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Summary record of the 1806th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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appearing in other articles: "The immunity of a State cannot be invoked". In order to avoid problems of interpretation, the Committee had felt justified in specifying that the court referred to was "a court of another State which is otherwise competent". Lastly, it had specified that the proceeding in which that court exercised its jurisdiction had to relate to the determination of one of the rights or interests enumerated in subparagraphs (a)–(e) of paragraph 1.

72. Subject to some drafting amendments made in the interests of uniformity and precision, subparagraphs (a) and (b) of the new paragraph 1 corresponded to subparagraphs (a) and (b) of the former paragraph 1, and subparagraphs (c), (d) and (e) of the new paragraph 1 dealt with the three matters covered by subparagraph (c) of the original paragraph 1.

73. The provisions of subparagraph (d) of the former paragraph 1 were reflected, with changes in drafting and presentation, in the new paragraph 2 of the article. Lastly, a new paragraph 3 set out in greater detail the provision in the former paragraph 2.

74. One member of the Drafting Committee had been opposed to paragraph 2, which he considered unnecessary because its contents were partly covered by the provisions of other articles or related to cases outside the scope of the draft. As for paragraph 3, several members had regarded it as a provisional text subject to the approval of article 4 or other additional articles which might prove necessary.

The meeting rose at 1 p.m.

1806th MEETING

Monday, 18 July 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balandá, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)*

* Resumed from the 1799th meeting.

(A/CN.4/L.365 and Add.1, ILC(XXXV)/Conf. Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 1 to 8¹

1. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), continuing the report on the work of the Drafting Committee which he had begun at the previous meeting, said that articles 1 to 8 on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which had been adopted by the Drafting Committee (A/CN.4/L.365 and Add.1) corresponded to draft articles 1 to 8 submitted by the Special Rapporteur. He recalled that the original texts of draft articles 1 to 6 were contained in the second report of the Special Rapporteur. Those draft articles had been examined by the Commission at its thirty-third session and had been referred to the Drafting Committee, but it had not considered them at that time.² Draft articles 1, 3, 4 and 5, as reformulated, had been reproduced in the third report of the Special Rapporteur which had also contained, without modification, the texts of draft articles 2 and 6. Draft articles 7 to 14 had constituted a new set of articles submitted by the Special Rapporteur in his third report. The 14 draft articles submitted in the third report of the Special Rapporteur had been examined by the Commission at its thirty-fourth session and referred to the Drafting Committee which, for lack of time, had been unable to consider them.³ At the current session, the Commission had also referred to the Drafting Committee draft articles 15 to 19 submitted in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1–4). Articles 9 to 19 would therefore have to be considered by the Drafting Committee at the Commission's next session. The Special Rapporteur had grouped together articles 1 to 6 in part I, entitled "General provisions", and articles 7 to 19 in part II, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag". The Drafting Committee had decided to postpone its decision on the various parts into which the draft might be divided until it had made considerably more progress in its examination of the proposed articles.

2. The Drafting Committee proposed the following text for article 1:

Article 1. Scope of the present articles⁴

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

¹ For the consideration of these draft articles by the Commission at its thirty-fourth session, see *Yearbook . . . 1982*, vol. I, pp. 293–312, 1745th meeting, paras. 7–37, and 1746th–1747th meetings.

² *Yearbook . . . 1981*, vol. II (Part Two), p. 162, para. 249.

³ *Yearbook . . . 1982*, vol. II (Part Two), p. 120, para. 249.

⁴ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 314.

3. The text adopted by the Drafting Committee corresponded to that of the article 1 submitted by the Special Rapporteur. However, the Drafting Committee had substantially simplified its wording by employing the generic terms used in article 3, namely "diplomatic courier", "diplomatic bag", "mission" and "delegation", which would be explained in that article. Furthermore, it had changed the emphasis of article 1. Whereas the original text had stressed the communications of States for all official purposes, the Drafting Committee had highlighted the very scope of the draft—the diplomatic courier and the diplomatic bag employed for the official communications of a State.

4. The Drafting Committee proposed the following text for article 2:

Article 2. Couriers and bags not within the scope of the present articles³

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

5. The text of article 2 as adopted by the Drafting Committee reproduced, with only a few minor drafting changes, the text of paragraph 2 of the draft article submitted by the Special Rapporteur. The Committee had reached the conclusion that paragraph 1 of that draft had not been necessary and had therefore deleted it. The expression "all official purposes" had been replaced by the expression "official communications", which was used in article 1. Furthermore, in subparagraph (b), the phrase "with regard to the facilities, privileges and immunities which would be accorded" had been replaced by the expression "which would be applicable", which was used in the corresponding provisions of, for example, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The Drafting Committee's adoption of the article in no way implied that it had taken a position on the question of extending the scope of the draft to couriers and bags of international organizations or of national liberation movements. That was a matter which could be settled at a later stage.

