Document:-

A/CN.4/SR.1980

Summary record of the 1980th meeting

Topic:

<multiple topics>

Extract from the Yearbook of the International Law Commission:-

1986, vol. I

watercourse system", which had been proposed by the second Special Rapporteur in 1980. In order to move ahead, the Commission had decided to retain that term, the only one on which there had been a consensus, but it had refrained from defining it. The third Special Rapporteur, Mr. Evensen, had proposed using the term "international watercourse", but the definition he gave it had been tautological. In his own view, the Commission should use the term "international watercourse system", which encompassed a large number of elements not taken into account by the term "international watercourse", which denoted only the main watercourse.

44. The present Special Rapporteur was proposing that the Commission should use the working hypothesis accepted in 1980 (*ibid.*, para. 63). That hypothesis was, however, based on the "international watercourse system" and "shared natural resource" concepts, which therefore had to be retained. Although the term "shared natural resources" was far from perfect, what mattered was that it conveyed the idea of equal rights and equal obligations. Again, whether the Commission used the term "international watercourse system" or simply "international watercourse", the international character of the watercourses in question was entirely relative, because they were used for non-navigational purposes only by riparian States or watercourse system States.

45. The General Assembly had decided that the Commission should prepare not a draft convention but a framework agreement that could be used by States as a basis for multilateral, regional or bilateral agreements. The fact remained, however, that every system had its own economic, social and human characteristics and it was therefore extremely difficult to formulate rules of a universal nature that would apply to all watercourse systems. The Commission had to have firm foundations in order to elaborate a framework agreement; but no progress would be possible if each new Special Rapporteur called into question the basic principles defined by his predecessors.

46. The present discussion merely went over ground covered four years earlier and would serve no purpose at all. To make any headway, the Commission had to decide what it wanted to do and define the basis for its work, taking into account the General Assembly's instructions. If it intended to leave aside the principles underlying the draft articles which it had adopted on first reading, it would have to start from scratch, in other words draft new articles 1 to 9 before discussing those submitted by the present Special Rapporteur. The topic under consideration was far too complex for the Commission not to discuss it seriously and simply to prepare draft articles for submission to the General Assembly without going into the basic principles. All the arbitral awards and all the decisions by the ICJ and national courts mentioned by the Special Rapporteur in his report (*ibid.*, paras. 100-133 and 164-168) dealt with the general rules of river law. Agreements concluded by States belonging to the same watercourse system had, moreover, been based on the general rules of river law. It was therefore absolutely necessary to formulate rules. Judges themselves, who were not lawmakers, needed rules; but the rules in question had to be of a universal nature.

47. He preferred the term "equitable utilization" to "optimum utilization", because it was essential to stress that every riparian State had to be able to make equitable use of the waters of the international watercourse sytem to which it belonged.

48. Before becoming Special Rapporteur, Mr. McCaffrey had proposed that the concept of "equity" should be combined with the idea of "benefit".[9] But who would benefit? If, for example, Sudan decided to divert the waters of the Nile and share the benefits of that operation with Egypt, the Egyptian people would not benefit in the slightest because they would be deprived of water.

49. Thus, no matter what questions were raised, there was always the basic problem of what the Commission intended to do and on what basis it would formulate the draft articles. It could delay no further in shaping and following a specific course of action.

The meeting rose at 12.20 p.m.

[9] See *Yearbook ... 1984*, vol. I, pp. 244-245, 1855th meeting, paras. 27-28.

1980th MEETING

Wednesday, 2 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies (*concluded*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Rubin, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American

* Resumed from the 1958th meeting.

Juridical Committee had come to the conclusion in recent years that international law was facing a crisis throughout the world and that its work and that of the Commission were therefore of the utmost importance. Many of the topics dealt with by the Inter-American Juridical Committee were similar to those before the Commission, but there were some differences between the working procedures of the two bodies. The Inter-American Juridical Committee attempted, for example, to complete consideration of a given agenda item within the term of office of its members. In addition, some topics were deleted from the Committee's agenda in the interests of efficiency if no progress had been achieved or seemed likely. In other cases, the Committee had addressed itself to issues of immediate importance. At its last session, for example, it had been able to complete work on a draft convention on the restitution of minors. The draft convention was currently before member States and it was hoped that it would be submitted to a diplomatic conference in the near future and subsequently ratified. Another issue of enormous concern in the region was drug abuse. At a conference held recently in Rio de Janeiro, a number of measures had been recommended, including the consideration of legal issues by the Inter-American Juridical Committee.

3. Under the Charter of OAS, the Inter-American Juridical Committee also had a mandate to establish relations with universities and other centres of learning. That activity had been conducted very seriously in recent years. Courses on international law were provided during the second of the Committee's two annual sessions. In addition, exchanges with universities and centres of learning had been arranged and seminars were organized, in some cases in conjunction with the American Society of International Law and other institutions.

4. Three years earlier, the Inter-American Juridical Committee had adopted a resolution concerning the establishment of a federation of national associations of international law which would facilitate exchanges and the transfer of information between the various national associations. Until that time, there had been very little exchange of information, even between adjacent countries.

5. The CHAIRMAN, thanking Mr. Rubin for his interesting statement, said that the Commission greatly appreciated the visits by the observer for the Inter-American Juridical Committee, which were in keeping with a long-standing tradition, since the Committee was one of the oldest regional bodies dealing with international law.

6. The Commission and the Committee had a number of points in common. For example, the multiracial, multicultural and multilingual composition of the Committee, whose members came from countries which had different legal systems and had reached different stages of development, was similar to that of the Commission. The Committee also dealt with some of the same topics as the Commission, such as jurisdictional immunities and shared natural resources.

7. There were, of course, differences between the two bodies, but only because their scope was not the same. Like all regional bodies, the Committee often had more immediate concerns than a universal body such as the Commission and the results of its work necessarily had a much more direct impact on people's lives. But the two bodies reflected the same trends and shared the same aspirations, and what separated them was quite insignificant by comparison with everything they had in common.

The law of the non-navigational uses of international watercourses (*concluded*) (A/CN.4/393,[1] A/CN.4/399 and Add.1 and 2,[2] A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

NEW DRAFT ARTICLES 10 TO 14[3] (*concluded*)

8. Mr. MALEK said that he had not taken part in the discussion on international liability for injurious consequences arising out of acts not prohibited by international law in order to enable the Commission to complete its discussion on that topic on time. Some of the comments he would have made in that connection were, however, relevant to the law of the non-navigational uses of international watercourses, for in many respects the two topics were strikingly similar.

