

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1984

*Volume I*

*Summary records  
of the meetings  
of the thirty-sixth session  
7 May-27 July 1984*

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## NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 1980*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

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This volume contains the summary records of the meetings of the thirty-sixth session of the Commission (A/CN.4/SR.1814-A/CN.4/SR.1874), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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## MEMBERS OF THE COMMISSION

<i>Name</i>	<i>Country of nationality</i>	<i>Name</i>	<i>Country of nationality</i>
Chief Richard Osuolale A. AKINJIDE	Nigeria	Mr. Stephen C. McCAFFREY	United States of America
Mr. Riyadh Mahmoud Sami AL-QAYSI	Iraq	Mr. Zhengyu Ni	China
Mr. Mikuin Leliel BALANDA	Zaire	Mr. Frank X. NJENGA	Kenya
Mr. Julio BARBOZA	Argentina	Mr. Motoo OGISO	Japan
Mr. Boutros BOUTROS GHALI	Egypt	Mr. Syed Sharifuddin PIRZADA	Pakistan
Mr. Carlos CALERO RODRIGUES	Brazil	Mr. Robert Q. QUENTIN-BAXTER	New Zealand
Mr. Jorge CASTAÑEDA	Mexico	Mr. Edilbert RAZAFINDRALAMBO	Madagascar
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela	Mr. Paul REUTER	France
Mr. Khalafalla EL RASHEED MOHAMED AHMED	Sudan	Mr. Willem RIPHAGEN	Netherlands
Mr. Jens EVENSEN	Norway	Sir Ian SINCLAIR	United Kingdom of Great Britain and Northern Ireland
Mr. Constantin FLITAN	Romania	Mr. Constantin A. STAVROPOULOS	Greece
Mr. Laurel B. FRANCIS	Jamaica	Mr. Sompong SUCHARITKUL	Thailand
Mr. Jorge E. ILLUECA	Panama	Mr. Doudou THIAM	Senegal
Mr. Andreas J. JACOVIDES	Cyprus	Mr. Nikolai A. USHAKOV	Union of Soviet Socialist Republics
Mr. S. P. JAGOTA	India	Mr. Alexander YANKOV	Bulgaria
Mr. Abdul G. KOROMA	Sierra Leone		
Mr. José Manuel LACLETA MUÑOZ	Spain		
Mr. Ahmed MAHIOU	Algeria		
Mr. Chafic MALEK	Lebanon		

## OFFICERS

*Chairman:* Mr. Alexander YANKOV  
*First Vice-Chairman:* Mr. Sompong SUCHARITKUL  
*Second Vice-Chairman:* Mr. Julio BARBOZA  
*Chairman of the Drafting Committee:* Mr. Ahmed MAHIOU  
*Rapporteur:* Mr. Jens EVENSEN

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*Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of  
 Legal Affairs, represented the Secretary-General and acted as Secretary of the  
 Commission.*

## **AGENDA**

The Commission adopted the following agenda at its 1814th meeting, held on 7 May 1984:

1. Organization of work of the session.
2. State responsibility.
3. Jurisdictional immunities of States and their property.
4. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.
5. Draft Code of Offences against the Peace and Security of Mankind.
6. The law of the non-navigational uses of international watercourses.
7. International liability for injurious consequences arising out of acts not prohibited by international law.
8. Relations between States and international organizations (second part of the topic).
9. Programme, procedures and working methods of the Commission, and its documentation.
10. Co-operation with other bodies.
11. Date and place of the thirty-seventh session.
12. Other business.

## ABBREVIATIONS

ECA	Economic Commission for Africa
EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILA	International Law Association
ILO	International Labour Organisation
IMO	International Maritime Organization
INTELSAT	International Telecommunications Satellite Organization
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UPU	Universal Postal Union
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WMO	World Meteorological Organization
World Bank	International Bank for Reconstruction and Development

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<i>I.C.J. Reports</i>	ICJ, <i>Reports of Judgments, Advisory Opinions and Orders</i>
<i>P.C.I.J., Series A</i>	PCIJ, <i>Collection of Judgments</i> (Nos. 1-24: up to and including 1930)
<i>P.C.I.J., Series A/B</i>	PCIJ, <i>Judgments, Orders and Advisory Opinions</i> (beginning in 1931)

**PRINCIPAL CONVENTIONS**  
**cited in the present volume**

- Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) (United Nations, *Treaty Series*, vol. 500, p. 95)
- Vienna Convention on Consular Relations (Vienna, 24 April 1963) (United Nations, *Treaty Series*, vol. 596, p. 261)
- Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (United Nations, *Juridical Yearbook 1969* (Sales No.E.71.V.4), p. 140)
- Convention on Special Missions (New York, 8 December 1969) (United Nations, *Juridical Yearbook 1969* (Sales No.E.71.V.4), p. 125)
- Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87)

