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Summary record of the 1636th meeting

Topic:
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1636th MEETING

Thursday, 17 July 1980, at 3.20 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)* (A/CN.4/335)

[Item 6 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BEDJAOUI congratulated the Special Rapporteur on his preliminary report (A/CN.4/335), which showed great theoretical knowledge and long practical experience. He emphasized the importance, for the very existence of inter-State relations, of the question of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, at a time when there was a perceivable danger of diplomatic privileges and immunities being called in question, as the Special Rapporteur had observed at the end of his report. He drew the Commission's attention to the special situation of the third world countries in regard to the topic. Most of those countries had no diplomatic couriers, owing to lack of human and material resources, and the unaccompanied diplomatic bag presented a particularly difficult problem for them because their national airlines did not generally make long-distance flights.

2. He believed that the first characteristic of diplomatic law relating to the courier and the bag was that it derived essentially from conventional sources. The reason why the General Assembly, at its thirty-first session, had requested the Commission to study the question of the diplomatic courier and the diplomatic bag, was in order that it should develop and give more concrete form to the 1961 Vienna Convention[1] and the other Vienna conventions on diplomatic law of 1963, 1969 and 1975.[2]

3. The second characteristic of diplomatic law was that its conventional source was itself supplied by fully established general principles, the foremost of which was the principle of freedom of communication for all official purposes. The Special Rapporteur had asked what place those principles should have in the future draft articles. He (Mr. Bedjaoui) believed that it was in the general provisions that the principle of freedom of communication for all official purposes should be reaffirmed, together with the principle of respect for the laws and regulations of the receiving State. In his opinion, there was a gap to be filled there, since the existing conventions contained no provisions on the subject.

4. A third characteristic of diplomatic law was that it needed to be clearly stated with respect to the diplomatic courier and diplomatic bag, for recourse to the conventional sources was not enough. As the Special Rapporteur had observed, the best sources on the subject were bilateral treaties relating to consular relations, but conventional law showed that provisions relating to the diplomatic courier and the diplomatic bag were incomplete, as the Algerian Government had pointed out. Thus, as the Special Rapporteur had stated in paragraph 14 of his report, further elaboration of the conventional data should be effected by means of codification and progressive development, which should be all the easier to accomplish because the principles of the subject-matter were very certain.

5. It was not necessary to decide, at that stage, on the form of the draft to be prepared—convention, protocol or other appropriate legal instrument.

6. In his opinion, no distinction should be made between the diplomatic courier and bag and the consular courier and bag; the problem should be tackled in a general way, referring to the "official courier" and the "official bag", since the consular bags of a State were often brought to its embassy and transported by the same courier as the diplomatic bag.

7. He did not intend to state an opinion on the functional and non-personal nature of the immunities granted to the courier, since that was a problem which would be considered later. But he wished to urge the Special Rapporteur to deal very specially with the question of the courier *ad hoc*, because that was a problem of particular interest to third world countries, which had no permanent couriers. He also wished to stress the need to give the unaccompanied bag a protective status as wide as respect for the laws and regulations of the receiving and transit countries would permit.

8. Lastly, he believed that the Special Rapporteur could go ahead, since his task was now well defined, thanks to the detailed programme of action drawn up by the Working Group, to the secretariat's research work and to the preliminary comments by Governments on the scope and orientation of the work to be undertaken.

9. Mr. ŠAHOVIĆ congratulated the Special Rapporteur on having presented a clear and precise analytical report on a complex subject, which posed a number of awkward problems whose solution would determine

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* Resumed from the 1634th meeting.

[1] See 1634th meeting, foot-note 1.

[2] *Ibid.*, foot-notes 2, 3 and 4, respectively.

the final success of the Commission's work. The study of the subject had given rise to some scepticism and, in the Sixth Committee of the General Assembly, a number of Member States had questioned its usefulness. In his opinion, it was a subject of current interest, for new facts had emerged in the practice of States which made it necessary to reconsider the legal basis for regulation of the diplomatic courier and the diplomatic bag. He considered that the Commission should persist in its task and define the broad outline of the study at the present session.

