

Document:-  
**A/CN.4/SR.1813**

**Summary record of the 1813th meeting**

Topic:  
**Other topics**

Extract from the Yearbook of the International Law Commission:-  
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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.

ambiguous. The word “custom” should be replaced by “practice”.

*It was so agreed.*

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

Paragraph (3)

3. Mr. LACLETA MUÑOZ said that the word “generally”, in the sentence to be inserted between the first and second sentences of the paragraph (see A/CN.4/L.358/Add.1/Corr.1), unfortunately gave the impression that the Commission had not been in complete agreement. Hence the word should be deleted.

*It was so agreed.*

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

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were approved.*

*The commentary to subparagraph (1), as amended, was approved.*

*Commentary to subparagraph (2)*

Paragraph (1)

4. Mr. YANKOV (Special Rapporteur) pointed out that, in the French text, the opening words *Les deux objectifs et caractéristiques fondamentales* should be corrected to read *Les deux caractéristiques objectives et fondamentales*.

*Paragraph (1), as amended, was approved.*

Paragraph (2)

5. Mr. McCAFFREY proposed that the opening words “The way of delivery” should be amended to read “The means of delivery”. In the fourth sentence, the words “Its way of delivery” should be altered to “Its method of delivery”.

*It was so agreed.*

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

Paragraph (3)

6. Mr. McCAFFREY proposed that, in the English text, the phrase “this subparagraph is similarly structured as”, in the first sentence, should be reworded to read “this subparagraph is structured similarly to”.

*It was so agreed.*

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

Paragraph (4)

*Paragraph (4) was approved.*

*The commentary to subparagraph (2), as amended, was approved.*

*Commentary to subparagraph (3)*

7. Mr. McCAFFREY proposed that, in the second sentence, the opening words “They have been” should be amended to read “It has been”, bearing in mind that the antecedent was the word “terminology”. In the third sentence, the words “dispatching a diplomatic courier whose function is precisely to accompany a bag” should be replaced by the shorter and more accurate formula: “dispatching a bag accompanied by a diplomatic courier”.

8. Mr. YANKOV (Special Rapporteur) said he could accept the first amendment; but, with regard to the second, the language in the third sentence constituted an explanation of the terms used.

9. Mr. McCAFFREY said that he would not insist on his second proposal.

10. Mr. BALANDA suggested that the difficulty which had led Mr. McCaffrey to make his proposal to amend the third sentence could be resolved by replacing the phrase “a State dispatching a diplomatic courier” by “a State sending a diplomatic courier”.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the commentary to subparagraph (3), with Mr. McCaffrey’s amendment to the second sentence and Mr. Balanda’s amendment to the third sentence.

*It was so agreed.*

*The commentary to subparagraph (3), as amended, was approved.*

*Commentary to subparagraph (4)*

Paragraph (1)

12. Mr. YANKOV (Special Rapporteur) said that, in the Spanish text of the second sentence, the word *ecuación* should be amended to *asimilación*.

13. Mr. McCAFFREY proposed that, in the second sentence, the opening words “To use another terminology”, should be replaced by “To use other terminology”.

14. Mr. BALANDA said that, in the French text of the first sentence, the words *celui même* should be replaced by *celui-là même*.

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1), subject to those three amendments.

*It was so agreed.*

*Paragraph (1), as amended, was approved.*

Paragraph (2)

*Paragraph (2) was approved*

*The commentary to subparagraph (4), as amended, was approved.*

*Commentary to subparagraph (5)*

*The commentary to subparagraph (5) was approved.*

*Commentary to subparagraphs (6), (7) and (8)*

*The commentary to subparagraphs (6), (7) and (8) was approved.*

*Commentary to subparagraph (9)*

*The commentary to subparagraph (9) was approved.*

*The commentary to paragraph 1 of article 3, as amended, was approved.*

*Commentary to paragraph 2*

*The commentary to paragraph 2 of article 3 was approved.*

*The commentary to article 3, as amended, was approved.*

*Commentary to article 4 (Freedom of official communications)*

*Commentary to paragraph 1*

*The commentary to paragraph 1 of article 4 was approved.*

*Commentary to paragraph 2*

*The commentary to paragraph 2 of article 4 was approved, with a drafting change.*

*The commentary to article 4, as amended, was approved.*

*Commentary to article 5 (Duty to respect the laws and regulations of the receiving State and the transit State)*

*Commentary to paragraph 1*

16. Mr. McCAFFREY said that, at the end of the third sentence, the words "and its safe arrival at its destination" should be followed by a comma and the phrase "while guarding against its abuse", so as to take into consideration the sentiments expressed in the Sixth Committee that part of the purpose of the draft articles was to help to ensure that a sending State did not abuse the use of the diplomatic bag. As the text now stood, the third and fourth sentences gave the impression that all the privileges, immunities and facilities accorded to the courier and the bag were aimed solely at ensuring protection of the bag and its safe arrival at its destination. Lastly, the words "shall do all possible efforts", in the final sentence, should be replaced by "shall make all possible efforts".