6. The Drafting Committee proposed the following text for article 3:

Article 3. Use of terms⁴

1. For the purposes of the present articles:

(1) "diplomatic courier" means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

³ For the text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 315.

⁴ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 116, footnote 318.

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975,

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) "diplomatic bag" means the packages containing official correspondence, documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) "sending State" means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) "receiving State" means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) "transit State" means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) "mission" means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) "consular post" means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) "delegation" means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

7. That text corresponded to the article 3 submitted by the Special Rapporteur. However, the Committee had reduced the number of paragraphs from three to two, the first of which comprised nine subparagraphs, compared with 12 subparagraphs in the original text.

8. Paragraph 1, subparagraph (1), defined the term "diplomatic courier", which covered both the regular courier and the courier *ad hoc*, who had been the subject of a separate subparagraph in the original text. The term referred to a person duly authorized by the sending State either as a diplomatic courier in the strict sense, a consular courier, a courier of a special mission or a courier of a permanent mission, of a permanent observer mission, of a

delegation or of an observer delegation. Those various categories were distinguished by reference to the meaning given to each one by the relevant codification conventions. Moreover, the detailed reference made in the original draft to the active and passive subjects of communications effected through the diplomatic courier had been simplified by a reference to "the official communications referred to in article 1".

9. Paragraph 1, subparagraph (2), corresponded to paragraph 1, subparagraph (3), of the original draft. However, its wording was modelled on that of subparagraph (1). For example, the description of the dispatchers or recipients of the diplomatic bag had been replaced by a reference to "the official communications referred to in article 1". Similarly, the subdivisions of the subparagraph referred to the various types of bags covered by the term "diplomatic bag", which were defined by reference to the meaning given to them in the relevant codification conventions. The Drafting Committee had further simplified the text by using the expression "packages . . . whether accompanied by diplomatic courier or not" in place of the original phrase "packages . . . dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea".

10. Paragraph 1, subparagraph (3), which corresponded to subparagraph (4) of the original draft, defined the term "sending State". The wording had been simplified through the use of the generic terms "missions" and "delegations". The Drafting Committee had deleted the expressions "with or without a courier" and "wherever situated" as being superfluous.

11. Paragraph 1, subparagraph (4), which defined the term "receiving State", corresponded to subparagraph (5) of the original draft, which had defined in two subdivisions the two concepts of "receiving State" found in the codification conventions. The distinction made in those conventions between diplomatic or special missions and missions or delegations to international organizations or conferences had been rendered unnecessary by the use of the generic terms "missions" and "delegations". For reasons of consistency, the Drafting Committee had added a clarification by employing the words "which receive or dispatch a diplomatic bag".

12. Paragraph 1, subparagraph (5), which defined the term "transit State", reproduced the wording of subparagraph (6) of the original text, with the exception of the expression "*en route* to the receiving State", which had been replaced by the words "in transit" in order to cover both communications through a courier or a diplomatic bag originating in the territory of the receiving State and those effected between the territories of two States other than the sending State.

13. Paragraph 1, subparagraph (6), defined "mission" as a generic term covering a permanent diplomatic mission, a special mission, a permanent mission and a permanent observer mission, within the meaning given to them in the relevant codification conventions. Through that drafting technique, used in the 1975 Vienna Convention on the Representation of States in their Relations

with International Organizations of a Universal Character, the Drafting Committee had been able to recast the definitions given in subparagraphs (7), (9) and (10) of the original draft.

14. The definition of the term "consular post" given in paragraph 1, subparagraph (7), was identical to that appearing in subparagraph (8) of the original draft, except that the word "any" had been replaced by the word "a".

15. In order to harmonize the provisions, the term "delegation" had been defined in paragraph 1, subparagraph (8), not as in the corresponding subparagraph (11) of the original text, but by a reference to the meaning given to that term in the Vienna Convention on the Representation of States. The term meant both a delegation in the strict sense and an observer delegation.

16. Lastly, paragraph 1, subparagraph (9), which defined the term "international organization", was identical to subparagraph (12) of the original draft.

17. In view of the definitions adopted, in particular those concerning the terms "diplomatic courier" and "diplomatic bag", the Drafting Committee had not deemed it necessary to retain paragraph 2 of the original draft.

18. The rule set forth in article 3, paragraph 2, was the same as that contained in paragraph 3 of the original draft. That saving clause and the introductory phrase of paragraph 1, "For the purposes of the present articles", reflected the self-contained character of the draft and prevented any confusion as a result of the use of identical terms in other conventions.

19. The Drafting Committee proposed the following text for article 4:

Article 4. Freedom of official communications⁷

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

20. The text of article 4 adopted by the Drafting Committee was a simplified version of the article 4 submitted by the Special Rapporteur. The reference in paragraph 1 to "official communications . . . as referred to in article 1" made it unnecessary to retain the detailed enumeration appearing in the original text. Furthermore, the present text of paragraph 1 specified that the communications concerned were effected "through the diplomatic courier or the diplomatic bag". The wording of paragraph 2 reflected more precisely than the original text the rule laid down in the Vienna Conventions on Diplomatic Relations (art. 40, para. 3) and on Consular Relations (art. 54, para. 3), in the Convention on Special Missions (art. 42, para. 3) and in the Vienna Convention on the Representation of States (art. 81, para. 4). Lastly,

⁷ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 320.

the Drafting Committee had shortened the title of the article.

