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**Summary record of the 1694th meeting**

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## 1694th MEETING

Monday, 20 July 1981, at 3.15 p.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, 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.4/347 and Add.1 and 2)

[Item 8 of the agenda]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

- ARTICLE 1 (Scope of the present articles),  
 ARTICLE 2 (Couriers and bags not within the scope of in the present articles),  
 ARTICLE 3 (Use of terms),  
 ARTICLE 4 (Freedom of communication for all official purposes effected through diplomatic couriers and diplomatic bags),  
 ARTICLE 5 (Duty to respect international law and the laws and regulations of the receiving and the transit State), and  
 ARTICLE 6 (Non-discrimination and reciprocity)<sup>1</sup> (*concluded*)

1. Mr. USHAKOV said that, methodological problems aside, the draft articles should deal with the legal situation of all couriers and bags, since their status was the same. In his opinion, the term "the courier" could be used without qualification.

2. Although members of the Commission had said much about the abuse that might be made of the diplomatic bag, whether accompanied or not, he considered it an exaggeration to assert that the use of the diplomatic bag could be a source of serious danger with respect to trafficking in drugs, arms currency or human beings, for it had never played more than a marginal role in that regard. The question of abuse was, therefore, only of minor importance and should not be allowed to dominate the content of the draft articles. On the other hand, the numerous lacunae revealed by the Special Rapporteur and during the Commission's discussions unquestionably justified the continuation of work on the topic.

3. Mr. SUCHARITKUL said that he fully agreed with the Special Rapporteur, as far as the content of

the topic was concerned. While the desire to extend the privileges and immunities, currently accorded to the diplomatic courier and bag, to other institutions of States and international organizations was understandable, action to that end should be taken only after careful consideration, since it might create difficulties for the receiving State in the form of an obligation to ensure the inviolability of communications between consular missions of other States within its own borders. In order to afford such protection, a receiving State would have to issue appropriate instructions, not only to customs officers, but also to the police and other internal authorities. Moreover, it might prove difficult to assimilate the field of consular relations with that of diplomatic relations. Admittedly, bilateral treaties on consular relations had been concluded between countries with similar structures and cultural histories, such as the United Kingdom and the United States of America. However, the development of consular relations in Asian countries had followed a quite different course.

4. The difficulties existing with regard to the adoption of a universal regime for consular relations were illustrated by the fact that the 1963 Vienna Convention<sup>2</sup> had been ratified by far fewer countries than had the 1961 Vienna Convention.<sup>3</sup> Consequently, he agreed with Mr. Ushakov that, if an attempt was to be made to cover all types of official communications, it might be preferable, first, to use general terms such as "official courier" and "official bag" rather than to distinguish between diplomatic and consular couriers and bags, and, second, to determine the extent to which the receiving State could accept the duty of protection.

5. He was gratified to note that the Special Rapporteur was prepared to leave aside the question of international organizations for the time being. Such organizations did not function in the same way as States, since they had no diplomatic couriers, although of course missions accredited to international organizations of a universal character could be accorded privileges and immunities as a result of which their couriers and bags could be regarded as having diplomatic status.

6. Mr. YANKOV (Special Rapporteur) thanked all the members of the Commission who had made criticisms of his report and had suggested alternative approaches. All the points raised called for careful consideration.

7. The reason why he had placed such emphasis in his report on the provisions of the 1961 Vienna Convention, the 1963 Vienna Convention, the Convention on Special Missions<sup>4</sup> and the 1975 Vienna Convention,<sup>5</sup> rather than on other relevant bilateral or

<sup>1</sup> For texts, see 1691st meeting, para. 1.

<sup>2</sup> See 1691st meeting, footnote 2.

<sup>3</sup> *Ibid.*, footnote 1.

<sup>4</sup> *Ibid.*, footnote 3.

<sup>5</sup> *Ibid.*, footnote 4.

multilateral conventions, was that he had considered that, regardless of the number of countries which had ratified them, those four conventions could, at the current stage of the Commission's work, serve as a basis for tackling the topic, since they provided an international mean. He admitted, however, that he might have gone too far in that direction, even though the report did contain a number of references to the provisions of bilateral conventions on consular relations and to national legislation. In future, greater consideration should perhaps be accorded to other conventions which dealt with aspects not covered in the four main conventions.