10. The legal basis for the study was to be found in the Vienna conventions on diplomatic law and more particularly in the articles concerning the diplomatic courier and bag. However, in regard to application of the rules already adopted in those conventions, there were a number of problems arising out of State practice in the matter. The comments of Member States were not very concrete in that regard and contained mainly general opinions, but they did make it possible to identify a certain number of specific problems. The Commission should thus take State practice as the starting point for its study, taking into account the problems already encountered by States. It should review existing rules in the light of new aspects of the question, of technical and political problems, and of the special situation of the third world countries, in order to draw up rules which could be accepted by the whole of the international community.

11. In his opinion, however, elaboration of those rules should not be carried too far, and they should not be raised, in the hierarchy of the norms of diplomatic law, to the same level as the general basic rules already codified by the Commission in the Vienna conventions and approved by the international community as part of general international law. It would be enough to prepare a draft of articles that could be adopted in the form of an additional protocol to the Vienna conventions on diplomatic law.

12. He did not think that any great importance need be attached to the problem of assimilation of the different categories of diplomatic courier and diplomatic bag. He saw no objection to speaking of the "official courier" and "official bag", as the Special Rapporteur had proposed, though he did not find it really necessary. The question should be approached from the standpoint of the functions and legal status of the diplomatic courier, and both the courier and the bag should be guaranteed a special status based on the diplomatic and consular privileges and immunities accorded to States under the Vienna conventions.

13. Mr. EVENSEN commended the Special Rapporteur for his excellent report and oral presentation (1634th meeting). Section III was particularly useful. He also thanked the Secretariat for its invaluable working paper on the topic.

14. He entirely agreed with the view expressed in section IV that preparation of an instrument on the topic should combine codification and progressive development of international law. The more general of the relevant conventions left unanswered many essential present-day questions concerning couriers and diplomatic bags, especially unaccompanied diplomatic bags. Reference was made in paragraph 36 of the report to the elaboration of "a protocol" or "an appropriate legal instrument". While it was too early to discuss terminology at that stage, he did not consider that a "protocol" was the best term. The Commission's task was to draw up a legal instrument, not a declaration, resolution or code of conduct. The instrument should contain a number of essential details, should be of practical value and should take its rightful place among the many legal instruments recently prepared on the related topics of diplomats, consuls and international organizations. The outline in section VI, together with the issues indicated by the Working Group, as set out in section V, was acceptable and provided a useful basis for the Commission's work.

15. With regard to the questions raised by the Special Rapporteur, he agreed that it would be useful at the outset to formulate some kind of definition, and suggested that it should take account of the existing situation, referred to by Mr. Bedjaoui. Only a few States had permanent professional couriers; small States had to rely on more *ad hoc* arrangements, using representatives of diplomatic missions abroad or of foreign ministries at home. Couriers were also being used increasingly by permanent missions to international organizations, by special missions to conferences and by international organizations themselves. In his own experience, for example, couriers were needed for United Nations forces and for United Nations observers in special situations and in countries involved in conflict. It was therefore as important to establish a regime for *ad hoc* couriers as it was to establish a regime for more permanent professional couriers. The Special Rapporteur should try to draft articles on the official functions of couriers and the official functions and scope of diplomatic bags, bearing in mind future needs and possibilities.

16. As to multiple appointment and nationality of the diplomatic courier (A/CN.4/335, para. 47, points 3 and 7) the principles should be flexible. The Nordic countries, for example, used joint couriers, or in some cases the couriers of one country were used by the others. For small countries, like his own, the possibility of using the diplomatic bag of another country was very useful. The possibility of entrusting the official bag to the captain of a commercial aircraft or a ship (*ibid.*, para. 60, point IV, 8) had also been found extremely useful, perhaps because the three Scandinavian countries had a joint airline, mainly government-owned, though not government-controlled.

17. In reply to a question by the Special Rapporteur, he said it was important to include articles on the rights and obligations of transit countries and third countries.

Useful information could be obtained from existing conventions. In reply to another question, he said he believed that it might be useful for the instrument to contain references to other diplomatic or consular conventions in some contexts. The idea should not be excluded.

18. With reference to Mr. Reuter's statement at the 1634th meeting, he wondered whether it was sufficient to include provisions in the instrument concerning abuse of the official bag and its consequences. He suggested that the Special Rapporteur might reflect on whether the instrument should not also contain an outline of procedures to be followed by Governments, embassies and delegations abroad to prevent abuse as far as possible, with emphasis on their serious and far-reaching obligations.

19. He hoped that the Special Rapporteur would continue his work on the lines indicated in his preliminary report and start formulating draft articles, which he looked forward to discussing at the 1981 session.