21. The Drafting Committee proposed the following text for article 5:

Article 5. Duties of the sending State and its diplomatic courier⁸

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

22. Article 5 of the original draft had comprised three paragraphs. The first two had been to some extent incorporated in paragraph 2 of the current text. Paragraph 3 of the original text, which had concerned temporary accommodation, had been deleted as being unnecessary and inappropriate. In view of the discussion which had taken place in the Commission, the Drafting Committee had considered it useful to insert a provision (para. 1) concerning the duties of the sending State, the wording of which was based on that of article 6, paragraph 2 (b). In the Committee's opinion, that text laid down the duties in question in a more appropriate manner than did paragraph 1 of the original text. Paragraph 2 was concerned solely with the duties of the diplomatic courier. Consequently, the Drafting Committee had deleted the reference in the original text to the duty to respect the rules of international law.

23. The Drafting Committee proposed the following text for article 6:

Article 6. Non-discrimination and reciprocity⁹

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

24. The text of article 6 adopted by the Drafting Committee reproduced that submitted by the Special Rapporteur with a few drafting changes intended to make it more precise. The Committee had added in paragraph 1 a reference to the receiving State or the transit State and had deleted the phrase "with regard to the treatment of diplomatic couriers and diplomatic bags", which it had considered superfluous. In paragraph 2 (a), it had also inserted a reference to the transit State.

⁸ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 321.

⁹ For the text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 322.

25. The Drafting Committee proposed the following text for article 7:

Article 7. Documentation of the diplomatic courier¹⁰

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

26. The text of the new article 7 followed closely that submitted by the Special Rapporteur. However, the reference to the passport of the diplomatic courier had been deleted, since a passport was not required in all cases. In addition, the title had been changed in order to reflect more accurately the content of the article. The Drafting Committee had decided to postpone a decision on where to place the article in the draft and on its numbering until further progress had been made in considering the other articles.

27. The Drafting Committee proposed the following text for article 8:

Article 8. Appointment of a diplomatic courier¹¹

Subject to the provisions of articles [9], 10 and 14, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

28. Article 8 as adopted by the Drafting Committee was a simplified version of the corresponding article submitted by the Special Rapporteur, as a result of the use of the generic terms defined in article 3. The reference to "the competent authorities" had been considered unnecessary and had been deleted. Similarly, the Committee had deleted the phrase "and are admitted to perform their functions on the territory of the receiving State or the transit State", considering that article 8 should be confined to the appointment of a diplomatic courier and that those words seemed unnecessary in the light of the provisions of draft article 16, paragraph 1. Lastly, the reference to article 9 had been placed between square brackets, since the Committee had been unable to agree on its relevance, and the reference to article 11, which the Committee had considered irrelevant, had been replaced by a reference—which was appropriate—to article 14.

**State responsibility (concluded) (A/CN.4/L.363,
ILC(XXXV)/Conf. Room Doc.5)**

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles) (concluded)

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)
CONSIDERATION BY THE COMMISSION

29. The CHAIRMAN invited the Commission to consider the adoption of articles 1, 2, 3 and 5 of part 2 of the draft articles on State responsibility, as proposed by the Drafting Committee, which had been introduced by

¹⁰ For the text submitted by the Special Rapporteur, *ibid.*, p. 118, footnote 323.

¹¹ For the text submitted by the Special Rapporteur, *ibid.*, p. 118, footnote 324.

the Chairman of that Committee at the previous meeting. He pointed out that those articles, which were reproduced in document A/CN.4/L.363, would be adopted at present only in first reading; the Commission would have an opportunity to discuss them again in second reading at a future session, when they would be referred once again to the Drafting Committee.

30. Mr. USHAKOV informed members of the Commission that at the time of the adoption of article 1 by the Drafting Committee he had abstained, being of the opinion that the question dealt with in that article had not been studied in sufficient detail. On that occasion, he had submitted the following text which he would like to see reproduced in the commentary, to be prefaced by the words "One member of the Commission proposed the following text":

Article 1

1. The international responsibility of a State arising pursuant to the provisions of part 1 of the present articles consists for that State in the negative legal consequences of its internationally wrongful act.

2. Under paragraph 1 and depending on each particular case and the attendant circumstances, the international responsibility of a State consists, *inter alia*, in that the State:

(a) shall be subjected to measures and action provided for in the Charter of the United Nations, including Chapter VII thereof, and taken in accordance with the Charter, or to measures authorized by virtue of the provisions thereof;

(b) shall be subjected to the limitations and restraints in accordance with international law, including restraints on the use of its territory and/or the exercise of its rights;

(c) shall make reparation for the damage caused and, if necessary, restore the rights and interests that have been infringed;

(d) shall take measures and action prescribed by international law, including the applicable international arrangements;

(e) shall provide the requisite satisfaction to the injured State or States;

(f) shall institute criminal proceedings against persons accused of having committed offences which have given rise to the international responsibility of the State.

