

Document:-
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Summary record of the 1812th meeting

Topic:
Other topics

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redrafted in more precise terms, along the following lines: "The Commission took the view that a code unaccompanied by penalties and by a competent criminal jurisdiction was not sufficient. However, since the matter also has political implications, a question is addressed to the General Assembly asking for guidance on the point."

34. Mr. USHAKOV said that the question referred to in subparagraph (c) was couched in terms that were too broad. Furthermore, it was premature to envisage an international criminal jurisdiction for individuals, while an international criminal jurisdiction for States was inconceivable. In that connection, he drew attention to article 5 of part 2 of the draft articles on state responsibility, which read: "The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security." In his view, there were no grounds for substituting an international criminal jurisdiction for those provisions and procedures.

35. Mr. EL RASHEED MOHAMED AHMED said he could agree to Mr. Mahiou's suggestion concerning subparagraph (b). With regard to subparagraph (c), he proposed the deletion of the phrase reading "although the Commission considers that a code unaccompanied by penalties and by a competent criminal jurisdiction would be of purely academic interest".

36. Mr. BALANDA said he could accept Mr. Mahiou's proposal or Mr. Yankov's suggestion regarding subparagraph (c). He noted that most members who had spoken on the draft code had raised the question of the criminal responsibility of States. The Special Rapporteur was therefore fully justified in asking the General Assembly, in subparagraph (c), to indicate more precisely the Commission's mandate on that point.

37. Mr. USHAKOV said that subparagraph (c) should comprise two questions: "Is it necessary to provide for an international criminal jurisdiction for States?"; "Is it necessary to provide for an international criminal jurisdiction for individuals?"

38. Mr. THIAM (Special Rapporteur) said he could agree to a proposal along those lines.

39. Mr. CALERO RODRIGUES proposed that the Special Rapporteur should consult Mr. Ushakov and the other members concerned with a view to arriving at a text for final approval by the Commission.

It was so agreed.

The meeting rose at 4.45 p.m.

¹ See 1805th meeting, para. 39.

1812th MEETING

Friday, 22 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-fifth session (continued)

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (concluded) A/CN.4/L.366)

B. Consideration of the topic at the present session (concluded)

Paragraph 40 (concluded)

1. In reply to a request by Mr. CALERO RODRIGUES, Mr. THIAM (Special Rapporteur) read out subparagraph (b) of the conclusion in the amended form approved at the 1811th meeting:

"(b) With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem."

Subparagraph (b), as amended, was adopted.

2. It only remained for the Commission to adopt subparagraph (c), which he had reworded with the assistance of Mr. Ushakov and Mr. Mahiou and which read:

"(c) With regard to the implementation of the code:

(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;

(ii) Moreover, in view of the prevailing opinion within the Commission, which endorses the principle of criminal responsibility in the case of States, the General Assembly should indicate whether such jurisdiction should also be competent with respect to States."

Subparagraph (c), as amended, was adopted.

Paragraph 40, as amended, was adopted.

Section B, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

CHAPTER III. Jurisdictional immunities of States and their property (continued)* (A/CN.4/L.356 and Corr.1, A/CN.4/L.356/Add.1-3 and Add.3/Corr.1)

B. Draft articles on jurisdictional immunities of States and their property (continued)

* Resumed from the 1808th meeting.

PART III (EXCEPTIONS TO STATE IMMUNITY) (*continued*) (A/CN.4/L.356/Add.1)

Commentary to article 12 (Commercial contracts) (continued)

3. Mr. SUCHARITKUL (Special Rapporteur) said that, further to consultations with Mr. Ni and other members, agreement had been reached regarding the amendments to be made in order to take account of Mr. Ni's proposal at the 1808th meeting. Accordingly, he would in due course introduce a new version of paragraph (7) of the commentary to article 12. Consequential amendments were thus required in paragraphs (2) and (3) of the commentary.