8. Referring to a point raised by Mr. Šahović (1693rd meeting) concerning the scope of the topic, he said that while he agreed that the theoretical ramifications and political significance of the topic should not be exaggerated, the Commission had a responsibility to deal with it as carefully as possible. Referring to another point raised by Mr. Šahović, he said that he viewed the Commission's task as being to elaborate specific rules based on existing practice and designed to facilitate the administration of couriers and bags and reduce the difficulties arising between States. The main problem would be to strike a proper balance between concern for secrecy and the safe and unimpeded delivery of the diplomatic bag, on the one hand, and the legitimate rights and interests of other States, on the other. That problem could be solved by establishing a greater degree of legal certainty.

9. With regard to the breadth of the network of communications to be covered by the draft articles, he said that the restrictive approach, whereby such communications would be limited to those between a sending State and its various missions abroad, might not be adequate. While that approach had been followed in some of the more than one hundred pertinent bilateral treaties studied, the most common approach had been that described in paragraph 81 of his second report (A/CN.4/347 and Add.1 and 2). In the light of the observations made by members of the Commission, he would suggest the adoption of a middle way. For example, the area of communications between States might be excluded, although there had been instances in which a State, needing to deliver important diplomatic documents to another State in which it had no diplomatic mission, had, in order to protect those documents and preserve their confidential nature, resorted to use of the diplomatic bag. There had also been instances of States using the diplomatic bag to communicate with international organizations of which they were not members and in which they were not represented. It was for the Commission to state which approach it preferred.

10. With regard to the inclusion of international organizations within the scope of the draft articles, he said that many international instruments, such as those establishing the privileges and immunities of the United Nations, the specialized agencies and the Council of

Europe, established the right of such organizations to despatch and receive diplomatic couriers and diplomatic bags. Referring to the observations made by Sir Francis Vallat (1693rd meeting) in that connection, he said that critical situations arose in which the communications of the United Nations were subject to a greater than usual degree of confidentiality. Consequently, he would suggest that the Commission should keep the situation of international organizations under review, on the understanding that such organizations could, if necessary, be included in the scope of the draft articles, on the same basis as States. He agreed with Sir Francis Vallat concerning the appropriateness of a functional approach and the handling of any functional differences in specific articles.

11. A number of speakers, including Mr. Aldrich (1691st meeting) and Mr. Njenga, Mr. Reuter and Sir Francis Vallat (1693rd meeting), had referred to the extent to which the exception laid down in article 35, paragraph 3, of the 1963 Vienna Convention could be instrumental in preventing or reducing abuses of the diplomatic bag. It was to be noted that, of the four Conventions studied in detail in the report, only the 1963 Convention contained such an exception—and even that provision began by stating the principle of the inviolability of the consular bag. As Mr. Calle y Calle (1691st meeting) and Mr. Sucharitkul had stated, that principle could therefore be regarded as fundamental. Of the 122 international agreements on diplomatic law he had studied for the purposes of his report, 92 provided quite clearly that the diplomatic bag should be neither opened nor detained, and only 18 contained a provision similar to, or milder than, that contained in article 35 of the 1963 Vienna Convention. It would be unjustifiable to take what was an exceptional provision, rather than a generally accepted principle, as a model for international law governing the status of the diplomatic bag. Accordingly, he had suggested in his report that the legal status of the diplomatic bag should be based in general on the provisions of article 27 of the 1961 Vienna Convention.

12. Although the possibility of abuse of the diplomatic bag was a real problem, it should not be allowed to overshadow the importance of the principle of freedom of communication. From the international conventions he had studied, it was clear that, while States were sometimes willing to impose restrictions on their freedom of communication, they preferred, in most instances, to adhere to the general rule.

13. An idea that had gained wider acceptance over the past ten years was that, if there were grounds for suspicion concerning the contents of a diplomatic bag, it should simply be returned unopened to the sending State. However, to incorporate that idea in law might be considered unfair to the States unable to afford the sophisticated devices now in existence that could read documents contained in a diplomatic bag without the bag's being opened. It should also be noted that when

the Governments of Bahrain, Kuwait and Libya had, in relation to the 1961 Vienna Convention, reserved the right to open a diplomatic bag if there was serious reason to believe that it contained articles other than those provided for in article 27 of that convention, many States had stated categorically that such a reservation was contrary to the principle of freedom of communication and had refused to accept it. Moreover, recent discussions in the Sixth Committee of the General Assembly had shown that the majority of States favoured the principle contained in article 27 of the 1961 Vienna Convention.

14. Referring to a point raised by Mr. Verosta (1693rd meeting) concerning the number of definitions contained in the draft articles, he said that it had been his intention to provide the Commission with the maximum number of definitions, on the grounds that it would be easier to delete a definition than to introduce a new one.

