2076th MEETING
Friday, 8 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrígues, Mr. Erikkson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepulveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Co-operation with other bodies (concluded)*
[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

1. The CHAIRMAN invited Mr. Njenga to address the Commission in his capacity as Observer for the Asian-African Legal Consultative Committee.

2. Mr. NJENGA (Observer for the Asian-African Legal Consultative Committee) expressed the hope that his dual status as a member of the International Law Commission and Secretary-General of the Asian-African Legal Consultative Committee would serve to strengthen the very close relationship which had developed over the years between the two bodies.

3. The Asian-African Legal Consultative Committee had been established to serve its member Governments as an advisory body in the field of international law and as a forum for Afro-Asian co-operation in legal matters of common concern. The history of the Committee's activities thus far had been that of the needs and aspirations of the new States of Asia and Africa. One of the functions specifically assigned to the Committee was the examination of questions under consideration by the Commission, and the Committee had endeavoured to generate interest in those questions among the Governments of its region by preparing notes and comments on the Commission's work for the use of delegations representing member Governments to the Sixth Committee of the General Assembly.

4. In more than three decades of service, the Committee had dealt with the legal aspects of a wide range of topics, including environmental protection, international economic relations and the elements of good neighbourly relations between States. A fundamental feature of its deliberations in each of those areas had been their objectivity and their predominantly legal orientation.

5. During the first decade, 1957-1967, the Committee's activities had been confined to giving advice on problems submitted to it by member Governments and to the consideration of issues of common concern, many of them of considerable importance to the region, where uniformity of approach was desirable. The subjects considered by the Committee during that period had included diplomatic immunities and privileges, immunity of States in respect of commercial transactions, extradition of fugitive offenders, status and treatment of aliens, dual or multiple nationality, border and frontier issues, legality of nuclear weapons tests, rights of refugees, and international rivers, to name but a few. Final reports and/or resolutions had been adopted on those items.

6. During the second decade, the Committee's work had expanded considerably, the main emphasis being placed on assisting member Governments in regard to some of the major international questions before the United Nations, especially those that became the subject of codification conferences. In addition to the 1969 Vienna Convention on the Law of Treaties and the more recent negotiations on the law of the sea, with which it had been concerned, the Committee had also prepared background and analytical studies for the United Nations Conferences on Limitation in International Sale of Goods (1974), on the Carriage of Goods by Sea (1978), on Succession of States in respect of Treaties (1978), on Contracts for International Sale of Goods (1980), on Outer Space (1982), and on the Law of Treaties between States and International Organizations or between International Organizations (1986).

7. When economic issues had come to the forefront in United Nations deliberations, the Committee had addressed the legal aspects of some of those issues. Since the establishment a Sub-Commission on International Trade Law Matters in 1980, many of the Committee's activities had been concerned with economic relations and trade law. In addition to working closely with UNCTAD and UNCITRAL, it had engaged in the preparation of standard/model contracts for use in international trade transactions relating to commodities and model bilateral agreements on the promotion and protection of investments; the formulation of industrialization schemes; and the organization of a system for the settlement of disputes in economic matters through the development of national arbitral institutions and the establishment of regional centres for arbitration. Two such centres had already been set up under the Committee's auspices, at Kuala Lumpur and Cairo, and a third, at Lagos, was expected to become operational in June or July 1988.

8. A new phase in the evolution of the Committee's activities had begun with the adoption on 13 October 1980 of General Assembly resolution 35/2, granting the Committee permanent observer status. Pursuant to that resolution, the Committee had oriented its work programme to complement United Nations efforts in areas such as the law of the sea, international protection of refugees, and international economic co-operation for development. In addition, it had undertaken major projects aimed at rationalizing the work of the Sixth Committee, strengthening the role of the United Nations, and promoting wider use of the ICJ. Its programme for co-operation with the United Nations provided, inter alia, that the Committee would continue to follow...
discussions in the Sixth Committee and developments in the International Law Commission, UNCITRAL and the Special Committee on the Charter of the United Nations.

9. Developments in the work of the Commission at its current session were of special interest to the Committee because the items on the non-navigational uses of international watercourses and on jurisdictional immunities of States were also on its own agenda. The close link between the two bodies had been appropriately symbolized by the presence at the Committee's session in March 1988, in Singapore, of the outgoing Chairman of the Commission, Mr. McCaffrey, whose comprehensive and informative statement had been greatly appreciated.

10. He wished to take the opportunity of inviting the Commission's present Chairman, Mr. Díaz González, to participate in the Committee's twenty-eighth session, to be held in Nairobi early in 1989.

11. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his most interesting statement and kind invitation.

12. Mr. McCaffrey thanked the Committee and its newly elected Secretary-General, Mr. Njenga, for the warm hospitality extended to him at the Committee's session of March 1988, where he had been greatly impressed by the wide diversity of topics studied by the Committee on behalf of its member States and by the quality of the work done, as well as by the work of the Committee's secretariat and the collegiality of the delegations to the session.


FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)*

PARTS IV AND V OF THE DRAFT ARTICLES:

ARTICLES 15 [16] TO 18 [19] (concluded)

13. The CHAIRMAN said that, although the debate on agenda item 6 was concluded, he proposed, as a matter of courtesy and on the understanding that no precedent was being set, to comply with requests he had received from two members of the Commission who wished to speak on that item and had not been able to do so previously.

14. Mr. AL-BAHARNA, after thanking the Chairman for allowing him to make a general statement although the debate on the item was already concluded, said that he had read the Special Rapporteur's fourth report (A/CN.4/412 and Add.1 and 2) with great interest. In 1984, when the previous Special Rapporteur had submitted his second report, consideration of the topic appeared to have reached an advanced stage, but in 1987 the prospects for completing the work in the near future had become much less favourable. He was therefore gratified to note that the Special Rapporteur now hoped that the first reading could be completed by 1991, and urged the Commission to support the schedule proposed in the fourth report (ibid., para. 8). If possible, however, he would prefer the first reading to be completed in 1990 rather than in 1991.

15. In his report (ibid., footnote 9), the Special Rapporteur suggested that a definition of "optimum utilization" might be included in article 1. It was doubtful, however, whether the article on use of terms would be the best place for such a definition—if, indeed, the term could be defined with certainty. Furthermore, the Special Rapporteur proposed dealing with the subject of "security of hydraulic installations" under "Other matters" (ibid., para. 7). While recognizing that hydraulic installations constituted an important part of the hardware of international watercourses, he doubted whether it was necessary or feasible to deal with the issue in connection with non-navigational uses.

16. While he agreed with the Special Rapporteur on the need for regular exchanges of data and information on international watercourses, he wondered whether watercourse States were required under international law to supply such data and information to one another and, if so, whether that obligation was absolute. In the survey of State practice (ibid., paras. 15-26), there was reference to a number of bilateral and subregional treaties dealing with the matter, some of which established institutions for the exchange of data and information. He was not convinced that an international obligation to exchange information could be deduced from those treaties or from State practice; he therefore questioned the Special Rapporteur's position, in particular, his assumption that article 6 could form the basis for a legal obligation (ibid., para. 14). No obligation to exchange data and information followed necessarily from the rule of equitable utilization; such exchanges merely helped to establish whether the rule of equitable utilization was being observed.

17. The relevant passages of the ECE Principles regarding co-operation in respect of transboundary waters, quoted in the report (ibid., para. 22), provided a good model, which the Commission would be well advised to follow. In the light of those principles and of the basic concepts of international law, draft article 15 [16] (see 2050th meeting, para. 1) appeared to overreach itself. If the rules in question, as the Special Rapporteur stated in his comments, were to be residual rather than mandatory, the word "shall" should be replaced by "should" throughout the article. Furthermore, he would prefer the words "reasonably available", in paragraph 1, to be replaced by "as far as practical"; and he doubted the usefulness of the proviso at the end of that paragraph, which merely introduced un-
necessary complications. Paragraph 1 should be expressly linked to paragraph 5 so as to make it clear that the obligation formulated was not absolute, but subject to considerations of defence and security. Lastly, noting that, in paragraph (7) of his comments, the Special Rapporteur sought the Commission’s views on whether the article should expressly provide for the establishment of joint commissions for collecting and processing data on international watercourses, he maintained that, in conformity with the views held by both the previous special rapporteurs, the establishment of such bodies should be explicitly provided for in that article or in another, separate, article.

18. With regard to the draft articles on pollution of international watercourses, protection of the environment of international watercourses and pollution or environmental emergencies, he believed that the “bare minimum” approach adopted by the Special Rapporteur might not do that subject full justice. In view of its much more extensive treatment by his predecessors, as well as the Special Rapporteur’s own view that it was the single most important component of the draft articles (A/CN.4/412 and Add.1 and 2, para. 90), he would do well to review his formulations. In particular, he might consider reintroducing in the draft the article on control and prevention of water-related hazards (art. 26) proposed by the previous Special Rapporteur in his second report. For the definition of the term “pollution”, he preferred the text proposed by the previous Special Rapporteur (art. 22) to the definition appearing in paragraph 1 of draft article 16 and in the Special Rapporteur’s comments (ibid., footnote 207).

19. The Special Rapporteur’s statement, in paragraph (4) of his comments on draft article 16 [17], that it was doubtful that pollution per se of an international watercourse could be said to be proscribed by contemporary international law, caused him serious misgivings. To recognize that pollution was unlawful only if it caused injury was not the same as saying that contemporary international law did not proscribe pollution. The comment, in his view, should be modified or deleted. As to the substantive rule contained in paragraph 2 of article 16 [17], he would have preferred it to be closer to the wording of article X of the Helsinki Rules, which related the rule to the principle of equitable utilization of the waters and imposed on States the dual obligation to prevent pollution and to abate it. The Special Rapporteur’s explanation notwithstanding, it would be preferable to replace the words “appreciable”, in paragraph 2 of the article, by a more objective term such as “substantial” or “serious”, the former being used in the Helsinki Rules and the latter in the arbitral award in the Lake Lanoux case.