31. Furthermore, he wished to point out with regard to article 3 that he saw no connection between article 5, to which it referred, and the rules of customary international law. In his opinion, the reference was not justified and should be deleted. Article 4 had not yet been drafted and it was therefore not possible to speak about it.

32. Mr. MALEK said that the proposed articles 1, 2, 3 and 5 were acceptable and that he was prepared to vote for them or to join in any consensus on them. He expressed his appreciation of the remarkable work done by the Drafting Committee.

33. He was somewhat surprised to note that none of the opening articles of part 2 spelled out the area of law which it was intended to cover. It was to be feared that the articles in part 2 would swell in number by continuing to refer to "legal consequences" while neglecting to give a precise idea of the legal concepts in question. In his third report, the Special Rapporteur had submitted an article¹² concerning the new obligations and new rights arising as legal consequences from an internationally wrongful

act. A reading of that article as drafted by the Special Rapporteur had made it possible to understand immediately the specific object of part 2. However, that article had been drafted in such a way as to give the impression that it reserved obligations exclusively for the State committing the wrongful act and rights exclusively for other States. Yet it was known that the perpetrator of a wrongful act did not lose all its rights under international law. It was also known that an internationally wrongful act did not necessarily merely give rise to rights for other States. That was why, at the Commission's previous session, he had proposed a text for article 1 which would provide that any internationally wrongful act of a State entailed, for that State and any other State concerned, obligations and rights in conformity with the provisions of part 2 and other rules of international law.

34. The article 1 proposed by the Drafting Committee was, on the whole, well drafted and it brought out clearly the connection between parts 1 and 2 of the draft. However, as the introductory article of part 2, it would be greatly enhanced by a more precise indication of its objective. For example, the phrase "entails legal consequences as set out in the present part" should be replaced by a text which might be worded in the following manner: "entails obligations and rights in conformity with the provisions of the present part".

35. With regard to article 2, he had doubts about the usefulness of the word "specifically". He also wondered whether the phrase "the provisions of this part govern the legal consequences of any internationally wrongful act of a State" was not in contradiction with the main statement of article 3, namely "the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part". In other words, if according to article 2 the draft was designed to govern in all cases—except those in which the legal consequences of an internationally wrongful act had been determined by other rules of international law—the legal consequences of any wrongful act of a State, he had difficulty in understanding the *raison d'être* of article 3, which would be concerned with the legal consequences not set out in the draft. That article 3, which was new in relation to the articles submitted by the Special Rapporteur, could be deleted without disrupting the balance of the draft. However, the point it was intended to cover might be met by adding at the end of article 1 a saving clause referring not only to the provisions of part 2, but also to general international law or simply to international law and not necessarily to customary international law as stated specifically in article 3.

36. That said, he stressed that he was not making any formal proposal regarding the various articles proposed by the Drafting Committee. His comments were intended only for the summary record of the meeting.

37. Mr. QUENTIN-BAXTER said that he had two general comments with regard to the four articles under discussion. In the first place, he entertained serious doubts regarding the expression "as appropriate" used in article 5. The position, as he saw it, was that either the

¹² See 1771st meeting, para. 2.

Charter of the United Nations was applicable in a particular case or it was not. Neither the Commission nor anyone else could say when it was appropriate for the provisions and procedures of the Charter to apply. Consequently, he preferred the text originally submitted by the Special Rapporteur¹³ to the text of article 5 proposed by the Drafting Committee.

38. His second point concerned the fact that the Drafting Committee had not found it possible to draft articles 4 and 6. He was concerned at the implications of that situation, since the work of the Drafting Committee had, owing to various circumstances beyond the Committee's control, fallen out of step with that of the Commission. In that connection he recalled that, when the Commission had adopted in first reading part 1 of the draft articles on State responsibility,¹⁴ consisting of as many as 35 draft articles, it had discussed each individual article thoroughly. No such discussion would be possible on the four articles on State responsibility which the Drafting Committee had now completed.

39. Furthermore, he noted that the Drafting Committee had not been able to formulate an article on the principle of proportionality, which was basic to the Special Rapporteur's whole reasoning. As a result, the Commission would be unable to give any guidance to the Special Rapporteur on that vital question.

40. The elaboration of the draft articles on State responsibility was the Commission's primary task, and the General Assembly was impatient to see the topic advance to the stage of second reading. In order to meet that expectation, the Commission should see to it that the Drafting Committee moved back into step with it in its work.