*It was so agreed.*

*The commentary to paragraph 1 of article 5, as amended, was approved.*

*Commentary to paragraph 2*

*The commentary to paragraph 2 of article 5 was approved.*

*The commentary to article 5, as amended, was approved.*

*Commentary to article 6 (Non-discrimination and reciprocity)*

*Introduction to the commentary*

*The introduction to the commentary was approved.*

*Commentary to paragraph 1*

*The commentary to paragraph 1 of article 6 was approved.*

*Commentary to paragraph 2, subparagraph (a)*

*The commentary of subparagraph (a) of paragraph 2 of article 6 was approved, with a drafting change.*

*Commentary to paragraph 2, subparagraph (b)*

*The commentary to subparagraph (b) of paragraph 2 of article 6 was approved.*

*The commentary to paragraph 2 of article 6, as amended, was approved.*

*The commentary to article 6, as amended, was approved.*

*Commentary to article 7 (Documentation of the diplomatic courier)*

17. Mr. BALANDA said it had already been proposed that, in the French text of article 7 before the commentary, the words *d'un document officiel* should be

replaced by the plural *des documents officiels*, in order to bring the text of the article into line with the title. The purpose of such a change would be to cover cases in which the diplomatic courier was the bearer of several official documents establishing his status and specifying the number of items constituting the diplomatic bag.

18. Mr. YANKOV (Special Rapporteur) said that the best solution might be to bring the French text into line with the other texts.

*It was so agreed.*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

19. Mr. LACLETA MUÑOZ said that, in the first sentence of the Spanish text, the words *su número de matrícula* should be replaced by *los números de serie de éstos*.

*It was so agreed.*

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

Paragraph (3)

20. Mr. BALANDA said that, in the second sentence of the French text, the word *reflétaient* should be replaced by *reflètent*.

*It was so agreed.*

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

Paragraph (4)

*Paragraph (4) was approved.*

*The commentary to article 7, as amended, was approved.*

*Commentary to article 8 (Appointment of the diplomatic courier)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

21. Mr. McCAFFREY proposed the insertion at the end of the second sentence, which stated that the appointment of the diplomatic courier was an act within the domestic jurisdiction of the sending State, of the phrase "and the word 'freely' is used to indicate this". Some explanation should be given to show how the term "freely" was used in article 8, notwithstanding the fact that it was also found in the corresponding provisions of the existing diplomatic conventions.

22. Mr. YANKOV (Special Rapporteur) said that comments had been made in the Sixth Committee about the use of the word "freely". Some representatives have considered it redundant to state in the article that the courier was "freely appointed", something that was self-evident. As he saw it, it was desirable to indicate that freedom of appointment in the matter was the consequence of the sovereignty and discretionary powers of the sending State. He would prefer Mr. McCaffrey's proposal to take the form of a separate sentence along the following lines: "Accordingly, the word 'freely' has been used in the text of article 8."

23. Mr. FLITAN pointed out that the first sentence of paragraph (1) explained that the use of the expression “freely appointed” was “consistent with the terminology used in the corresponding provisions of all four diplomatic conventions”.

24. Mr. YANKOV (Special Rapporteur) said that it was none the less desirable to provide an explanation in paragraph (2), one that would not in any way affect what was stated in paragraph (1).

25. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (2), with the insertion proposed by Mr. McCaffrey, as reworded by the Special Rapporteur.

*It was so agreed.*

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

Paragraph (3)

*Paragraph (3) was approved.*

Paragraph (4)

26. Mr. YANKOV (Special Rapporteur) proposed that the words “or a member of the staff of the Ministry of Foreign Affairs” should be inserted at the end of the second sentence, thereby making the text more complete.

*It was so agreed.*

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

Paragraph (5)

27. Mr. FLITAN proposed that the phrase “or the matter could be dealt with in a separate article to follow draft article 11” should be inserted at the end of the paragraph, so as to take account of a possibility which had also been contemplated by the Drafting Committee.

*It was so agreed.*

*Paragraph (5), as amended, was approved.*

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

*Section C, as amended, was adopted.*

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

*Mr. Yankov took the Chair.*

**CHAPTER VI. The law of the non-navigational uses of international watercourses (A/CN.4/L.359 and Add.1)**

**A. Introduction (A/CN.4/L.359)**

Paragraphs 1 to 11

*Paragraphs 1 to 11 were adopted.*

Paragraph 12

28. Mr. BARBOZA proposed that footnotes 20 and 21, containing draft articles 1 to 5 and X and a “provisional working hypothesis” that had been adopted by the Commission at its thirty-second session,<sup>1</sup> should be incorporated into the body of paragraph 12, for they were no less important than the questionnaire addressed to Governments, which was reproduced in the body of paragraph 5.