## CHECK-LIST OF DOCUMENTS OF THE THIRTY-SIXTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/375	Provisional agenda	Mimeographed. For the agenda as adopted, see p. xi above.
A/CN.4/376 and Add.1 and 2	Sixth report on jurisdictional immunities of States and their property, by M. Sompong Sucharitkul, Special Rapporteur	Reproduced in <i>Yearbook ... 1984</i> , vol. II (Part One).
A/CN.4/377 [and Corr.1]	Second report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	<i>Idem.</i>
A/CN.4/378	International liability for injurious consequences arising out of acts not prohibited by international law: replies received in response to the questionnaire prepared by the Special Rapporteur with the assistance of the Secretariat	<i>Idem.</i>
A/CN.4/379 and Add.1	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: information received from Governments	<i>Idem.</i>
A/CN.4/380 [and Corr.1]	Fifth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	<i>Idem.</i>
A/CN.4/381 [and Corr.1]	Second report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur	<i>Idem.</i>
A/CN.4/382	Fifth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	<i>Idem.</i>
A/CN.4/383 and Add.1	Fifth report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Robert Q. Quentin-Baxter, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.369	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-eighth session of the General Assembly	Mimeographed.
A/CN.4/L.370	Draft report of the International Law Commission on the work of its thirty-sixth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 10 (A/39/10)</i> . The final text appears in <i>Yearbook ... 1984</i> , vol. II (Part Two).
A/CN.4/L.371 and Add.1	<i>Idem</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	<i>Idem.</i>
A/CN.4/L.372 and Add.1	<i>Idem</i> : chapter III (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem.</i>
A/CN.4/L.373 [and Corr.1] and Add.1 and 2	<i>Idem</i> : chapter IV (Jurisdictional immunities of States and their property)	<i>Idem.</i>
A/CN.4/L.374 and Add.1	<i>Idem</i> : chapter V (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.375 and Add.1 [and Add.1/Corr.1] and Add.2	<i>Idem</i> : chapter VI (The law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.376 and Add.1	<i>Idem</i> : chapter VII (State responsibility)	<i>Idem</i> .
A/CN.4/L.377	<i>Idem</i> : chapter VIII (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.378	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 10, 11, 13 to 17, 20, 21, 23 (paras. 2, 3 and 5), 24 and 25	Texts reproduced in summary records of the 1862nd and 1864th meetings.
A/CN.4/L.379	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 13, 14, 16, 17 and 18	<i>Idem</i> , 1868th and 1869th meetings.
A/CN.4/L.380	<i>Idem</i> , revised text of article 19 proposed by the Special Rapporteur	Mimeographed.
A/CN.4/L.381	<i>Idem</i> , text of paragraph 2 of article 11 proposed by the Special Rapporteur	<i>Idem</i> .
A/CN.4/SR.1814- A/CN.4/SR.1874	Provisional summary records of the 1814th to 1874th meetings of the International Law Commission	<i>Idem</i> . The final text appears in the present volume.



# INTERNATIONAL LAW COMMISSION

## SUMMARY RECORDS OF THE THIRTY-SIXTH SESSION

*Held at Geneva from 7 May to 27 July 1984*

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### 1814th MEETING

*Monday, 7 May 1984, at 3.05 p.m.*

*Outgoing Chairman:* Mr. Laurel B. FRANCIS

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

#### Opening of the session

1. The OUTGOING CHAIRMAN declared the thirty-sixth session of the International Law Commission open and extended a warm welcome to members, to the Legal Counsel and to all the Secretariat staff. Mr. Romanov, Director of the Codification Division and Secretary of the Commission, was on leave. The Deputy Secretary, Mr. Valencia Ospina, had recently been appointed Deputy Registrar of the International Court of Justice, and Mr. De Saram was replacing him. The Enlarged Bureau would no doubt wish to consider the manner in which the Commission's appreciation of Mr. Valencia Ospina's work might be recorded.

2. Since the thirty-fifth session, the Commission had been represented at a number of important regional meetings: by Mr. El Rasheed Mohamed Ahmed, in August 1983, and by Mr. Reuter, in January 1984, at the sessions of the Inter-American Juridical Committee; and by Mr. Evensen at the thirty-ninth session, in November 1983, of the European Committee on Legal Co-operation. He wished to thank them for so ably representing the Commission; they would, of course, be afforded an opportunity to report on those meetings if they so wished.

