

Document:-  
**A/CN.4/SR.2093**

**Summary record of the 2093rd meeting**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
**1988, vol. I**

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76. Mr. TOMUSCHAT cited as an example the commentaries to the final draft articles on the law of treaties, adopted by the Commission at its eighteenth session, in 1966,<sup>3</sup> which contained a great quantity of quotations and examples drawn from treaties and judicial precedents. The Special Rapporteur had not departed from the Commission's tradition or indeed from its statute, as Mr. Calero Rodrigues had pointed out. The commentary under consideration was perhaps a little too long, but it was difficult at the present stage to do away with a whole section of it.

77. Mr. EIRIKSSON said he, too, thought that sources did have their place in a commentary, the purpose of which was not only to provide an understanding of the actual text of the article, as already pointed out, but also to explain why the Commission had adopted it. The difficulty in the present instance was one of striking a balance between the text of the commentary and the quotations, some of which could in fact be relegated to footnotes. However, the paragraphs in question should certainly not be deleted altogether.

78. The difficulty might also lie in the fact that the Commission had to adopt the commentary on the penultimate day of its session, without having time to verify all the sources mentioned. It would be a good idea to revert to the matter, for example when a whole set of draft articles had been adopted on first reading.

79. Mr. BEESLEY said that he endorsed the comments made by Mr. Tomuschat, Mr. Eiriksson and Prince Ajibola, as well as the observations made regarding the Commission's statute. For his part, he saw nothing to be deleted in the commentary to article 8, and would propose that the matter be left to the Special Rapporteur.

80. Mr. AL-BAHARNA said that he would like to hear the Special Rapporteur's opinion. Perhaps the quotations could be deleted and the sources mentioned in footnotes.

81. Mr. GRAEFRATH said that the Commission had just approved 11 paragraphs of the commentary, and therefore there was no question of doing away with it entirely. However, since paragraph (8)—the only paragraph containing a legal interpretation of article 8—had been deleted, the reader might well ask what the subsequent explanations related to. In any event, he had already entered a reservation with regard to the whole of the commentary and had no intention of pressing his proposal.

82. Mr. BENNOUNA said that it might be as well to reconsider the commentary paragraph by paragraph, in order to see what could be cut out.

83. Mr. SHI (Rapporteur) said that, in view of the little time available to the Commission, the best course would be to leave the commentary as it was for the time being and assign the Planning Group the task of considering the question in detail at the next session.

84. The CHAIRMAN, speaking as a member of the Commission, said that, generally speaking, sources were

useful and important and should figure in the commentaries to the articles adopted by the Commission. However, in the present instance the sources would be more suitable in a report by the Special Rapporteur than in a commentary, which was supposed to convey a kind of consensus in the Commission. In future, it would be necessary to ensure that a commentary contained only sources known to the Commission beforehand, which, in theory at least, was not true in the case in point.

85. Mr. McCAFFREY (Special Rapporteur) pointed out that article 6, which had been adopted by the Commission at its thirty-ninth session and which, in the view of some members, enunciated the most important of the general principles, was accompanied by a very lengthy commentary.<sup>4</sup> According to other members, article 8 was the one which contained the most important principle, and therefore it should be given identical treatment, for reasons of balance. He had merely sought to show, without in any way adopting a position, that the principle was based on a number of precedents in diplomatic practice and international instruments. In doing so, he had departed neither from the Commission's practice, nor from the provisions of its statute, which stipulated (art. 16 (g)) that, in the context of the progressive development of international law, the Commission was to attach to its drafts such explanations and supporting material as it deemed appropriate.

86. He proposed that the Commission should reconsider the whole of the commentary to article 8 once it had adopted the draft articles on first reading. For the time being, if the Commission so wished, he could agree to delete paragraphs (27) and (28) and simply give a reference to the texts quoted therein, without reproducing them, in a footnote to paragraph (24).

87. The CHAIRMAN said that the Commission would consider the Special Rapporteur's proposal at the next meeting.

*The meeting rose at 1.10 p.m.*

<sup>4</sup> *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

## 2093rd MEETING

*Thursday, 28 July 1988, at 3 p.m.*

*Chairman:* Mr. Bernhard GRAEFRATH

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Prince Ajibola, Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

<sup>3</sup> *Yearbook . . . 1966*, vol. II, pp. 187 *et seq.*, document A/6309/Rev.1, part II.

**Draft report of the Commission on the work of its fortieth session (continued)**

**CHAPTER III. The law of the non-navigational uses of international watercourses (concluded)** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)

- C. Draft articles on the law of the non-navigational uses of international watercourses (concluded)** (A/CN.4/L.425 and Add.1 and Add.1/Corr.1)
2. TEXTS OF DRAFT ARTICLES 8 TO 21, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS FORTIETH SESSION (concluded) (A/CN.4/L.425/Add.1 and Corr.1)

*Commentary to article 8 (Obligation not to cause appreciable harm) (concluded)*

Paragraph (13) (concluded) and paragraphs (14) to (18)

1. Mr. YANKOV pointed out that paragraphs (13) to (17) contained references to diplomatic communications between a very limited number of States and of only relative significance. He urged the Special Rapporteur to replace them by a general reference and to indicate the sources in a footnote. The same remark applied to source material emanating from non-governmental organizations.