29. Mr. EVENSEN (Special Rapporteur) explained that the texts in question had been placed in footnotes

because they had been adopted not at the present session, but in 1980. They were reproduced in the draft report only for information.

30. Mr. McCAFFREY said that in chapter III, dealing with jurisdictional immunities of States and their property, the draft articles adopted at previous sessions appeared in the body of the chapter and not in a footnote. For the purposes of the discussion in the Sixth Committee, it was preferable for the material in footnotes 20 and 21 to be set out in paragraph 12 itself.

31. The CHAIRMAN said that, as a rule, texts of articles placed in footnotes were draft articles which had not been adopted. In the present instance, the articles concerned had been adopted on first reading and should be included in the body of paragraph 12.

32. Mr. LACLETA MUÑOZ pointed out that, in the Spanish text of footnote 20, the passage in square brackets following article X was obviously an error and should be deleted.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 12, with the correction to the Spanish text and with the amendment proposed by Mr. Barboza.

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

Paragraphs 13 to 15

*Paragraphs 13 to 15 were adopted.*

Paragraph 16

34. Mr. McCAFFREY said that paragraph 16 seemed somewhat out of place, since it did not follow on naturally from the previous paragraphs; but in view of the lateness of the hour, he would not make any proposal in that regard.

35. Mr. BALANDA said that the proper place for paragraph 16 was the beginning of the chapter. Nevertheless, he would not press the point.

*Paragraph 16 was adopted.*

*Section A, as amended, was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.359/ Add.1)**

Paragraphs 1 to 14

*Paragraphs 1 to 14 were adopted.*

Paragraph 15

*Paragraph 15 was adopted, with some drafting changes.*

Paragraph 16

*Paragraph 16 was adopted.*

Paragraph 17

36. Mr. McCAFFREY, referring to the words “contiguous or successive rivers”, in the first sentence, said that it would be more appropriate to speak of contiguous or successive riparian States.

37. The CHAIRMAN said that he did not experience the same difficulty as Mr. McCaffrey, for it was possible to have contiguous or successive riparian States and also contiguous or successive rivers.

<sup>1</sup> *Yearbook . . . 1980*, vol. II (Part Two), pp. 110 *et seq.* (arts. 1 to 5 and X and commentaries thereto), and p. 108, para. 90 (note concerning the term “international watercourse system”).

38. Mr. NJENGA said he agreed with that remark.

39. Mr. BARBOZA pointed out that the correct expression was employed in Spanish. *Río de curso sucesivo* was used for a river that crossed the territory of one State and then another State. *Río contiguo* was used for rivers that formed frontiers. In any event, reference was always made to rivers, not to States.

40. Mr. CALERO RODRIGUES said that, during the discussion, he himself had referred to "contiguous or successive rivers", an expression which he believed to be correct not only in his own language but also in English.

41. Mr. McCAFFREY said that he would not press the point, although the expression did seem strange.

42. Mr. BALANDA said that, in French, he had similar difficulties with the expression *rivières contiguës ou successives*, and he tended to agree with Mr. McCaffrey.

43. The CHAIRMAN said he would take it that the Commission agreed to adopt paragraph 17 as it stood, on the understanding that the views expressed by members on the expression "contiguous or successive rivers" would appear in the summary record.

*It was so agreed.*

*Paragraph 17 was adopted.*

Paragraphs 18 to 27

*Paragraphs 18 to 27 were adopted.*

New paragraph 27 bis

44. Mr. BARBOZA proposed the insertion of a paragraph 27 bis worded along the following lines: "Many members expressed the opinion that articles 1 to 5 and X and the note, provisionally adopted by the Commission at its thirty-second session (1980), should no longer be considered in the first reading of the draft, and that the Special Rapporteur should begin his next report with the new article 6."

45. Mr. CALERO RODRIGUES said that he had no objection to the proposed additional paragraph, but the opening words "Many members" should be amended to read "Several members".

46. Mr. EVENSEN (Special Rapporteur) said that there were good reasons to prefer the expression "Several members", which would introduce a desirable element of flexibility, especially in view of the discussions in the Sixth Committee.

47. Mr. McCAFFREY said he agreed with Mr. Barboza. He would have been inclined to say "Many members", but if that wording was not acceptable, perhaps it would be possible to say "A number of members".