4. Mr. NI thanked the Special Rapporteur for his co-operation, which had made it possible to iron out the differences regarding paragraph (7) of the commentary. He had not requested any change in the text of paragraph (2), but would not object to the amendments by the Special Rapporteur.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

5. Mr. SUCHARITKUL (Special Rapporteur) explained that two changes were to be made in paragraph (2). The first consisted in replacing the opening words of the second sentence "It is designed to accommodate" by "It is the result of continuing efforts to accommodate". The second change was to insert the words "or on other grounds" after the words "the theory of implied consent", in the same sentence.

Paragraph (2), as amended, was approved.

Paragraph (3)

6. Mr. SUCHARITKUL (Special Rapporteur) explained that a consequential amendment required the concluding portion of paragraph (3), from the words "and is now able to reach", to be replaced by the following: "and is now able provisionally to adopt a formula, which could in due course be revised and improved so as to take more fully into account the interests and views of all countries with different systems and practices."

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

Paragraph (5) was approved, subject to some drafting changes.

Paragraph (6)

7. Mr. BALANDA said that the words "disposed to", in the first sentence, should be replaced by "in a position to". Again, the second sentence gave the impression that foreign law would apply in all cases and that the State concluding the contract would waive its immunity from jurisdiction. The word "abroad" should therefore be inserted after the phrase "The conduct of the State in concluding a commercial contract".

8. Mr. SUCHARITKUL (Special Rapporteur) said that he had no objection to Mr. Balanda's amendment to the first sentence. The position was different with regard

to the second sentence, which was the outcome of a lengthy discussion in the Commission.

9. Mr. MAHIU said that Mr. Balanda's second point was well taken, but in his opinion the concluding sentence of paragraph (6) met Mr. Balanda's concern.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved Mr. Balanda's amendment to the first sentence.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

11. Mr. SUCHARITKUL (Special Rapporteur) said that paragraph (7) should be replaced by the following text:

"(7) However, the view was expressed by some members concerning the formula contained in paragraph 1 of article 12 that the expression 'the applicable rules of private international law' is elusive, susceptible of differing interpretations leading to different results, and that the concept of 'implied consent' is artificial and questionable, since in fact a State concluding a commercial contract with a foreigner has not waived its immunity, or agreed to submit to the territorial jurisdiction, nor should it be presumed to have done so."

Paragraph (7), as amended, was approved.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

Paragraph (11)

12. Mr. SUCHARITKUL (Special Rapporteur) said that the wording of paragraph (11) stood in need of improvement. It would be redrafted without affecting the substance in any way.

Paragraph (11) was approved on that understanding.

Paragraph (12)

Paragraph (12) was approved.

Paragraph (13)

13. Mr. BALANDA proposed that the words "non-existence of sovereign power of the State", in the last sentence, should be replaced by "activity not pertaining to the sovereignty of the State".

It was so agreed.

Paragraph (13), as amended, was approved.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were approved.

Paragraph (17)

14. Mr. McCAFFREY said that he could not agree with the statement in the penultimate sentence that the term "commercial contracts" was preferable to the expression "trading or commercial activity". The words "preferable to" should be replaced by "more widely acceptable than".

It was so agreed.

Paragraph (17), as amended, was approved.

Paragraph (18)

15. Mr. McCAFFREY said that the first sentence was confusing, particularly because of the concluding words "in the context of time dimension". They should be deleted and the sentence should be reworded to state that "an attempt has been made to ascertain the development, over time, of State practice with respect to this exception".

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

16. Mr. McCAFFREY said that it was inappropriate to speak, in the last sentence, of "the determination of the non-commercial nature" of a particular contract or transaction. It would be better to use the formulation "determination of the nature".

It was so agreed.

Paragraph (19), as amended, was approved.

Paragraph (20)

17. Mr. McCAFFREY proposed that the word "activities" should be inserted after the word "trading" in the first sentence.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) to (23)

Paragraphs (21) to (23) were approved.