3. He himself had represented the Commission at the thirty-eighth session of the General Assembly, presenting the report of the Commission on the work of its thirty-fifth session (A/38/10), a report which had in general been well received in the Sixth Committee. The Secretariat had circulated a very useful topical summary of the Sixth Committee's discussions (A/CN.4/L.369) which

gave a detailed account of the General Assembly's response to the report.

4. After fulfilling his duties in the Sixth Committee, he had prolonged his stay at United Nations Headquarters for a week, so as to hold discussions with the Legal Counsel and to meet the Secretary-General, the President of the General Assembly and the Chairman of the Advisory Committee on Administrative and Budgetary Questions. All those discussions had proved very fruitful and he was grateful to the Legal Counsel and his staff for the courtesies extended to him and for their assistance in arranging the meetings.

5. Lastly, he thanked all members, and particularly the special rapporteurs, for their valuable co-operation, which he felt sure they would continue to extend to his successor.

#### Election of officers

*Mr. Yankov was elected Chairman by acclamation.*

*Mr. Yankov took the Chair.*

6. The CHAIRMAN thanked members for the great honour of having elected him Chairman and paid tribute to the outgoing Chairman's valuable contribution to the Commission's work. The discussions in the Sixth Committee of the General Assembly had pointed to the importance, in view of the present deterioration in international relations, of concentrating all the Commission's efforts on consolidating the international legal system and promoting friendly relations and co-operation among nations. Many speakers in the Sixth Committee had emphasized the need for the Commission not to be over-ambitious, to aim for realistic targets and to prepare a carefully considered programme of work for the remaining part of its term of office, and had stressed that the Commission's tasks called for courage, serenity and wisdom.

7. As for the provisional agenda (A/CN.4/375), General Assembly resolution 38/138 of 19 December 1983, on the Commission's report for 1983, did not set any order of priorities among the various topics. The General Assembly had thus left that question to be decided by the Commission in the light of the comments made in the Sixth Committee and of the feasibility of completing the work on certain topics before the present terms of office of some members came to an end.

8. Serious consideration should be given, as pointed out in the Sixth Committee, to ensuring that the important work of the Drafting Committee kept in step with that of the Commission itself. In view of the heavy workload facing it, the Drafting Committee should be appointed at the earliest possible opportunity, so that it could hold its first meeting during the first week of the session. The same was true in the case of the Planning Group, so that it could meet while the Legal Counsel was still in Geneva.

9. Lastly, he was optimistic about the outcome of the session, given the co-operation of members and the competent assistance of the Secretariat.

*The meeting was suspended at 3.45 p.m. and resumed at 4.15 p.m.*

*Mr. Sucharitkul was elected First Vice-Chairman by acclamation.*

*Mr. Barboza was elected Second Vice-Chairman by acclamation.*

*Mr. Mahiou was elected Chairman of the Drafting Committee by acclamation.*

*Mr. Evensen was elected Rapporteur by acclamation.*

#### **Adoption of the agenda (A/CN.4/375)**

10. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/375). He suggested that it might first wish to consider item 5 (Draft Code of Offences against the Peace and Security of Mankind), leaving it to the Enlarged Bureau to decide on the order in which the other items were to be considered.

11. Mr. AL-QAYSI said that, bearing in mind the very flexible terms of General Assembly resolution 38/138, the Commission should not at the present stage decide which item to take up first. There were many factors involved and, for practical reasons, consultations should be held among members.

12. Mr. THIAM said he had no objection to the Enlarged Bureau discussing the order of consideration of the items on the agenda, more particularly in the light of the availability of the special rapporteurs and their reports. He had none the less asked the Secretariat for his second report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/377) to be considered early on, if possible.

13. Sir Ian SINCLAIR, agreeing on the need to have regard to whether the special rapporteurs were available, said he would have no objection at this stage to dealing first with item 5. The Enlarged Bureau could, however, perhaps consider the matter in the context of the other items. A number of them were ready for debate and, in his view, item 7 (International liability for injurious consequences arising out of acts not prohibited by international law) should be placed fairly high on the list.

14. Mr. DÍAZ GONZÁLEZ pointed out that, at the previous session, the Commission and the Planning Group had agreed on two important points, which had

been endorsed by the General Assembly. First, rather than strive to consider all the items on the agenda—which could be done only superficially because of time restrictions—the Commission should endeavour to move ahead in considering the topics on which it already had the requisite documentation. Secondly, priority should be attached to the meetings of the Drafting Committee, so that it could complete consideration of the draft articles already referred to it.

15. Consequently, the Commission should concentrate on only some of the items, those for which documents were available, such as the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, and also State responsibility, a topic on which scarcely any headway had been made for three years.