2. The CHAIRMAN recalled that, at the previous meeting, the Special Rapporteur had agreed to prepare a shortened version of paragraphs (13) to (18). He therefore suggested that those paragraphs should be approved on that understanding.

*It was so agreed.*

*Paragraphs (13) to (18) were approved.*

Paragraphs (19) to (24)

*Paragraphs (19) to (24) were approved.*

Paragraphs (25) and (26)

3. Mr. CALERO RODRIGUES proposed that paragraph (25) should be deleted. It reproduced article 3 of the 1974 Charter of Economic Rights and Duties of States and the Commission had not adopted that Charter as a basis for the articles on international watercourses.

4. Mr. McCAFFREY (Special Rapporteur) said that he would be reluctant to agree to such a deletion. The provision in question was a good illustration of the importance of the principle of co-operation.

5. Mr. MAHIU said that it was essential to retain paragraph (25) and its reference to the 1974 Charter of Economic Rights and Duties of States.

6. Mr. SEPÚLVEDA GUTIÉRREZ said that he strongly supported that remark. The 1974 Charter was of great importance to many Latin-American countries.

7. Mr. CALERO RODRIGUES pointed out that article 3 of the 1974 Charter spoke of the "exploitation of natural resources shared by two or more countries". The concept of shared natural resources did not constitute the basis of the Commission's work on international watercourses.

8. Mr. EIRIKSSON said that he agreed with Mr. Calero Rodrigues. The article cited in paragraph

(25) was not a source for article 8 of the draft under consideration.

9. Mr. RAZAFINDRALAMBO said that he could not agree with Mr. Eiriksson. Article 3 of the 1974 Charter was indeed relevant to article 8 of the draft. It referred clearly to the obligation not to cause damage to other States in the exploitation of natural resources.

10. Mr. ARANGIO-RUIZ said it was quite appropriate to cite that article, which set forth the obligation not to cause damage to other States. Particularly interesting was the fact that the adjective "appreciable" was not used in the article in question to qualify "damage".

11. Mr. MAHIU suggested that the quotation from article 3 of the 1974 Charter should start with the words "each State must co-operate . . .". In that way, the reference to "natural resources shared by two or more countries" would be omitted, thereby meeting the point raised by Mr. Calero Rodrigues.

12. Mr. BENNOUNA said that it would be logical for paragraph (26), which dealt with the general duty to avoid causing transboundary harm, to be placed before paragraph (25), on the specific case of common resources.

13. Mr. ARANGIO-RUIZ pointed out that, if a State was bound not to cause damage in the case of shared resources, it would be all the more bound not to do so in the case of resources that were not shared; hence the relevance of the quotation.

14. Mr. McCAFFREY (Special Rapporteur) said that he could agree to placing paragraph (26) before paragraph (25). He further proposed that the beginning of paragraph (25) should be amended to read: "Similarly, the Charter of Economic Rights and Duties of States provides in article 3 that 'each State must co-operate on the basis of a system of information and . . .'".

*It was so agreed.*

*Paragraph (25), as amended, and paragraph (26) were approved.*

Paragraphs (27) and (28)

15. The CHAIRMAN recalled that, at the previous meeting, the Special Rapporteur had proposed that paragraphs (27) and (28) should be shortened and incorporated in a footnote to paragraph (24).

*It was so agreed.*

*Paragraphs (27) and (28) were approved.*

Paragraph (29)

*Paragraph (29) was approved.*

*The commentary to article 8, as amended, was approved.*

*Mr. Díaz González took the Chair.*

*Commentary to article 9 (General obligation to co-operate)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

16. Mr. BARSEGOV proposed that the phrase "calls for co-operation between watercourse States", in the first sentence, should be replaced by "calls for co-operation between the parties". In addition, the words "the relevant" should be inserted before "international watercourses". The international instruments referred to in paragraph (3) were specific agreements relating to specific watercourses.

17. Mr. McCAFFREY (Special Rapporteur) said that specific international agreements were not the only instruments referred to in paragraph (3). As indicated in footnote 72, there were also declarations and resolutions adopted by intergovernmental organizations, conferences and meetings, which did not apply to specific States or specific watercourses. Nevertheless, he could agree to the amendments proposed by Mr. Barsegov.

*Mr. Barsegov's amendments were adopted.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

18. Mr. CALERO RODRIGUES said that the quotations from General Assembly resolutions 2995 (XXVII) and 3129 (XXVIII) could be deleted, for the same reason that he had earlier proposed deleting the reference to article 3 of the Charter of Economic Rights and Duties of States from the commentary to article 8. Similarly, the quotation from Recommendation 90 of the Mar del Plata Action Plan, adopted by the United Nations Water Conference in 1977, could be deleted.