Paragraph (24)

18. Mr. LACLETA MUÑOZ said that, in the Spanish text, the words *ilimitada es como* should be replaced by the words *amplia como*.

It was so agreed.

Paragraph (24), as amended, was approved.

Paragraph (25)

Paragraph (25) was approved.

Paragraph (26)

19. Mr. McCAFFREY said that the concluding words of the paragraph, "as the question of exception of commercial contracts from State immunity", should be replaced by "on the question of the exception of commercial contracts from State immunity".

It was so agreed.

Paragraph (26), as amended, was approved.

Paragraph (27)

20. Mr. MAHIOU said that, in the French text, the opening words were misleading, because they gave the impression that the majority of countries had enacted legislation on the question of State immunity, which was far from being the case. It would be better to speak of "a number of Governments".

21. Mr. SUCHARITKUL (Special Rapporteur) explained that, while a certain number of Governments had adopted such legislation, many more were contemplating the enactment of laws on the subject. Moreover, in some countries the question of State

immunity was regulated in laws also dealing with other matters.

22. Mr. McCAFFREY said that, in the heading of the subsection, the word "on" should be replaced by "of". In the second sentence of paragraph (27), the opening words "While these legislations" should be replaced by "While these laws". In the third sentence, the word "of", before "commercial contracts", should be replaced by the words "relating to the", and the words "as provided" should be replaced by "as contained". Lastly, a full stop should be inserted after "United Kingdom", to be followed by the opening words of a new sentence beginning: "The latter has, on this point . . .".

23. Mr. LACLETA MUÑOZ said that, in the Spanish text, the words *según se estipula*, in the third sentence, should be replaced by the word *contenidos*.

It was so agreed.

Paragraph (27), as amended, was approved.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were approved.

Paragraph (35)

24. Mr. SUCHARITKUL (Special Rapporteur) said that the last sentence had to be redrafted in order to take account of more recent developments. He therefore suggested that it should be amended to read: "More recently, the problem was re-examined by the International Law Association during its meeting at Montreal in 1982."

It was so agreed.

Paragraph (35), as amended, was approved.

Paragraphs (36) and (37)

Paragraphs (36) and (37) were approved.

Paragraph (38)

25. Mr. USHAKOV said that he had refrained from commenting on certain passages of chapter II of the draft report because he had already fully explained his position in his memorandum (A/CN.4/371). He did not accept the distinction between State acts which were manifestations of State or public power (*jure imperii*) and State acts which were of a private or commercial nature (*jure gestionis*). In fact, the element that had to be taken into account was the express or tacit consent of a State to submit to the jurisdiction of another State. He could not endorse the theory of restricted immunity on which the commentary relied, particularly since article 12 simply alluded to tacit consent. It was therefore difficult for him to accept article 12 accompanied by a commentary of that kind.

26. Mr. KOROMA proposed the insertion of an additional paragraph along the following lines: "This survey should not lead to the conclusion that the majority of States now subscribe to the restricted immunity school of thought." The fact of the matter was that the overwhelming majority of States adhered firmly to the doctrine of the absolute immunity of States from jurisdiction.

27. Mr. NI supported that statement. The commentary to article 12, from paragraph (11) onwards, seemed one-sided in that it entirely endorsed the theory of restricted immunity. It was essential to introduce an element of balance and to indicate the other point of view.

28. Mr. MAHIU said that he strongly supported Mr. Koroma's proposal, which reflected the views of a number of members of the Commission.

29. Mr. SUCHARITKUL (Special Rapporteur) said that he was prepared to insert a new paragraph to meet Mr. Koroma's concern, but the paragraph should not appear to express a conclusion that was contrary to the entire substance of the commentary.

30. Mr. KOROMA said that he had examined the most recent legal literature on the subject and had ascertained that the doctrine of absolute immunity still prevailed in the vast majority of countries.