20. The wording of paragraph 3 was rather weak and seemed to water down the legal obligation stated in paragraph 2; in particular, he questioned the usefulness of the opening words, “At the request of any watercourse State”, and of the word “introduction”. The paragraph should be suitably amended to bring it into closer conformity with the firm obligations laid down in paragraph 2.

21. Draft article 17 [18] was a useful complement to article 16 [17], but consideration should be given to reversing the order of the two articles, so that the provision setting out the more positive duties came before the one expressed in negative terms. A comparison of article 17 [18] with article 20 proposed by the previous Special Rapporteur in his second report1 showed that the latter text contained a few more elements and was also more practical; paragraph 2, regarding the adoption of measures and regimes for protecting the environment, was particularly significant, and he suggested that it should be restored. Since the draft was likely to become a framework convention, it was advisable to include as many fertile ideas as possible.

22. He approved of paragraph 2 of article 17 [18], on the need to protect the marine environment. Its inclusion was necessary, because the bulk of marine pollution was due to river discharges. Lastly, he suggested that a reference should be included in paragraph 2, or in a new paragraph 3, to the 1982 United Nations Convention on the Law of the Sea, as in paragraph 3 of draft article 20 proposed by the previous Special Rapporteur.

23. In principle, he supported the idea of including an article to cover emergency situations relating to pollution, but the text of draft article 18 [19] seemed to be somewhat confusing. The article defined the words “pollution or environmental emergency” in paragraph 1, and then proceeded to lay down the legal obligations in paragraph 2. He suggested that those two elements be combined, as had been done by the previous Special Rapporteur in paragraph 1 of draft article 25. In addition, the title should be amended to read: “Emergency situations regarding pollution”, and the unsatisfactory expression “potentially affected watercourse States”, in paragraph 2, should be replaced by the language used in article 198 of the United Nations Convention on the Law of the Sea, namely “other States it deems likely to be affected by such damage”. That change would make the text simpler and clearer.

24. In his comments (para. 5) on article 18 [19], the Special Rapporteur asked whether a provision should be added in that article along the lines of article 199 of the 1982 Convention, dealing with contingency plans against pollution, and whether that article 18 should also prescribe obligations for third States. His own response was in the affirmative to the first question and in the negative to the second. Whereas it was possible legally to prescribe contingency plans for watercourse States, it was doubtful whether the same could be done for third States.

25. Mr. NJENGA, after congratulating the Special Rapporteur on his scholarly fourth report (A/CN.4/412 and Add.1 and 2), said that he had some general comments to make on environmental protection and the specific issue of pollution. He believed that the Commission would be losing the focus of the debate if it were to concentrate on the question of the liability—strict or otherwise—of one watercourse State to another for activity which caused “appreciable” or “substantial” pollution or environmental emergency which caused “appreciable” or “substantial” damage, caused him serious misgivings.
harm. The pollution of watercourses should be looked at in the broader context of damage to the international community as a whole, as something that caused harm to all States, including the State of origin and its population. The developing countries were acutely aware of that fact, particularly in Africa, where over 80 per cent of the rural population depended for drinking water on rivers that were completely untreated for any pollution resulting from land-based activities.

26. The realization of the grave danger represented by pollution had caused consternation concerning the clandestine and unscrupulous activities of certain companies of industrialized countries, which had been dumping toxic chemical wastes in Africa. One journalist from Lagos, writing in the Sunday Observer of 19 June 1988, had spoken of “some European countries” which, “after inflicting the slave trade on the continent in the last century”, were “bent on decimating the African population of the next century by dumping their unwanted toxins on Africa’s feeding grounds”.

27. In fact, some of the most highly polluting companies which were deteriorating the environment—including international watercourses—in the third world were companies from industrialized countries which had relocated their operations in developing countries to avoid stringent environmental standards, and which were making huge profits in those countries with little concern for the effects of their activities on the environment.

28. The general obligation of co-operation in the control and abatement of pollution was now generally accepted and should therefore constitute the fundamental principle of the articles of part V of the draft. In its report entitled “Our common future”, the World Commission on Environment and Development stressed that “a new focus on the sustainable use and management of transboundary ecological zones, systems and resources” was needed. It pointed out that “over one third of the 200 major international river basins in the world are not covered by an international agreement, and fewer than 30 have any co-operative institutional arrangements. These gaps are particularly acute in Africa, Asia and Latin America, which together have 144 international river basins”. And the report continued: “Governments, directly and through the United Nations Environment Programme (UNEP) and the International Union for Conservation of Nature and Natural Resources (IUCN) should support the development of regional and subregional co-operative arrangements for the protection and sustained use of transboundary ecological systems...”.