16. Mr. AL-QAYSI, agreeing with Mr. Díaz González, said it was hard to understand why item 9 (Programme, procedures and working methods of the Commission, and its documentation) figured on the agenda, since it was a matter normally dealt with by the Planning Group. Consideration of any given item, moreover, depended not only on the availability of the special rapporteur but also on whether the relevant report had been made ready at an early date, whether members had had time to digest it, and also on the time available to the Commission itself.

17. Furthermore, in view of the backlog of work, there was no reason why the Commission should not set up a Drafting Committee and a Planning Group in the first week of its session, and indeed of all its sessions. It would then be possible to pin-point any priority items immediately and also give a lead to the Sixth Committee so far as its own deliberations were concerned.

18. In his opinion, the Commission should proceed to adopt the provisional agenda; the Enlarged Bureau could then meet and consultations could be held with a view to achieving the progress that everyone wanted.

19. Mr. USHAKOV proposed that the Commission should adopt the agenda and leave it for the Enlarged Bureau to decide the order in which the items were to be considered.

*It was so agreed.*

*The provisional agenda (A/CN.4/375) was adopted unanimously.*

#### **Organization of work of the session**

[Agenda item 1]

20. The CHAIRMAN announced that a meeting of the Enlarged Bureau would be held the following morning, 8 May 1984, to consider the Commission's programme of work.

21. Mr. CALERO RODRIGUES said it would be helpful if the Enlarged Bureau could set an early date for the Drafting Committee to begin its work.

22. The CHAIRMAN, in response to a question by Mr. KOROMA, said that the Enlarged Bureau would be composed of the members of the Bureau of the Commission itself and Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Thiam and Mr. Ushakov. Any other member so wishing could, of course, attend the meetings of the Enlarged Bureau.

*The meeting rose at 5.45 p.m.*

## 1815th MEETING

*Tuesday, 8 May 1984, at 12.05 p.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

### Organization of work of the session (*continued*)

[Agenda item 1]

1. The CHAIRMAN informed members that the Enlarged Bureau had that morning considered the tentative timetable for the session. After a detailed discussion on the organization of work, the Enlarged Bureau submitted the following recommendations:

I. The Commission could begin by considering the following two topics:

Draft Code of Offences against the Peace and Security of Mankind (item 5) . . . . . 9-18 May

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 4) . . . . . 21 May-6 June

Should any time be left over from the discussion of item 5, this time could be allocated to item 4.

II. The Commission could then consider the following topics. The dates mentioned were approximate and would depend on the specific requirements of each topic and on the progress of work:

Jurisdictional immunities of States and their property (item 3) . . . . . 7-19 June

International liability for injurious consequences arising out of acts not prohibited by international law (item 7) . . . . . 20-27 June

The law of the non-navigational uses of international watercourses (item 6) . . . . . 28 June-6 July

State responsibility (item 2) . . . . . 9-20 July

Draft report of the Commission and related matters 23-27 July

2. The Enlarged Bureau further recommended that, in view of the financial implications, the two official holidays on 31 May and 11 June 1984 should be observed by the Commission.

3. Mr. KOROMA asked when the Drafting Committee could be expected to begin its work.

4. The CHAIRMAN said that every effort would be made to convene the Drafting Committee and the Planning Group as soon as possible. Consultations were under way regarding membership of the two bodies.

5. Mr. McCaffrey, noting that the Enlarged Bureau's recommendations made no reference to item 8 (Relations between States and international organizations (second part of the topic)), said he assumed that the Special Rapporteur for that topic had given his consent in that connection, so as to allow more time for consideration of other items.

6. As many as eight working days had been allotted to item 5 but only seven to, for instance, item 6, which seemed quite inadequate in view of the fact that the report on the topic under item 6 contained a full set of draft articles.

7. The CHAIRMAN said that Mr. McCaffrey's assumption regarding item 8 was correct. As mentioned earlier, the number of days for item 5 had been allotted on the understanding that, if any time was left over, the Commission would immediately take up consideration of item 4. All the suggested dates were subject to adjustment in the light of the exigencies of the situation.

8. In response to a question by Sir Ian SINCLAIR regarding item 4, and speaking also in his capacity as Special Rapporteur for that topic, he said it was his intention to suggest that the Commission should start where it had left off at the previous session, dealing first with the articles outstanding and then taking up the new articles.

9. Mr. REUTER said he could endorse the recommendation that, purely for financial reasons, the Commission should not meet on Thursday 31 May (Ascension Day) or on 11 June (Whit Monday), which were official holidays at the United Nations Office at Geneva. Nevertheless, because of its extremely heavy work-load, the Commission had frequently met on Ascension Day in the past. Obviously, the Commission was again ready to meet at least on Ascension Day if, despite the financial implications, the competent services of the United Nations so wished.