31. Mr. McCAFFREY suggested that the proposed new paragraph should be worded along the following lines: "Some members of the Commission wished to point out that the survey should not necessarily lead to the conclusion . . .", with the remainder of Mr. Koroma's text unchanged.

32. Mr. NI said that the abundant State practice referred to in the commentary was predominantly that of countries in Western Europe and North America. The absence of recorded practice in many countries from other parts of the world was simply proof that those countries adhered to the doctrine of absolute immunity; as a result, there were no cases to report. Arguments based on the number of decisions reported were thus quite misleading.

33. Mr. USHAKOV drew attention to paragraph 17 of his memorandum (A/CN.4/371) and pointed out that 18 of the 29 States which had replied to the questionnaire and supplied information on the question did not share the views of the Special Rapporteur. It was therefore wrong to say that the majority of States favoured the theory of restricted immunity. In the Sixth Committee of the General Assembly, representatives from a large number of countries had taken a stand against that notion. As Mr. Ni had pointed out, the commentary did not reflect the world situation but rather the trends in, and the practice of, certain Western States. If article 12 rested exclusively on the principle of tacit consent by States it would be acceptable, but it was unacceptable when it was based on a commentary that took the principle of restricted immunity as its point of departure.

34. The CHAIRMAN suggested that the drafting of the proposed additional paragraph should be left to Mr. Koroma and the Special Rapporteur, in consultation with other interested members.

It was so agreed.

Paragraph (38) was approved.

The commentary to article 12, as amended, was approved, subject to the addition of paragraph (39).¹

Commentary to article 15 (Ownership, possession and use of property) (A/CN.4/L.356/Add.3 and Corr.1)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

35. Mr. USHAKOV said that paragraph (4) failed to explain the situation properly. In principle, a court was always competent, so there was no reason to refer to the existence of competence "in regard to the proceeding". For a court to be competent in a particular proceeding, there had to be some territorial link: a succession arising in the forum State or the fact that the deceased person was a national of the State concerned.

36. Mr. SUCHARITKUL (Special Rapporteur) said that the insertion of a sentence would suffice to meet Mr. Ushakov's concern.

It was so agreed.

37. In reply to a question by Mr. LACLETA MUÑOZ, Mr. VALENCIA OSPINA (Deputy Secretary to the Commission) said that the final text would of course take into account the changes made by the Drafting Committee.

38. Mr. BALANDA pointed out that, in the French text of the document under consideration, the phrases in English still had to be translated into French.

Paragraph (4), as amended, was approved.

Paragraph (5)

39. Mr. NJENGA proposed that the word "which", in the fifth sentence, should be replaced by "what".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

Paragraph (7) was approved, with a drafting change.

Paragraph (8)

40. Mr. CALERO RODRIGUES pointed out that paragraph (8) of the commentary explained only one of the two cases envisaged in paragraph 2 of article 15, namely the case in which the State itself could not have invoked immunity had the proceeding been instituted against it.

41. Nothing was said in the commentary about the other kind of case, in other words "if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence".

42. Mr. SUCHARITKUL (Special Rapporteur) thanked Mr. Calero Rodrigues for drawing his attention to that omission. He would prepare a paragraph (8 *bis*) which would state that paragraph 2 of article 15 was also designed to cover situations in which there was no *prima facie* evidence in support of the claim by the State concerned, and in which that claim was not admitted.

It was so agreed.

Paragraph (8) was approved, on the understanding that it would be followed by an appropriate paragraph (8 bis).

¹ See 1813th meeting, para. 112.

Paragraph (9)

43. Mr. MAHIU suggested the insertion at the end of the paragraph of a sentence along the following lines: "Another member reserved his position on this paragraph which, by its content and formulation, was likely to give rise to serious difficulties, particularly where it sought to deprive a State of property as a result of a proceeding from which it was absent; he considered that paragraph 2 must be re-examined before deciding whether it should be included in draft article 15."