9. The prevention of harm, which was the ultimate purpose of the topic of international liability, also formed the basis of the topic under consideration, under which, as indicated in previous reports, any use, however equitable, by a State of an international watercourse that caused or was likely to cause appreciable harm to another State would be regarded as wrongful.

10. With regard to the right to an equitable share of the uses of the waters of an international watercourse, the Special Rapporteur had referred in his second report (A/CN.4/399 and Add.1 and 2, paras. 125-128) to the well-known arbitral award in the *Trail Smelter* case between Canada and the United States of America. In that award, the tribunal had confirmed the principle of international law that

> ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

and, in the light of the circumstances of the case, the tribunal had held that

> ... the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. ... It is, therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law ...

[1] Reproduced in *Yearbook ... 1985*, Vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, Vol. II (Part One).

[3] For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft article contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

The tribunal's answer to the specific question whether the Trail Smelter "should be required to refrain from causing damage in the State of Washington" had been affirmative, but in its conclusions on that point and on the question as to "what measures or régime, if any, should be adopted or maintained by the Trail Smelter?", the tribunal had given consideration, as required by the arbitration Convention, to the desire of the parties "to reach a solution just to all parties concerned". In accordance with the Convention, the tribunal had thus found that

> ... the phraseology of the questions submitted ... clearly evinces a desire and an intention that, to some extent, in making its answers ... the Tribunal should endeavour to adjust the conflicting interests by some "just solution" which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained if, in spite of such restrictions and limitations, damage should occur in the future in the United States.

Nowhere in its conclusions had the tribunal suggested that a State might be bound to agree to suffer substantial transboundary harm, whatever offers of reparation or compensation might be proposed. Those conclusions thus contained elements of a rule which applied both to the uses of international watercourses and to the conduct of activities not prohibited by international law.

11. In his second report, the Special Rapporteur clearly summarized the work done on the law of the non-navigational uses of international watercourses, drew attention to the various problems raised in the Commission and in the Sixth Committee of the General Assembly and proposed a number of solutions, some of which would be hard to dispute and none of which could, in any event, be rejected out of hand. Those proposals, which were all technically sound, should greatly assist the Commission in finding compromise solutions that would be acceptable to all.

12. The topics with which the Commission was dealing were all very important, but none was as important as the one under consideration. The problems to which the non-navigational uses of international watercourses gave rise might not be terribly complex, but if they were not carefully considered with a view to finding solutions, they, more than other problems, might be the cause of extremely serious crises everywhere in the world. The African members of the Commission had often stressed the fact that widespread armed conflict might break out in Africa precisely because of drought, which was attributable to the absence of agreements on the rational allocation of water in that part of the world. Similarly, one of the main causes of the Middle East crisis, which was becoming increasingly serious, was the shortage of water in that region and the absence of rules that would make it easier to solve the specific problems to which that shortage gave rise.

13. Consideration had, however, never been given to the possibility of assigning the topic under consideration, which had been on the Commission's agenda for some 15 years, higher priority than other topics. There was, moreover, no sign of any willingness to compromise on the most controversial issues. Everyone continued to stand his ground. At the Commission's thirty-sixth session, during the consideration of the revised draft articles submitted by the previous Special Rapporteur—which had taken account of the views expressed both in the Commission at its thirty-fifth session, and in the Sixth Committee of the General Assembly at its thirty-eighth session—he himself had noted with regret[4] that the Commission had not made any progress since the previous session, when a hopeless discussion had been held on the original text of those draft articles. At that time, the obstacles had appeared to be increasingly difficult to overcome and points of view had looked less and less reconcilable. Unfortunately, there had not been any great improvement in the situation. Despite the constructive report submitted by the present Special Rapporteur, no progress had been made in the discussion now being concluded. The Commission continued to face the same basic problems, which still seemed insurmountable.

14. Referring to the solutions to those problems proposed by the Special Rapporteur, he said that he fully agreed with the conclusions concerning the definition of the term "international watercourse" (*ibid.*, para. 63). The Commission did not have to define that term in order to move ahead with its work on the draft articles. It could therefore set that question aside for the time being, thereby speeding up the study of the topic.

15. With regard to the use of the term "shared natural resource", he would be prepared to support any proposal that could be endorsed by the majority of members. Until now, he had not taken any decision either for or against the "shared natural resource" concept, which did not appear to have a very specific meaning and which was still not enshrined in international law, and he intended to refrain from taking any position which might delay the Commission's work on the important topic now under consideration. He did not think that it was appropriate, however, to adopt a concept which was not entirely clear and whose legal consequences were or might be referred to in article 6 or in other articles of the draft. There again, he agreed with the conclusions reached by the Special Rapporteur (*ibid.*, para. 74).

16. As to the duty not to cause "appreciable harm", he had always been convinced that, both in the context of the topic under consideration and in that of the topic of international liability, it would be appropriate to adopt the principle of prohibiting any appreciable harm, as stated in draft article 9 submitted in 1984 by the previous Special Rapporteur.

17. He reserved his position on the three alternatives for article 9 proposed by the present Special Rapporteur (*ibid.*, paras. 182-184) because those texts, like several of the Special Rapporteur's other proposals, required further thought. Since the draft articles were, unfortunately, a long way from being adopted, it was pointless to be in too much of a hurry. In any event, the Commission would have to spend more time on the present topic, particularly if, as he hoped, it had before it the entire set of draft articles.

18. Mr. YANKOV congratulated the Special Rapporteur on his lucid and constructive second report

[4] See *Yearbook ... 1984*, vol. I, p. 266, 1859th meeting, para. 14.

(A/CN.4/399 and Add.1 and 2). Although the report gave an objective account of the work of previous Special Rapporteurs, the time had perhaps come for the present Special Rapporteur to endeavour to unify his approach to the topic, in order to facilitate the Commission's work.

19. A number of different schools of thought existed regarding the legal character to be given to the draft articles. However, that fact should not be allowed to impede the work of the Commission, which should endeavour to elaborate draft provisions of as simple and general a nature as possible, given the individual peculiarities of international watercourses. Modern treaty making was more imaginative than in the past. Recently, instruments had been elaborated which, while they were not treaties *stricto sensu*, had nevertheless had a significant impact on the regulation of international relations. Consequently, the draft articles should be as simple and general as possible, and the decision as to whether they should be given legal force should be left to Governments. Accordingly, the Commission should adopt a flexible approach at the current stage.