48. In reply to a question by the CHAIRMAN, Mr. BARBOZA said that he would prefer the wording "A number of members", but he was prepared to accept the term "Several members".

49. Mr. NJENGA said he was strongly opposed to Mr. Barboza's proposal for a new paragraph 27 bis, one which suggested that certain draft articles already provisionally adopted could not be reviewed. In fact, the article on shared natural resources had attracted considerable

criticism. It was therefore essential not to tie the Special Rapporteur's hands, as would be the case if the proposed paragraph 27 bis were adopted. The text was not balanced and did not take into account the fact that many members of the Commission were totally opposed to the course of action indicated therein.

50. The Commission had to elaborate a set of draft articles that would command the broadest support, not only among members but also among States. It would be doing no service to the cause of progress on the topic if the draft included articles that a number of members found unacceptable.

51. Mr. EVENSEN (Special Rapporteur) said that a very delicate political matter appeared to be involved. He therefore proposed to listen to the discussions in the Sixth Committee very carefully and also planned to visit the Governments of some major riparian States before proceeding with his work. He had no strong feelings with regard to the choice of the opening words, but since the view expressed in paragraph 27 bis was opposed by some members, it would be appropriate for their opinion to be reflected in another paragraph to follow paragraph 27 bis. He assured all members that the proposed paragraph would not be unduly restrictive in regard to his future work.

52. Mr. BARBOZA said that he was compelled to insist on his proposed paragraph 27 bis, which was necessary in the interests of balance. It was not intended to reflect the debate in the Sixth Committee, but rather the discussion in the Commission, six or seven members of which had clearly expressed views identical to his own.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Barboza's proposal, amending the opening word to "Several", and on the understanding that the Special Rapporteur considered that the paragraph would not restrict him in any way in his work.

*It was so agreed.*

54. Mr. NJENGA pointed out that the Special Rapporteur had also suggested that, for the sake of balance, a further paragraph should be included to reflect the views of members who did not agree with the opinion expressed in paragraph 27 bis. He therefore proposed the insertion of the following text, to follow paragraph 27 bis: "Some other members, however, questioned some of the concepts in the articles provisionally adopted, such as 'shared natural resources', as offering a suitable basis for evolving generally acceptable principles in this field."

55. Mr. BARBOZA pointed out that paragraphs 31 *et seq.* reflected the different opinions expressed in the Commission with regard to the advisability of adopting the principle of shared natural resources; those paragraphs covered the contents of Mr. Njenga's proposed text, which, if adopted, would be repetitive and complicate the task of the Special Rapporteur.

56. The CHAIRMAN suggested that the proposed additional passage might perhaps read: "Other members of the Commission, however, considered that the Special Rapporteur should not be limited in his further work,

considering the examination of this problem in the Sixth Committee.” A formulation along those lines would put the emphasis on the desirability of allowing the Special Rapporteur the necessary latitude in his work.

57. Mr. EVENSEN (Special Rapporteur) proposed the following compromise formula: “Other members expressed their concern with regard to certain aspects of the provisionally adopted articles.” It did not take up any of the specific issues and also allowed for the fact that concern had been expressed about some other matters, not only the concept of shared natural resources.

58. Mr. BARBOZA pointed out that paragraph 27 *bis* related to a question of procedure; it meant that the discussion could be re-opened only on the second reading of the texts which the Commission had already adopted on first reading. Opinions regarding the concepts of international watercourse systems and shared natural resources had been fully expressed elsewhere. His own views on procedure had in fact been supported by many members of the Commission.

59. Mr. CALERO RODRIGUES said that he had not opposed the inclusion of paragraph 27 *bis* because the paragraph was a statement of fact. He did not like the idea, held by some members of the Commission, that articles, once they were adopted, should be considered sacrosanct, even at the expense of condemning the Commission to a fruitless exercise. Insistence on leaving the draft articles in question as they were would simply mean that the Commission would be unable to produce effective draft articles.

60. The concern expressed by Mr. Njenga for some balance in the reporting of views, and for ensuring that the Special Rapporteur’s hands were not tied, seemed to be justified. Paragraph 27 *bis* did not, in his view, tie the Special Rapporteur’s hands, for it simply expressed the opinion of six or seven members of the Commission. That opinion, however, was rejected by other members, who felt that the draft articles in question must be reviewed in order to provide the Commission with a better basis for its future work.

61. The compromise text suggested by the Special Rapporteur reflected to some extent the opinions expressed by himself and a number of other members, including Mr. Njenga, in the course of the debate. His own idea, however, would be to introduce an additional sentence at the end of paragraph 27 *bis* reading simply: “Other members did not share that view.” If that suggestion was not acceptable, he would be prepared to accept the formulation proposed by the Special Rapporteur, but on the understanding that it would constitute an additional sentence to paragraph 27 *bis*. Insertion of that sentence would not in any way prejudice the main part of that paragraph.