It was so agreed.

44. Mr. LACLETA MUÑOZ pointed out that, in the Spanish text of article 15, paragraph 2 (b) as reproduced in chapter III of the draft report should end with the words *derecho o interés*; the remainder of the sentence should constitute the concluding part of paragraph 2 itself.

45. Mr. USHAKOV suggested that the concluding words of the last sentence, "do not concern another State but are instituted against persons, natural or juridical, other than a State", should be replaced by "do not concern persons, natural or juridical, other than a State, but are in fact instituted against the State itself".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved.

The commentary to article 15, as amended, was approved.

CHAPTER VIII. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.361)

A. Introduction

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 6

46. Mr. CALERO RODRIGUES, referring to the third sentence, said he did not think it was correct to say that the Drafting Committee had not considered any draft articles on account of the programme of work. Perhaps the sentence should be deleted.

47. Mr. QUENTIN-BAXTER (Special Rapporteur) said his intent had been to indicate that the programme of work had not permitted any in-depth discussion of the topic in 1983. It was not an implied criticism but simply an explanation of the course of events.

48. Mr. NJENGA, agreeing that the sentence in question contained a purely factual statement, suggested that Mr. Calero Rodrigues' point might be met by inserting the word "any" before "draft articles".

49. Mr. CALERO RODRIGUES said that, while he could agree to that suggestion, he would none the less propose that the phrase "or for draft articles to be considered by the Drafting Committee" should be replaced by "or for any draft articles which might be presented to be considered by the Drafting Committee".

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

50. Mr. BALANDA said that, in the third sentence of the French text, the words *un rapport prématurément soumis pour la session de 1984* should be replaced by *un rapport soumis en avance pour la session de 1984*.

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

51. Mr. USHAKOV said that he was unaware of the existence of the study of State practice mentioned in paragraph 9. He could therefore neither support nor oppose the suggestion that it should be made more widely available. Perhaps the study had been intended for the Special Rapporteur.

52. Mr. QUENTIN-BAXTER (Special Rapporteur) said that the sentence was merely intended to reflect a decision taken by the Commission. The study in question was the kind of document members required in order to form their own views, and interest in it had been displayed both in the Sixth Committee and in the Commission.

53. Mr. CALERO RODRIGUES proposed that the word "more" should be deleted from the expression "more widely available", at the end of the third sentence.

It was so agreed.

54. Mr. BALANDA said that, as he saw it, there was a contradiction in the second sentence, which spoke of the participation of a "substantial number of Commission members" in what was none the less a "short" debate.

55. Mr. YANKOV said that it was not the normal practice to give any indication in the report of the Commission of the number of members who had participated in a debate; those interested in such information had only to consult the summary records. Moreover, such subjective assessments served no useful purpose.

56. Mr. McCAFFREY proposed that the expression "A substantial number", at the beginning of the sentence, should be amended to read "A number".

It was so agreed.

Paragraph 9, as amended, was adopted.

1. *The majority policy conflicts and the solutions offered*

Paragraphs 10 to 17

57. Mr. USHAKOV said he wondered whether paragraphs 10 to 17 were intended to reflect the views of the Special Rapporteur or of the members of the Commission. For instance, he did not recall the Commission taking any decision on the question of the scope of application. In the circumstances, paragraphs 10 to 17 should be deleted.

58. Mr. McCAFFREY pointed out that the paragraphs in question set forth the Special Rapporteur's conclusions, as based on the discussions that had taken place in the Commission and in the Sixth Committee.

59. Mr. NJENGA said that the paragraphs contained a fair and balanced account of the debates in the Sixth

Committee and in the Commission. Accordingly, he was unable to agree to any deletion.