20. Mr. TABIBI congratulated the Special Rapporteur and the Secretariat on their reports on the topic. The subject was a highly sensitive one, because couriers and diplomatic bags were an essential part of relations between States, between States and international organizations and between diplomatic missions. They were particularly important nowadays, because codes and ciphers were no longer safe or reliable, owing to the new scientific means of breaking them. But with the growth of abuse, the diplomatic bag was not only losing its security, it could even become a danger. All the years of work, all the international conventions and all the organizations combating the drug traffic had not been able to stop it, because of abuse of the diplomatic bag.

21. The topic was a vital one, especially for the smaller States which lacked the means to protect themselves. In its approach, the Commission must respect certain established principles recognized by international law, such as respect for freedom of communication and the means of communication, non-discrimination in regard to the movement of the courier and the diplomatic bag, and respect for the security and laws of the host State and third States. It should proceed within the framework of previous work and conventions. He agreed with the contents of section III of the preliminary report and the reference to the four United Nations codification conventions.

22. The task of the diplomatic or official courier had grown from a simple duty to a function that could be performed by an *ad hoc* courier, such as the captain of a ship, the pilot of an aircraft, the driver of a motor-car or train, or even the leader of a caravan of camels or of horse transport. The diplomatic bag, too, had changed and what had once been described as an official letter had become a sealed container in a wagon, train, ship or aircraft. But even the diplomatic bag was not inviolate; its contents could be photographed by electronic devices. Some countries now found it safer to send a courier with a verbal message.

23. He had an open mind on the form of the instrument to be elaborated; whether it was to be a protocol or a convention was not important at that stage. The Commission had to draft a set of practical articles; it could decide later what type of instrument to submit to the General Assembly. With regard to the scope of the draft, in his opinion it would be better to concentrate first on States and deal with international organizations later.

The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/332 and Add.1, A/CN.4/L.316)

[Item 4 of the agenda]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

24. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the draft articles and explanatory note proposed by the Committee (A/CN.4/L.316), which read:

Article 1. Scope of the present articles

1. The present articles apply to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present articles except in so far as other uses of the waters affect navigation or are affected by navigation.

Article 2. System States

For the purposes of the present articles, a State in whose territory part of the waters of an international watercourse system exist is a system State.

Article 3. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

* Resumed from the 1612th meeting.

Article 4. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 3 of the present articles.

Article 5. Use of waters which constitute a shared natural resource

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

2. Waters of an international watercourse system which constitute a shared natural resource shall be used by a system State in accordance with the present articles.

. . .

Article X. Relationship between the present articles and other treaties in force

Without prejudice to paragraph 3 of article 3, the provisions of the present articles do not affect treaties in force relating to a particular international watercourse system or any part thereof or particular project, programme or use.

Note

A watercourse system is formed of hydrographic components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus, any use affecting waters in one part of the system may affect waters in another part.

An "international watercourse system" is a watercourse system, components of which are situated in two or more States.

To the extent that part of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. Thus, to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but relative, international character of the watercourse.

25. Mr. VEROSTA (Chairman of the Drafting Committee) said that the six articles, together with the explanatory note, corresponded to articles 1, 2, 4, 5 and 7 originally submitted in the Special Rapporteur's second report (A/CN.4/332 and Add.1, paras. 52, 59, 69, 105 and 142).[3] Article 3 (*ibid.*, para. 64), for which no text had been proposed in that report, was intended to reserve future inclusion of a provision on the meaning of the terms used in the draft articles. The Drafting Committee had not considered article 6 (*ibid.*, para. 130), dealing with collection and exchange of information, because it had been unable to deal adequately with the important issues raised in the short time available. The Committee had found it appropriate at the present stage to propose a new article X, entitled "Relationship between the present articles and other treaties in force". He drew attention to the explanatory note which the Committee had adopted as a provisional working hypothesis.

26. In order to take account of criticisms made in the Commission, the Drafting Committee had decided to use the term "*cours d'eaux*" instead of "*voie d'eaux*" in the French text of the articles, in order to align the terminology used in the various languages. A corresponding change would therefore be needed in the title of the topic. He suggested that the Commission might wish to take a decision on the proposed change before discussing the draft articles.

27. The CHAIRMAN invited the Commission to take a preliminary decision on the change in the French text proposed by the Chairman of the Drafting Committee. If there were no objections, he would take it that the Commission approved that change.