20. He agreed with the Special Rapporteur that the definition of an "international watercourse" or an "international watercourse system", while very important for the determination of the scope and structure of the draft articles, should be left until a later stage (*ibid.*, para. 63). There was a divergence of views among members of the Commission as to which term should be used. Personally, he believed that to conduct the study on the basis of an entire river basin, with all its ramifications, would be a very difficult undertaking. Consequently, the Commission should continue on the basis of the provisional working hypothesis accepted in 1980.

21. The retention of the "shared natural resource" concept could create more problems than it solved. He would prefer emphasis to be placed on principles of international law applicable to the use of natural resources, such as the duty to co-operate and not to cause harm, and on the principles of sovereign equality of States, territorial integrity, good-neighbourly relations and reasonable and equitable use of resources.

22. In determining what was meant by "reasonable and equitable use", the Commission should again adopt a flexible approach. Some of the relevant factors listed in draft article 8 were a statement of the obvious, while others related to very specific features difficult to determine *a priori*. Since the list was merely indicative, it would be preferable to regard reasonable and equitable utilization as a general guiding principle of law for determining the rights of States in respect of the non-navigational uses of international watercourses, as proposed by the Special Rapporteur (*ibid.*, para. 169), rather than to attempt to draft an exhaustive list of specific factors.

23. With regard to the maxim *sic utere tuo ut alienum non laedas*, emphasis should be placed on the sovereign rights of a State to use waters within its territory, while at the same time respecting the rights and legitimate interests of other user States. In that regard, he agreed with the Special Rapporteur that draft article 9 should be redrafted in such a way as to bring it into conformity with the article or articles setting forth the principle of equitable utilization (*ibid.*, para. 180). Of the three alternative texts proposed by the Special Rapporteur, he preferred the third, which emphasized the duty to refrain from causing appreciable harm (*ibid.*, para. 184).

24. The new draft articles 10 to 14 deserved further consideration. Perhaps in his next report, the Special Rapporteur could endeavour to present more coherent articles containing the various elements, rather than submitting three categories of articles.

25. With regard to institutional aspects, the Commission should try not to be over-ambitious, particularly when reference was made to the United Nations, given the variety of possible situations and the difficulties encountered by a universal organization in attempting to deal with them. Finally, the Commission should in the future give priority to the present topic, with a view to completing consideration of it during its next term of office.

26. Mr. McCAFFREY (Special Rapporteur), summing up the debate, thanked all members who had spoken on the topic for their comments, which he had found very helpful. While the nature of the instrument being prepared and the approach to be adopted were for the Commission to decide, it should be noted that both the Commission and the Sixth Committee of the General Assembly had already endorsed the "framework agreement" approach. He shared the position of his two predecessors on how that term should be applied (A/CN.4/399 and Add.1 and 2, para. 13). The Commission should proceed on the basis that it was preparing a "framework agreement" containing the general principles and rules governing the non-navigational uses of international watercourses.

27. The exercise in which the Commission was engaged was, or could be, both declarative and constitutive. In 1980, the Commission had already recognized that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general. In his report, he had attempted to identify some of the most basic of those principles. However, as suggested by Mr. Arangio-Ruiz (1979th meeting), the Commission should consider two sets of principles, one *de lege lata* and the other *de lege ferenda*. His own preference would be to exhaust the declarative aspect of the topic first, see how far it was possible to go in codifying and progressively developing legal principles, and then, possibly in a separate part of the draft, make recommendations regarding institutional mechanisms and other aspects of international watercourse management which were not required by international law, but would be highly desirable, or even necessary, for the smooth and effective management of a watercourse. Indeed, such a set of recommendations might prove to be one of the most valuable aspects of the Commission's work on the topic.

28. Members who had referred to the question whether the definition of an "international watercourse" or an "international watercourse system" should be postponed had indicated that the Commission should indeed, for the time being, defer such a defini-

tion and rely on the provisional working hypothesis accepted in 1980.

29. Members appeared to be fairly evenly divided as to whether the "shared natural resource" concept should be retained in the draft. However, some members on both sides had recognized that the term had become emotionally charged and had virtually taken on a life of its own. Consequently, they had suggested that effect could be given to the principles underlying the concept without the term itself being used. That might ultimately be the easiest course for the Commission to follow, at least provisionally.

30. There had also been a roughly even division of opinion in the Commission as to whether the relevant factors listed in draft article 8 should be retained in the text of the article itself or transferred to the commentary. Some members had expressed the view that draft articles 6 and 7 would be "empty" without some guidance as to how they should be applied, while others had been of the view that the factors did not reflect legal rules *per se* and thus should not appear in the draft. The question would have to be considered carefully by the Drafting Committee. If the factors were to be included in the article, the Commission must determine whether priority could be assigned to any of them and whether any indication could be given as to how to resolve conflicts between them. It seemed clear that the Commission should strive for a flexible solution, perhaps along the lines suggested by Mr. Yankov.

31. Members had also been fairly evenly divided as to whether the relationship between legally prohibited harm and the principle of equitable utilization should be made clear in draft article 9. Of those who had expressed a preference for redrafting in order to reconcile the two principles, most had preferred the third of the proposed alternatives (A/CN.4/399 and Add.1 and 2, para. 184). The matter should not be difficult to resolve. Draft article 9 as submitted by the previous Special Rapporteur could, of course, simply be interpreted as not prohibiting harm that would be allowed pursuant to an equitable allocation. That was perhaps the easiest solution. Alternatively, the article could be drafted in such a way as to emphasize the prohibition against causing harm, while preserving the principle of equitable utilization. That was a matter that could be dealt with by the Drafting Committee. Mr. Ogiso's point (1979th meeting) regarding the use of word "appreciable" was well taken and warranted close consideration by the Drafting Committee.

32. With regard to the new draft articles 10 to 14 which he had submitted, he noted that several speakers had pointed to the need for some mediation or conciliation mechanism in order to ensure that the whole system functioned properly. He agreed with that view and intended to consider the matter at a later stage. For the time being, however, his aim was to indicate the legal requirements regarding the uses or planned new uses of international watercourses.