10. The CHAIRMAN said that Mr. Reuter's views undoubtedly expressed the feelings of all members and should be reflected in the Commission's records.

11. In response to a question by Mr. AL-QAYSI, he said that the Legal Counsel would be available for a meeting of the Planning Group on 21 May 1984. There was no reason, however, why the Planning Group should not meet before that date.

12. Sir Ian SINCLAIR said it was his understanding that the question of varying the length of the Commission's sessions, which had been discussed in the Planning Group the previous year, would be considered in plenary

at the current session. It would perhaps be advisable to take up that question fairly rapidly.

13. The CHAIRMAN agreed that the Commission should find time to consider the matter on the basis of the recommendations made in the Planning Group and the Enlarged Bureau.

14. Mr. NI said he could agree to the Enlarged Bureau's recommendations but noted that no reference had been made to item 9 (Programme, procedures and working methods of the Commission, and its documentation), which had not been discussed in plenary for some time. In reply to a letter dated 19 July 1983 from the Chairman of the Committee on Conferences relating to the shortening of sessions or a biennial cycle of sessions, the Commission's outgoing Chairman had stated that the question would be discussed at the current session.<sup>1</sup> Important matters regarding the economy and efficiency of the United Nations were involved and he would therefore like to know whether time would be allocated to deal with the item in plenary as well as in the Planning Group.

15. The CHAIRMAN suggested that it should be left to the Planning Group to make the necessary recommendations in the light of the comments made by Mr. Ni and Mr. Al-Qaysi.

16. Mr. CALERO RODRIGUES, also expressing his agreement with the Enlarged Bureau's recommendations, stressed that the Planning Group and the Drafting Committee should be allowed sufficient time to do their work: both those bodies needed far more time than they had had in the past. It would also be useful if some thought could be given to the possibility of making available to the Commission, in writing, the comments of any members who could not be present at the Commission's sessions.

17. Mr. KOROMA suggested that the Enlarged Bureau might wish to consider whether draft articles should be referred to the Drafting Committee before agreement on them had been reached in plenary.

18. Mr. REUTER said he welcomed the suggestion by Mr. Calero Rodrigues, since the only way the Commission could gain time was to make much more regular use of such a procedure. It had been suggested many times, should be discussed by the Planning Group and was, indeed, a procedure followed by many learned associations.

19. Mr. LACLETA MUÑOZ said that the Commission's programme and methods of work should remain flexible. In the light of his experience at the previous session as Chairman of the Drafting Committee, he proposed that the Chairman of the Commission should, after each meeting, take soundings in order to find out the number of speakers for the following meeting. If there were not enough, they could be listed for a later meeting and the time thus gained could be allotted to the Drafting Committee. Such a procedure would overcome the backlog of work and be in no way prejudicial to the progress of the work of the Commission itself.

<sup>1</sup> A/AC.172/96/Add.1, annex.

20. The CHAIRMAN suggested that the Commission should adopt the Enlarged Bureau's recommendations regarding the timetable for the session.

*It was so agreed.*

*The meeting rose at 1.15 p.m.*

## 1816th MEETING

*Wednesday, 9 May 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

### **Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364,<sup>1</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>2</sup> A/CN.4/L.369, sect. B)**

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/377). The consideration of this topic had as its basis the draft code adopted by the Commission at its sixth session in 1954,<sup>3</sup> which read as follows:

##### *Article 1*

Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished.

##### *Article 2*

The following acts are offences against the peace and security of mankind:

(1) Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Yearbook ... 1984*, vol. II, pp. 151-152, document A/2693, para. 54.

(3) The preparation by the authorities of a State of the employment of armed force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation of a competent organ of the United Nations.

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(7) Acts by the authorities of a State in violation of its obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character.

(8) The annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.

(10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:

- (i) Killing members of the group;
- (ii) Causing serious bodily or mental harm to members of the group;
- (iii) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (iv) Imposing measures intended to prevent births within the group;
- (v) Forcibly transferring children of the group to another group.

(11) Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities.

(12) Acts in violation of the laws or customs of war.

(13) Acts which constitute:

- (i) Conspiracy to commit any of the offences defined in the preceding paragraphs of this article; or
- (ii) Direct incitement to commit any of the offences defined in the preceding paragraphs of this article; or
- (iii) Complicity in the commission of any of the offences defined in the preceding paragraphs of this article; or
- (iv) Attempts to commit any of the offences defined in the preceding paragraphs of this article.

#### Article 3

The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code.

#### Article 4

The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order.