62. Mr. McCAFFREY said that Mr. Barboza’s position was procedurally correct. If the Commission were to go back on draft articles which it had provisionally adopted simply because some member did not like them, it would never get anything done. For example, he did not like article 19 of part 1 of the draft articles on State responsibility, but he would not think of proposing that

the debate on that article should be re-opened. The Commission had to follow certain methods in its procedure. The compromise text proposed by the Special Rapporteur was acceptable and he was prepared to support it.

63. Mr. BARBOZA said that he accepted the Special Rapporteur’s proposal, but with great reluctance, for it upset the balance of paragraph 27 *bis* and repeated unnecessarily what was already stated elsewhere in the report.

64. Mr. NJENGA said that he could accept, for the additional sentence, the compromise formulation suggested by the Special Rapporteur, provided it was expanded to read: “Other members expressed their concern with regard to certain aspects of the provisionally adopted articles and felt that the Special Rapporteur should not be unduly restricted in his future task.”

65. Mr. EVENSEN (Special Rapporteur) appealed to Mr. Njenga to withdraw his proposal and to accept the compromise formulation. He wished to stress that he did not feel in any way restricted by the terms of paragraph 27 *bis*. He therefore urged the Commission to adopt his compromise proposal, without any addition that would upset its balance.

66. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the compromise text proposed by the Special Rapporteur, on the understanding that it would become the second sentence of paragraph 27 *bis*.

*It was so agreed.*

*Paragraph 27 bis, as amended, was adopted.*

*Mr. Francis resumed the Chair.*

Paragraphs 28 to 33

*Paragraphs 28 to 33 were adopted.*

Paragraph 34

67. Mr. CALERO RODRIGUES proposed that the word “since”, in the second sentence, should be deleted.

*It was so agreed.*

*Paragraph 34, as amended, was adopted.*

Paragraphs 35 to 37

*Paragraphs 35 to 37 were adopted.*

Paragraph 38

*Paragraph 38 was adopted, with a drafting change.*

Paragraphs 39 to 45

*Paragraphs 39 to 45 were adopted.*

New paragraph 45 *bis*.

68. Mr. BARBOZA proposed the insertion of a paragraph 45 *bis* reading: “Some members proposed that articles 11 to 14 should be placed in chapter II, in the light of the clear obligation not to cause appreciable harm (art. 9), instead of in chapter III (Co-operation and management), in which the obligations set forth had less clear outlines.”

*It was so agreed.*

*Paragraph 45 bis was adopted.*

Paragraphs 46 to 52

*Paragraphs 46 to 52 were adopted.*

*Section B, as amended, was adopted.*

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

**CHAPTER IX. Other decisions and conclusions of the Commission (concluded)\*** (A/CN.4/L.362 and Add. 1 and 2)

**A. Programme and methods of work of the Commission** (A/CN.4/L.362/Add.2)

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

Paragraph 7

69. Mr. McCaffrey proposed that the opening words "Satisfaction was expressed" should be amended to read "The Commission expressed satisfaction": the words "to the Commission", in the same sentence, would then be deleted as redundant.

*It was so agreed.*

70. On a more important point of substance, he could not accept the last sentence, which reflected the view that the increase in the number of professional officials servicing the Commission "should become permanent". The sentence went on to add that the numbers of Secretariat staff should match the increase in the membership of the Commission "as well as the ever-increasing assistance in the form of research and studies to be provided to Special Rapporteurs". As he had had occasion to point out in the Planning Group, no member of the Commission had expressed such a view, although some members had of course expressed gratitude for assistance received from the Secretariat. A number of members who had been unable to attend the meeting because of other commitments had asked him to propose that the last sentence should be replaced by a formulation along the following lines: "The current level of staffing should be maintained in order to satisfy the increasing demand for professional services."

71. At least two Special Rapporteurs had taken exception to the statement that there was "ever-increasing assistance in the form of research and studies to be provided to Special Rapporteurs". He was not qualified to speak on that point, but it should be borne in mind, since those Special Rapporteurs were not in attendance at the present meeting. The statement in question was somewhat demeaning and it was understandable that any Special Rapporteur should object to it.

72. Lastly, he had serious doubts about the statement in the last sentence that the number of Secretariat staff members assisting the Commission "should match the increase of its membership". He failed to see the relationship between the two.

73. Mr. Yankov, speaking as Chairman of the Planning Group, said that the question raised by Mr. McCaffrey had been considered at two consecutive meetings of the Group and at a meeting of the Enlarged Bureau. The view in question had in fact been expressed by several members of the Commission.