15. Concerning the question of the definition of the courier, he had understood from the discussions at the Commission's thirty-second session and in the Sixth Committee that what was required was a comprehensive definition of the courier, stipulating his function, his credentials and the legal protection and facilities to be accorded to him. His own preference would be for such a definition, which would not be repeated in subsequent provisions, but would provide a basic framework. However, in that connection he would be grateful for the guidance of the Commission.

16. The same discussions in the Commission and the Sixth Committee had given him the impression that there was a preference for retaining the institutions of the diplomatic courier and diplomatic bag as a basis for determining the status of other types of courier and bag, rather than introducing a new and unfamiliar concept such as that of "official courier". In that connection, Mr. Ushakov had suggested that the unqualified term "courier" should be used. The matter was one for the Commission to decide.

17. In accordance with the comments made by members of the Commission, the wording of article 1, paragraph 2, might be simplified along the following lines:

"The present articles shall apply also to the communications referred to in paragraph 1 of the present article when consular couriers and consular bags and couriers and bags of special missions or other missions or delegations are employed".

Such an amendment would be in keeping with his suggestion concerning an assimilation provision covering all types of couriers and bags. As he had indicated in paragraphs 34 and 35 of his report, precedents for the inclusion of such wording were to be found in a number of bilateral consular conventions.

18. With regard to article 3, subparagraph 1 (3), Mr. Riphagen (1691st meeting) had said that it seemed somewhat strange to apply the words "in the perform-

ance of its official function" to the diplomatic bag. It would, of course, be possible to improve the wording of that subparagraph, but since the diplomatic bag did, in his view, perform an official function as an instrument of freedom of communication, it should be accorded preferential treatment and protection.

19. Referring to the doubts expressed by Mr. Riphagen and Mr. Njenga (1693rd meeting) concerning the use of the words "with whose consent" in article 3, subparagraph 1 (7), he said that, although he would not insist on the inclusion of those words, he did think they made it clear that diplomatic couriers were sometimes allowed to pass through the territory of a State without transit visas and sometimes required to obtain the express consent of the State concerned and the necessary visas.

20. With regard to the definition contained in article 3, subparagraph 1 (8), Mr. Aldrich (1691st meeting) had suggested that reference should be made to "other States" rather than to a "third State". In existing diplomatic law, however, the term "third State" referred to a State that was not normally involved in the dispatch of the diplomatic bag but could become so involved in certain exceptional circumstances of *force majeure* or of fortuitous event, as provided in article 40, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

21. He agreed with Mr. Riphagen that the use of the words "may apply" in article 3, paragraph 2, was inadequate. He therefore suggested that those words should be replaced by the words "shall apply".

22. As he had emphasized in paragraph 213 of his report, draft articles 4, 5 and 6 had been presented only on a preliminary basis, as tentative formulations designed to elicit an exchange of views. The comments made by members of the Commission on those draft articles would be very useful to him at a later stage.

23. With regard to the question raised by Mr. Ushakov concerning article 5 (1693rd meeting) and the duty of the diplomatic courier to respect international law, he explained that it was his own understanding that such a duty was, of course, incumbent on States as subjects of international law, but that, as agents of States, diplomatic couriers had certain privileges which they could not abuse without going beyond their functions and, by extension, breaching principles of international law. Provisions similar to article 5 did, moreover, exist in other international conventions.

24. The general comments made by Mr. Sucharitkul concerning the principle of freedom of communication embodied in article 4 had certainly been very helpful. In reply to Mr. Šahović's question (*ibid.*) whether the Commission should not formulate a set of general principles relating to the obligations of States concerning freedom of communication, he noted that it was not the Commission's task to prepare a code of conduct for States. For that reason, he had whenever

possible referred in the draft articles only to the rights and duties of diplomatic couriers. He would, however, try to take account in subsequent versions of draft article 4 of Mr. Tabibi's suggestion (*ibid.*) concerning the strengthening of the obligations of the sending State.

25. With regard to Mr. Riphagen's question (1691st meeting) concerning the wording of article 6, subparagraph 2 (*b*), he said he realized that the meaning of that provision might not be entirely clear, but what he had had in mind was a provision similar to that contained in article 47, subparagraph 2 (*b*), of the 1961 Vienna Convention.

26. Replying to the question raised by Mr. Riphagen and Mr. Aldrich (*ibid.*) concerning the difference between a diplomatic bag entrusted to the captain of a ship or a commercial aircraft and a diplomatic bag sent through normal postal channels as a consignment on a ship or an aircraft, he said that when a diplomatic bag was entrusted to the captain of a ship or an aircraft, an official document indicating the number of packages constituting the diplomatic bag was required and the captain of the ship or aircraft had physical custody of the bag, whereas in the case of a bag sent as parcel post, overland shipment or airfreight, only the ordinary documents for forwarding were required and the bag was the responsibility of the postal administration concerned. Legal protection for both types of diplomatic bags was, however, the same.