33. While he realized that the allocation of maritime resources by international tribunals was not the same thing as the apportionment of the uses and benefits of international watercourses, some analogies could be drawn, particularly with regard to fisheries. The Commission should determine whether judicial decisions relating to natural resources could be of assistance in its work on the topic.

34. A number of members had expressed the view that the general duty to co-operate should be accorded separate treatment. He would consider that point in future reports. He would also give particular consideration to whether draft article 11 should refer to a specific period of time, to whether draft article 14 was too open to abuse, and to the safeguards to be provided.

35. Mr. Flitan (1977th meeting) had seen a contradiction between the first and last sentences of paragraph (9) of the comments on draft article 10. In drafting the paragraph, he had simply meant to indicate that, if the information was not readily available, either because it was not easily accessible or simply because it was not known, then the State proposing a new use should not be required to bear the entire expense of finding it. Some discretion was needed in that regard. Naturally, if the notified State lacked means, as suggested by Mr. Balanda (1979th meeting), some equitable adjustment might be necessary, depending on a number of factors, including the reasonableness of the request and the importance of the information in question. In reply to another point raised by Mr. Balanda, he said that the notification should be given at the planning stage, rather than at the implementation stage, since the latter stage would be too late for any consultation procedure to take place. In response to a question raised by Mr. El Rasheed Mohamed Ahmed (1978th meeting), he said that, in the first instance, the proposing State must determine whether appreciable harm might be caused. However, there should be an objective standard. When there was any doubt, the State contemplating a new use of a watercourse should so notify other user States.

36. As to draft article 13, Mr. Balanda had wondered how other States could be required to fulfil the obligations incumbent on proposing States under article 10. The answer was that they could not. Upon learning of a proposed project, a potentially affected State could require the proposing State to comply with the provisions of article 10.

37. With regard to draft article 14, Mr. Riphagen (*ibid.*) had suggested that cases of utmost urgency might be treated as specific instances of a state of necessity, as provided for in part 1 of the draft articles on State responsibility. That possibility was worth considering. A case of utmost urgency might be a "circumstance precluding wrongfulness". Indeed, draft article 14, paragraph 3, stated only that the proposing State should be liable for any harm caused to the notified State by the initiation of the proposed use.

38. Mr. El Rasheed Mohamed Ahmed had wondered whether draft article 14, paragraph 3, introduced the concept of strict liability. It might more properly be seen as providing for cases of liability for injurious consequences arising out of acts not prohibited by international law, in which the State proceeding with a use of utmost urgency would be liable for any damage caused. In reply to a question raised by Mr. Balanda, he said that he had simply intended to state that the proposing

State should notify potentially affected States of its proposal and its urgency. He agreed, however, that some clarification was needed.

39. Mr. Mahiou (1977th meeting) had said that it was difficult to conceive of a concrete example of the situation described in the report (A/CN.4/399 and Add.1 and 2, para. 197) in which a State wishing to introduce a new use of a watercourse was actually unable to do so because of uses already being made by other States. Examples of such situations might be the introduction of fish stocks in watercourses into which paper-mill waste was being dumped, the use of already polluted water for irrigation, the use of a watercourse to provide drinking-water for a new settlement, and sensitive industrial uses which required purer water than that available.

40. He agreed that the topic he was dealing with overlapped to some extent with the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law. He believed that the Commission's work on the latter topic and on the law of the non-navigational uses of international watercourses would be mutually complementary.

41. Although it must seem to many members that the Commission was marking time on the present topic, one reason for the difficulties encountered was that nine draft articles submitted by the previous Special Rapporteur had been in the Drafting Committee since 1984. It was to be hoped that the Committee would be able to take them up at the following session and that the Commission would be able to adopt a number of articles.

42. In future reports, he intended to continue with work on the procedural articles and to develop other points in chapter III of the outline, including the general principles of co-operation, but probably excluding management regulations, institutional mechanisms and other areas not strictly of a legally required nature. He also hoped to develop a number of principles on environmental protection.

43. Mr. DÍAZ GONZÁLEZ recalled that the Commission had already referred six draft articles to the Drafting Committee and then adopted them on first reading, after which they had also been approved by the Sixth Committee of the General Assembly. Since then, the Commission had abided by its decision. The Drafting Committee had, however, not been able to consider the other draft articles referred to it because the Commission had not given it any specific instructions. Since there had been objections to some aspects of the Special Rapporteur's second report (A/CN.4/399 and Add.1 and 2), the Commission should now decide how it intended to proceed with its consideration of the present topic.

44. Mr. McCAFFREY (Special Rapporteur) said that, at its thirty-second session, in 1980, the Commission had indeed provisionally adopted the six draft articles 1 to 5 and X; it had also accepted a provisional working hypothesis on the term "international watercourse system". None of those texts had since been rejected by the Commission. In the light of the developments which had taken place since 1980, however, the Commission had decided at its thirty-sixth session, in 1984, to refer to the Drafting Committee the first nine draft articles submitted by the previous Special Rapporteur.

45. In the preliminary report which he himself had submitted at the Commission's thirty-seventh session (A/CN.4/393), he had proposed that the nine articles already referred to the Drafting Committee should remain with that Committee—a proposal which the Commission had accepted[5]—and that he himself should continue working on the basis of the outline proposed by the previous Special Rapporteur. In 1984, the Commission had also decided to refer to the Drafting Committee the six articles and the provisional working hypothesis adopted in 1980.[6] In order to proceed expeditiously with the work on the topic, it was desirable not to change those arrangements. His hope was that the Commission would be able to complete its work on the articles which had been referred to the Drafting Committee.

46. He had never suggested that the members of the Commission agreed on all the points he had put to them, with the possible exception of the question of the use of the "watercourse system" concept. On most other points, the Commission was divided, but it should try to work out generally acceptable formulations. To that end, it should follow its usual method of requesting the Drafting Committee to discuss the problems that had arisen and propose possible solutions. He was in the Commission's hands, but he did not believe that it had to take any further action at the present stage.

47. Mr. USHAKOV said that, until now, the topic had been discussed only in general terms, not on an article-by-article basis. It might therefore be premature for the Commission to adopt a definite position at the present stage.

48. Mr. McCAFFREY (Special Rapporteur) said that, for the reasons given by Mr. Ushakov, he was not proposing that the new draft articles 10 to 14 which he had submitted should be referred to the Drafting Committee. He merely suggested that the articles already referred to the Drafting Committee should be left with that Committee.

49. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the Special Rapporteur's suggestion.

It was so agreed.

State responsibility (*concluded*)* (A/CN.4/389,[7] ILC(XXXVIII)/Conf.Room Doc.2)

[Agenda item 2]

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

* Resumed from the 1956th meeting.

[5] *Yearbook ... 1985*, vol. II (Part Two), pp. 70-71, paras. 281 and 285.

[6] *Yearbook ... 1984*, vol. II (Part Two), p. 88, footnote 285.

[7] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

REPORT BY THE CHAIRMAN OF THE DRAFTING COMMITTEE

ARTICLE 6

50. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had devoted five meetings to article 6 of part 2 of the draft articles.[8] He was grateful to Mr. Calero Rodrigues for chairing those meetings.

51. The Drafting Committee had not had enough time to complete its consideration of draft article 6, but it had reached a consensus on the introductory part of paragraph 1, on the opening words of paragraph 1 (*a*) and on the revised text of paragraph 1 (*c*) and (*d*). There had been no agreement on paragraph 1 (*b*) or on the concluding part of paragraph 1 (*a*). Lastly, there had been a large measure of consensus on paragraph 2.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*)* (A/CN.4/400,[9] A/CN.4/L.398, sect. D, A/CN.4/L.400)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 28 TO 33

52. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report (A/CN.4/L.400) and the texts of articles 28 to 33 adopted by the Committee.

53. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Committee's report set out the complete text of the draft articles proposed for adoption by the Commission on first reading. It included articles previously adopted, as well as articles 28 to 33, which had been adopted at the present session and were based on the former articles 36, 37, 39, 41, 42 and 43; the previous numbers of renumbered articles appeared in square brackets.

54. A few adjustments had been made to previously adopted articles in order to ensure greater consistency and to solve pending problems. For example, in article 3, paragraph 1 (2), which defined the "diplomatic bag", the description of the content of the bag had been brought into line with that contained in article 25. The order of articles 7 and 8 had been reversed, since it was more appropriate to place an article on the appointment of the courier before an article on his documentation. The title of article 13 had been expanded to correspond to that of article 27.

ARTICLE 28 [36] (Protection of the diplomatic bag)

55. He introduced the text proposed by the Drafting Committee for article 28 [36], which read:

Article 28 [36]. Protection of the diplomatic bag

1. The diplomatic bag shall [be inviolable wherever it may be; it shall] not be opened or detained [and shall be exempt from examination directly or through electronic or other technical devices].

2. Nevertheless, if the competent authorities of the receiving [or transit] State have serious reasons to believe that the [consular] bag contains something other than the correspondence, documents or articles referred to in article 25, they may request [that the bag be subjected to examination through electronic or other technical devices. If such examination does not satisfy the competent authorities of the receiving [or transit] State, they may further request] that the bag be opened in their presence by an authorized representative of the sending State. If [either] [this] request is refused by the authorities of the sending State, the competent authorities of the receiving [or transit] State may require that the bag be returned to its place of origin.

56. Article 28, which was based on the revised text of draft article 36 submitted by the Special Rapporteur and originally entitled "Inviolability of the diplomatic bag",[10] had been discussed at length and had given rise to serious differences of opinion in the Commission and in the Drafting Committee, which explained the presence of so many square brackets in the text now being proposed. The Drafting Committee had been unable to agree on the basic substantive issues involved, namely the extent to which the draft could provide for a uniform régime for all categories of bags and what such a uniform régime should be.

57. Paragraph 1 reproduced the text submitted by the Special Rapporteur, but contained two sets of square brackets. The phrases that were not in square brackets were simply a repetition of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. The first phrase in square brackets referred to the concept of the "inviolability" of the bag. Some members had said that the use of that concept was not only logical, but also necessary. Others had had reservations about the inclusion of that concept because it did not appear in any of the existing relevant conventions with regard to the bag as such. The second phrase in square brackets related to electronic or technical examination of the bag. Some members had considered that it was necessary to include that phrase, which dealt with a practical contemporary issue that the 1961 and 1963 United Nations Conferences had not had to face. Others had taken the view that it should not be included or could be included only if it were qualified by a provision along the lines of paragraph 2. Still others had held that the phrase was unnecessary, since the existing conventions already excluded such examination. A minor drafting change had been made in paragraph 1: it had been thought more correct to refer to "other technical devices" than to "other mechanical devices".

58. Paragraph 2 was based on the corresponding paragraph proposed by the Special Rapporteur, but its unbracketed parts had been modelled more closely on article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Paragraph 2 thus now provided

* Resumed from the 1951st meeting.

[8] The text of draft article 6 considered by the Commission at its thirty-seventh session and referred to the Drafting Committee, as well as a summary of the discussion thereon, appear in *Yearbook ... 1985*, vol. II (Part Two), p. 20, footnote 66, and p. 22, paras. 119-126.

[9] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[10] See 1948th meeting, para. 1.

that a request could be made for the bag to be opened prior to requiring that it be sent back. The final phrase was, however, based on the Special Rapporteur's approach, not on that of the 1963 Vienna Convention.

59. Three issues on which no agreement had been reached had been indicated by square brackets. The words "or transit" had been placed in square brackets because members had not been able to agree whether a transit State should be in a position to make the request provided for in the paragraph. The word "consular" had been placed in square brackets because of the difference of opinion between those who believed that the provision of paragraph 2 on the possibility of requesting that the bag be opened should apply to all bags and those who thought that such a request could be allowed only with regard to the consular bag. The third phrase in square brackets related to the possibility that the receiving State might request that the bag be subjected to electronic examination. That provision for a "middle-step" request by the receiving State had been seen by most members as a useful addition, but one member had opposed it, believing it to be illogical and absurd, as well as contrary to existing law.

60. As to the fate of article 28, the Drafting Committee had considered three possibilities: (*a*) reporting back the revised text submitted by the Special Rapporteur without making any recommendation; (*b*) redrafting the text in order simply to reflect the *status quo*, namely a paragraph 1 repeating the 1961 Vienna Convention formula for three types of bags and a paragraph 2 repeating the 1963 Vienna Convention formula for the consular bag; (*c*) suggesting that no article at all should be adopted on the matter.

