and duties of the sending State and those of the receiving State, so as to protect the interest of the sending State in having the bag freely and quickly delivered, to ensure that the sending State would respect the laws and regulations of the receiving State, and effectively to prevent abuse of the privileges accorded.

23. As to paragraph 1 of draft article 31, he saw no reason to formulate a different provision, since the four codification conventions all contained similar provisions, which had proved to be in conformity with State practice. Paragraph 2 referred to “any intermediary points on the route or transfer points”, which it was not necessary to indicate in all cases. He therefore suggested that the words “as necessary” be added after the words “as well as of”. Paragraph 3 raised not only the question of the external markings on a diplomatic bag, but also that of its contents and of the limitations on abuse of rights. Hence that paragraph appeared to fall within the scope of draft article 32.

24. With regard to draft article 32, on the content of the diplomatic bag, he emphasized that in principle the bag was inviolable and that the Special Rapporteur’s proposed article 36 confirmed the inviolability of the bag and its exemption from examination. The four codification conventions provided only for the inviolability of official correspondence. But if the diplomatic bag contained official correspondence as well as articles for official use, it might consist of numerous packages of each category, with no limit to their size or weight. As the packages would be indistinguishable one from another, it might be asked who would determine which contained articles other than those referred to in article 32, paragraph 1. Though mutual trust and co-operation should exist at the international level, cases of abuse did occur and they were even on the increase. At the present time, none of the multilateral conventions on diplomatic law provided a viable solution to the problem of the verification of the contents of the diplomatic bag. Going further than the 1963 and 1969 Conventions, draft article 32, paragraph 1, restricted the content of the diplomatic bag by adding the word “exclusively” before the words “for official use”, which was certainly a positive step, although it did not solve the problem.

25. Paragraph 2 of draft article 32 raised the same difficulties as paragraph 2 of article 20; it provided that the sending State must take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and must prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag. Such a provision would require Governments to enact new laws in order to fulfil their obligations. Generally speaking, under internal criminal law a State could prosecute and punish nationals who committed offences outside its territory. Such prosecution and punishment were, however, subject to certain limitations, which sometimes consisted merely of a list of punishable offences and sometimes depended on the length of the sentence. If, however, persons other than diplomatic couriers had used the diplo-

matic bag for the transport of unauthorized articles, and if criminal acts had been committed before the bag had left the territory of the sending State, the question arose whether articles other than those allowed could be used as evidence to prosecute and punish, without resorting to legislation.

26. Paragraph 3 of draft article 31 dealt with the size and weight of the bag, and raised the question not only of its external markings, but also of its contents and of the abuse of rights. It was obvious that large containers and crates should not be dispatched as diplomatic bags. It was not only a question of size and weight, however, but also of contents and of abuses; further consultations should be held between all States in order to find an acceptable method. Some bilateral conventions already provided for the opening of the bag in the presence of an authorized representative of the sending State, to ensure that it did not contain anything other than official correspondence and articles intended for official use. That practice should be widespread before generally accepted rules were formulated. For the time being, therefore, sending and receiving States should formulate provisions based on mutually accepted principles and come to an agreement, as had been done on the size and weight of the diplomatic bag.

27. At first sight, it appeared that draft article 33 could be combined with draft article 30. But the latter article dealt with the captain or master and his status, the official documents which should be in his possession and the facilities to be accorded to him, whereas draft article 33 focused on the diplomatic bag entrusted to the captain or master, with specific provisions on the legal status of the bag, its external markings, its contents and the privileges and immunities to be accorded to it by the receiving and transit States. As the two articles differed in content and focus, they should not be artificially merged. The status of a captain or master entrusted with the delivery of the bag was not the same as that of a diplomatic courier, so it was natural for him to be the subject of a separate article. Nor was the status of a diplomatic bag entrusted to a captain or master the same as that of a diplomatic bag not accompanied by diplomatic courier, such as bags sent by post. For the diplomatic bag entrusted to a captain or master was not really accompanied by a designated person.