27. Since the Commission's term of office was ending and it was important to ensure the continuity of the study of the topic under consideration, he suggested that the Secretariat might send a questionnaire to Governments requesting them to provide all relevant information on treaties, national laws, regulations, procedures and practices concerning the treatment of the diplomatic courier and the diplomatic bag and that it might request that the topic should be discussed in the Sixth Committee of the General Assembly.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 1 to 6 to the Drafting Committee.

*It was so decided.*

**Succession of States in respect of matters other than treaties (concluded) (A/CN.4/338 and Add.1-4, A/CN.4/345 and Add.1-3, A/CN.4/L.328 and Add.1 and 2)**

[Item 2 of the agenda]

**DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (concluded)**

**ARTICLE G<sup>6</sup> (Scope of the articles in the present Part (State archives)),**

<sup>6</sup> For initial consideration of the text by the Commission at its present session, see 1688th meeting, paras. 33 *et seq.*

**ARTICLE H<sup>7</sup> (Effects of the passing of State archives),  
ARTICLE I<sup>8</sup> (Date of the passing of State archives),  
ARTICLE J<sup>9</sup> (Passing of State archives without compensation), and  
ARTICLE K<sup>10</sup> (Absence of effect of succession of States on the archives of a third State)**

29. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed that articles G, H, I, J and K should read (A/CN.4/L.328/Add.1):

**Article G. Scope of the articles in the present Part**

The articles in the present Part apply to the effects of a succession of States in respect of State archives.

**Article H. Effects of the passing of State archives**

A succession of States entails the extinction of the rights of the predecessor State and the arising of the rights of the successor State to such of the State archives as pass to the successor State in accordance with the provisions of the articles in the present Part.

**Article I. Date of the passing of State archives**

Unless otherwise agreed or decided, the date of the passing of State archives is that of the succession of States.

**Article J. Passing of State archives without compensation**

Subject to the provisions of the articles in the present Part and unless otherwise agreed or decided, the passing of State archives from the predecessor State to the successor State shall take place without compensation.

**Article K. Absence of effect of a succession of States on the archives of a third State**

A succession of States shall not as such affect State archives which, at the date of the succession of States, are situated in the territory of the predecessor State and which, at that date, are owned by a third State according to the internal law of the predecessor State.

30. Those articles, together with article A, constituted the first section, entitled "Introduction", of Part III of the draft, which dealt with State archives. Article A, which contained a definition of the expression "State archives", had been adopted by the Commission in first reading, while articles G, H, I, J and K had been submitted by the Special Rapporteur at the present session and referred by the Commission for the first time to the Drafting Committee. Those articles contained introductory provisions applicable to Part III of the draft as a whole. They corresponded to the provisions adopted in the introductory sections of Parts II and IV of the draft, which dealt with State property and State debts respectively. In drafting the titles and texts of the articles under consideration, the Drafting Committee had drawn particularly on the

<sup>7</sup> *Idem*, 1689th meeting, paras. 1-15.

<sup>8</sup> *Idem*.

<sup>9</sup> *Idem*.

<sup>10</sup> *Idem*.

articles in Part II, Section 1 (State property). It had decided, in the light of the comments made in the Commission, to maintain the parallelism between the introductory sections of Parts II and III. To that end, it had made the same drafting amendments to the articles under consideration as had been made to the articles in Part II, section 1, with the result that the articles were now identical—except as concerned the use of the terms “property” and “archives”.

*Articles G, H, I and J were adopted.*

31. Mr. ALDRICH said that, in his view, article K, like article 9, was neither necessary nor desirable.

*Article K was adopted.*

#### ARTICLE A<sup>11</sup> (State archives)

32. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article A as proposed by the Drafting Committee (A/CN.4/328/Add.1) read:

##### *Article A. State archives*

**For the purposes of the present articles, “State archives” means all documents of whatever kind which, at the date of the succession of States, belonged to the predecessor State according to its internal law and had been kept by it as archives.**

33. A number of drafting changes had been made to the article to preclude the possibility of its being interpreted restrictively: the words “the collection of documents of all kinds” had been replaced by the words “all documents of whatever kind”, while, at the end of the article, the word “preserved” had been replaced by the word “kept” and the term “State archives” had been replaced by the term “archives”, which, in the context of the definition, included all types of official record. The replacement of the word “preserved” by the word “kept” made clear the scope of the definition, which covered the archives known as “living archives”.