60. Mr. QUENTIN-BAXTER (Special Rapporteur) explained that his aim had been to present, in condensed form, aspects of his fourth report (A/CN.4/373) and of his oral introduction, and to draw attention to certain broad issues that had been the subject of extensive debate in the Commission and the Sixth Committee over a period of years. The first of those issues concerned the scope of the topic and there could be no doubt that the predominant view was in favour of a limitation of scope.

61. Mr. THIAM said that, in 1982, the Commission had not taken a decision on the advisability of pursuing the study of the topic and still less had it decided to delineate the scope. It had preferred to await the report which the Special Rapporteur was to submit later—a report which in fact had been only superficially examined at the present session. Since the purpose now was to reflect the discussions which had taken place in 1983, it was better to focus attention on those discussions.

62. Mr. CALERO RODRIGUES said that, in his view, the paragraphs were useful as an introduction to subsection 2, which dealt with the discussion in the Commission, for they described the Special Rapporteur's approach to the problem and how matters had progressed since his latest report. Hence he would not be in favour of any deletion. The heading of the subsection under discussion might none the less give rise to difficulties and could perhaps be amended to something like "The Special Rapporteur's approach".

63. Mr. YANKOV said that, while he could agree to that suggestion, it would perhaps be simpler just to add "as contemplated by the Special Rapporteur" to the existing heading.

64. Mr. McCAFFREY proposed that the heading should be amended by adding the words "by the Special Rapporteur" and that the first sentence of paragraph 10 should be amended to read: "In his report the Special Rapporteur had resolved the question of scope on the basis of positions taken in the Sixth Committee."

65. Mr. THIAM stressed that it was necessary in the paragraphs under consideration to attribute to the Special Rapporteur all the opinions that were presented as being those of the Commission.

66. Mr. USHAKOV said that his criticism of the paragraphs in question was precisely that they reflected only the subjective and biased interpretation of the discussion by the Special Rapporteur. The impression was being conveyed that the Commission had taken a decision on the issues of principle and that the only thing left to be done was to submit the draft articles to the General Assembly.

67. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, while there had been no formal decisions in the Commission or the Sixth Committee, debates had taken place in which a large number of representatives had adopted clear-cut positions. Moreover, the statement made in the first sentence of paragraph 17, for instance, was supported by documentation, and the votes taken on the matter had been listed in his fourth and earlier

reports. It was the duty of a special rapporteur to listen to what was said in the Commission and in the Sixth Committee and, when dealing with new and broad subjects, to assess the various trends.

68. In 1982 the Commission had taken the view that the time had come to decide whether to pursue consideration of the topic. It was therefore his task to place the matter within a context in which such a decision could be taken and he had endeavoured to prepare the way in the two meetings that had been available. In principle, decisions should be taken on the basis of the evidence marshalled by the Special Rapporteur. No one had to agree with such evidence; but no one was entitled to suppress it.

69. Mr. BARBOZA suggested that, in addition to making it clear that paragraphs 10 to 17 reflected the views of the Special Rapporteur, it was necessary to delete certain adjectives such as "majority" or "predominant", which portrayed an unduly clear-cut position on the part of the Commission.

70. Mr. EVENSEN said that paragraphs 10 to 17 should be toned down, since they seemed to rely too much on what had been said in the Sixth Committee, where views varied from year to year.

71. Mr. QUENTIN-BAXTER (Special Rapporteur) said that any toning down could be effected only at the expense of the continued treatment of the topic. The second sentence of paragraph 10, for example, was by no stretch of the imagination a subjective view. It was clearly founded on the position taken in the Commission and in the Sixth Committee. Indeed, there was nothing in paragraphs 10 to 17 that could not be supported by an appraisal of the facts.

72. Mr. USHAKOV said that the paragraphs under consideration had the defect of presenting only the majority view in the Commission and in the Sixth Committee, while ignoring the minority view.