41. Mr. RIPHAGEN (Special Rapporteur) said that, while he had no objection to Mr. Ushakov's proposal concerning article 1 appearing somewhere in the Commission's report, he felt that it would be incongruous to insert it in the commentary to that article. Readers of that commentary would be puzzled to find in it a proposal for a completely different text.

42. Mr. FLITAN said that in the Drafting Committee he had opposed the idea of replacing article 1 by a text of much broader scope such as that proposed by Mr. Ushakov. In the Committee's opinion, article 1 was a transitional article which should be brief and merely introduce the following articles. It would be hazardous and contrary to general legislative practice to refer in article 1 to the content of all the provisions of part 2. Furthermore, the expression "legal consequences" should continue to be used, since it was somewhat difficult to say that rights as well as obligations arose from an internationally wrongful act. The Drafting Committee had therefore preferred to use a more neutral expression.

43. Mr. SUCHARITKUL said that he found the Drafting Committee's texts for articles 1, 2 and 5 quite acceptable.

44. As far as article 3 was concerned, however, he had an observation to make. That article contained a residual rule concerning the application of "the rules of customary international law". That expression had been used in the preamble to a number of codification conventions but he drew attention to the fact that, in the more recent instruments of that nature, it had been replaced by the formula "the rules of general international law". Two important examples in that respect were the 1982 United Nations Convention on the Law of the Sea and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 8 April 1983. The reason for that change was political, because the reference to customary international law was not acceptable to the developing countries. He stressed that he was not proposing any formal amendment, but merely drawing attention to the problem.

45. Mr. JACOVIDES noted that the Drafting Committee had not made any proposals with respect to articles 4 and 6, although those articles had been thoroughly discussed by the Commission earlier in the session. In the Sixth Committee and elsewhere, the conclusion might be drawn that the debates in the Commission had not been properly reflected.

46. He recalled that, in the course of that discussion (1776th meeting), he had stressed the need to include in article 4 a reference to the concept of *jus cogens* and to deal in draft article 6 with legal consequences for third States.

47. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) observed that the Drafting Committee had examined article 6, but strictly within the framework of its mandate, under which it had been invited to determine whether it was necessary to include a provision along the lines of article 6 among the basic provisions. He wished to stress that the Drafting Committee had reached the conclusion that such a provision should not appear among the basic provisions but among those devoted to international crimes. On the other hand, the Drafting Committee had taken note of the possibility of including in those provisions a general article referring to international crimes but had not considered drafting it for lack of time. Furthermore, replying to Mr. Quentin-Baxter, he said that while the Commission had indeed confirmed the referral to the Committee of articles 1, 2 and 3 of the first set of draft articles, it had not confirmed the referral of articles 4 and 5.

48. Mr. MAHIOU said he found the presentation of the articles in part 2 of the draft logical. Article 1 rightly indicated that the legal consequences of an internationally wrongful act were set out in part 2. Those articles also took account of other facts, notably that the provisions were residual in character. When the Commission formulated a draft convention, it endeavoured to regulate all aspects of the problem, but it was never very certain of having done so, hence the need to make it clear that there were other rules of international law, generally based on custom. However, the rules embodied in the Charter of the United Nations should not be ignored.

¹³ *Ibid.*

¹⁴ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

49. The Drafting Committee had replaced the reference to rights and obligations in the article 1¹⁵ submitted in the Special Rapporteur's third report by a vaguer formula in order to avoid referring to rights arising from wrongful acts. To avoid any risk of contradiction, it would have been necessary to have a more complex text drawing a distinction between the obligations of the State committing such an act and the rights of the victim State. It should be noted that article 1 became meaningful only in the light of part 1 and the later provisions.

50. With regard to article 3, he was not convinced by Mr. Ushakov's contention that the reference to article 5 was redundant. For his part, he saw a link between articles 3 and 5: the Charter of the United Nations was applicable at the same time as part 2 and where there were gaps in its provisions, in which case the Charter would apply at the same time as customary international law. It was true that the inclusion of a reference to customary international law was debatable, since problems could also be settled by international treaty law or the general principles of law. He therefore feared that article 3 might restrict the applicable rules of international law if the expression "customary international law" were to be interpreted too strictly.

51. Sir Ian SINCLAIR said that, in general and in principle, he could accept the draft articles under discussion, but had two comments to make. The first related to his preference for a draft more along the lines of the original text submitted by the Special Rapporteur, inasmuch as it referred to the obligations of the author State and to the rights and obligations of other States. He himself would be inclined to use the terms "consequential obligations" and "consequential rights and obligations".

52. The use in the Drafting Committee's texts of articles 1, 2, 3 and 5 of the expression "legal consequences" was much too elliptical and general, although no doubt it would be spelled out later in part 2 that the legal consequences had to consist of obligations for the author State and rights and obligations for other States. It should also be borne in mind that an internationally wrongful act could have legal consequences not only for other States but also for other subjects of international law, such as international organizations.