*Article A was adopted.*

#### ARTICLE 3 *quater* (Rights and obligations of natural or juridical persons)

34. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed an article 3 *quater* (A/CN.4/L.328/Add.2) which read:

##### *Article 3 quater. Rights and obligations of natural or juridical persons*

**Nothing in the present articles shall be considered as prejudging in any respect any question relating to the rights and obligations of natural or juridical persons.**

The article was designed to forestall the impression that the effects of a succession of States in respect of

State property, archives or debts might prejudice in any way any question relating to the rights and obligations of natural or juridical persons. The Drafting Committee had felt it particularly appropriate to formulate such a safeguard clause in view of the Commission’s decision (1692nd meeting) not to refer in article 16 to “any other financial obligation chargeable to a State”.

35. Article 3 *quater* had been drafted in very general terms and had, therefore, been included in Part I, which contained general provisions applicable to the draft as a whole.

36. Sir Francis VALLAT said that, while he was not opposed to article 3 *quater*, and understood its intention, he was of the opinion that it did not make good the omission of article 16, subparagraph (b), from the set of draft articles, which now contained no provision that would enable natural or juridical persons to have recourse against any of the successor States formed as a result of the dissolution of a State.

*Article 3 quater was adopted.*

#### ARTICLE L (Preservation of the unity of State archives)

37. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article L as proposed by the Drafting Committee (A/CN.4/L.328/Add.2) read:

##### *Article L. Preservation of the unity of State archives*

**Nothing in the present Part shall be considered as prejudging in any respect any question that might arise by reason of the preservation of the unity of State archives.**

The article was based on the former paragraph 6 of article F, which had been adopted in first reading the previous year.<sup>12</sup>

38. In the light of the discussion within the Commission, the Drafting Committee had felt it advisable to draw up a separate article laying down, in a general form, the principle of the unity of State archives. That principle was relevant not only to the category of State succession covered by article F, but also to the other such categories covered by Part III, section 2. The Drafting Committee had, therefore, stated it in general terms and included it in Part III, section 1, the provisions of which were applicable to Part III as a whole.

39. Since it contained a safeguard clause, article L had been modelled on the other similar clauses to be found in articles 3 *ter* and 3 *quater*.

*Article L was adopted.*

#### ARTICLE B<sup>13</sup> (Newly independent State)

<sup>12</sup> For text, see 1690th meeting, para. 1.

<sup>13</sup> For initial consideration of the text by the Commission at its present session, see 1689th meeting, paras. 16–42.

<sup>11</sup> *Idem*, 1688th meeting, paras. 33 *et seq.*

40. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article B as proposed by the Drafting Committee (A/CN.4/L.328/Add.2) read:

*Article B. Newly independent State*

1. When the successor State is a newly independent State:

(a) archives, having belonged to the territory to which the succession of States relates and become State archives of the predecessor State during the period of dependence, shall pass to the newly independent State;

(b) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the newly independent State.

2. The passing or the appropriate reproduction of parts of the State archives of the predecessor State other than those mentioned in paragraph 1, of interest to the territory to which the succession of States relates, shall be determined by agreement between the predecessor State and the newly independent State in such a manner that each of those States can benefit as widely and equitably as possible from those parts of the State archives.

3. The predecessor State shall provide the newly independent State with the best available evidence from its State archives which bears upon title to the territory of the newly independent State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the newly independent State pursuant to other provisions of the present article.

4. The predecessor State shall co-operate with the successor State in efforts to recover any archives having belonged to the territory to which the succession of States relates and having been dispersed during the period of dependence.

5. Paragraphs 1 to 4 apply when a newly independent State is formed from two or more dependent territories.

6. Paragraphs 1 to 4 apply when a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations.

7. Agreements concluded between the predecessor State and the newly independent State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

41. Article B, which together with articles C, D, E and F constituted Section 2, entitled "Provisions concerning specific categories of succession of States", of Part III of the draft, was basically identical to the article the Commission had approved in first reading. However, in response to fears voiced in the Commission that the draft as a whole would otherwise be without effect, the Drafting Committee had added a new paragraph 4, concerning the duty of the predecessor and successor States to co-operate in attempting to recover any archives having belonged to the territory to which the succession of States related that, as was often the case, had been dispersed during the period of dependence. The old paragraphs 4 to 6 had accordingly been renumbered 5 to 7, and the references they had contained to paragraphs 1 to 3 had been extended to the new paragraph 4.