19. Mr. McCAFFREY (Special Rapporteur) said that he could not agree to such extensive deletions of material which he regarded as useful and relevant. As a compromise, he suggested retaining the third sentence, beginning "By way of illustration . . ." and containing a quotation from General Assembly resolution 2995 (XXVII). The reference to bilateral and multilateral co-operation would thus be retained. On the other hand, the quotation from paragraph 2 of General Assembly resolution 3129 (XXVIII) in the fourth sentence, with its reference to shared natural resources, could be deleted.

20. The first sentence of the passage referring to the 1977 United Nations Water Conference should be left as it stood. The second sentence, containing the quotation from Recommendation 90 of the Mar del Plata Action Plan, could be reworded along the following lines: "For example, Recommendation 90 provides for co-operation between States in the case of international watercourses . . . in accordance with the Charter of the United Nations and principles of international law . . .". The Conference's recommendations closely paralleled the provisions of the articles under consideration and were thus specially relevant. He would submit a revised text of the passage in question to the Secretariat.

21. Mr. CALERO RODRIGUES said he accepted that solution and thanked the Special Rapporteur.

22. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (4) as amended by the Special Rapporteur, on the understanding that the Special Rap-

porteur would provide the Secretariat with a revised text.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

23. Mr. TOMUSCHAT said that it would have been helpful to have a footnote indicating the voting pattern with regard to the General Assembly resolutions in question.

24. Mr. EIRIKSSON said that he agreed with the Commission's decision. The discussion that had just taken place showed the need to review commentaries, especially in view of the commentary to article 6, approved at the thirty-ninth session.<sup>1</sup> With regard to Mr. Tomuschat's remark, he was not certain that the numbers of a vote in the General Assembly were an indication of the authoritative nature of the resolution adopted.

25. Mr. ROUCOUNAS pointed out that the excisions being made in quotations from United Nations instruments changed the entire context of the paragraphs being approved. Although he would not oppose them, he wished to record his opposition to that way of proceeding.

Paragraph (5)

*Paragraph (5) was approved.*

Paragraph (6)

26. Mr. GRAEFRATH proposed that the phrase "smooth functioning of the procedural rules contained in part III of the draft articles", in the second sentence, should be replaced by "other parts of the draft".

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

*The commentary to article 9, as amended, was approved.*

*Commentary to article 10 (Regular exchange of data and information)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

27. Mr. CALERO RODRIGUES proposed that the last word of the paragraph, "entity", should be replaced by "method".

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

28. Mr. GRAEFRATH proposed that the expression "a state of war", in the first sentence, should be replaced by "an armed conflict".

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

<sup>1</sup> For the Commission's discussion on the commentary to article 6, see *Yearbook . . . 1987*, vol. I, pp. 265-269, 2040th meeting, paras. 14-70; for the text of the commentary, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31 *et seq.*

Paragraph (4)

*Paragraph (4) was approved.*

Paragraphs (5) and (6)

29. Mr. EIRIKSSON said that the commentary re-affirmed his original view that the expression “reasonably available”, in paragraphs 1 and 2 of article 10, should never have been used. Some two pages of commentary were required to explain the meaning of that expression, which could easily have been conveyed by using the words “that which it has already collected for its own use or is easily accessible”, contained in paragraph (5). It was an important point in view of the fact that the term “available” was also used in a number of other places in the draft.

*Paragraphs (5) and (6) were approved.*

Paragraph (7)

30. Mr. EIRIKSSON said that a distinction should be made between the use of the term “available” in the 1960 Indus Waters Treaty and the 1986 Convention on Early Notification of a Nuclear Accident, on the one hand, and in the “Helsinki Rules”, on the other. Alternatively, the reference to the Helsinki Rules might be deleted.

31. Mr. GRAEFRATH supported Mr. Eiriksson’s proposal to delete the reference to the Helsinki Rules.

32. Mr. McCAFFREY (Special Rapporteur) said that the problem might be resolved by deleting the reference to the Helsinki Rules and adding the following text to the end of footnote 85: “Cf. art. XXIX of the Helsinki Rules and the commentary thereto, cited in footnote 84 above.”

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

Paragraphs (8) to (11)

*Paragraphs (8) to (11) were approved.*

Paragraph (12)

33. Mr. EIRIKSSON suggested that the word “available”, in the second sentence, should be replaced by the words “reasonably available” in quotation marks, as in paragraph (11).

*It was so agreed.*

34. Mr. TOMUSCHAT proposed that the phrase “the Commission saw no reason why it should not be exchanged”, in the same sentence, should be replaced by “the Commission believed that requiring the exchange of such data and information would not be excessively burdensome”.

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

Paragraph (13)

*Paragraph (13) was approved.*

Paragraph (14)

35. Mr. CALERO RODRIGUES proposed that the expression “For example”, at the beginning of the fifth

sentence, should be replaced by “In some cases”, that the word “Alternatively”, at the beginning of the sixth sentence, should be replaced by “In other cases”, and that the last phrase of the paragraph should be amended to read: “but this may entail undue burdens for the State providing the material”.