74. Some members of the Planning Group had suggested that consideration be given in future to having the Secretariat extend its research assistance to members of the Commission other than Special Rapporteurs, when so required, in which case the increased membership of the Commission would in fact play an important role with regard to professional staff requirements.

75. Speaking as a member of the Commission, he could accept Mr. McCaffrey's proposal in part, but he considered that it had to be supplemented by a reference to maintaining the level of staffing — an idea which was reflected in the existing text by the words "should become permanent". It was also necessary to retain the idea of the number of Secretariat members matching the increase in the membership of the Commission and its work-load.

76. Mr. EL RASHEED MOHAMED AHMED said that there appeared to be no conflict between Mr. McCaffrey's proposal and Mr. Yankov's suggestion. Both were giving expression to the same idea, namely satisfaction at the increase in the professional staff servicing the Commission.

77. Mr. Yankov proposed that the last sentence of paragraph 7 should be reworded to read: "The view was expressed that the level of staffing pattern should be maintained, as the number of members of the Secretariat assisting the Commission in the course of its session should match the increase in its membership and its work-load, as well as the ever-increasing assistance in the form of research and studies to be provided to Special Rapporteurs."

78. Mr. McCaffrey said that, in order to save time, he could accept the proposal, provided the opening words were amended to "A view was expressed that the current staffing pattern should be maintained". He wished, however, to place on record his reservations regarding Mr. Yankov's text.

79. Mr. Ushakov said that the sentence actually expressed the point of view of several members, including himself. He therefore suggested that the opening words should be "The view".

80. The Chairman said that, if there were no objections, he would take it that the Commission agreed to replace the last sentence of paragraph 7 by the text proposed by Mr. Yankov, but with the opening words amended to read: "The view was expressed that the current staffing pattern should be maintained".

*It was so agreed.*

*Paragraph 7, as amended, was adopted.*

Paragraphs 8 and 9

*Paragraphs 8 and 9 were adopted.*

Paragraph 10

81. The Chairman said that the Enlarged Bureau had not accepted the Planning Group's recommendation for the Commission's annual session to be held partly in New York and partly in Geneva. Normally, the last two sentences of paragraph 10 would not have been included in the draft report.

\* Resumed from the 1809th meeting.

82. Mr. JACOVIDES said that, in the Planning Group, he and at least one other member had felt that it would be helpful to mention the suggestion in question. To do so did not commit the Commission to any particular course. The idea was a novel one and might, or might not, be tried out, depending on the outcome of the inquiry into the financial and other implications.

83. The CHAIRMAN said that the suggestion was mentioned in paragraph 10 simply as a matter of courtesy to the members of the Planning Group. It had not been accepted by the Enlarged Bureau. For one thing, such a course might prove to be financially prohibitive, among other reasons because of the higher per diem in New York than in Geneva.

84. Mr. JACOVIDES said that the whole point of requesting the Secretariat to make a survey of the financial and other implications was to find out whether the idea was feasible from the financial point of view. Quite apart from financial considerations, however, the Commission owed it to the Sixth Committee to see how it could improve its methods of work. A session held partly in New York and partly in Geneva would improve the prospects of better attendance, at least for some members. He felt certain that several members shared his opinion.

85. If the suggestion was kept in the form in which it appeared in paragraph 10, the Commission could consider it again in 1984 in the light of the findings of the proposed survey.

86. Mr. YANKOV said that, since the suggestion in question had in fact been made, it would have been his duty as Chairman of the Planning Group to inform the Commission thereof, regardless of whether it was mentioned in paragraph 10.

87. He wished to state for the record that it would be almost impossible for him, as a member of the Commission, to attend sessions at two different periods of the year. Apart from financial and other implications—and even the proposed Secretariat study would have some financial implications—he could not see the point of asking the Secretariat to undertake that work when the suggestion was known in advance not to be viable.

88. The CHAIRMAN suggested that the two sentences in question should be deleted, on the understanding that the suggestion for meetings elsewhere than in Geneva should be discussed in plenary by the Commission at its next session.

*It was so agreed.*

*Paragraph 10, as amended, was adopted.*

Paragraph 11

*Paragraph 11 was adopted.*

Paragraph 12

89. Mr. BARBOZA, referring to the English and Spanish texts, pointed out that the Planning Group had decided that the Commission should prepare “draft articles” and not “drafts”. He therefore proposed that the word “drafts”, in the first sentence, should be amended to “draft articles”.

90. The CHAIRMAN said it was his understanding that the Enlarged Bureau had adopted the term “drafts” in the interests of flexibility.