42. In paragraph 3, the phrase "the best available evidence of documents from the State archives of the predecessor State" had been replaced by the words

"the best available evidence from its State archives", and the same change was made at the other points in section 2 where the phrase had appeared, namely, in paragraph 3 of article C, paragraph 3 (now para. 2) of article E, and paragraph 3 of article F. Similarly, the Drafting Committee had deleted the words "documents of" from all the provisions of section 2 where they had previously appeared before the words "State archives", namely article C, paragraphs 4 and 5 (formerly subparagraphs 4 (a) and (b)); article E, paragraph 4 (formerly paragraph 5); and article F, paragraph 5. Finally, in paragraph 2, the term "mentioned" had been preferred, for the sake of consistency with the articles already adopted, to the term "dealt with". In the English version of the draft, the word "mentioned" had also been substituted for forms of the verbs "to deal with" and "to refer to" in other provisions of section 2, namely article C, subparagraph 2 (b), and subparagraph 1 (b) of each of articles E and F.

43. Sir Francis VALLAT said that although article B was drafted in terms of the newly independent State, it was not clear to what territory paragraph 6 of that provision referred. Indeed, since the wording of paragraph 6 was defective, it would be difficult to apply paragraph 2 in relation to paragraph 3, and also difficult to apply paragraph 7. He therefore suggested that those questions should be clarified in the commentary to article B.

44. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the suggestion made by Sir Francis Vallat concerning the commentary to article B was acceptable.

45. Mr. NJENGA said that the wording of article B, paragraph 4, would be clearer if it was amended to read:

"The predecessor State shall co-operate with the successor State in efforts to recover any archives which, having belonged to the territory to which the succession of States relates, were dispersed during the period of dependence".

46. Mr. USHAKOV said that it should be emphasized in the commentary to article B that subparagraph 1 (a) referred to archives that had belonged to the territory to which the succession of State related and that had become "State archives . . . during the period of dependence", whereas paragraph 4 concerned archives that had belonged to the territory and that had "been dispersed during the period of dependence".

47. Mr. ALDRICH said that the wording of article B, subparagraph 1 (a), might be clearer if the word "having" was added between the word "and" and the words "become State archives of the predecessor State . . .".

48. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article B with the amended wording

proposed by Mr. Njenga and the addition proposed by Mr. Aldrich.

*Article B, as amended, was adopted.*

ARTICLE C<sup>14</sup> (Transfer of part of the territory of a State)

49. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the text which the Drafting Committee proposed for article C (A/CN.4/L.328/Add.2) read:

*Article C. Transfer of part of the territory of a State*

1. When part of the territory of a State is transferred by that State to another State, the passing of State archives of the predecessor State to the successor State is to be settled by agreement between them.

2. In the absence of such an agreement:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be at the disposal of the State to which the territory concerned is transferred, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates exclusively or principally to the territory to which the succession of States relates, shall pass to the successor State.

3. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the transferred territory or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

4. The predecessor State shall make available to the successor State, at the request and at the expense of that State, appropriate reproductions of its State archives connected with the interests of the transferred territory.

5. The successor State shall make available to the predecessor State, at the request and at the expense of that State, appropriate reproductions of State archives which have passed to the successor State in accordance with paragraph 1 or 2.

50. Apart from the drafting changes which he had already mentioned, the Drafting Committee had merely replaced the phrase "in question" ("*en question*") by the word "concerned" ("*concerné*") in the English and French versions of subparagraph 2 (a). The former subparagraphs 4 (a) and 4 (b) had now become paragraphs 4 and 5 respectively.

*Article C was adopted.*

ARTICLE D<sup>15</sup> (Uniting of States)

51. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the text which the Drafting Committee proposed for article D (A/CN.4/L.328/Add.2) read:

*Article D. Uniting of States*

1. When two or more States unite and so form a successor State, the State archives of the predecessor States shall pass to the successor State.

2. Without prejudice to the provision of paragraph 1, the allocation of the State archives of the predecessor States as belonging to the successor State or to its component parts shall be governed by the internal law of the successor State.

*Article D was adopted.*

ARTICLE E<sup>16</sup> (Separation of part or parts of the territory of a State)

52. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that the Drafting Committee proposed that article E should read (A/CN.4/L.328/Add.2):

*Article E. Separation of part or parts of the territory of a State*

1. When part or parts of the territory of a State separate from that State and form a State, and unless the predecessor State and the successor otherwise agree:

(a) the part of State archives of the predecessor State, which for normal administration of the territory to which the succession of States relates should be in that territory, shall pass to the successor State;

(b) the part of State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates directly to the territory to which the succession of States relates, shall pass to the successor State.