*It was so agreed.*

*Paragraph (14), as amended, was approved.*

Paragraphs (15) to (17)

*Paragraphs (15) to (17) were approved.*

*The commentary to article 10, as amended, was approved.*

*Commentary to part III (Planned measures)*

36. Mr. McCAFFREY (Special Rapporteur) said that the commentary to part III of the draft could be deleted as a result of the discussion on article 19, which everyone had agreed dealt with planned measures.

*The commentary to part III was deleted.*

*Commentary to article 11 (Information concerning planned measures)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were approved.*

*The commentary to article 11 was approved.*

*Commentary to article 12 (Notification concerning planned measures with possible adverse effects)*

Paragraphs (1) to (10)

*Paragraphs (1) to (10) were approved.*

Paragraph (11)

37. Mr. TOMUSCHAT proposed that the words “It is hoped that this listing will”, in the last sentence, should be replaced by “This listing is intended to”.

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

Paragraphs (12) and (13)

*Paragraphs (12) and (13) were approved.*

*The commentary to article 12, as amended, was approved.*

*Commentary to article 13 (Period for reply to notification)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

38. After a discussion in which Mr. EIRIKSSON, Mr. TOMUSCHAT and Mr. McCAFFREY (Special Rapporteur) took part, the CHAIRMAN suggested that those members should draft a text to replace the second part of the last sentence, as from the words “failure to reply . . .”.

*It was so agreed.*

*Paragraph (2), as amended, was approved.*

Paragraph (3)

*Paragraph (3) was approved.*

*The commentary to article 13, as amended, was approved.*

*Commentary to article 14 (Obligations of the notifying State during the period for reply)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

*The commentary to article 14 was approved.*

*Commentary to article 15 (Reply to notification)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

*The commentary to article 15 was approved.*

*Commentary to article 16 (Absence of reply to notification)*

Paragraph (1)

39. Mr. EIRIKSSON said that, during the discussion of article 16, he had protested that the type of notification under article 15, paragraph 2, that was referred to in article 16 had not been properly defined; the commentary only reinforced that view. He would therefore urge that the last part of the first sentence, beginning "—i.e. one which states . . .", be deleted.

40. The CHAIRMAN said that the Commission had already engaged in a lengthy debate over whether to include the phrase in question, and it represented a hard-won compromise solution.

41. Mr. McCAFFREY (Special Rapporteur) added that the phrase in question was essential to the commentary and accurately reflected the Commission's thinking when it had adopted article 16. The whole point of article 15, paragraph 2, was that, if a State believed a project would adversely affect it or violate articles 6 or 8, it had to communicate that finding to the notifying State and provide, in that communication, a reasoned and documented explanation. Both elements—communication of the finding and supplying an explanation for the finding—were essential to article 15, paragraph 2. He therefore strongly believed that the last part of the first sentence of paragraph (1) must be retained.

42. Mr. GRAEFRATH said he agreed that there was a certain amount of confusion about article 15, paragraph 2, as a result of its combined treatment of two cases: when no communication at all had been received, and when one that had been received did not provide the necessary explanation for the findings. It might be useful to make that distinction clear. Accordingly, he proposed that the last part of the first sentence of paragraph (1) should be replaced by "or one that does not provide the necessary explanation for its findings".

43. Mr. TOMUSCHAT said that he agreed with the idea behind Mr. Graefrath's proposal but believed it could be better rendered by saying: "or receives a communication that does not meet the requirements of paragraph 2 of article 15".

44. Mr. CALERO RODRIGUES said that he agreed entirely with Mr. Eiriksson on the substance of the mat-

ter but, like the Special Rapporteur, he also thought that the explanation of what constituted a communication under article 15, paragraph 2, was useful. Such a communication must state that the planned measures would be inconsistent with the provisions of articles 6 or 8, and must be accompanied by evidence of such findings.

45. Mr. McCAFFREY (Special Rapporteur) said that he would urge the Commission to retain the text unrevised. If a change had to be made, he would prefer the text proposed by Mr. Tomuschat.

46. Mr. EIRIKSSON said that he would not insist on a revision of the text.

*Paragraph (1) was approved.*

Paragraph (2)

*Paragraph (2) was approved.*

*The commentary to article 16 was approved.*

*Commentary to article 17 (Consultations and negotiations concerning planned measures)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

47. Mr. BENNOUNA said that paragraph (3) was extremely important, since it commented on the obligation to negotiate in good faith and referred to a landmark judgment of the ICJ. He would have preferred the judgment to be quoted in the paragraph itself and also believed that a reference to the *North Sea Continental Shelf* cases should be incorporated.

48. Mr. McCAFFREY (Special Rapporteur) suggested that the following sentence should be inserted after the second sentence: "The manner in which consultations and negotiations are to be conducted was also addressed by the ICJ in the *North Sea Continental Shelf* cases."