91. Mr. YANKOV, speaking as Chairman of the Planning Group, said that was indeed the case. The Planning Group, however, had submitted a text which referred specifically to the draft articles on State responsibility, on jurisdictional immunities of States and their property, on the law of the non-navigational uses of international watercourses and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It had added that the necessary priority should be accorded to the topic of the draft Code of Offences against the Peace and Security of Mankind in accordance with the relevant General Assembly resolutions. Lastly, reference had been made to the possibility of attention being devoted to the elaboration of draft articles on the remaining topics on the current programme.

92. The purpose of the Enlarged Bureau, as expressed in paragraph 12, was to set forth those same ideas in an abbreviated form. Nevertheless, the reference to “draft articles” should not be lost and he therefore supported Mr. Barboza’s proposal.

93. Mr. BARBOZA observed that, in paragraph 10, the Enlarged Bureau had included a reference to a suggestion which had been rejected; in the case of paragraph 12, on the other hand, it had failed to include a suggestion which had not been rejected. He saw no reason for such difference in treatment. He noted, however, that the Chairman of the Planning Group had accepted his proposal to replace the reference to “drafts” by “draft articles”.

94. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 12, with the amendment proposed by Mr. Barboza.

*It was so agreed.*

*Paragraph 12, as amended, was adopted.*

*Section A, as amended, was adopted.*

**C. Date and place of the thirty-sixth session (concluded) (A/CN.4/L.362)**

95. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the Enlarged Bureau’s recommendation that the Commission should hold its next session at Geneva from 7 May to 27 July 1984.

*It was so agreed.*

*Section C was adopted.*

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

**CHAPTER I. Organization of the session (A/CN.4/L.354 and Add.1)**

Paragraphs 1 to 10 (A/CN.4/L.354)

*Paragraphs 1 to 10 were adopted.*

Paragraphs 11 to 38 (A/CN.4/L.354/Add.1)

96. The CHAIRMAN explained that paragraphs 11 to 38 reproduced the passages of the summary record of the

Commission's 1795th meeting which recorded the statement made by the Secretary-General, as well as his own statements as Chairman.

97. Mr. USHAKOV suggested that the Commission should conform to the procedure established in connection with visits by the previous Secretary-General, namely to reproduce the Secretary-General's statement in full, as an annex to the report, but to omit the statements by the Chairman.

98. Mr. JACOVIDES said he tended to agree with Mr. Ushakov.

99. Mr. McCAFFREY said that perhaps the Secretariat could inform the Commission of the precedents in the matter. His own view was that it was important to include the statements made by the Chairman in connection with the Secretary-General's visit. He was in favour of reproducing the Secretary-General's statement in full, but there might be some rule regarding the length of documentation.

100. Mr. YANKOV said he supported the proposal by Mr. Ushakov to include an annex reproducing the whole of the statement by the Secretary-General, who was the highest official of the United Nations and did not visit the Commission very often. However, he saw no useful purpose in including an extensive summary of the same statement in the main body of the report.

101. Mr. VALENCIA-OSPINA (Deputy Secretary to the Commission) said that the previous Secretary-General, Mr. Waldheim, had visited the Commission in 1972 and in 1974. On both occasions, the statements by the Secretary-General and the Chairman had been summarized at some length in chapter I of the Commission's report. The suggestion that the full text of the Secretary-General's statement should be reproduced as an annex was an innovation. Moreover, it would mean repeating an existing text, a procedure that would be contrary to current regulations, which precluded the reproduction of texts already distributed as documents.

102. The CHAIRMAN said that Mr. Jagota, in his capacity as Rapporteur of the Commission, had asked him to take over his responsibilities with respect to the report. He had therefore addressed a note to the Secretary to the Commission requesting that documents normally sent to the Rapporteur should be passed to him.

103. Upon receiving the draft of chapter I, he had noted that it contained extensive summaries of statements made by observers from various regional bodies. Accordingly, he had been concerned to ensure that the statement by the Secretary-General should be suitably summarized, for it was unthinkable that such an important text should not be given proper treatment. He had requested that an appropriate summary of the statements by the Secretary-General and himself at the 1795th meeting should be included in chapter I, and had received the following reply, dated 20 July 1983, from the Secretary to the Commission:

1. Reference is made to your memorandum of 19 July 1983 dealing with the matter.
2. The attached is a draft for "an appropriate summary" referred to in your memorandum.

3. I have to emphasize that summarizing such an important statement as the one made by the Secretary-General in the Commission is an extremely delicate task, both substantively and politically. It is even more so, as the original text of the statement is a several-page document and the summary is to be a very short one. Summarizing it unavoidably involves deletions from, alterations to, and other changes in the original text.

Should I not be so specifically requested by you, I would never have ventured to associate the Commission Secretariat or myself with the submission of any summary of this kind unless it had been prepared or cleared by the author of the original statement.