2. The predecessor State shall provide the successor State with the best available evidence from its State archives which bears upon title to the territory of the successor State or its boundaries, or which is necessary to clarify the meaning of documents of State archives which pass to the successor State pursuant to other provisions of the present article.

3. Agreements concluded between the predecessor State and the successor State in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

4. The predecessor and successor States shall, at the request and at the expense of one of them, make available appropriate reproductions of their State archives connected with the interests of their respective territories.

5. The provisions of paragraphs 1 to 4 apply when part of the territory of a State separates from that State and unites with another State.

53. Apart from the drafting changes which he already mentioned, the Drafting Committee had deleted from article E the text adopted in first reading as paragraph 2.<sup>17</sup> That text had corresponded to the second paragraph of article B, where it had been maintained. In article E, it had raised great problems of legal logic because of its dual reference to "passing" and "appropriate reproduction" and because of its final part, which had stated that the passing or reproduction "shall be determined by agreement

<sup>14</sup> *Idem*, 1690th meeting, paras. 1-31.

<sup>15</sup> *Idem*.

<sup>16</sup> *Idem*.

<sup>17</sup> For text, see 1690th meeting, para. 1.

between the predecessor State and the successor State in such a manner that each of those States can benefit as widely and as equitably as possible from those parts of the State archives”.

54. Sir Francis VALLAT, referring to paragraph 4, said that the words “at the request and at the expense of one of them”, the words “their State archives” and the words “their respective territories” were not at all clear and made it seem as though that paragraph was drafted both in the singular and in the plural.

55. Mr. USHAKOV said that, while Sir Francis Vallat was right, the text of the paragraph had been adopted in its present form in first reading. Perhaps its wording could be improved at some later stage.

56. Mr. ALDRICH said that, while paragraph 4 had not been discussed at length in the Drafting Committee, the Committee had noted that the word “appropriate” would give the predecessor and successor States involved grounds for determining exactly which reproductions they should make available to one another.

*Article E was adopted.*

#### ARTICLE F<sup>18</sup> (Dissolution of a State)

57. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) said that article F as proposed by the Drafting Committee read (A/CN.4/L.328/Add.2):

##### *Article F. Dissolution of a State*

1. When a predecessor State dissolves and ceases to exist and the parts of its territory form two or more States, and unless the successor States concerned otherwise agree:

(a) the part of the State archives of the predecessor State, which should be in the territory of a successor State for normal administration of its territory, shall pass to that successor State;

(b) the part of the State archives of the predecessor State, other than the part mentioned in subparagraph (a), that relates directly to the territory of a successor State, shall pass to that successor State.

2. The State archives of the predecessor State other than those mentioned in paragraph 1 shall pass to the successor States in an equitable manner, taking into account all relevant circumstances.

3. Each successor State shall provide the other successor State or States with the best available evidence from its part of the State archives of the predecessor State which bears upon title to the territories or boundaries of that other successor State or States, or which is necessary to clarify the meaning of documents of State archives which pass to that State or States pursuant to other provisions of the present article.

4. Agreements concluded between the successor States concerned in regard to State archives of the predecessor State shall not infringe the right of the peoples of those States to development, to information about their history and to their cultural heritage.

5. Each successor State shall make available to any other successor State, at the request and at the expense of that State,

appropriate reproductions of its part of the State archives of the predecessor State connected with the interests of the territory of that other successor State.

58. In addition to undergoing drafting changes similar to those made to other articles, article F had lost its former paragraph 6, which had become article L. Furthermore, the Drafting Committee had decided to replace the original paragraph 2, which, except for referring only to “passing” of parts of State archives, had corresponded to paragraph 2 of articles B and E adopted in first reading. The new wording of paragraph 2 was based in part on article 23, concerning State debts, with the difference that the phrase “an equitable proportion” which appeared in article 23 had been replaced by the phrase “in an equitable manner”.

59. Sir Francis VALLAT, referring to paragraph 2, said it might be made clear in the commentary to the article that the words “in an equitable manner” referred to the manner of the passing of State archives, not to the manner of their division.

*Article F was adopted.*

60. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) drew attention to the fact that, in the second section of Part II and of Part IV of the draft, the articles entitled “Newly independent State” (arts. 11 and 20) appeared immediately after the articles entitled “Transfer of part of the territory of a State” (arts. 10 and 19); in Part III, concerning State archives, however, the article “Newly independent State” (art. B) preceded the article entitled “Transfer of part of the territory of a State” (art. C).

61. It might be thought that the articles should be arranged identically in section 2 of each of Parts II, III and IV; should the Commission subscribe to that view, the Secretariat would reorder the provisions accordingly.