*It was so agreed.*

*Paragraph (3), as amended, was approved.*

Paragraph (4)

*Paragraph (4) was approved.*

*The commentary to article 17, as amended, was approved.*

*Commentary to article 18 (Procedures in the absence of notification)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

*The commentary to article 18 was approved.*

*Commentary to article 19 (Urgent implementation of planned measures)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

Paragraph (4)

49. Mr. EIRIKSSON said that the last sentence was difficult to understand and was superfluous. It should be deleted.

*It was so agreed.*

*Paragraph (4), as amended, was approved.*

*The commentary to article 19, as amended, was approved.*

*Commentary to article 20 (Data and information vital to national defence or security)*

*The commentary to article 20 was approved.*

*Commentary to article 21 (Indirect procedures)*

*The commentary to article 21 was approved.*

*Section C.2, as amended, was adopted.*

*Chapter III of the draft report, as amended, was adopted.*

#### **CHAPTER I. Organization of the session (A/CN.4/L.423)**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

*Paragraph 4 was adopted subject to an editorial correction.*

Paragraphs 5 to 8

*Paragraphs 5 to 8 were adopted.*

Paragraphs 9 to 15

50. Mr. SHI (Rapporteur) drew attention to the fact that section F of chapter I, "General description of the work of the Commission at its fortieth session", was an innovation. The Enlarged Bureau had decided to include it further to a recommendation by the Planning Group. He expressed thanks to the Secretariat for its assistance in preparing the draft report.

51. Mr. EIRIKSSON thanked the Rapporteur for his endeavours and particularly for the inclusion of the new section, which greatly enhanced the report.

*Paragraphs 9 to 15 were adopted.*

*Chapter I of the draft report was adopted.*

#### **CHAPTER VI. Jurisdictional immunities of States and their property (A/CN.4/L.428 and Corr.1)**

##### **A. Introduction**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

*Section A was adopted.*

##### **B. Consideration of the topic at the present session**

Paragraphs 5 to 26

*Paragraphs 5 to 26 were adopted.*

Paragraph 27

*Paragraph 27 was adopted subject to an editorial correction.*

*Section B was adopted.*

*Chapter VI of the draft report was adopted.*

#### **CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.430)**

##### **A. Programme, procedures and working methods of the Commission, and its documentation**

Paragraphs 1 to 3

*Paragraphs 1 to 3 were adopted.*

Paragraph 4

52. Mr. EIRIKSSON remarked that it seemed unnecessary to indicate the composition of the Planning Group, as it was already shown in paragraph 4 of chapter I. He would not, however, press for the paragraph to be amended or deleted.

*Paragraph 4 was adopted.*

Paragraphs 5 to 7

*Paragraphs 5 to 7 were adopted.*

Paragraph 8

53. Mr. CALERO RODRIGUES proposed that, in the fourth sentence, the words "the second reading of" should be inserted between the words "on" and "the draft articles on the status of the diplomatic courier".

*It was so agreed.*

54. Mr. GRAEFRATH, replying to a point raised by Mr. AL-BAHARNA, explained that the fourth sentence meant not that the Commission proposed to exclude the other topics on its agenda from its programme of work in 1989 and 1990, but that it intended to try to complete work on the two topics mentioned.

55. Mr. BARSEGOV suggested that the sentence should be amended to incorporate that explanation.

*It was so agreed.*

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 14

*Paragraphs 9 to 14 were adopted.*

Paragraph 15

56. Mr. KOROMA, supported by Mr. SEPÚLVEDA GUTIÉRREZ, proposed that the words "reconciling of differences", at the end of the paragraph, should be replaced by "reconciliation of different points of view".

*It was so agreed.*

*Paragraph 15, as amended, was adopted.*

Paragraph 16

*Paragraph 16 was adopted.*

Paragraph 17

57. Prince AJIBOLA, supported by Mr. AL-BAHARNA, proposed that the words "in a timely fashion", at the end of the first sentence, should be replaced by "in due time".

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

Paragraphs 18 to 21

*Paragraphs 18 to 21 were adopted.*

Paragraph 22

58. Mr. CALERO RODRIGUES proposed that the following sentence should be added at the end of the paragraph: "It should be noted that the Commission made full use of the time and services made available to it during the 12 weeks of its current session."

59. The CHAIRMAN said he endorsed that proposal and pointed out that the Commission had actually exceeded the time allocated to it.

*Mr. Calero Rodrigues's amendment was adopted.*

*Paragraph 22, as amended, was adopted.*

Paragraphs 23 to 29

*Paragraphs 23 to 29 were adopted.*

Paragraph 30

60. Mr. GRAEFRATH, replying to a point raised by Mr. BARSEGOV, proposed that the penultimate sentence should be amended to read: "It wishes to emphasize that all the language versions of the summary records should be issued in a timely and orderly manner, avoiding skips in the normal sequence." The last sentence of the paragraph should be maintained without change.

*It was so agreed.*

*Paragraph 30, as amended, was adopted.*

Paragraph 31

61. Mr. BARSEGOV proposed that a sentence should be added to the effect that summary records in any language should not be published in final form until corrections had been received in all of the languages in which statements had been made.