It was so decided.

28. Mr. VEROSTA (Chairman of the Drafting Committee) said that the Drafting Committee had adopted the explanatory note following the draft articles as a provisional working hypothesis on what was meant, at that preliminary stage of work, by the expressions "watercourse system" and "international watercourse system" used throughout the draft articles. It had not been the Committee's intention to prepare final definitions of those terms for inclusion in the draft articles, but to suggest to the Commission that the contents of the note should appear in the introductory section of the relevant chapter of the Commission's report, as an indication to the General Assembly of a tentative understanding of what was meant by certain terms used.

29. Some members of the Drafting Committee who had supported the note had pointed out that by virtue of the provisions of the proposed article 3, paragraph 2, it was clear that, regardless of any tentative notions as to what might constitute an international watercourse system, a system agreement concluded under the draft articles would itself define the waters to which it applied. At least one member of the Drafting Committee had expressed the view that it would be better to start work on the topic on the basis of the more classical definition of the international river as "a river that separates or traverses the territory of two or more States"—a definition which could be expanded to suit particular uses to be covered in the draft.

30. The first paragraph of the note provided a scientific definition of the expression "watercourse system", whose hydrographic components constituted a unitary whole by virtue of their physical relationship. Any use affecting waters in one part of the system *might* affect waters in another part. Such use of waters might take place in the upstream or the

[3] The text of the seven articles initially submitted by the Special Rapporteur is reproduced in the 1607th meeting, para. 1.

downstream part of the system. The second paragraph referred to the international character of the watercourse system, resulting from the fact that its components were situated in two or more States. The third paragraph dealt with the consequences of the premises established in the first two paragraphs, namely, that if the part of the waters in one State were not affected by, or did not affect, uses of waters in another State, they should not be regarded, for the purposes of the draft articles, as being included in the international watercourse system. In other words, the international character of the watercourse was not absolute, but depended on the extent to which the use of waters of the system situated in two or more States affected one another.

31. He suggested that the Commission might now wish to consider the contents of the note and decide whether or not it should be included in the Commission's report as a tentative working hypothesis, as suggested by the Drafting Committee.

32. The CHAIRMAN invited members of the Commission to consider whether the note following the draft articles should be adopted as a tentative working hypothesis.

33. Mr. ŠAHOVIĆ said he accepted the draft articles proposed by the Drafting Committee, on the understanding that they were to be interpreted having regard to the right of nations to permanent sovereignty over their natural resources, the rights of riparian States and the principle of good neighbourliness.

NOTE[4]

34. Mr. USHAKOV said that the definition of the expression "international watercourse system" proposed in the note was neither a legal nor a scientific definition, since the Drafting Committee had not defined the expression "hydrographic component", but had merely quoted examples. He considered that without a legal definition of an "international watercourse system", the proposed articles were meaningless.

35. Mr. BARBOZA said that the majority of the Drafting Committee would have preferred to leave the definition of a watercourse system to the final stages of drafting, but some members had pressed for a rough definition, to be used as a working hypothesis. The text finally proposed was intended only as a starting point, and would not commit the Commission in any way. The views of the Sixth Committee of the General Assembly would obviously have to be taken into account in adopting the final definition.

36. The CHAIRMAN suggested that, in view of the different opinions expressed, the commentary should explain that the note had no scientific pretensions and was merely a tentative working hypothesis, subject to amendment, in the light of the views expressed in the Sixth Committee of the General Assembly, by the Commission in the later stages of its work. He took it that the note could be adopted on that basis.

It was so decided.

ARTICLE 1[5] (Scope of the present articles)[6]

37. Mr. VEROSTA (Chairman of the Drafting Committee) said that the structure of the text adopted by the Drafting Committee was basically the same as that of the original article.[7] In paragraph 1, the Drafting Committee had considered it appropriate to specify the uses covered. It had preferred the expression "uses ... for purposes other than navigation" to the term "non-navigational uses". The Drafting Committee had also decided to make it clearer that the article applied to the uses both of the international watercourse system itself and of its waters. The reason for doing so was that, while uses of the watercourse system itself implied uses of its waters, the converse might not always be true. Finally, the Drafting Committee had chosen the expression "measures of conservation related to the uses", which was meant to include those consequences of the uses, or other questions related to the uses, which, in the Special Rapporteur's original text, had been referred to as "problems ... such as flood control, erosion, sedimentation and salt water intrusion". The expression "measures of conservation related to the uses" was to be understood as referring also to pollution.