61. In the end, the Drafting Committee had decided that it had a duty to indicate at least those areas of agreement which did exist and those on which disagreement on substantive issues subsisted. It would be for the Commission in plenary and ultimately for Governments to decide those questions. As in the past, the second reading of the article would no doubt be greatly facilitated by the comments and observations to be submitted by Governments.

62. Finally, the title of article 28, which now read "Protection of the diplomatic bag", was tentative and would require further discussion on second reading.

63. Mr. USHAKOV said that article 28, paragraph 2, would be acceptable if it referred to the "consular bag" and to the "receiving State".

64. Sir Ian SINCLAIR said that article 36, now article 28, had been a source of difficulties from the outset. It had been his understanding that the majority of representatives in the Sixth Committee of the General Assembly had wished to have a uniform system for all types of diplomatic bags. The draft articles were in fact predicated on that approach. He had serious reservations with regard to article 28 as it now stood. It would have been preferable for the Commission to agree that the provisions of paragraph 2 should apply to all bags. It was because of the provisions of paragraph 1, and the failure to agree on them, that some phrases had been placed in square brackets.

65. Mr. KOROMA reiterated his view that article 28 was superfluous. It was the attempt to take account of new developments that had made the text of the article unacceptable to several members. All that was needed was a statement that the diplomatic bag could not be opened or detained and that it must be exempt from examination directly or indirectly. The introduction of references to electronic and other devices created a position of inequality as between States because many States simply did not possess such devices.

66. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 28 [36].

Article 28 [36] was adopted.

ARTICLE 29 [37] (Exemption from customs duties, dues and taxes)

67. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 29 [37], which read:

Article 29 [37]. Exemption from customs duties, dues and taxes

The receiving State or, as the case may be, the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit and departure of the diplomatic bag and shall exempt it from customs duties and all national, regional or municipal dues and taxes and related charges other than charges for storage, cartage and similar services.

68. Article 29 reproduced with only slight modification the revised text of draft article 37 submitted by the Special Rapporteur.[11] The usual expression "or, as the case may be" replaced the expression "or, as appropriate", and the words "and departure" replaced the words "or exit". The word "free", which had formerly qualified the words "entry, transit or exit", had been deleted, as it added nothing to the meaning and was subject to various interpretations. The concluding phrase had been brought into line with the corresponding phrase in article 36, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations.

69. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 29 [37].

Article 29 [37] was adopted.

ARTICLE 30 [39] (Protective measures in case of *force majeure* or other circumstances)

70. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 30 [39], which read:

Article 30 [39]. Protective measures in case of **force majeure** *or other circumstances*

1. In the event that, due to *force majeure* or other circumstances, the diplomatic courier, or the captain of a ship or aircraft in commercial service to whom the bag has been entrusted or any other member of the crew, is no longer able to maintain custody of the diplomatic bag, the receiving State or, as the case may be, the transit State shall take appropriate measures to inform the sending State and to ensure the integrity and safety of the diplomatic bag until the authorities of the sending State take repossession of it.

[11] *Ibid.*

2. In the event that, due to *force majeure*, the diplomatic courier or the diplomatic bag is present in the territory of a State which was not initially foreseen as a transit State, that State shall accord protection to the diplomatic courier and the diplomatic bag and shall extend to them the facilities necessary to allow them to leave the territory.

71. Article 30 was based on the revised text of draft article 39 submitted by the Special Rapporteur.[12] That text had been recast so that paragraph 1 now referred to *force majeure* or other circumstances, such as illness, which might prevent the diplomatic courier, the captain of a ship or aircraft in commercial service to whom the bag had been entrusted or any other member of the crew from maintaining custody of the bag. The emphasis had now been more appropriately placed on events such as accidents, abandonment, loss or misplacement which prevented custody of the bag from being maintained. The point was that the "guardian" of the bag had for some reason been unable to maintain custody of it. Paragraph 1 did not deal with lost or misplaced bags which had been transmitted unaccompanied through the postal service or by some other mode of transport. In such cases, the transmittal service concerned would retain responsibility for dealing with the kind of events referred to in paragraph 1. The purpose of the obligation under paragraph 1 had been brought out more clearly by the provision that the receiving State or the transit State must take appropriate measures to inform the sending State of the situation and to ensure the integrity and safety of the bag until the authorities of the sending State had regained possession of it.

72. Paragraph 2 concerned an event of *force majeure* which resulted in the courier or bag being present in the territory of a State not initially foreseen as a transit State. The proposed text specified that such a State must not only accord protection to the diplomatic courier and the diplomatic bag, but must also extend the facilities necessary to allow them to leave the territory. The commentary would explain that it was for the State on whose territory the courier and the bag were present to decide whether they were simply to be allowed to return directly to the sending State or whether they were to be allowed to continue their journey to their destination.

73. The title now referred not only to *force majeure*, but also to "other circumstances".

74. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt article 30 [39].

Article 30 [39] was adopted.

ARTICLE 31 [41] (Non-recognition of States or Governments or absence of diplomatic or consular relations)

75. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 31 [41], which read:

Article 31 [41]. Non-recognition of States or Governments or absence of diplomatic or consular relations

The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under the present articles shall not be affected either by the non-recognition of the sending State or of its Government or by the non-existence of diplomatic or consular relations.

76. Article 31 was a simplified version of the revised text of draft article 41 submitted by the Special Rapporteur.[13] Paragraph 2 of the earlier text had been deleted because it stated the obvious and its content would be covered in the commentary.

77. Article 31 applied only to situations of non-recognition or lack of relations between a sending State and (*a*) a State on whose territory a special mission was received; (*b*) a State on whose territory the headquarters of an international organization was located; (*c*) a State on whose territory an international conference was held. An attempt had been made to draft the article specifically to cover those three situations, but the task had proved extremely difficult because a very heavy and detailed text would habe been required. In order to avoid those problems and save time, the Drafting Committee had thought it wise to cast the safeguard clause in article 31 in broad and general terms.

78. The text no longer referred to host or receiving States or to transit States. Indeed, it had been questioned whether a transit State could be placed in the same position as a receiving or host State in the context of article 31. It had been generally agreed that the transit State might well require additional formalities, such as a visa or prior express consent to transit, before it accorded the facilities, privileges and immunities in question to a courier in transit from a sending State which it did not recognize.

79. Sir Ian SINCLAIR said that it should have been possible to draft a text that would specifically cover the three situations referred to by the Chairman of the Drafting Committee. As it now stood, article 31 had the disadvantage of being much too general and he hoped that it would be improved on second reading.