*It was so agreed.*

*Paragraph 31, as amended, was adopted.*

Paragraphs 32 to 37

*Paragraphs 32 to 37 were adopted.*

*Section A, as amended, was adopted.*

#### **B. Co-operation with other bodies**

Paragraph 38

*Paragraph 38 was adopted.*

Paragraph 39

62. Mr. CALERO RODRIGUES said that Mr. Vanossi's first name should be inserted before his surname at the end of the second sentence.

*It was so agreed.*

*Paragraph 39, as amended, was adopted.*

Paragraph 40

63. Prince AJIBOLA suggested that the paragraph should make it clear that Mr. Frank Njenga, the Secretary-General of the Asian-African Legal Con-

sultative Committee, was also a member of the Commission.

64. After a discussion in which Mr. MAHIOU, Mr. AL-BAHARNA and Mr. YANKOV also took part, Prince AJIBOLA withdrew his suggestion.

*Paragraph 40 was adopted.*

*Section B, as amended, was adopted.*

#### **C. Date and place of the forty-first session**

Paragraph 41

65. The CHAIRMAN said that, as far as the dates of the forty-first session were concerned, the choice was between 1 May to 21 July 1989 and 8 May to 28 July 1989.

66. After a brief discussion in which Prince AJIBOLA, Mr. EIRIKSSON, Mr. BEESLEY and Mr. RAZAFINDRALAMBO took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to hold its forty-first session from 8 May to 28 July 1989.

*It was so agreed.*

*Paragraph 41 was adopted.*

*Section C was adopted.*

67. Mr. AL-BAHARNA expressed the hope that the adoption of those dates would not entail any delay in the publication of the final text of the Commission's report on its forty-first session.

#### **D. Representation at the forty-third session of the General Assembly**

Paragraph 42

*Paragraph 42 was adopted.*

*Section D was adopted.*

#### **E. International Law Seminar**

Paragraph 43

*Paragraph 43 was adopted.*

Paragraph 44

68. Ms. NOLL-WAGENFELD (Secretariat, United Nations Office at Geneva), replying to a point raised by Mr. KOROMA, said that Professor Philippe Cahier had been invited to chair the selection committee for the International Law Seminar because no member of the Commission had been present in Geneva at the time.

69. Mr. ROUCOUNAS, without proposing any change in the text of paragraph 44, suggested that in future the Secretariat should try to ensure that the tradition of having the selection committee chaired by a member of the Commission was maintained as far as possible.

*Paragraph 44 was adopted.*

Paragraph 45

70. Mr. YANKOV, supported by Mr. TOMUSCHAT and the CHAIRMAN, speaking as a member of the Commission, suggested that a list of the names and



countries of origin of the participants in the Seminar should be given in a footnote.

*It was so agreed.*

71. Mr. OGISO said that his name and the topic of the lecture he had given to the Seminar, namely "Jurisdictional immunities of States and their property", should be added to the last sentence.

*It was so agreed.*

*Paragraph 45, as amended, was adopted.*

Paragraphs 46 to 50

*Paragraphs 46 to 50 were adopted.*

Paragraph 51

72. Mr. ROUCOUNAS proposed that the word "earnestly" should be inserted between the words "appeal" and "to States" in the last sentence.

*It was so agreed.*

*Paragraph 51, as amended, was adopted.*

Paragraph 52

73. Mr. SHI (Rapporteur) said that he had received a request from Ms. Noll-Wagenfeld (Secretariat) to amend the paragraph to read:

"The Commission also noted with concern that, because of the constraints resulting from the financial crisis, no interpretation services could be made available to the Seminar this year. The Commission, being aware that the Seminar has never been provided for in the Organization's Regular Budget, draws the attention of all Governments to this situation and expresses the hope that every effort will be made to provide the Seminar at future sessions with adequate services and facilities."

74. The CHAIRMAN, speaking as a member of the Commission, said that he would prefer to retain the original text of paragraph 52.

75. Mr. CALERO RODRIGUES said that the proposed amendment appeared to shift the burden of providing services for the Seminar from the Secretary-General to Governments.

76. Mr. BENNOUNA said that he, too, would prefer to retain the original text, but would suggest the addition of a passage in which the Commission noted that, because of the lack of interpretation services, the Seminar had been conducted exclusively in English and requested that every effort be made to implement General Assembly resolution 42/207 C with a view to ensuring equality between the official languages and giving all participants an equal chance to benefit from the Seminar.

77. Mr. RAMA-MONTALDO (Secretariat) said that paragraph 52 in its present form simply sought to secure a continuation of the conditions in which the Seminar had been held for the past 24 years. Those conditions had not changed fundamentally, even over the past three or four years, in which the Organization's financial crisis had been at its worst, and there had never been any difficulty in holding the Seminar with interpretation services provided in all working languages.

78. It could be seen from a comparative table, copies of which could be circulated to members of the Commission if necessary, that the Seminar had been held largely in June of each year since 1965 and had enjoyed services provided in all working languages, despite the crisis in the finances of the United Nations.

79. Mr. BARSEGOV, speaking on a point of order, proposed that the consideration of paragraph 52 should be deferred until the following meeting.