28. Referring to draft article 34, he pointed out that the four codification conventions did not contain explicit provisions on the dispatch of the diplomatic bag by postal services or other means, but provided that "all appropriate means" of communication might be employed—a formula which obviously included postal services and other means of transport and communication. Paragraph 1 of draft article 34 provided that "the diplomatic bag dispatched by postal services or other means, whether by land, air or sea, shall comply with all the requirements set out in article 31", but did not mention that article 32, on the content of the diplomatic bag, must also be respected. Did that mean that the diplomatic bag referred to in article 34 was not subject to the provisions of article 32?

29. Draft article 35, on general facilities accorded to

the diplomatic bag, was symmetrical with draft article 15 on general facilities, but it was drafted in stronger terms. Perhaps that was intended to show that the diplomatic bag not in the direct and permanent custody of a courier had more protection and preferential treatment, which was quite understandable.

30. Sir Ian SINCLAIR said that the articles under discussion constituted a mixed bag. Article 30 was the last of the set of draft articles dealing with the status of the diplomatic courier or other person entrusted with the transport and delivery of the diplomatic bag; articles 31 to 35 were the first five of the very important series of articles dealing with the bag itself. Article 30 dealt with the need to afford a sensible, but not excessive degree of protection to the carrier of the bag; the succeeding articles met the need to regulate the status of the bag itself.

31. Draft article 30 dealt with the comparatively recent, but growing practice of entrusting the diplomatic bag to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew. The article was thus a necessary and useful provision, which served to regulate an increasingly used means of transport and delivery of the diplomatic bag. The importance and significance of that method of conveying the diplomatic bag varied, of course, from one sending State to another. States which employed a professional courier service might use it rarely, but they would do so from time to time. For other States, it could well be the regular method of transport and delivery of the diplomatic bag, except where an *ad hoc* courier was appointed. A vivid picture had been painted by Mr. Razafindralambo of some of the difficulties encountered by developing countries which used that method as normal routine.

32. In any case, whatever the practice of particular sending States, there was no doubt about the need for a provision covering the case of a captain, master or crew member who was entrusted with the transport and delivery of the diplomatic bag. He therefore had no difficulty in accepting article 30 in principle; in substance it was similar to article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the other major codification conventions.

33. As to the drafting, however, he agreed with Mr. Ni and suggested that the Drafting Committee should endeavour to shorten and simplify the wording of article 30, paragraph 1, in the light of the definitions in article 3 as provisionally adopted, and of the economy of the draft as a whole. In particular, he suggested the deletion of the last part of paragraph 1: "or for the custody, transportation and delivery of the bag of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State in the territory of the receiving State addressed to the sending State" and the insertion in its place of the words: "or, as the case may be, in the territory of the sending State".

34. There had been some discussion about the possible deletion of the reference to "an authorized member of the crew". He himself was uncertain on that point, but if those words were retained he would have no objection to

the innovation they constituted. If, however, the majority wished to delete those words, he would suggest that a passage be introduced into the commentary to explain that delivery of the diplomatic bag to the captain of a commercial aircraft or the master of a merchant ship would not necessarily exclude the possibility of the bag being physically entrusted to an authorized member of the crew thereafter.

35. He had a point of substance to raise with regard to paragraph 4 of draft article 30. As worded, that paragraph seemed to imply that the receiving State had discretion to allow or not to allow access to the aircraft or ship by the member of the diplomatic mission of the sending State entrusted with taking delivery of the diplomatic bag. He felt certain that the Special Rapporteur had not intended to convey that impression, as was clearly shown by the statement in his report that assistance for handing over the diplomatic bag should be accorded in order to facilitate "free and direct delivery" of the bag to the member of the mission who was to take possession of it, and that "free and direct access to the plane or ship should be provided for reception of incoming diplomatic mail" and also for handing over (A/CN.4/374 and Add.1-4, paras. 241-242) "outgoing diplomatic mail".

36. He himself entirely agreed with those observations by the Special Rapporteur. Unfortunately, there had been instances recently of receiving States refusing access to airport tarmacs to authorized members of a sending State's mission sent to take delivery of the diplomatic bag. Consequently, it was essential to spell out clearly in article 30 the duty of the receiving State to permit those who were authorized to receive the diplomatic bag to have unimpeded access to the aircraft or ship. He accordingly suggested that paragraph 4 of article 30 should be redrafted along the following lines:

"4. The receiving State shall permit duly authorized members of the mission, consular post or delegation to have direct and unimpeded access to the aircraft or ship in order to take possession of the diplomatic bag from the captain or master (or authorized member of the crew) to whom it was entrusted."