80. Mr. MAHIOU said it seemed to him that the Drafting Committee had gone too far in trying to simplify article 31. The new wording might therefore lead to a debate on the scope of that provision and give rise to doubts on the part of States which did not recognize or maintain diplomatic or consular relations with a particular Government. The necessary explanations should therefore be included in the commentary. The Commission would, in any event, have to come back to the working of article 31 on second reading.

81. Mr. KOROMA suggested that the Commission should try to recast article 31 before submitting it to the Sixth Committee of the General Assembly.

82. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, at the current late stage, practical problems would make it difficult to revise article 31 in all languages.

83. Mr. REUTER said he thought that the doubts and misgivings which had been expressed were the result of the fact that the words "shall not be affected" covered both matters of law and matters of fact. He therefore

[12] *Ibid.*

[13] *Ibid.*

suggested that those words should be replaced by "shall not be altered in principle". The Commission would thus show clearly that it was not taking any position on the practical problems which might arise and that the principle of no change was valid only from the purely legal point of view. If that suggestion was not satisfactory, it might be explained in the commentary that various solutions had been possible.

84. Mr. USHAKOV said that the wording proposed by Mr. Reuter was unacceptable because it differed so radically from that of similar provisions contained in existing conventions. Certainly the text of article 31 needed to be clarified, and that could be done on second reading; it would, for example, have to be specified to which States article 31 applied. At the current stage, however, the Commission should refrain from drafting a text in too great a hurry.

85. Sir Ian SINCLAIR said that Mr. Reuter's suggestion met some of his own concerns about the wording of article 31. He hoped that the commentary would reflect the Commission's intentions with regard to that article and make it clear that its provisions did not apply to the *de facto* effects of non-recognition or absence of diplomatic or consular relations. He would be content with the matter being taken up on second reading.

86. Mr. TOMUSCHAT said that he also endorsed Mr. Reuter's helpful suggestion; but unfortunately it would not change the fact that the wording of article 31 was much too general.

87. Mr. ROUKOUNAS said that, during the general debate (1951st meeting), he had questioned the validity of article 41, now article 31. Having heard the presentation of and comments on the provision, he maintained his reservations.

88. Mr. KOROMA suggested that article 31 should be left as it stood and that it should be accompanied by a suitable commentary.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 31 [41] as it stood, on the understanding that it would be accompanied by a suitable commentary.

Article 31 [41] was adopted.

ARTICLE 32 [42] (Relationship between the present articles and existing bilateral and regional agreements)

90. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 32 [42], which read:

Article 32 [42]. Relationship between the present articles and existing bilateral and regional agreements

The provisions of the present articles shall not affect bilateral or regional agreements in force as between States parties to them.

91. Article 32 was now composed of one paragraph, whereas the text on which it was based, the revised draft article 42 submitted by the Special Rapporteur,[14] had had three. Two paragraphs had been deleted and the third had been amended.

92. Paragraph 1 of the earlier text had stated that the present articles "shall complement" the provisions of the four relevant codification conventions. The Drafting Committee had found that the word "complement" could give rise to varying interpretations and believed that the draft should not go into the complex area of treaty law concerning the application of successive treaties relating to the same subject-matter. It had thought that it would be wiser to leave that matter aside, since guidance might be provided by article 30 of the 1969 Vienna Convention on the Law of Treaties.

93. Paragraph 3 of the earlier text had been deleted because its content was already covered by article 6, paragraph 2 (*b*).

94. Paragraph 2 of the earlier text formed the basis for the article now being proposed. The words "shall not affect", which had been used instead of the words "are without prejudice to", were taken from article 73, paragraph 1, of the 1963 Vienna Convention on Consular Relations. The broad formulation in the original paragraph 2 had been changed because most members of the Drafting Committee had thought it likely that one or more of the four relevant codification conventions would in fact be affected by other provisions of the present draft, and in particular by article 28. State practice with regard to consular couriers and bags was, moreover, evidenced primarily in bilateral agreements. The possibility of there being relevant regional agreements had also been recognized; such agreements would not be affected by the provisions of the draft.

95. One member of the Drafting Committee had disagreed with the use of the term "bilateral or regional agreements" and had urged that the text should be based on that of article 73, paragraph 1, of the 1963 Vienna Convention so as to avoid arguments *a contrario*. That member had also been unable to agree that any of the provisions of the present draft could be said to "affect" the four codification conventions as such.

96. The title had been brought into line with the new content of the article.

97. Mr. USHAKOV said that, as it now stood, article 32 might imply that the future convention would be prejudicial to some agreements in force—and that was impossible under the law of treaties. He could, moreover, not agree with the members of the Drafting Committee who took the view that the words "regional agreements" could mean any bilateral agreements except agreements of a universal character. The idea reflected in article 32 was therefore acceptable, but the text itself was not.

98. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 32 [42] subject to the reservations formulated by Mr. Ushakov.

Article 32 [42] was adopted.

[14] *Ibid.*

ARTICLE 33 [43] (Optional declaration)

99. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 33 [43], which read:

Article 33 [43]. Optional declaration

1. A State may, at the time of expressing its consent to be bound by the present articles, or at any time thereafter, make a written declaration specifying any category of diplomatic courier and corresponding category of diplomatic bag listed in paragraph 1 (1) and (2) of article 3 to which it will not apply the present articles.

2. Any declaration made in accordance with paragraph 1 shall be communicated to the depositary, who shall circulate copies thereof to the Parties and to the States entitled to become Parties to the present articles. Any such declaration made by a Contracting State shall take effect upon the entry into force of the present articles for that State. Any such declaration made by a Party shall take effect upon the expiry of a period of three months from the date upon which the depositary has circulated copies of that declaration.

3. A State which has made a declaration under paragraph 1 may at any time withdraw it by a notification in writing.

4. A State which has made a declaration under paragraph 1 shall not be entitled to invoke the provisions relating to any category of diplomatic courier and diplomatic bag mentioned in the declaration as against another Party which has accepted the applicability of those provisions to that category of courier and bag.

100. Article 33 was based on the revised text of draft article 43 submitted by the Special Rapporteur.[15] It followed the general approach reflected in the earlier text, but had been formulated in a more precise manner; a new paragraph had also been added. Some members of the Drafting Committee had said that the article appeared to undermine the purposes of codification in the area, namely to provide uniform rules for all couriers and bags. It had nevertheless been recognized that such a provision could assist in obtaining a broader measure of government support for the draft as a whole.