38. Paragraph 2 of the original article had recognized that navigational uses affected or were affected by non-navigational uses and should not, therefore, be excluded from the scope of the articles. The new text was drafted so as to bring out clearly the general rule that navigational uses were excluded from the scope of the articles to the extent indicated.

39. Mr. USHAKOV said he was unable to express an opinion on the article as he did not know what was meant by the expression "international watercourse system". He drew attention to a contradiction between paragraph 1, which stated that the articles applied to "uses of international watercourse systems and of their waters for purposes other than navigation", and paragraph 2, which provided that the articles applied to navigation in certain circumstances.

40. Mr. FRANCIS said he wished to make a reservation on paragraph 2, for the reasons advanced by Mr. Ushakov.

41. Mr. BARBOZA said he did not see any contradiction between the two paragraphs. Both were

[4] For text, see para. 24 above.

[5] For consideration of the text initially submitted by the Special Rapporteur, see 1607th to 1610th meetings, 1611th meeting, paras. 1–23, and 1612th meeting, paras. 1–33.

[6] For text, see para. 24 above.

[7] See foot-note 1.

essential for protecting the waterway systems referred to.

42. As far as paragraph 2 was concerned, navigation might, for example, be affected by the excessive use of waters for irrigation. Conversely, navigation might lead to excessive pollution. There could be no protection in either case unless the provisions of paragraph 2 were applied.

43. The CHAIRMAN said that the differences of opinion concerning the interrelationship of paragraphs 1 and 2, and Mr. Ushakov's inability to accept the tentative working hypothesis, would be reflected in the report.

44. Mr. YANKOV said that he wished to make some reservations. Even for a working hypothesis at that stage, he would have preferred something more descriptive of the international watercourse than the notion of a watercourse system. Secondly, he had some doubts about the words "for purposes other than navigation". He would welcome an explanation from the Chairman of the Drafting Committee or the Special Rapporteur as to whether, for example, a small vessel intended not for navigation in the conventional sense of the transport of goods or persons, but for hydrological research or irrigation, would be governed by the present articles or would be outside their scope.

45. In his view, the expression "non-navigational uses" was simpler, and possibly more appropriate, than a reference to "purposes".

46. Mr. SCHWEBEL (Special Rapporteur) said that he, personally, had had no problem with the term "non-navigational uses", but the Drafting Committee had considered the phrase "purposes other than navigation" to be clearer. The case cited by Mr. Yankov would undoubtedly come within the scope of the articles, because such a vessel would be navigating, and if its navigational activities affected other uses, or vice versa, it would come under paragraph 2, while if it was used for such purposes as irrigation, it would come under paragraph 1.

47. The Commission had adopted a questionnaire,[8] which had been sent to Governments. One of the questions had related to the extent to which the Commission should study the navigational uses of international watercourses, and all of the many Governments that had replied had supported the study of navigational uses to the extent that they affected, or were affected by, non-navigational uses. To narrow down the article would be to depart from the views of the Governments which had replied to the questionnaire, and from the action of the General Assembly, which, in his view, the Commission was not free to do. There was no apparent contradiction in the article.

48. Mr. FRANCIS said that, in the light of the comments made by Mr. Barboza and the Special Rapporteur, article 1 appeared to deal with questions of State responsibility.

49. The CHAIRMAN said that the comments made would be recorded. He suggested that the Commission should adopt article 1 on that understanding.

It was so decided.

ARTICLE 2[9] (System States)[10]

50. Mr. VEROSTA (Chairman of the Drafting Committee) said that the title of article 2 (in English) was the same as that proposed by the Special Rapporteur.[11] The text adopted by the Drafting Committee maintained the basic rule, with certain drafting changes to make it more precise. The reference to water that "flows" had been replaced by a reference to waters that "exist", so as to take account of differing views on the concept of flowing. The new text referred to "part of the waters", to avoid the implication that all the waters of a system might exist at any particular time in a particular State.

51. Mr. USHAKOV said he could not express any opinion on article 2 either, as he still did not know what was meant by an "international watercourse system".

52. The CHAIRMAN suggested that the Commission should adopt article 2 on the understanding that Mr. Ushakov's criticism would be recorded.

It was so decided.