53. His second comment related to the use of the expression "rules of customary international law". He did not believe that it was the time or place to enter into a discussion on the respective merits of that expression and of the term "rules of general international law". He himself believed that the latter formula would introduce an element of confusion and favoured the expression used by the Drafting Committee, which was backed by a long tradition in the Commission.

54. Mr. USHAKOV said he would not insist that the text which he had proposed for article 1 should appear in the commentary to that article. However, he would like it to be reproduced in the section of the report concerning State responsibility.

¹⁵ See 1771st meeting, para. 2.

ARTICLE 1

55. The CHAIRMAN said that, if there were no further comments on article 1, he would take it that the Commission agreed to adopt it in the form proposed by the Drafting Committee.¹⁶

Article 1 was adopted.

ARTICLE 2

56. The CHAIRMAN said that, if there were no further comments on article 2, he would take it that the Commission agreed to adopt it in the form proposed by the Drafting Committee.¹⁷

Article 2 was adopted.

ARTICLE 3

57. Mr. DÍAZ GONZÁLEZ said he had doubts about the usefulness of article 3, since its connection with article 5 was difficult to see. It seemed to him that article 2 already met the objective sought by article 3. If the Commission were nevertheless to accept article 3, it should draft the provision in the following terms:

"Without prejudice to the provisions of articles [4] and 5, the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part shall be governed by the rules of customary international law."

58. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) explained that the object of article 3 was different from that of article 2, which was to note the residual character of the provisions of the draft articles. Article 3, on the other hand, was intended to cover cases in which the draft articles were incomplete. The two articles therefore concerned two different situations. The absence of an article on the principle of proportionality was explained by the fact that the Drafting Committee had replaced the reference to rights and obligations by a reference to the legal consequences of an internationally wrongful act. There had therefore been no immediate need for a provision on the principle of proportionality, which would be examined in due course.

59. Mr. FLITAN observed that the question of the relationship between *jus cogens* and the provisions of part 2 was the subject of article 4, the wording of which was still to be formulated by the Drafting Committee.

60. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt article 3 in the form proposed by the Drafting Committee.¹⁸

Article 3 was adopted.

ARTICLE 5

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed

¹⁶ For the text, see 1805th meeting, para. 30.

¹⁷ *Idem*, para. 33.

¹⁸ *Idem*, para. 37.

to adopt article 5 in the form proposed by the Drafting Committee.¹⁹

Article 5 was adopted.

**Jurisdictional immunities of States and their property
(concluded) (A/CN.4/L.364, ILC(XXXV)/Conf.
Room Doc.1)**

[Agenda item 2]

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

CONSIDERATION BY THE COMMISSION

62. The CHAIRMAN invited the Commission to consider the adoption of the articles proposed by the Drafting Committee (A/CN.4/L.364).

ARTICLE 10 (Counter-claims)

63. Mr. USHAKOV said that he was not opposed to article 10 but wished to reiterate his doubts regarding the validity of some of its provisions. According to certain authors, in particular some specialists of private international law in the Soviet Union, it was doubtful whether a State which presented a claim before a court thereby consented to any counter-claims against it. It would be interesting to have more information on the practice in the matter.

64. The CHAIRMAN said that, if there was no objection, he would take it that article 10 as proposed by the Drafting Committee²⁰ was adopted.

Article 10 was adopted.

ARTICLE 12 (Commercial contracts)

65. Mr. USHAKOV stressed that any natural or juridical person that entered into a commercial contract with a State generally made sure that the applicable law and the competent jurisdiction were specified either in the contract or in an annex. Article 12 was actually concerned only with the case in which such a stipulation was omitted, either inadvertently or through carelessness on the part of that person. Although he was not entirely opposed to article 12, he considered it superfluous.

66. Mr. NI said that he had great difficulty with article 12, first of all because of the reference in paragraph 1 to the applicable rules of private international law. It was well known that there were no uniform rules of private international law applicable to all countries, although there were some regional conventions in the matter. When a court was seized of a case, it naturally held that it was competent to exercise jurisdiction if there were the slightest grounds for so doing. Moreover, the rules pertaining to conflict of laws were sometimes even incorporated into domestic legislation. Under article 12 as drafted, only the court of the forum State had the power to decide whether or not it could exercise juris-

diction, and that decision was final: the foreign defendant State, should it object to the exercise of jurisdiction, could either enter a conditional appearance to argue a virtually hopeless case, or suffer the consequences of a default judgment.

67. Secondly, under the terms of paragraph 1, if the foreign State entered into a commercial contract with a foreign natural or juridical person, it would be deemed to have consented to the exercise of jurisdiction by the court of the forum State. That, in his view, was an arbitrary provision since it would force the foreign, and sovereign, State to accept something which it could not have anticipated. Furthermore, it went further than the original article 12,²¹ which provided for the exercise of jurisdiction in cases where the activity in question was conducted wholly or partly by the foreign State in the territory of the forum State; and it went much further than the 1972 European Convention on State Immunity, which provided for jurisdiction in cases where the foreign State had an office, agency or other establishment on the territory of the forum State through which the activity in question was conducted, and the proceedings related to such activity.²² In both those instances, there was a requirement of a physical nature.