As he saw it, it was essential that those who were authorized to take delivery of the bag should be accorded direct access to it on the tarmac or at the docks. That was certainly more important than extending vague and unspecified facilities for the delivery of the bag to the captain, the master or the authorized member of the crew. The alternative formulation he had suggested was in any event closer to the substance of the corresponding provisions in the four codification conventions than the text proposed.

37. Turning to the provisions on the status of the diplomatic bag, he said that draft article 31 was relatively uncontroversial. With regard to paragraph 2, while it might be useful to indicate intermediary points on the labels of diplomatic bags, it should not be a mandatory requirement. In United Kingdom practice, it was customary to indicate only the final destination, simply be-

cause, once a bag had been consigned to an airline or forwarding agent, the sending State had no control over diversions resulting from changes in flight plan or decisions by forwarding agents. He therefore proposed that the phrase "as well as of any intermediary points on the route or transfer points" should be deleted. That would not prevent States which currently indicated intermediary points on labels from continuing to do so. He had been unable to find any relevant State practice despite a careful study of the relevant sections of the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, paras. 250-272) and fifth report (A/CN.4/382, paras. 54-63).

38. He also saw some problems in paragraph 3 of draft article 31, which provided for the maximum size or weight of the diplomatic bag to be determined by agreement between the sending and receiving States. In his view, it should be left to the practice of States to determine, in their mutual relations, whether a limit should be set. As the Special Rapporteur had noted in his fourth report (A/CN.4/374 and Add.1-4, para. 255), the maximum size or weight of the bag was among the "optional requirements", a view also reflected in his fifth report (A/CN.4/382, para. 63). He therefore considered that there should be no obligation on the sending and receiving States to agree on the maximum size or weight of the bag and that paragraph 3 could be deleted. That, again, should not prejudice the position of States wishing to place limits on the maximum size or weight of diplomatic bags. If, however, it was deemed necessary to retain such a provision, paragraph 3 should be made discretionary rather than mandatory.

39. Draft article 32 stated the basic principle contained in the four main codification conventions, namely that the bag should contain only official correspondence and documents or articles intended for official use. The problem was how to ensure strict compliance by the sending State with that obligation. There was every reason to believe that some sending States paid no attention to restrictions on the use of the diplomatic bag, relying upon the inviolability of the bag to escape detection. Reference had already been made to the incident at Rome in 1964, when a diplomatic bag had been used to transport a drugged Israeli official. Other glaring abuses included a recent incident in which the British public had been treated to the sight, on their television screens, of a diplomatic mission removing from its premises 48 heavy diplomatic bags, one or more of which had undoubtedly contained the weapon or weapons used a few days earlier in the killing of a young policewoman assigned to protect the diplomatic premises from which the shots had been fired. Such facts could not be denied, and there was irrefutable evidence of grave abuses of the obligation stated in article 32.

40. The majority of sending States no doubt complied faithfully with the restrictions on the contents of the diplomatic bag, though there might be a few which, exceptionally, permitted it to be used for private correspondence or to carry articles that could only doubtfully be regarded as intended exclusively for official use. Some examples of that flexible interpretation of the principle

involved were given in the Special Rapporteur's fifth report (*ibid.*, paras. 66-68). The Commission should not, however, concern itself with venial sins, which paled into insignificance by comparison with such grave abuses as using the diplomatic bag for illicitly conveying arms, drugs, foreign currency and other articles that constituted a serious danger to the public order of the receiving State. Given the scale of such abuses, it would be wrong to qualify in any way the basic principle laid down in paragraph 1 of article 32.