101. Paragraph 1 had been recast in the light of the debate in plenary to provide that a State could specify any category of courier and corresponding category of bag to which it would not apply the present articles. The use of the words "corresponding category of diplomatic bag" was intended to make it clear that a State could not decide to apply the present articles to the consular courier, for example, but not to the consular bag. The categories of couriers and bags chosen for non-application must correspond to each other. Other drafting changes had been made for the sake of clarity and precision.

102. Paragraph 2, which was new, contained the necessary procedural elements for the application of paragraph 1. The first sentence provided that a declaration would be communicated to the depositary, who would circulate copies thereof to the parties and to the States entitled to become parties to the present articles. That sentence was based on article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties. The second sentence indicated that a declaration made by a contracting State would take effect upon the entry into force of the present articles for that State. The term "Contracting State" had the meaning provided for in article 2, paragraph 1 (*f*), of the 1969 Vienna Convention, which referred to "a State which has consented to be bound by the treaty, whether or not the treaty has entered into force". The third sentence provided for a different period of time in the case of a declaration made by a "Party", which was, according to article 2, paragraph 1 (*g*), of the 1969 Vienna Convention, "a State which has consented to be bound by the treaty and for which the treaty is in force". In such a case, the articles would already have entered into force for the State concerned and its declaration would represent a change in its previous application of the articles. It had thus been thought necessary and fair to provide for a three-month "waiting period" before the declaration took effect.

103. Paragraph 3 was based on paragraph 2 of the text submitted by the Special Rapporteur, but the end of the sentence had been amended to make it clear that a withdrawal of a declaration had to be made "by a notification in writing".

104. Paragraph 4 was based on paragraph 3 of the text submitted by the Special Rapporteur, but its wording had been brought into line with that of paragraph 1. The title of the article had been shortened and now read simply: "Optional declaration".

105. Mr. FLITAN said that the purpose of the draft articles was to complement the four codification conventions referred to in article 3 and that the Commission could not make any changes in the régime established by those instruments. He was therefore in favour of the deletion of draft article 33, which specifically authorized amendments to the provisions of those conventions; that would, moreover, contradict the fact that some of those provisions were reproduced in the present draft.

106. Mr. YANKOV (Special Rapporteur) said that, in order to avoid any confusion with regard to the question of reservations as referred to in article 23, paragraph 1, of the 1969 Vienna Convention on the Law of Treaties, the commentary should make it clear that the optional declaration provided for in draft article 33 could in no way be regarded as a reservation, either in terms of its nature or in terms of its operation. If reference was to be made to the 1969 Vienna Convention, it would be more appropriate to mention article 77, paragraph 1 (*e*), on the functions of depositaries.

107. Mr. MAHIOU said that paragraph 3 would require further clarification because paragraph 2 set a time-limit for a declaration made by a party, whereas paragraph 3 set no time-limit at all for the withdrawal of a declaration made under paragraph 1.

108. Mr. YANKOV (Special Rapporteur) said that the Drafting Committee had discussed the point raised by Mr. Mahiou. It was his own understanding that a withdrawal of an optional declaration would restore the normal position of the articles, so that there would be no need for any notification. That point could be explained in the commentary.

109. Mr. KOROMA said that he had some reservations with regard to article 33.

[15] *Ibid.*

110. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 33 [43].

Article 33 [43] was adopted.

TITLES OF THE FOUR PARTS OF THE DRAFT ARTICLES

111. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, from the outset, the Special Rapporteur had proposed that the draft should be divided into parts, but the matter had been left pending until further progress had been made. Now that the complete draft had been prepared, the Drafting Committee proposed that the articles should be divided into the following four parts:

Part I. General provisions: articles 1 to 6;

Part II. Status of the diplomatic courier and the captain of a ship or aircraft entrusted with the diplomatic bag: articles 7 to 23;

Part III. Status of the diplomatic bag: articles 24 to 29;

Part IV. Miscellaneous provisions: articles 30 to 33.

The titles of the four parts of the draft articles were adopted.

ADOPTION OF THE DRAFT ARTICLES ON FIRST READING

112. The CHAIRMAN, noting that the first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier had been completed, suggested that the Commission should adopt the whole set of draft articles.

The draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier were adopted on first reading.

TRIBUTE TO THE SPECIAL RAPPORTEUR

113. Mr. REUTER, speaking also on behalf of many other members of the Commission, proposed the following draft resolution:

"*The International Law Commission,*

"*Having adopted* provisionally the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier,

"*Desires to express* to the Special Rapporteur, Mr. Alexander Yankov, its deep appreciation for the outstanding contribution he has made to the treatment of the topic by his scholarly research and vast experience, thus enabling the Commission to bring to a successful conclusion its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier."

The draft resolution was adopted.

114. Mr. YANKOV (Special Rapporteur) sincerely thanked all the members of the Commission for their appreciation of his efforts in what had, in fact, been a collective undertaking by the Commission and its Drafting Committee. He was most grateful to the Secretariat for the valuable assistance it had given him in his work.

The meeting rose at 1.20 p.m.

1981st MEETING

Friday, 4 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-eighth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter II.

CHAPTER II. *Jurisdictional immunities of States and their property* (A/CN.4/L.403 and Add.1 and 2 and Add.2/Corr.1)

A. Introduction (A/CN.4/L.403)

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.403)

Section B was adopted.

C. Tribute to the Special Rapporteur, Mr. Sompong Sucharitkul (A/CN.4/L.403)

Section C was adopted.

D. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.403/Add.1 and 2 and Add.2/Corr.1)

SUBSECTION 1 (Texts of the draft articles provisionally adopted by the Commission on first reading) (A/CN.4/L.403/Add.1)

2. Mr. USHAKOV said that the reservations he had expressed in connection with the draft articles, both at previous sessions and at the present session, were still entirely valid.

Section D.1 was adopted.

SUBSECTION 2 (Texts of draft articles 2 (paragraph 2), 3 (paragraph 1), 4 to 6 and 20 to 28, with commentaries thereto, provisionally adopted by the Commission at its thirty-eighth session) (A/CN.4/L.403/Add.2 and Corr.1)

Commentary to article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was approved.