2. Mr. THIAM (Special Rapporteur), introducing his second report (A/CN.4/377), said that, at its previous session, the Commission had discussed at length the general problems of codifying offences against the peace and security of mankind. The question of the draft's content *ratione materiae* had not created any problems, but the same was not true of the content *ratione personae*, particularly the possibility of attributing international criminal responsibility to a State, and also whether the Commission's mandate was to prepare the statute of an international criminal jurisdiction. The Commission had decided to request instructions from the General Assembly on those two points.<sup>4</sup> Resolution 38/138, adopted on 19 December 1983 by the General Assembly following its consideration of the Commission's report on the work of the previous session, gave no specific replies and simply recommended that the Commission, "taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly... should continue its work on all the topics in its current programme".

3. The questions the Commission had submitted to the General Assembly had a political aspect and the Commission's work would be hampered until the necessary political will was clearly expressed. As a rule, he had sought to draw a distinction between what was desirable and what was possible. Two tendencies, not always reconcilable, had emerged during the Commission's discussion of the topic in 1983. An idealistic tendency to go as far as possible and draw all the consequences from the principles enunciated had emerged alongside a tendency that endeavoured to take account of realities. He would attempt to ensure that the Commission's work moved ahead and avoided the pitfalls.

4. The aim of the second report was to enable the Commission to define the topic's scope *ratione materiae*. The draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954 would have to be reviewed and, if necessary, offences added to the list contained therein. It should be noted that it was difficult to identify among international offences the ones that constituted offences against the peace and security of mankind. As a starting-point, the Commission might adopt the approach that every offence against the peace and security of mankind was an international offence; but not every international offence was necessarily an offence against the peace and security of mankind. The Commission must therefore be careful not to include all international offences in the draft and to elaborate a draft international criminal code.

5. That approach, however, was not enough, and at its previous session the Commission had adopted the criterion of extreme seriousness in order to take a further step towards identifying offences against the peace and security of mankind.<sup>5</sup> Only international offences that were of extreme seriousness would be taken into consideration. The problem was that the criterion of extreme seriousness was highly subjective, but it was not unique

<sup>4</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 69.

<sup>5</sup> *Ibid.*, p. 16, paras. 64-65.

to the topic, because the same criterion was used in internal law to classify offences. The seriousness of offences against the peace and security of mankind was evaluated by the fact that they affected peoples, nations, ethnic groups, States, values, beliefs, civilizations or the common heritage of mankind. Crimes in that category were, moreover, characterized by the scope of their destructive and disastrous effects. The criterion of seriousness therefore had to be used in classifying offences against the peace and security of mankind, but the seriousness was quite special in view of its international dimension. That criterion would be a starting-point, but the extent to which it could be applied would have to be determined by studying the relevant international instruments.

6. The report was divided into two parts dealing, respectively, with offences covered by the 1954 draft code and offences classified after 1954. Article 2 of the 1954 draft defined the topic's scope *ratione materiae* and each paragraph dealt with a separate offence. The article merely enumerated the acts which were regarded as offences against the peace and security of mankind, without indicating any general criterion for defining offences in that category. Before any attempt was made to identify guiding principles, the offences listed in the 1954 code could be combined into three categories: (a) offences against the sovereignty and territorial integrity of States; (b) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (c) crimes against humanity.

7. The offences in the first category, which were enumerated in paragraphs 1-6 and 8-9 of article 2 of the 1954 draft, consisted basically of aggression and its offshoots. In addition to aggression itself, the definition of which had been formulated only in 1974,<sup>6</sup> the 1954 draft listed a number of offences which could be regarded as acts of aggression: any threat of aggression, preparations for aggression and the organization or encouragement of the organization of armed bands for incursions into the territory of another State. The 1954 code also referred to civil strife, the undertaking, encouragement or toleration of activities calculated to foment civil strife in another State, terrorism, annexation and intervention in the internal or external affairs of another State by means of coercive measures of an economic or political character. In 1954 the classification of all those acts as offences against the peace and security of mankind had already found its justification in *jus cogens* or in the Charter of the United Nations, so that it should not take up a great deal of the Commission's time, except perhaps from the standpoint of the wording.

8. With regard to offences violating the prohibitions and limitations on armaments or the laws and customs of war, article 2, paragraph 7, of the 1954 draft code referred to violations of treaties designed to ensure international peace and security by means of such prohibitions or limitations. Paragraph 12 also mentioned acts in violation of the laws and customs of war. In 1954 condemnation of acts of that kind had also been justified by var-

ious international instruments, ranging from the St. Petersburg Declaration of 11 December 1868<sup>7</sup> to the Geneva Protocol of 17 June 1925.<sup>8</sup> The question of nuclear weapons, often discussed in the General Assembly, had still not been settled. Logically, it would be inconceivable to prohibit the use of weapons of mass destruction without mentioning nuclear weapons. The United Nations had, moreover, adopted a resolution which made it a crime for a State to use nuclear weapons first.<sup>9</sup> Since nuclear weapons were deterrents intended to prevent war, some people concluded that a ban on them would run counter to the very concept of deterrence. Hence they were weapons of mass destruction that should not be prohibited, but they should not be used.