68. If it were not possible to modify the article, he would submit a comment for inclusion in the commentary to article 12 in order to reflect his position in the matter. He believed that Mr. Ushakov and he were trying to reach the same goal but in different ways. The point was that, if all contracts included a choice-of-law clause, there would be no difficulties: it was precisely because that was not the case that the problem arose.

69. Sir Ian SINCLAIR observed that the Commission's mandate was to prepare a draft on jurisdictional immunities of States and their property, not to try to harmonize the jurisdictional rules already in operation in national courts. Had it had such a mandate, its task would have been even more difficult. For his part, he was prepared to go along with article 12 subject to the reservation that he would want to examine its terms more carefully, given that it now related to commercial contracts rather than to trading or commercial activities as in the original text.

70. As to Mr. Ushakov's point, he regarded the article as absolutely essential and as a key to the acceptability of the draft as a whole for many States. He wished it were clear that such an article was not necessary but there was a large measure of jurisprudence on precisely those cases where the parties to a commercial contract, including a State, had failed to stipulate what the applicable law was to be, and it was to cover those cases that the rule in paragraph 1 of article 12 was required.

71. Mr. KOROMA said that, despite the Special Rapporteur's efforts in regard to article 12, two very serious difficulties remained. In the first place, he continued to believe that the expression "the applicable

¹⁹ *Idem*, para. 39.

²⁰ *Idem*, para. 60.

²¹ See 1805th meeting, footnote 12.

²² Art. 7 of the Convention; see 1762nd meeting, footnote 7.

rules of private international law", in paragraph 1, was indeterminate. Moreover, as Mr. Ni had stated, those rules were not uniform. Secondly, he had the strongest reservations about the notion of implied consent inherent in the phrase "the State is considered to have consented to the exercise of that jurisdiction . . .", which meant, in effect, that the court would decide the matter.

72. Mr. SUCHARITKUL (Special Rapporteur) pointed out that, so far as implied consent was concerned, under the terms of paragraph 2 (b) of article 12, paragraph 1 would not apply "if the parties to the commercial contract have otherwise expressly agreed". Such agreement did not have to be in writing or even incorporated into the contract, provided that it was express.

73. To meet Mr. Ni's point, the Commission might wish to consider the addition in paragraph 1 of a proviso reading: "provided that the commercial contract has a significant territorial connection with the State of the forum".

74. The CHAIRMAN said that, in view of the limited time available, the Commission should perhaps consider the Special Rapporteur's proposed form of wording at a later date. He suggested that the Commission should, subject to the reservations made, adopt article 12 as proposed by the Drafting Committee.²³

It was so agreed.

Article 12 was adopted.

ARTICLE 2 (Use of terms), para. 1 (g)

75. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission wished to adopt paragraph 1 (g) of article 2 as proposed by the Drafting Committee.²⁴

Paragraph 1 (g) of article 2 was adopted.

ARTICLE 3 (Interpretative provisions), para. 2

76. Mr. THIAM said he would prefer the words "the non-commercial character of the contract", at the end of article 3, paragraph 2, to be replaced by "the commercial or non-commercial character of the contract". Doubtless the intention had been to indicate that the non-commercial character of the contract made it possible to determine whether or not the State which had concluded the contract enjoyed immunity from jurisdiction, but it was preferable to make a distinction between two cases. If the commercial character of a contract could be inferred from its object, the State concluding the contract could not invoke immunity from jurisdiction. In the contrary case, it could invoke it.

77. The CHAIRMAN said that, if there was no objection, he would take it that article 3, paragraph 2, as proposed by the Drafting Committee²⁵ was adopted.

Paragraph 2 of article 3 was adopted.

ARTICLE 15 (Ownership, possession and use of property)

78. Mr. USHAKOV said that he was entirely opposed to article 15, paragraph 2. On the basis of that provision it would be sufficient, in the case of a proceeding designed to deprive a State of property in its possession or under its control, to institute before a court of that State a proceeding directed not against the State itself, but against a person other than the State; that was in conflict with article 7, paragraph 3.

79. He could accept paragraph 3 of article 15 on the understanding that it was merely indicative in nature and would have to be elaborated upon.

80. Mr. MAHIOU said that he had serious reservations regarding article 15, paragraph 2, but for reasons other than those given by Mr. Ushakov. The provision concerned the case in which a State, although not a party to the proceeding, might be involved. The argument developed in that provision was interesting, but in the final analysis it could affect the principle of immunity of States from jurisdiction. According to that provision, it was for the court in which the judicial proceeding was instituted to decide whether or not the State could have invoked immunity from jurisdiction, if the proceeding had been instituted against it, or whether the right or interest claimed by the State was admitted or supported by *prima facie* evidence. He was therefore concerned about the possible scope of article 15, paragraph 2. In that connection, he stressed the tendency of some courts to want to expand their jurisdiction.