29. The World Commission also pointed out that “legal régimes are being rapidly outdistanced by the accelerating pace and expanding scale of impacts on the environmental base of development” and went on to stress the urgent need “to recognize and respect the reciprocal rights and responsibilities of individuals and States regarding sustainable development; to establish and apply new norms for States and inter-State behaviour to achieve sustainable development; to strengthen and extend the application of existing laws and international agreements in support of sustainable development, and to reinforce existing methods and develop new procedures for avoiding and resolving environmental disputes”.

30. It was worth noting that article 192, which was the first provison in part XII of the 1982 United Nations Convention on the Law of the Sea, laid down: “States have the obligation to protect and preserve the marine environment.” That general obligation of States to co-operate on transboundary environmental problems was clearly reflected in the legal principles established in 1986 by the Experts Group on Environmental Law of the World Commission on Environment and Development. Those principles laid down, in paragraph 1 of article 14, the requirement for States to “co-operate in good faith with the other States concerned in maintaining or attaining for each of them a reasonable and equitable use of a transboundary natural resource or in preventing or abating a transboundary environmental interference or significant risk thereof”. Paragraph 2 of the article further stated the aim of such co-operation as: “arriving at an optimal use of the transboundary natural resource or at maximizing the effectiveness of measures to prevent or abate transboundary environmental interference”.

31. He also drew attention to the recommendations of the first African Ministerial Conference on the Environment, held at Cairo from 16 to 18 December 1985, which had adopted the Cairo Programme for African Co-operation. The Conference had adopted 29 priority subregional activities, 15 of which related to the rational transboundary use of the waters and ecosystems of the region. They included support for the Lake Chad Basin Commission for the integrated development of Lake Chad Basin; support for the River Niger Basin Authority for the integrated development of the River Niger Basin; the study and implementation of plans for a number of other river basins, including that of the Zambezi; improvement of co-operation for the integrated development of the Congo-Zaïre River; a hydrometrical and geological survey of the Volta River system; consideration of the water resource development of the three Maghreb countries; strengthening of co-operation among the countries of the River Nile basin in the environmental field; study and implementation of an integrated multipurpose development plan for the Lake Victoria basin, and a number of other schemes. He hoped that the Special Rapporteur would be able to follow the progress of that programme through UNEP, which was the implementing agency.

32. He had brought those regional and international developments to the Commission’s attention in order to see whether the draft articles reflected the new perspectives that were emerging in the area of environmental protection and the fight against pollution.

33. Without wishing to enter into the controversy about the status of the United Nations Convention on the Law of the Sea, he wished to stress that he had no doubt about the immense normative value of part XII...
of that Convention, which dealt with protection and preservation of the marine environment. Its provisions had been negotiated by representatives of all shades of international opinion and represented the largest measure of consensus on the topic. Even if the Convention had not been signed by 159 States and ratified by more than 35 of them, that would not detract from the value or the international authority of those provisions as showing how far States wished to commit themselves on the protection and preservation of the environment.

36. Referring to draft article 16 [17], he observed that the definition in paragraph 1 was most comprehensive and backed by a wealth of authority. He agreed, however, that the proper place for that definition was in the article on the use of terms. Paradoxically, the acceptance of such a broad and comprehensive definition would make it very difficult to accept paragraph 2 of article 16 [17], because any human activity, however well intended, was a potential cause of pollution as defined in paragraph 1. Paragraph 2, as proposed, would expose a watercourse State to claims by indeterminate claimants for an indefinite period, especially as no definite standards had been set for the types and quantities of substances that could be safely discharged.

35. It was true that the Special Rapporteur had stressed that, by using the term "appreciable harm", he was not advocating the absolute prohibition of all pollution. In paragraph (4) of his comments to article 16, he described "appreciable harm" as "harm that is significant—i.e. not trivial or inconsequential—but less than substantial". But, in the absence of a mechanism for the settlement of disputes and of clearly established standards, the concept of "appreciable harm" could not be objectively assessed. What was "appreciable" to one party could be a mere inconvenience to the other, and what was insignificant for one purpose could be catastrophic for another. For instance, pollution which caused no inconvenience for irrigation could be disastrous for purposes of human consumption.

37. It was unnecessary to dwell on the "due diligence" test of a "good government" or "a civilized State" advocated by Pierre Dupuy, who appeared to be putting forward the dubious argument that it was enough to exonerate a State if it possessed "on a permanent basis, a legal system and material resources sufficient to ensure the fulfilment of [its] international obligations under normal conditions". Even if it used such infrastructure "with a degree of vigilance adapted to the circumstances" (see paras. (7) and (8) of the comments on art. 16). In fact, the position at present was that the States that polluted international watercourses and the marine environment were precisely those that possessed those attributes. The condition of the international watercourses of Europe and North America confirmed that fact.

38. It was thus clear that paragraph 2 of article 16 [17] did not provide for a fair balance of the interests of all the States concerned and needed radical revision. He would prefer that revision to be done by the Special Rapporteur, but was not opposed to its being done by the Drafting Committee.