41. That distinction between venial sins and grave abuses was also relevant to paragraph 2 of article 32. He noted that although the Special Rapporteur had suggested in his fourth report that a possible remedy might be to impose an obligation upon the sending State to prosecute and punish those responsible for such abuses (A/CN.4/374 and Add.1-4, para. 288), he had intimated in his oral introduction of the articles under consideration (1830th meeting) that he was willing to delete the last clause of paragraph 2 of the article in view of the criticism which a similar proposal had attracted in the context of article 20. That was surely right. For in the case of grave abuses, it might well be the responsible high-level authorities of the sending State that had permitted and, indeed, ordered the abuse, and in such circumstances it was unrealistic to suppose that the prosecution would ever be brought. A provision of the kind proposed would do nothing to discourage those responsible for the really grave abuses and would be regarded by most impartial observers as simply window-dressing. He was therefore grateful to the Special Rapporteur for having so readily agreed to delete that particular provision.

42. The acceptability of draft article 33 depended upon that of articles 35 to 39, to which article 33 made reference, and which had yet to be discussed. The same comment applied to paragraph 1 of draft article 34, which, as had been suggested, should perhaps make reference to article 32 as well as to article 31.

43. Paragraphs 2 and 3 of draft article 34 seemed to be excessively detailed and the Drafting Committee might wish to consider deleting the first sentence of each paragraph. If that were done, the second sentence of paragraph 3 could be redrafted to read: "The competent authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag dispatched by other means of transportation, whether by land, sea or air."

44. In view of the connection between articles 34 and 35, a possible alternative would be to delete paragraphs 2 and 3 of article 34 and expand article 35 to make it clear that it applied irrespective of the means adopted for the dispatch of the diplomatic bag.

45. Mr. LACLETA MUÑOZ congratulated the Special Rapporteur on having shown flexibility and been receptive to the suggestions made both in the Commission and in the Sixth Committee of the General Assembly. That applied particularly to draft article 30, which, in its present form, reflected the practice of several States, including Spain, of entrusting the transport of the diplo-

matic bag not exclusively to the captain of a commercial aircraft or the master of a merchant ship, but also to an authorized member of the crew. Some speakers had maintained that that possibility was provided for in article 27 of the 1961 Vienna Convention on Diplomatic Relations. That might be true if the latter provision was interpreted broadly, but not otherwise; in fact, it expressly stated only that the diplomatic bag might be "entrusted to the captain of a commercial aircraft". Hence there was some point in specifying that the bag could also be entrusted to a member of the crew, especially as the practice—in Spain at least—was that the relevant official documents were not given to the captain or made out in his name, but given to the member of the crew entrusted with the diplomatic bag. It was that crew member who handed over the bag to the officer of the diplomatic mission appointed to take delivery of it. The captain of the aircraft or ship played no part, and the receiving State did not know whether it was the captain or another person who was responsible for transporting the diplomatic bag and for delivering it to its destination. That made little difference because, as provided in article 30, the operation was completed on board the commercial aircraft or merchant ship. On the other hand, as several members of the Commission had emphasized, it was most important to make explicit and detailed provision for freedom of access to the commercial aircraft or merchant ship by the official responsible for taking delivery of the bag, as had been done in paragraph 4 of article 30.

46. As to draft article 31, he agreed with several of the comments made. In his opinion, the article could be simplified, for it was not necessary to provide, as was done in paragraph 2, that the packages constituting the diplomatic bag must bear a visible indication of any intermediary points on the route or transfer points. In Spain there was no such obligation. Again, paragraph 3 could be deleted or made optional, otherwise it might be interpreted to mean that the sending State and the receiving State were required to conclude an agreement determining the maximum size or weight of the diplomatic bag. Obviously, they could do so if they saw fit, but it was not necessary in all cases.

47. He had no particular difficulty with paragraph 1 of draft article 32, although the terminology should be brought into line with that of article 27 of the 1961 Vienna Convention, since the retention of the word "exclusively" was of no great importance. Paragraph 2, on the other hand, raised some problems. As Sir Ian Sinclair had pointed out, it gave the impression that the abuses of the diplomatic bag which were to be punished were committed without the knowledge of the sending State and perhaps by negligence. In reality, the most serious abuses were committed by the sending State itself. That State was required to fulfil the obligations imposed by article 32, irrespective of whether it was required to take appropriate measures to prosecute and punish those responsible for abuses. It was possible that the sending State might not punish anyone, because it had committed the abuse itself. In his opinion, paragraph 2 was thus quite ineffective. It would be preferable to delete it and regulate the matter on the basis of the responsibility of the State for breach of its obligations.