*It was so agreed.*

**CHAPTER V. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.427 and Add.1)**

**A. Introduction (A/CN.4/L.427)**

Paragraphs 1 to 9

*Paragraphs 1 to 9 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.427 and Add.1)**

Paragraphs 10 to 126 (A/CN.4/L.427)

Paragraphs 10 to 20

*Paragraphs 10 to 20 were adopted.*

New paragraph 20 bis

80. Mr. EIRIKSSON proposed the following new paragraph 20 bis:

"During the Commission's discussion, the view was expressed that the draft articles should be confined to diplomatic and consular couriers and bags. As an alternative to article 33, flexibility could be attained by providing in separate optional protocols for application to the couriers and bags referred to in the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States."

81. Mr. YANKOV (Special Rapporteur) said that that idea had in fact been suggested during the discussion.

*Mr. Eiriksson's amendment was adopted.*

*New paragraph 20 bis was adopted.*

Paragraphs 21 to 42

*Paragraphs 21 to 42 were adopted.*

Paragraph 43

82. Mr. EIRIKSSON proposed that the following text should be inserted after the second sentence:

"Another member also supported the deletion of the phrase in question and suggested that subparagraph (b) should be reworded as follows:

"(b) where States by custom or agreement extend to each other more favourable treatment with respect to their diplomatic couriers and diplomatic bags than is required by the present articles.'"

83. Mr. BARSEGOV asked whether the proposed new text of subparagraph (b) had to be given in full or whether it would not be enough simply to state the purpose of the proposal.

84. Mr. YANKOV (Special Rapporteur) said that he thought it would be better to give the text so that the proposal would be clear. Otherwise, the text would have to be reproduced in a footnote.

*Mr. Eiriksson's amendment was adopted.*

*Paragraph 43, as amended, was adopted.*

Paragraphs 44 to 126

*Paragraphs 44 to 126 were adopted.*

Paragraphs 127 to 209 (A/CN.4/L.427/Add.1)

Paragraphs 127 to 158

*Paragraphs 127 to 158 were adopted.*

Paragraph 159

85. Mr. OGISO said that the Drafting Committee might wish to note that the words "serious reason" were used in alternative B of draft article 28, paragraph 2, while the words "serious reasons" were used in alternative C.

*Paragraph 159 was adopted.*

Paragraphs 160 to 165

*Paragraphs 160 to 165 were adopted.*

Paragraph 166

86. Mr. EIRIKSSON proposed that the words "it may be. It shall", in the first sentence, should be replaced by "it may be: it shall" and that the following text should be added after the first sentence: "The introduction of the words 'its contents' would make it clear that external examination of the bag would be permitted. With the link provided by the words 'subject to paragraph 2', the word 'Nevertheless' could be deleted from paragraph 2."

87. Mr. YANKOV (Special Rapporteur) suggested that the text proposed by Mr. Eiriksson should begin with the words "The view was expressed that". As it now stood, that text might give the impression that the opinion of the Commission as a whole was being reflected.

88. Mr. EIRIKSSON said that the beginning of the text he had proposed might be amended to read: "The intention in introducing the words 'its contents' was to make it clear that external examination of the bag would be permitted . . .".

*It was so agreed.*

*Mr. Eiriksson's amendments were adopted.*

*Paragraph 166, as amended, was adopted.*

Paragraphs 167 to 169

*Paragraphs 167 to 169 were adopted.*

Paragraph 170

89. Prince AJIBOLA said he was surprised that the words "the bag" were used interchangeably with the words "the diplomatic bag". In his view, only the latter expression should be used throughout the draft in order to avoid any confusion.

90. Mr. YANKOV (Special Rapporteur) said that what mattered was the definition of the expression "diplomatic bag" given in article 3, paragraph 1 (2). It was only for the sake of concision that he had used the shorter term, to which he did not attach any particular meaning. Whenever the consular bag was being referred to, the word "bag" was duly qualified.

91. Mr. AL-BAHARNA said that, in the light of the explanations given by the Special Rapporteur and since article 28 was entitled "Protection of the diplomatic bag", it was obvious that the bag in question was the diplomatic bag.

92. Mr. BARSEGOV said that he shared Prince Ajibola's concern and that the use of two different terms gave the impression that the words "the bag" had a specific meaning. Since alternative B of article 28, paragraph 2, referred to "the consular bag" and alternative C of article 28, paragraph 2, referred to "the bag", it was not clear whether the latter text referred to the diplomatic bag. If it did, the Commission would be making a mistake.

93. Mr. YANKOV (Special Rapporteur), noting that the problem had not been raised during the discussion, said that, in some cases, in order to avoid any misunderstandings, he had used the words "the diplomatic bag", specifying that they were used in the sense of the 1961 Vienna Convention on Diplomatic Relations; in all other cases, he had used those words in the sense of the definition given in article 3. Whenever the consular bag was referred to, it was in the sense of the 1963 Vienna Convention on Consular Relations. When only the words "the bag" were used, they meant the diplomatic bag within the meaning of the 1961 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States, even though those instruments did not use the adjective "diplomatic".