73. Mr. QUENTIN-BAXTER (Special Rapporteur) said it was incorrect to say that he had given only the majority point of view; that was apparent, for example, from paragraph 12. Naturally, every special rapporteur tended to introduce a topic in terms of his own views, but those members who did not agree with them were entitled to say so and subsection 2 endeavoured to do just that. It was important for the Commission's future method of work to accept that special rapporteurs had to listen to what was said in the Commission and the Sixth Committee and to rely on that when nothing else was available. It would always be possible, of course, to add another paragraph at the end of subsection 1 to the effect that some members did not agree with the Special Rapporteur. However, such a course would be superfluous, since there was no assumption that they did agree.

74. The CHAIRMAN suggested that, in the light of the comments made, the heading of subsection 1 should be amended to read "The Special Rapporteur's appraisal of the situation".

It was so agreed.

Paragraphs 10 to 17 were adopted.

Subsection 1, as amended, was adopted.

2. *The Commission's discussion*

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

75. Mr. USHAKOV suggested that, in the last sentence, which reflected his own views, the words "a State had no obligation to repair transboundary harm unless the breach of a treaty obligation . . ." should be replaced by the following text: "a State had no obligation to repair harm arising from activities that were not prohibited by international law unless provision was made therefor by a relevant convention to which it was a party."

*It was so agreed.**Paragraph 19, as amended, was adopted.*

Paragraph 20

76. Mr. BALANDA suggested that, in the first sentence, the word "one" should be replaced by the words "some of them".

*It was so agreed.**Paragraph 20, as amended, was adopted.*

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Paragraph 24

77. In response to a proposal by Mr. McCAFFREY, Mr. QUENTIN-BAXTER (Special Rapporteur) proposed that the word "susceptible", in the third sentence, should be replaced by "attracted".

*It was so agreed.**Paragraph 24, as amended, was adopted.*

Paragraph 25

*Paragraph 25 was adopted.**Subsection 2, as amended, was adopted.**Section B, as amended, was adopted.**Chapter VIII of the draft report, as amended, was adopted.*

CHAPTER IV. State responsibility (concluded)* (A/CN.4/L.357 and Add.1 and Add.1/Corr.1)

C. Draft articles on State responsibility (part 2 of the draft articles)
(A/CN.4/L.357/Add.1 and Corr.1)

*Commentaries to articles 1, 2, 3 and 5**The commentaries to articles 1, 2, 3 and 5 were approved.**Section C was adopted.**Chapter IV of the draft report, as amended, was adopted.**The meeting rose at 1 p.m.*

* Resumed from the 1808th meeting.

1813th MEETING*Friday, 22 July 1983, at 3.30 p.m.**Chairman: Mr. Laurel B. FRANCIS**later: Mr. Alexander YANKOV*

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ushakov.

**Draft report of the Commission on the work
of its thirty-fifth session (concluded)**

CHAPTER V. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)* (A/CN.4/L.358 and Add.1 and Add.1/Corr.1)

C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.358/Add.1 and Corr.1)

Paragraph 57

*Paragraph 57 was adopted.**Commentary to article 1 (Scope of the present articles)*

Paragraph (1)

1. Mr. McCAFFREY proposed that a comma should be inserted after the words "of the draft articles", in the first sentence, and that the words "circumscribing it to all kinds" should be replaced by "comprising all kinds".

*It was so agreed.**Paragraph (1), as amended, was approved.*

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved, with some drafting changes.

Paragraph (4)

*Paragraph (4) was approved.**The commentary to article 1, as amended, was approved.**Commentary to article 2 (Couriers and bags not within the scope of the present articles)**The commentary to article 2 was approved.**Commentary to article 3 (Use of terms)**Introduction to the commentary**The introduction to the commentary was approved.**Commentary to paragraph 1.**Commentary to subparagraph (1)*

Paragraph (1)

Paragraph (1) was approved, with some drafting changes.

Paragraph (2)

2. Mr. McCAFFREY said that the reference in the second sentence to reasons based on custom was

* Resumed from the 1809th meeting.