48. In regard to draft article 33, he fully endorsed Sir Ian Sinclair's comments. He had some doubts about draft article 34. In the first place he found it too detailed. It was really not necessary to provide that the conditions and requirements for the international conveyance of the diplomatic bag by postal services must conform to the international regulations established by UPU or be determined in accordance with bilateral or multilateral agreements between States or their postal administrations. Did that mean that the agreements must contain specific regulations applying to the diplomatic bag? He did not think so; he interpreted the provision as meaning that the conditions and requirements must conform to all the regulations relating to the forwarding of mail, since the diplomatic bag sent by post was, after all, only a postal package, although it enjoyed the appropriate privileges and immunities. Consequently, like other members of the Commission, he was in favour of deleting the first sentence of paragraphs 2 and 3 of article 34, or of deleting the whole of those paragraphs and amending draft article 35 appropriately. For, basically, the diplomatic bag as such retained its status whatever the means by which it was dispatched.

49. He thought that the Drafting Committee could examine a number of the questions raised.

55. Mr. JAGOTA said that he agreed in general with the substance of the articles under consideration. Drafting points could be dealt with in the Drafting Committee in the light of the suggestions made.

51. One matter that had been raised was the reference in draft article 30 to an "authorized member of the crew", which had not been included in the codification conventions. While it had been suggested that such a reference would be in conformity with State practice, it had also been pointed out that the authority of the crew member would be subject to examination, which could lead to difficulty. Since the intention was that it should be left to the captain of the aircraft or the master of the ship to authorize a member of the crew, it might be better not to include any specific reference in the article, but to mention the matter in the commentary.

52. Another point raised during the discussion concerned the reference in draft article 31, paragraph 3, to the maximum size or weight of the diplomatic bag. There was general agreement on the object of the provision, which was to prevent possible misuse of the bag, but it had been suggested that it should perhaps be placed in article 32, on the content of the diplomatic bag, rather than in article 31. Since the whole question of the maximum size or weight of the diplomatic bag was liable to give rise to much controversy, however, it might be better to deal with any possible abuses in the context of article 31. That would also be the best way of dealing with the question of inviolability, which had an immediate link with confidentiality of information—a basic element in the promotion of friendly relations between States.

53. It had also been suggested that paragraph 3 of article 31, as drafted, was mandatory. It could, however, be argued that if one party did not agree, the residual rule would apply, in which case there would be no prescribed

maximum size or weight for the diplomatic bag. It therefore seemed far better to provide that the matter should be regulated by the States concerned. Read in that light, the phrase "shall be determined by agreement" did not strike him as mandatory, but rather as a suggestion that the States concerned should seek agreement on the matter.

54. With regard to the phrase "articles intended exclusively for official use", in draft article 32, paragraph 1, he asked how such articles would be distinguished from the "articles for the official use of the mission" referred to in article 36, paragraph 1 (a), of the 1961 Vienna Convention on Diplomatic Relations. For instance, would a typewriter for the official use of the mission be sent in the diplomatic bag or should it be regarded as coming under article 36, paragraph 1, of the 1961 Vienna Convention? That was a point which had yet to be clarified. He believed that, for the reasons already stated by other members, it would be advisable to delete the last clause of article 32, paragraph 2, after the words "referred to in paragraph 1".

55. It had been suggested that draft articles 34 and 35 should be combined. As he saw it, however, article 35 was a general provision which covered all modes of transport of the diplomatic bag; if it was combined with article 34, it would lose its general character. That was a point which the Drafting Committee should consider carefully: if it was concluded that there was no particular advantage in having a general provision of that kind, the two articles could be merged.