62. Mr. USHAKOV proposed that the articles of Part III, Section 2, in question should be placed in the same order as the corresponding articles in Parts II and IV.

*It was so decided.*

#### Statement by the Chairman of the Drafting Committee

63. Mr. DÍAZ GONZÁLEZ (Chairman of the Drafting Committee) reminded the Commission that, in addition to the articles on the succession of States, it had referred to the Drafting Committee the articles submitted at the present session by the special rapporteurs on the topics of: question of treaties concluded between States and international organizations or between two or more international organizations; State responsibility; jurisdictional immunities of States and their property; and status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

<sup>18</sup> For initial consideration of the text by the Commission at the present session, see 1690th meeting, paras. 1–31.

64. Bearing in mind the recommendations of the General Assembly, the Drafting Committee had concentrated on the two sets of draft articles submitted in second reading and, in particular, on the draft articles concerning succession of States in respect of State property, archives and debts. That being so, it had been unable to examine all the articles relating to treaties to which international organizations were parties, and any of the articles on the other topics. The Committee therefore remained seized of those articles, and would have to study them at the Commission's next session.

*The meeting rose at 6.10 p.m.*

## 1695th MEETING

*Tuesday, 21 July 1981, at 11.05 a.m.*

*Chairman:* Mr. Doudou THIAM

*Present:* Mr. Aldrich, Mr. Barboza, Mr. Calle y Calle, Mr. Diaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Sucharitkul, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

### Draft report of the Commission on the work of its thirty-third session

1. The CHAIRMAN invited the Commission to consider its draft report on its thirty-third session, paragraph by paragraph.

#### CHAPTER I. *Organization of the session* (A/CN.4/L.329)

##### Paragraph 1

*Paragraph 1 was adopted.*

##### Paragraph 2

2. Mr. FRANCIS (Rapporteur) noted that the Commission had to decide whether or not to retain the words "the law of the non-navigational uses of international watercourses", which had been placed in square brackets in the last sentence.

3. The CHAIRMAN, referring to the words in square brackets, said the Enlarged Bureau proposed that no new special rapporteur should be appointed at the present session for the topic on the law of the non-navigational uses of international watercourses. The Enlarged Bureau also proposed that the next session should begin on 3 May 1982.

4. Sir Francis VALLAT said he deeply regretted the fact that the Enlarged Bureau had decided not to appoint a new special rapporteur on the topic of the law of the non-navigational uses of international watercourses. The Commission had professed a wish

to further the continuity of its work on that topic, but the decision taken by the Enlarged Bureau would block such continuity. There was no real reason for failing to take a decision to appoint a new special rapporteur. If such a decision could not have been taken early in the session, it should be taken now, at a time when many States Members of the United Nations attached great importance to the question of international watercourses. He was concerned about the decision not to appoint a new special rapporteur because he had at heart the future interests of the Commission, whose capacity to deal with topics of great technical and practical significance was one of the touchstones on which its performance would be judged.

5. Most members had agreed that there was an eminently suitable person to deal with that topic, but the Commission had failed to take advantage of that person's availability and had not appointed him because of the opposition of three members and because of the practice of proceeding by consensus. In his opinion, when a large majority of the members of the Commission wished to follow a particular course, those in the minority should bow to the will of the majority.

6. Mr. NJENGA said he too found it difficult to understand why the Commission should shy away from taking a decision to appoint a new special rapporteur on the topic in question. If it now failed to appoint a special rapporteur, no work could be done on the topic at the following session, and he was not sure how the Commission would be able to justify its decision to the General Assembly. He also agreed with Sir Francis Vallat that it was quite unfair that a few members of the Commission should be able to block a decision favoured by the majority.

7. Mr. SUCHARITKUL said that he wished to associate himself with the views expressed by Sir Francis Vallat and Mr. Njenga concerning the Commission's failure to appoint a new special rapporteur because of the problem of a lack of consensus.

8. Mr. FRANCIS said that, in his opinion, the opposition to the appointment of a new special rapporteur for the topic of the law of the non-navigational uses of international watercourses would not be able to withstand the criticism that it would receive in the Sixth Committee. From his experience as a representative on that Committee, he knew how much significance many countries placed on the study of that topic, and was quite sure that a decision not to appoint a special rapporteur would be a miscalculation of the General Assembly's attitude to the only item on the Commission's agenda that involved people, rather than abstract ideas. It was therefore a matter of deep regret to him that he would be compelled to share the responsibility for such decision.

9. The CHAIRMAN said that, in the course of the discussions within the Enlarged Bureau, it had been pointed out that special rapporteurs had always been