9. Crimes against humanity included genocide, dealt with in article 2, paragraph 10, of the 1954 draft code, and the inhuman acts listed in paragraph 11 of that article. The Commission had considered it appropriate to distinguish between genocide and other inhuman acts "committed against any civilian population on social, political, racial, religious or cultural grounds". The terms used in 1954 reflected the influence exerted at the time by the Charter of the Nürnberg International Military Tribunal,<sup>10</sup> in which offences against the peace and security of mankind had been regarded as being bound up with a state of war. It was for that reason that emphasis had been placed on protection of the civilian population. The problems raised by offences of that kind lay in the fact that it was difficult to distinguish them from other violations of human rights. Not all violations of human rights fell within the purview of international law, whereas crimes against humanity did, and were at the top of the scale among all international offences. In that connection, it should be noted that many violations of human rights fell within the scope of internal law and came under the jurisdiction of internal civil or criminal courts. Crimes against humanity also differed from violations of human rights in that they involved attacks on groups, races, religious beliefs and opinions and were often politically motivated. In addition, such crimes were often particularly horrifying. Consequently, it could not be said, as some writers claimed, that any violation of human rights fell within the scope of international law. Violations of human rights committed within a State could be regarded as crimes against humanity only if they were extremely serious and an affront to the conscience of mankind.

10. The second part of the report dealt with developments after 1954. It had to be determined whether new offences could be regarded as offences against the peace and security of mankind. Since 1954, a number of international instruments, such as conventions, declarations and resolutions, had condemned practices and acts which

<sup>6</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>7</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (*British and Foreign State Papers*, 1867-1868, vol. LVIII (1873), p. 16).

<sup>8</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

<sup>9</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>10</sup> United Nations, *Treaty Series*, vol. 82, p. 284.

had previously been regarded as lawful. Many of them could have been condemned long ago, because they were contrary to *jus cogens*. In the light of positive law, as set forth in the relevant instruments, he had reached the conclusion that certain acts could now be classified as offences against the peace and security of mankind. The list of instruments given in his second report (*ibid.*, para. 44) was not exhaustive, but it should enable the Commission to determine which offences should be included in the future draft code. In that respect, the Commission could envisage either a minimum content or a maximum content.

11. In terms of the minimum content, the draft would have to include a number of the offences listed. Colonialism could have been regarded as a crime under international law even in 1954, but not until 1960 had the United Nations adopted a declaration outlawing colonialism.<sup>11</sup> It would be noted that colonialism was regarded as an international crime under article 19 of part 1 of the draft articles on State responsibility prepared by the Commission.<sup>12</sup>

12. *Apartheid* had been condemned in countless General Assembly resolutions. The list contained in the report under consideration (*ibid.*, para. 44 (3), footnote) should also include resolution 3068 (XXVIII) of 30 November 1973, by which the General Assembly had adopted the International Convention on the Suppression and Punishment of the Crime of *Apartheid*. All those resolutions left no doubt about the fact that *apartheid* was regarded as an international crime by the international community as a whole.

13. The existence of treaties relating to protection of the environment and the fact that article 19 of part 1 of the draft articles on State responsibility considered serious disturbances of the environment as international crimes militated in favour of the inclusion of such offences in the draft code.

14. The taking of hostages, an increasingly common practice, was becoming a means to exert pressure on States and even, in some cases, an instrument of government policy. The practice had emerged during the Second World War, but strictly against the background of belligerence. It was now applied even when no state of war existed and, in some instances, was coupled with violations of the protection of diplomats. The time had therefore come to decide whether acts of violence against persons enjoying international protection should not also be covered by the code.

15. The problem of mercenarism, which was of great concern to young States, had arisen in 1977 during the elaboration of the Additional Protocols<sup>13</sup> to the 1949

Geneva Conventions.<sup>14</sup> At that time, mercenaries had not been considered as combatants and had been recognized as having only the basic guarantees granted to all human beings. Mercenaries, who were now recruited to fight against national liberation movements or to destabilize young States, were motivated primarily by money and were linked to the entity or group for which they were fighting only by a contract of service. The problem of mercenarism had been discussed in the General Assembly and in regional institutions such as OAU, which had adopted at Libreville, on 30 June 1977, the Convention for the Elimination of Mercenarism in Africa,<sup>15</sup> which stated that mercenarism was "a crime against peace and security in Africa". It could with equal ease be regarded as a crime against all of mankind.