56. The purpose of paragraphs 2 and 3 of draft article 34 was to balance the application of the UPU postal regulations and the general obligations of the receiving and transit States to facilitate the transmission of the diplomatic bag. Although the technical aspects of the UPU regulations could cause difficulty for the transmission of the bag, he doubted whether the deletion of the reference to those regulations would avoid such difficulty. Since the category of bag involved was neither so secret nor so important as the bag accompanied by a diplomatic courier, the point covered by paragraphs 2 and 3 of article 34 could perhaps be dealt with in a single sentence, in which case article 35 could be retained.

57. Lastly, he considered that the position of article 36 in the draft should be examined by the Drafting Committee.

58. Mr. OGISO said he supported the proposed deletion of the reference to an "authorized member of the crew" in draft article 30, because the captain or master, not an authorized member of the crew to whom the bag might have been entrusted, would presumably be responsible for any loss or damage.

59. He also agreed that paragraph 3 of draft article 31, which was too mandatory in its terms, should be deleted. In his view, the question of the maximum size or weight should be left to the development of practice.

60. In connection with draft articles 31 and 32, he noted that, in his fourth report, the Special Rapporteur presented a detailed list of the possible contents of the diplomatic bag (A/CN.4/374 and Add.1-4, para. 280). He would appreciate it if the Special Rapporteur could enlighten him as to the source of his interpretation, which he believed should be reflected in the commentary or the

final report. Since articles 31 and 32 had a close relationship with article 36 and in particular with the question of misuse of the bag, he would also like to know whether he was correct in understanding the phrase "intended exclusively for official use", in paragraph 1 of article 32, to refer to the words "documents or articles".

61. Also with a view to preventing misuse, it might be advisable to recommend that official correspondence and other documents and articles for official use should be contained in separate bags. Such a division would facilitate the adoption of agreed methods of inspection. He would like to know whether that possibility had ever been considered.

62. Lastly, he suggested that articles 31 and 32 should be considered in conjunction with article 36 since, in his view, it was necessary to approach the question of preventing misuse of the bag from two angles: that of inviolability and that of practical procedure.

*The meeting rose at 6.05 p.m.*

## 1843rd MEETING

*Tuesday, 19 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup>  
(continued)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

ARTICLE 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 31 (Indication of status of the diplomatic bag)

ARTICLE 32 (Content of the diplomatic bag)

ARTICLE 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 34 (Status of the diplomatic bag dispatched by postal services or other means) *and*

ARTICLE 35 (General facilities accorded to the diplomatic bag)<sup>5</sup> (continued)

1. Mr. BALANDA said that, for readily comprehensible economy reasons, it was becoming increasingly common for countries in general and for developing countries in particular to employ the captain or one of the crew members of a commercial aircraft or merchant ship to dispatch diplomatic bags. He therefore welcomed the fact that the Special Rapporteur had attempted to define the status of those persons, while making it quite clear that such status was not special, but rather based on that provided for in the conventions on the codification of diplomatic law.

2. In view of the need to strike an equitable balance between the interests of the sending State, whose diplomatic bag must be dispatched safely and delivered freely and as rapidly as possible, and the legitimate interests of the receiving or transit State, the Special Rapporteur had also been right to try to provide special protection for the diplomatic bag not accompanied by diplomatic courier.

3. In his opinion, the wording of the draft articles under consideration should be simplified. They should cover only the main situations that might arise, without entering into details. Accordingly, the Special Rapporteur should, if possible, closely follow the corresponding provisions of the codification conventions, particularly with regard to draft article 32, paragraph 1. On the basis of the uniform approach on which the Commission had generally agreed at its previous session, he should, moreover, take account of the fact that the provisions being formulated should also apply to the diplomatic bags of special missions, permanent missions and delegations. Some harmonization would therefore be necessary.

4. With regard to draft article 30, paragraph 1, he agreed with the suggestion that the words "or an authorized member of the crew under his command" should be deleted to make it clear that the captain of a commercial aircraft or master of a merchant ship was responsible for the custody and transport of the diplomatic bag. It might, however, be indicated in the commentary that, in the light of State practice, the diplomatic bag could be entrusted to a member of the crew of a commercial aircraft or merchant ship.

5. Contrary to what Mr. Razafindralambo had stated (1842nd meeting), the condition laid down in article 30,

<sup>5</sup> For the texts, see 1830th meeting, para. 1.