39. Mr. BEESLEY said that there might be some misunderstanding regarding his position on the 1982 United Nations Convention on the Law of the Sea. He wished to make it clear that at no stage had he put the status of the Convention at issue; he had never suggested that the Convention as whole had any particular status. For sound legal reasons, he had avoided any statement to the effect that the whole of that Convention reflected customary international law. Moreover, although he did not share the reservations on part XI, which dealt with deep-sea mining, he had referred specifically to its controversial character in order to underline the fact that he was well aware of it.

40. He had, of course, referred to the status of part XII of the Convention, which related to both the topic now under consideration and the topic of international liability for injurious consequences arising out of acts not prohibited by international law. That part XII reflected customary international law had not been questioned, either in the Commission or elsewhere. Some counter-arguments had occasionally been put forward, but not by States. Indeed, the major non-signatory States to the Convention had made a point of acknowledging that part XII reflected customary international law.

41. He then asked whether the Special Rapporteur intended to reply to the statements made at the present meeting.

42. Mr. McCAFFREY (Special Rapporteur) said that he did not propose to reply at the present stage. He did not wish to see the debate reopened, and in any case practically all the points raised at the present meeting had been substantially covered by his summing-up at the end of the discussion (2073rd meeting).


[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

CONSIDERATION OF THE DRAFT ARTICLES13 ON SECOND READING (continued)

43. Mr. SHI, after congratulating the Special Rapporteur on the objectivity and scholarly qualities of his eighth report (A/CN.4/417), said that he agreed with the Commission's general approach to the topic and

* Resumed from the 2072nd meeting.
14 Ibid.
15 For the texts, see 2069th meeting, para. 6.
would therefore refrain from making any general comments. Nor was there any need for him to raise drafting points, which could be dealt with in the Drafting Committee. He would therefore confine his statement to the main issues which, in the Special Rapporteur’s view, required the Commission’s attention.

44. With regard to the scope of the draft articles, he suggested that the original articles 1 and 2 adopted on first reading be kept intact, without the amendments proposed by the Special Rapporteur. There was no convincing reason for extending the scope of the draft articles to the official communications of international organizations. Those organizations were essentially different from States, as was shown by the fact that the Commission had dealt separately with the law of treaties between States and the law of treaties between international organizations. There was also the problem that practically no two international organizations had the same characteristics. Moreover, if the official communications of international organizations inter se were to be covered by the draft articles, there would be no reason not to extend their scope to the communications of national liberation movements, thereby complicating the whole subject. He therefore suggested that the scope of the draft articles should not be extended to the official communications of international organizations inter se. The status of the couriers and bags of international organizations would not be affected, since it was safeguarded by article 2.

45. The rule of inviolability of temporary accommodation set out in article 17 had evoked diametrically contrary responses: some Governments had proposed its deletion as unacceptable, while others had suggested that it should be not only retained, but even strengthened. He himself believed that the rule provided an assurance of freedom, safety and confidentiality of communication by bag between the sending State and its missions abroad. It had been argued that there was no need to extend the inviolability of the diplomatic courier to his temporary accommodation, because in most cases he would stay at the premises of the mission, or if some sort of temporary accommodation was used, he would not take the diplomatic bag with him there. That argument disregarded the requirement of completeness of the rules on the diplomatic courier and diplomatic bag; incidents or accidents affecting freedom of communication by diplomatic bag were always possible. It was true that the application of article 17 could prove somewhat burdensome for a receiving State or a transit State, but it should be remembered that those States were also sending States. The rule in article 17 should therefore be kept as it stood; he agreed with the Special Rapporteur that it represented an acceptable balance between the freedom of communication of the sending State and the legitimate interests of the receiving and transit States.

46. Article 18, as adopted on first reading, represented a good compromise solution to the much disputed problem of immunity from jurisdiction. It was based on the functional approach and provided for a qualified immunity. Full or absolute immunity would have been more consonant with the functional necessity of the official duties of the diplomatic courier, but, in view of the objections made to it, qualified immunity was perhaps the only possible choice; it provided at least the minimum assurance required for freedom of communication by diplomatic bag accompanied by diplomatic courier. Article 18 should therefore be retained in its original compromise form, with the minor amendments proposed by the Special Rapporteur (ibid., paras. 158-161).

47. For article 28, on the protection of the diplomatic bag, the Special Rapporteur had submitted three alternative texts. As he himself saw it, alternative B should be ruled out, because paragraph 2 ran counter to the main purpose of the draft articles and deviated from the comprehensive and uniform approach adopted by the Commission. It was true that the paragraph was in line with paragraph 3 of article 35 of the 1963 Vienna Convention on Consular Relations, but paragraph 1 of that same article, which permitted consular posts to use diplomatic bags, made paragraph 3 virtually ineffective.