ARTICLE 3[12] (System agreements)[13]

53. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 3 corresponded to the article 4 proposed by the Special Rapporteur,[14] and (in English) had the same title. Taking into account the views expressed in the Commission, the Drafting Committee had decided to give more detailed treatment to what was one of the foundations of the draft, namely, the concept of the articles as a framework instrument. In accordance with paragraph 1 of the Special Rapporteur's text, the articles were to be supplemented by one or more system agreements as required.

54. The first sentence of paragraph 2 had been added to give further emphasis to the framework character of the draft articles, and was in the nature of a safeguard clause. The second sentence of paragraph 2 reproduced, with some additions, the original text of

[8] See *Yearbook ... 1976*, Vol. II (Part One), pp. 147 *et seq.*, document A/CN.4/294 and Add.1, para. 6.

[9] See foot-note 2 above.

[10] For text, see para. 24 above.

[11] See foot-note 1 above.

[12] See foot-note 2 above.

[13] For text, see para. 24 above.

[14] See foot-note 1 above.

paragraph 2 proposed by the Special Rapporteur. The Drafting Committee had considered the last part of the second sentence to be a better rendering of the idea expressed in the Special Rapporteur's text: instead of referring to the interests of all system States, it emphasized the interests of system States other than those which were parties to the system agreement.

55. Paragraph 3 expressed in a more circumscribed manner the rule in paragraph 1 of the original text, by which the articles were to be supplemented by system agreements. There was no obligation to conclude such agreements. The paragraph was merely designed to introduce a further measure of protection.

56. Mr. USHAKOV said that no system agreement existed at present, since the system agreements which article 3 attempted to define would only be concluded after adoption of the convention which the Commission was drafting. Article 3 therefore seemed to be pointless.

57. The CHAIRMAN said that, in the absence of further comments, and on the understanding that Mr. Ushakov's criticism and disclaimer, which reflected his general position on other articles, would be recorded, he would take it that the Commission agreed to adopt article 3.

It was so decided.

ARTICLE 4[15] (Parties to the negotiation and conclusion of system agreements)[16]

58. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 4 corresponded to article 5 in the Special Rapporteur's report[17] and had the same title. The text adopted by the Drafting Committee followed the model of the Special Rapporteur's text, but some drafting changes had been made to achieve greater clarity and precision.

59. In paragraph 1, the reference to "All system States" had been replaced by a reference to "Every system State of an international watercourse system". Instead of referring to the "conclusion of any system agreement", the new text used the phrase "to become a party to any system agreement".

60. In paragraph 2, the words "Each system state" had been replaced by the words "A system State", and the word "enjoyment" had been deleted. The phrase "the implementation of a proposed system agreement" in the new text was more precise than the corresponding words "the provisions of a system agreement" in the original text. The words "a particular project, programme or use", which appeared in paragraph 2 of article 3, had been added in paragraph 2 of article 4. In the light of article 3, paragraph 3, the words "entitled to participate in the negotiation and conclusion" had been replaced by a reference to participation in negotiation only.

61. Mr. USHAKOV said he thought article 4 was also pointless, for the reasons he had given in connexion with article 3.

62. The CHAIRMAN said that Mr. Ushakov's comment would be recorded. If there were no objections, he would take it that the Commission was prepared to adopt article 4.

It was so decided.

ARTICLE 5[18] (Use of waters which constitute a shared natural resource)[19]

63. Mr. VEROSTA (Chairman of the Drafting Committee) said that article 5 was based on the article 7 proposed by the Special Rapporteur.[20] Bearing in mind the views expressed in the Commission, and in order to avoid giving the impression that the present text was intended to define a shared natural resource in general terms, the Drafting Committee had considered it appropriate to include all the required limitations in detail.

64. Mr. USHAKOV pointed out that there was a contradiction between paragraph 2 of article 5, which appeared to indicate that only waters of an international watercourse system that constituted a shared natural resource should be used in accordance with the articles, and paragraph 1 of article 1, according to which the articles applied to uses of all international watercourse systems, whether or not they constituted a shared natural resource.

65. Mr. QUENTIN-BAXTER said that he had some difficulty in determining how the limitation in article 1, paragraph 2, would be applied when interpreting article 5, paragraph 1, which appeared to make even navigational uses the basis for bringing the system concerned entirely within the scope of the draft articles.

66. Mr. RIPHAGEN said that he read article 5, paragraph 2, as an obligation on States to use the waters of a shared natural resource in accordance with the present articles. It presupposed that there would be some obligations under the articles that would be independent of the existence of a systems agreement.