My firm view is to the effect that either the statement in question should be reproduced (in the Commission's report) as it appears in the official record (A/CN.4/SR.1795) or it should be covered in the Commission's report by way of a cross-reference to that summary record.

But the idea of a summary is yours, and no responsibility for its contents or the inclusion in the draft report can rest with the Secretariat.

4. As the time for releasing chapter I of the draft report, which was submitted for translation quite a time ago, is about to run out, I would suggest that it should be released right now, it being understood that at the end of the chapter we may tentatively say in brackets "to be continued". Then a summary, once finalized by you, can be submitted and issued as a separate text actually continuing the text of document A/CN.4/L.354 (the opening paragraph of the summary will bear number 11). This would save time and facilitate the work of the documents services.

He had replied on 21 July 1983 as follows:

Your memorandum of 20 July refers.

I fear we are losing too much time on what, in my view, is a simple (yet important) matter. It is simple in the sense that it goes without saying that at least an appropriate summary of the Secretary-General's and other statements made at the meeting should be included in the Commission's report. If this is so, as indeed it must be, then the Secretariat cannot escape its responsibility by omitting to do that in the first instance with reference to the draft report.

If in my previous memorandum I asked for an appropriate summary, it was because it then appeared to me (and still does) that the Commission's reports for 1972 (1194th meeting) and 1974 (1288th meeting) respectively reflected a concise summary of the statements concerned. But, in any case, I was not particularly concerned about the textual form in which the statements are reflected in the Commission's report but rather about their total omission.

I am the happier now that you have a firm view as to how the matter is to be resolved, and there would have been quick progress and no misunderstanding had the first draft submitted to me reflected the results of that view. I prefer your first alternative (in paragraph 3), namely that the Secretary-General's statement be reproduced in the Commission's report as it appears in the relevant official record, and I suggest that you proceed on that basis.

In the circumstances, I assume that the other statements will also be reproduced. That, in any case, would solve the translation problem.

104. Mr. USHAKOV said he still considered that it was not normal to attach the same weight to the Chairman's expressions of welcome and thanks as to the Secretary-General's statement.

105. Mr. NJENGA urged that the Commission should follow the precedent established on the occasion of the visits by the Secretary-General in 1972 and 1974.

106. Mr. McCAFFREY said he fully endorsed those remarks and suggested that the Secretariat should be entrusted with the harmonization of the present session's report with previous reports. The statements made by the Secretary-General and the Chairman had to be reflected in the report, but some balance had to be maintained between the length of the summaries, as Mr. Ushakov had rightly indicated.

107. Mr. NI said he shared the views of Mr. Njenga and Mr. McCaffrey and felt that the problem should be dealt with in accordance with precedent.

108. The CHAIRMAN said that he had originally asked for summaries in keeping with what had been done in previous reports, but the Secretary to the Commission had expressed a preference for reproducing the Secretary-General's statement in full. It was for the Commission to decide whether the report should include a summary, in accordance with past practice, or reproduce the text of the Secretary-General's statement in full.

109. Mr. FLITAN proposed that the Secretary-General's statement should be reproduced in full in the form of a working document of the Commission.

110. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Flitan's proposal, in addition to the inclusion of a summary in chapter I of the report.

*It was so agreed.<sup>2</sup>*

*Paragraphs 11 to 38 were adopted, subject to the appropriate amendments.*

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

**CHAPTER III. Jurisdictional immunities of States and their property (concluded)** (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 (concluded)**

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

**Commentary to article 12 (Commercial contracts) (concluded)**

New paragraph (39)

111. Mr. NI recalled that, at the 1812th meeting, a proposal had been made by Mr. Koroma, supported by Mr. Mahiou and himself, to insert an additional paragraph after paragraph (38) of the commentary to article 12. He wished to know whether that paragraph had been submitted for inclusion in chapter III of the report.

112. Mr. ROMANOV (Secretary to the Commission) said that Mr. Koroma, before leaving, had supplied him with the following text for the additional paragraph in question:

“Some members of the Commission pointed out that this survey should not necessarily lead to the conclusion that the majority of States now subscribed to the restrictive practice of immunity.”

113. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to insert that paragraph (39) in the commentary to article 12, as approved at the 1812th meeting.

*It was so agreed.*

*Paragraph (39) was approved.*

*PART III, as amended, was adopted.*

*Section B, as amended, was adopted.*

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

*The draft report of the Commission on the work of its thirty-fifth session as a whole, as amended, was adopted.*

#### **Closure of the session**

114. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-fifth session of the International Law Commission closed.

*The meeting rose at 7.05 p.m.*

<sup>2</sup> The statement made by the Secretary-General at the Commission's 1795th meeting appeared as document A/CN.4/L.368.