48. Alternative A reflected established law. The concept of inviolability of the diplomatic bag embodied in the article, although not explicitly provided for in the relevant Vienna Conventions, was nevertheless a logical extension of the inviolability of the archives, documents and official correspondence of the mission provided for in article 24 and in paragraph 2 of article 27 of the 1961 Vienna Convention on Diplomatic Relations. The inviolability of the diplomatic bag ensured full protection for the confidentiality of its contents. No examination of the bag—either directly or by scanning or other devices—could be permitted, since modern scanning devices had reached a stage of development that would make nonsense of the confidentiality of official communications. Alternative A was therefore correct in providing for explicit exemption of the diplomatic bag from examination, either directly or by scanning from a distance.

49. It had to be admitted that cases of abuse of diplomatic bags had occurred in the past and, at a time when the international community had to combat international terrorism and narcotic drug trafficking, it was important that the diplomatic bag should not be misused for such purposes. The observations addressed to the Commission by the 1987 International Conference on Drug Abuse and Illicit Trafficking, which the Special Rapporteur quoted in his eighth report (ibid., para. 239), were very relevant to that problem.

50. There was thus clearly a need for a certain flexibility in the application of the principle of inviolability of the bag. A balance had to be struck between protecting the confidentiality of the contents of the bag and preventing possible abuses. Viewed from that angle, alternative A appeared deficient and alternative C had the merit of remedying its shortcomings. He would be inclined even to agree to the use of non-intrusive examination by sniffer dogs if the authorities of the receiving State had serious doubts about the contents of the bag. The question arose whether that solution would not constitute a retrogression from established law; if an acceptable balance was maintained between confidentiality and prevention of abuses, however, there would be no retrogression, but rather a necessary progressive development of the law.
51. He favoured the deletion of article 33. Its retention would not only create a plurality of régimes, but would also defeat the purpose of the draft articles. In reality, the distinction between different categories of couriers and bags was becoming increasingly academic and meaningless. Today, among the various categories of couriers and bags, diplomatic bags—whether accompanied by diplomatic couriers or not—were the most commonly used form of official communication.

52. Finally, he was opposed to the inclusion in the draft articles of a set of regulations on the settlement of disputes. If the draft were finally to take the form of a treaty, it would be preferable, as experience had shown, to place the rules on the settlement of disputes in a separate optional protocol.

53. He suggested that the draft articles, with the revised texts proposed by the Special Rapporteur, should be referred to the Drafting Committee.

54. Mr. GRAEFRAITH congratulated the Special Rapporteur on a comprehensive report (A/CN.4/417), which clearly demonstrated that the topic was ripe for second reading.

55. In progressively developing and codifying the law on the topic, it was necessary to bear constantly in mind the standard set by the existing conventions on diplomatic and consular relations, so as to ensure that the draft articles did not depart from that standard and to strengthen, where practicable, the provisions of those conventions. The Special Rapporteur’s general approach and the suggestions he put forward in his eighth report would be particularly helpful in developing the topic along the right lines.

56. The functional approach, to which he himself attached particular importance, was often interpreted as an attempt to limit the privileges and immunities of the courier. But the Special Rapporteur suggested a much broader interpretation in his report (ibid., para. 30), according to which the purpose of the functional approach was to ensure that the courier was accorded all the facilities, privileges and immunities necessary for the performance of his task. That interpretation, which he fully endorsed, gave a scientific and theoretical value to the functional approach that went far beyond the confines of the topic and provided a very useful means of balancing the interests of States and defining legal rules.

57. As to the final form of the draft (ibid., paras. 32-38), he agreed that it would be best if it became a convention constituting a separate legal instrument. It should nevertheless retain an appropriate legal relationship with the existing codification conventions, so as to fit more readily into the network of the instruments in force.

58. The Special Rapporteur advanced cogent reasons for extending the scope of the draft, in articles 1 and 2, to communications between missions inter se. While a provision on the lines of article 1 as drafted would be a satisfactory solution and should be retained, he shared the doubts expressed about the advisability of extending the scope of the draft to the official communications of all intergovernmental organizations. It might be preferable to deal with that matter in special agreements.

59. Article 12 reflected existing law on the subject and was in general acceptable; but the problem of protection of the bag when the courier was declared persona non grata required further consideration. The Special Rapporteur acknowledged the justification of concern on that score, but believed (ibid., para. 123) that sufficient protective measures ensuring the integrity of the bag were provided for under article 30. Article 30, however, dealt with cases of “force majeure or other circumstances”, and although, if that article were broadly interpreted, a persona non grata declaration might conceivably be covered by “other circumstances”, there was no certainty that the receiving State would accept such an interpretation of an article that dealt with a different situation. On a subject as delicat as that of protection of the diplomatic bag, States would prefer to have an express provision, rather than rely on an interpretation of other, rather remote, provisions. He therefore suggested that such an express provision should be included in article 12.