67. Mr. SCHWEBEL (Special Rapporteur) said that he had been surprised by Mr. Ushakov's question whether there would be two separate sets of articles, and he saw no reason why there should be. As the articles were developed, certain principles and provisions would be included, and the concept of a shared

[15] See foot-note 2 above.

[16] For text, see para. 24 above.

[17] See foot-note 1 above.

[18] See foot-note 2 above.

[19] For text, see para. 24 above.

[20] See foot-note 1 above.

natural resource would be applied in accordance with those principles and provisions.

68. With regard to the relationship between article 1 and article 5, it was not intended to adopt any absolute definition of an international watercourse or to limit the definition to the Final Act of the Congress of Vienna (1815),[21] which, in scientific and other circles, was regarded as totally obsolete for the non-navigational uses of international watercourses. Nor was there any intention of adopting a more expanded definition. The intention was rather to relate the definition to the effects of the uses of the water by States sharing the watercourse. A subsidiary element of that approach was to be found in article 1, paragraph 2, where navigation was brought into the scope of the articles only in so far as it affected other uses or was affected by them. There was, in his view, a consistency between the approach of article 1, paragraph 2, and that of other articles, including article 5.

69. The CHAIRMAN said that, on the understanding that the various statements made would be reflected in the report, he would take it that the Commission was prepared to adopt article 5.

It was so decided.

ARTICLE X (Relationship between the present articles and other treaties in force)[22]

70. Mr. VEROSTA (Chairman of the Drafting Committee) said that article X might be placed among the final provisions of the draft. The Drafting Committee had considered that it should be included at the present stage, however, in order to reassure States about the effect on existing treaties of the final instrument that might be adopted on the basis of the draft articles. There was no intention of replacing or prejudicing other relevant treaties in force. The text was based on article 73, paragraph 1 of the 1963 Vienna Convention,[23] but it was tempered by the inclusion of a reference to the fact that it was without prejudice to the provisions of article 3, paragraph 3.

71. Mr. USHAKOV said that the effect of article X was nil, since the body of the article did not correspond to its title.

72. The CHAIRMAN said he took it that, on the understanding that Mr. Ushakov's comment would be recorded, the Commission was prepared to adopt article X.

It was so decided.

The meeting rose at 6.20 p.m.

[21] Reproduced in *Yearbook ... 1979*, vol. II (Part One), document A/CN.4/320, para. 43.

[22] For text, see para. 24 above.

[23] See 1634th meeting, foot-note 2.

1637th MEETING

Friday, 18 July 1980, at 10.15 a.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Bedjaoui, Mr. Calle y Calle, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tabibi, Mr. Thiam, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/335)

[Item 6 of the agenda]

PRELIMINARY REPORT BY THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. SCHWEBEL congratulated the Special Rapporteur on his excellent report (A/CN.4/335), which was a model of scholarship, clarity and good sense. However, he remained unconvinced of the need for a protocol on the topic in question. As the Special Rapporteur had pointed out, the General Assembly had referred only to the possible elaboration of an appropriate legal instrument on the topic; besides, as was pointed out in paragraph 233 of the topical summary of the Sixth Committee's discussion on the Commission's report to the thirty-fourth session of the General Assembly (A/CN.4/L.311), some representatives had expressed serious doubts about the utility of work on the topic, because it was already adequately covered in existing agreements and because other problems regarding diplomatic immunities of a more fundamental and serious nature might deserve closer attention. He saw great cogency in that view. At a time when the gravest and most grotesque violation of diplomatic immunity in the history of international law was still being perpetrated, preoccupation with a relatively minor practice seemed all the more misplaced. Indeed, if a protocol was drafted and adopted, it was debatable how widespread its ratification would be, in view of the doubts of many States regarding the need for it.

2. As to the substance of the report, he expressed the hope that the Special Rapporteur would give most earnest thought to the question of respect for national and international law. In that connexion, Mr. Reuter (1634th meeting) had drawn the attention of the Commission to the notorious abuses of the diplomatic bag for drug trafficking and terroristic smuggling. Some years earlier, the United States of America had been constrained to indict one of its nationals, who, in contravention of United States law, had sold a large quantity of submachine guns suitable for terrorist activities to the United Nations mission, in New York, of a State whose connexions with international terrorism were notorious. The individual in question