81. Mr. YANKOV noted that, whereas paragraph 3 referred to the "inviolability" of the premises of a diplomatic or special or other official mission, it spoke of the "protection" of consular premises. He further noted that all the corresponding articles of the main diplomatic conventions used the terms "inviolable" or "inviolability" in reference to premises, including article 31 of the Vienna Convention on Consular Relations, article 25 of the Convention on Special Missions and article 23 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. He therefore considered that, unless there was a very good reason for making such a distinction, it would be preferable to use the same term in both instances.

82. Mr. SUCHARITKUL (Special Rapporteur), agreeing with Mr. Yankov, suggested that the words "the protection" in paragraph 3 should be deleted.

It was so agreed.

83. Sir Ian SINCLAIR, referring to paragraph 2, said that he regarded it as a necessary gloss on paragraph 3 of article 7. There were very few cases in which proceedings could be instituted by a natural or legal person against, for example, a bank acting as a bailee in respect of certain property regarding which a foreign State or a series of foreign States might have a claim or interest or which might be in the constructive possession or control of the State or States concerned since they had in fact deposited the property with the bank. A case in point was that of

²³ For the text, see 1805th meeting, para. 63.

²⁴ *Idem*, para. 67.

²⁵ *Idem*, para. 68.

Dollfus Mieg et Cie S.A. v. Bank of England (1950).²⁶ Paragraph 2 of article 15 therefore provided that in such a situation the State was at liberty to intervene in the proceedings to assert its immunity: if the State could not have invoked immunity, then the proceedings could continue; conversely, if it could have invoked immunity, then that immunity had to be upheld. The latter part of the paragraph merely indicated that a State could not automatically assert that it had a claim to or interest in property and that there must be at least some indication that the claim or interest was justified. That explained the reference to *prima facie* evidence.

84. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), referring to the comments of Sir Ian Sinclair, confirmed that the condition set forth in the last part of paragraph 2 applied equally to subparagraph (a) and subparagraph (b).

85. Mr. USHAKOV, referring to article 15, paragraph 2, drew attention to two possible cases. In the first, the State was not able to invoke immunity from jurisdiction. It would then be of little importance whether the proceeding was instituted against the State itself or against a person other than the State. In those circumstances, it was strange to provide that a proceeding could be brought against a person other than a State when the State concerned could not have invoked immunity from jurisdiction if the proceeding had been brought against it. In the second case, the right or interest claimed by the State was neither admitted nor supported by *prima facie* evidence. The latter case therefore came under paragraph 1: the court first had to proceed to the determination of the right or interest in question. If the existence of that right or interest was established, a proceeding could not be brought against a person other than the State. In the contrary case, the question did not arise, since no right or interest existed.

86. Mr. SUCHARITKUL (Special Rapporteur) said that there were certain peculiarities in the common law system of dealing with the property of a foreign Government, and a closer examination of decided cases might help to shed light on the matter. He continued to think that article 15 was both useful and necessary and that, if it were omitted, paragraph 3 of article 7 would be unnecessary too.

87. The CHAIRMAN said that, in the absence of further comments, he would take it that the Commission agreed, subject to the reservations entered by Mr. Mahiou and Mr. Ushakov, to adopt article 15 as proposed by the Drafting Committee.²⁷

It was so agreed.

Article 15 was adopted.

The meeting rose at 6.15 p.m.

²⁶ United Kingdom, *The Law Reports, Chancery Division*, 1950, p. 333.

²⁷ For the text, see 1805th meeting, para. 69.

1807th MEETING

Tuesday, 19 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balandra, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/L.365 and Add.1, ILC(XXXV)/Conf.Rom Doc.7)

[Agenda item 3]

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

ARTICLE 1 (Scope of the present articles)

1. Mr. McCAFFREY said that he wished to reserve his position on article 1 since, in his view, the uniform approach which it embodied did not reflect customary international law. That was apparent from the fact that the 1969 Convention on Special Missions had not yet entered into force and that treatment of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations and under the 1963 Vienna Convention on Consular Relations differed. He had agreed to the text of the article as formulated on the express understanding that, at a later stage, an article would be incorporated in the draft whereby States could declare that they accepted the draft articles only in so far as they applied to certain kinds of couriers and bags. He trusted that that would be made clear in the commentary to articles 1 and 3.

2. The CHAIRMAN suggested that, subject to Mr. McCaffrey's reservation, the Commission should adopt article 1 as proposed by the Drafting Committee.¹

It was so agreed.

Article 1 was adopted.

ARTICLE 2 (Couriers and bags not within the scope of the present articles)

3. Mr. MAHIOU said that article 2 raised the question as to whether the draft articles should be extended to couriers and bags used by international organizations and national liberation movements. The Drafting Committee had finally decided to adopt the article, rather than place it between brackets as it had at one time envisaged, and to include in the commentary an explanation of the

¹ For the text, see 1806th meeting, para. 2.