60. He agreed with the Special Rapporteur’s approach to article 17, which struck the right balance between the interests of the receiving State and the sending State. He thought that the substance of the article should be retained, but that certain drafting amendments should be introduced to improve the structure and meet the concern of some States, as suggested by the Special Rapporteur (ibid., para. 147). For instance, paragraphs 1 and 3 of the article, each of which stated the same basic rule and then provided for an exception, could be combined in a single paragraph 1, reading:

1. The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State may not enter, search or inspect it:

The two exceptions, incorporated in new subparagraphs (a) and (b), would then follow, starting, respectively, with the words “Except with the consent . . .” and “Unless there are serious grounds . . .”. Paragraph 2 would remain unchanged.

61. The Special Rapporteur had rightly concluded that article 18 provided an acceptable middle ground for a compromise between States that favoured full immunity for the courier and those that favoured a restrictive approach. There could be no question of deleting article 18, since that would leave a gap in the legal regulation of the topic and would jeopardize the legal status of the diplomatic courier. He noted that article 78 of the 1975 Vienna Convention on the Representation of States, concerning insurance against third-party risks, had some relevance to paragraph 2 of article 18 in the context of defining the scope of the immunity of the courier from the civil and administrative jurisdiction of the receiving State.

62. Paragraph 1 of article 21 could be improved. He agreed with the suggestions made by the Special Rapporteur for improving the language of paragraph 1 and making it more precise (ibid., para. 177); in particular, that it should be provided that the courier was entitled to privileges and immunities from the moment of his appointment and as soon as he had received the official document referred to in article 8.
63. Article 28 was probably the most controversial provision in the draft, and also the most essential, and the Commission would be in breach of its mandate if it adopted a provision that lagged behind the terms of article 27 of the 1961 Vienna Convention on Diplomatic Relations, the standard-setting character of which had been underlined by the majority of States. Paragraph 1 of article 28 should therefore state the principle of the inviolability of the diplomatic bag in unambiguous and unrestricted terms, and the square brackets should be removed, as recommended by the Special Rapporteur, in the three alternatives—A, B and C—proposed for the article (ibid., paras. 244, 247 and 251).

64. He very much doubted whether search or inspection of the bag by scanning or other devices was admissible under article 27 of the 1961 Vienna Convention. Moreover, any positive aspects of such controls would be outweighed by the many drawbacks for official communications and the danger to the confidentiality of the bag. Such inspection would also place many countries at a disadvantage.

65. The main argument advanced in support of article 33, which provided for the creation of separate and more restrictive regimes by means of optional declarations, was that it would make for flexibility and thus increase the probability of ratification of the future convention. In his view, however, an adequate degree of flexibility was already provided for under the rules of general international treaty law. Article 33 would only weaken the legal régime of the future convention unnecessarily and create a danger of “atomization” of the legal status of the bag, which could vary in the course of a single journey. He therefore supported the Special Rapporteur’s proposal that article 33 should be deleted.

66. Mr. OGISO said he wished to ask the Special Rapporteur a specific question on article 28. If that article were adopted, would the prohibition of any examination of the diplomatic bag “directly or through electronic or other technical devices” extend to the common airport practice of putting baggage through X-ray machines? Would an airline company or a service company demand that a diplomatic bag be X-rayed be committing a wrongful act and, if so, would the State where the airport was located bear responsibility for that act?

67. Mr. BENNOUDA said that it would be useful to clarify what was meant in practical terms by electronic devices as opposed to the usual methods of metal detection. He would also appreciate clarification of the Special Rapporteur’s position regarding sniffer dogs: did he have a specific proposal to make, or was he simply suggesting that the Commission should look more closely at the measures described in the report of the International Conference on Drug Abuse and Illicit Trafficking, to which Mr. Shi had referred earlier?

68. Mr. YANKOV (Special Rapporteur) said that he would reply at once to some of the points raised at the current meeting, and would respond to the others at greater length later.

69. On the question whether X-ray controls at airport check-points constituted an examination within the meaning of the draft articles, he confirmed that technical progress had now reached the point where a sending State had absolutely no guarantee that an X-ray check for metal would not reveal the entire contents of a diplomatic bag. Countries that possessed advanced technology could well carry out a number of operations, in addition to checking for metal, without the knowledge of those present during the examination. In informal discussions with scientists and specialists on the subject, he had consistently been told that there was no guarantee that sophisticated radiological or electronic examinations would not be used to discover, not only the physical contents of diplomatic bags, but also specific items that were material and pertinent to the secrecy of communications, such as coding and decoding instructions or handbooks. He had been informed by technical specialists that, from a satellite positioned in outer space, the make and licence plate number of a car moving down a street, and even the content of a newspaper being read by someone in the car, could be identified. On the other hand, world attention had recently been drawn to the mistakes that could be made by sophisticated defence systems.

70. On the question whether the use of sniffer dogs was permissible under the draft articles, it should be borne in mind that drug abuse had become a problem of widespread concern, not only to those directly affected by the drug traffic but also in terms of general public health and safety. Hence anything that was not prejudicial to the secrecy of the diplomatic bag should be permitted in the fight against drugs. According to his own interpretation, the use of sniffer dogs was not covered by the prohibition of “examination directly or through electronic or other technical devices”, but he would welcome the views of other members on the matter. Sniffer dogs were unlikely to be so well educated that they could read the contents of a diplomatic bag, so he saw no reason why they should not be used to identify psychotropic and other substances prohibited by international conventions. He also pointed out that, under alternative C, the receiving State would have the option of requesting that a diplomatic bag be returned to its place of origin if the sending State refused to permit an examination of any kind.