94. Prince AJIBOLA said that, when the adjective was not used, there could be some doubt about the type of bag in question, since the term "bag" was not systematically followed by the words "within the meaning of article 3". If it was stated at the beginning of chapter V of the Commission's report that the term "bag" meant the "diplomatic bag" throughout the chapter, the reader would not have any doubts. Otherwise, confusion was inevitable.

95. Mr. AL-BAHARNA said that it might be helpful to define the word "bag" in article 3 by indicating that it meant the "diplomatic bag", since, whenever the consular bag was referred to, the Special Rapporteur specifically said so.

*Paragraph 170 was adopted.*

Paragraphs 171 to 203

*Paragraphs 171 to 203 were adopted.*

New paragraph 203 bis

96. Mr. EIRIKSSON proposed the following new paragraph 203 bis:

"The view was also expressed that the objective of article 33 could be achieved by providing for optional

protocols dealing with couriers and bags under the 1969 Convention on Special Missions or the 1975 Vienna Convention on the Representation of States.”

*It was so agreed.*

*New paragraph 203 bis was adopted.*

Paragraphs 204 to 209

*Paragraphs 204 to 209 were adopted.*

*Section B, as amended, was adopted.*

*Chapter V of the draft report, as amended, was adopted.*

**CHAPTER VII. State responsibility (A/CN.4/L.429 and Add.1 and 2)**

**A. Introduction (A/CN.4/L.429)**

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

97. Mr. CALERO RODRIGUES said that, in his view, paragraph 5 was much too concise. It should refer to section C of chapter IV of the Commission's report on its thirty-eighth session,<sup>2</sup> which reproduced articles 1 to 5 of part 2 of the draft; indicate that the Drafting Committee had before it draft articles 6 to 16 of part 2 and refer in that connection to footnote 66 of the Commission's report on its thirty-seventh session;<sup>3</sup> and explain that draft articles 1 to 5 and the annex of part 3 of the draft, also referred to the Drafting Committee, were reproduced in footnote 86 of the report on the thirty-eighth session.<sup>4</sup> A footnote along the following lines should also be added to paragraph 5: "For a full historical review of the Commission's work on the topic, see *Yearbook . . . 1985*, vol. II (Part Two), pp. 19 *et seq.*, paras. 102-163." That would give the reader an idea of the work done thus far.

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

Paragraph 6

*Paragraph 6 was adopted.*

*Section A, as amended, was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.429/Add.1)**

Paragraphs 1 to 15

*Paragraphs 1 to 15 were adopted.*

Paragraph 16

98. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, in the eighth sentence, the words "the substantive right" should be translated into French as *le droit substantiel* and that, in the tenth sentence, the words "without setting into motion some mechanism" should be translated into French as *sans mettre en mouvement les mécanismes*. In the eleventh sentence of the French

text, the words *de façon illicite* should be replaced by the word *illicitement*. With regard to the phrase in brackets in the penultimate sentence, he said that the aim was the total or partial replacement of restitution in kind by pecuniary compensation and not the replacement of restitution in kind by "total or partial pecuniary compensation". The words *un caractère excessif*, used in the last sentence of the French text, as well as in paragraphs 17 and 18, should be replaced by *un caractère excessivement onéreux*.

*Paragraph 16, as amended, was adopted.*

Paragraphs 17 and 18

*Paragraphs 17 and 18 were adopted.*

Paragraph 19

99. Mr. ARANGIO-RUIZ (Special Rapporteur) said that, together with the Secretariat, he would revise the first sentence of the French text, since the words *indemnisation pécuniaire totale ou partielle* and *le Rapporteur spécial a approuvé cette position* did not accurately reflect what he had said.

*Paragraph 19 was adopted on that understanding.*

Paragraph 20

*Paragraph 20 was adopted.*

*Section B, as amended, was adopted.*

**C. Draft articles on State responsibility (part 2 of the draft articles) (A/CN.4/L.429/Add.2)**

*Section C was adopted.*

*Chapter VII of the draft report, as amended, was adopted.*

100. Mr. EIRIKSSON inquired whether the General Assembly was to be asked specific questions concerning the topics of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and State responsibility. In his view, it was unnecessary to indicate to the General Assembly the points on which its discussions of those two topics should focus.

101. Mr. ARANGIO-RUIZ said that he would find it presumptuous to ask the General Assembly any questions at the current stage in the consideration of the topic for which he was Special Rapporteur, namely State responsibility.

102. Mr. AL-BAHARNA said that, in the case of the topics of jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had received very few comments from Governments and that might hamper the work of the two special rapporteurs. Should the General Assembly therefore not be requested to remind Governments that the Commission would welcome their comments?

103. The CHAIRMAN said that the General Assembly would not fail to do so in the relevant resolution.

<sup>2</sup> *Yearbook . . . 1986*, vol. II (Part Two), p. 38.

<sup>3</sup> *Yearbook . . . 1985*, vol. II (Part Two), pp. 20-21.

<sup>4</sup> *Yearbook . . . 1986*, vol. II (Part Two), pp. 35-36.

*The meeting rose at 8.05 p.m.*