71. Mr. ARANGIO-RUIZ, referring to the Special Rapporteur’s comment that airport electronic scanning devices did not offer sufficient guarantees for the inviolability of the diplomatic bag, asked what guarantees were given to a receiving or transit State that a diplomatic bag did not contain weapons or drugs? Two countries, Austria and Italy, had already made it clear that they did not favour a general prohibition of electronic scanning, and he personally was convinced that the possible presence of drugs or weapons in diplomatic bags was a very real problem.

72. Mr. OGISO again asked for clarification on the legal effect of article 28: if it were adopted, would the present practice of X-ray controls for baggage in airports be suspended for diplomatic bags?

73. Mr. TOMUSCHAT pointed out that another problem arose: airports were often run by private companies, but international obligations normally applied to State authorities. Would the State have to ensure that private companies did not scan diplomatic bags by means of electronic devices?
74. Mr. ERIKSSON said that, in a discussion on that very question at an expert group meeting within the Council of Europe, it had been assumed that the draft articles would not affect the ability of private air carriers to ensure the security of their own aircraft, but would apply to the activities of State customs officials. In most cases, of course, airport security was ensured by a combination of measures carried out by State authorities and private companies.

75. Mr. BARSEGOV, referring to comments made by other members of the Commission, said that the scope of international air transport regulations extended to private companies, and that he had never heard of unaccompanied air cargo being subjected to scrutiny at airports.

76. Mr. MAHIOU concurred with Mr. Barsegov that air transport was already regulated by a number of instruments which had to be respected by airline companies as well as by States. Even if airports were managed by private companies, they were still subject to State control through regulation. With regard to control mechanisms that operated in both the public and the private sectors, the example could be cited of motor coaches, which were subject to extremely strict regulations in terms of authorization to carry passengers, passenger identity controls, etc., and also that of privately owned data banks, whose use was monitored in many countries by government bodies set up to prevent interference in the private lives of individuals.

77. Mr. ARANGIO-RUIZ said that the Commission’s problems with article 28 did not relate to whether regulations could cover both private and public entities, for of course they could. If the future convention incorporated a provision against electronic scanning, both State authorities and private companies would be obliged to ensure that diplomatic bags were not subjected to that scrutiny. The Commission should concentrate on determining how the application of article 28 would affect situations such as those mentioned by Mr. Ogiso.

78. Mr. BENNOUNA, referring to the comments made by the Special Rapporteur, said that, although sniffer dogs were unlikely to read what was in diplomatic bags, they raised a serious problem. Could the evidence provided by their sense of smell, which was not infallible and could easily be misled by tobacco or food products, be used as grounds for opening or returning a diplomatic bag?

79. He had every sympathy with the recommendations made by the International Conference on Drug Abuse and Illicit Trafficking and would welcome any steps taken to combat the drug traffic.

80. Mr. TOMUSCHAT, referring to the comments made by Mr. Barsegov, said that, in his view, the whole problem hinged on the type of obligation the Commission wished to establish. Under human rights law, the prohibition of torture meant that a State could not use torture and must ensure that none took place in its territory. But the guarantee of free speech did not place the State under an obligation to ensure freedom of speech in private relations. There was thus a basic distinction between two types of obligation, and article 28 could be understood in either sense. The commentary could elucidate whether airline companies would be under an obligation to refrain from scanning diplomatic bags.

81. Mr. OGISO said that he had had difficulty understanding the comment made by Mr. Barsegov, because he saw article 28 as applying also to bags carried by diplomatic couriers, not to bags entrusted to the captains of aircraft.

82. Mr. YANKOV (Special Rapporteur) said that the issues raised during the discussion would fuel the Commission’s consideration of the topic over the next few days. An interesting point about counterbalance had been raised by Mr. Arangio-Ruiz. The obligation of the sending State was stipulated in article 5, and any abuse by that State of the relevant regulations would be a wrongful act and would thus entail its responsibility. That was one of the legal guarantees about which Mr. Arangio-Ruiz had asked; another was the attempt to strike a balance of interests between various categories of States throughout the draft articles.

83. An additional consideration brought out in the discussion was that the draft articles should apply to all diplomatic bags, whether accompanied or not; they should not create a régime within a régime applicable to private companies or individuals. If a State assumed obligations under an international convention, all legal entities under its jurisdiction or control must respect those obligations: article 27 of the 1969 Vienna Convention on the Law of Treaties had made it clear that internal law could not be invoked as a justification for non-compliance with international obligations.

The meeting rose at 1.05 p.m.

2077th MEETING

Tuesday, 12 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DíAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Erikkson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

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


[Agenda item 4]

2 Ibid.