16. As to the maximum content of the draft, the dividing line between offences against the peace and security of mankind and other international crimes could change, depending on current trends and sensitivities. For example, Vespasien Pella had wanted offences against the peace and security of mankind to include such acts as the counterfeiting of money, forgery of passports or documents, the abusive exercise of police powers on the high seas, the dissemination of false or distorted news or forged documents and insulting behaviour towards a foreign State (see A/CN.4/377, para. 70). Pella had been of the opinion that the concept of an offence against the peace and security of mankind must be as broad as possible. However, if the Commission adopted such a position, it would be straying from the objective set by the United Nations. The General Assembly had not requested the Commission to elaborate an international criminal code, but to prepare a code of offences against the peace and security of mankind. In so doing, it had wanted to emphasize the fact that such offences were a particular category of international crimes and were of a particularly odious nature. If the content were broadened, the code would become inconsequential.

17. Accordingly, the content of the code should be kept to the minimum. It would first be necessary to deal with the offences listed in 1954, subject to drafting amendments. They were: aggression, preparation for aggression and threat of aggression; the organization of armed bands for incursions into the territory of another State; civil strife, organized, undertaken or encouraged by a State in the territory of another State; violations of the prohibitions and limitations on armaments, on military training or on fortifications; the annexation of the territory of a State by another State; interference in the internal or external affairs of a State by another State; war crimes; genocide; crimes against humanity; and terrorism. Some violations of international law recognized by the international community since 1954 might be added, including colonialism; *apartheid*; the taking of hostages; mercenarism; the threat or use of violence against internationally protected persons; a serious disturbance of the public order of the receiving country by an internationally protected diplomat when such dis-

<sup>11</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960).

<sup>12</sup> For the text of draft article 19 (International crimes and international delicts) and the commentary thereto, see *Yearbook ... 1976*, vol. II (Part Two), pp. 95 *et seq.*

<sup>13</sup> Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

<sup>14</sup> Geneva Conventions of 12 August 1949 for the protection of war victims (United Nations, *Treaty Series*, vol. 75).

<sup>15</sup> OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

turbance was backed or encouraged by a State; the taking of hostages organized or encouraged by a State; and acts causing serious damage to the environment.

18. Many young States wanted economic aggression to be recognized as an offence, but in the definition which had now been worked out with great difficulty, aggression was regarded as involving military action, and it would be dangerous to extend it to the economic sphere. Naturally, everyone condemned the exploitation of weaker countries by powerful countries, but the connotation of "economic aggression" seemed to be more political than economic. The offending acts were indeed quite clear, but another term should be found to designate them.

19. He had refrained from presenting any draft articles, since his main concern was to discover which offences the Commission intended to rank as offences against the peace and security of mankind. Similarly, he had left aside the questions of principle that formed the general part with which every criminal code began.

20. The CHAIRMAN thanked the Special Rapporteur for his clear and well-structured introduction to the second report, one of the strong points of which was concision. It would serve as a very good basis for discussion and led to hope that draft articles could be prepared before the end of the current term of office of members of the Commission.

21. Mr. MALEK said that the second report of the Special Rapporteur (A/CN.4/377), was, like the first report (A/CN.4/364), excellent both in substance and in form. In particular, the Special Rapporteur had made a very reasonable choice of the specific points to be examined on a priority basis and had dealt with them in a remarkably succinct and clear manner.

22. He himself had received a copy of the second report only by miracle, a few days before leaving his country to take part in the present session. It was Lebanon's unfortunate lot to be experiencing the war of others on its own soil. For many years, it had often been cut off from the rest of the world, precisely because of odious acts that came under various legal headings and were exactly the same as many of the acts mentioned by the Special Rapporteur as constituting offences against the peace and security of mankind. The list of the crimes Lebanon had suffered from for the past 10 years was all too long. First and foremost was the crime of aggression, in most of its forms, as described in General Assembly resolution 3314 (XXIX) on the Definition of Aggression. But the list also included the organization, undertaking or encouragement by a State of activities calculated to foment civil strife in the territory of another State; the occupation of the territory of a State by another State; interference by the authorities of a State in the internal or external affairs of another State; crimes against humanity, including attempted genocide and conspiracy to commit genocide with intent to destroy, in whole or in part, a particular religious group; and the undertaking or encouragement by the authorities of a State of terrorist activities in another State or the toleration by the authorities of a State of activities in preparation for terrorist acts in another State.

23. Yet there appeared to be no reference to such criminal acts in the outline of the new draft code proposed by the Special Rapporteur in the conclusion to his report, whereas the 1954 draft code did in fact refer to them. That was doubtless an oversight, since international terrorism was now being devised and perpetrated in such a way that it had become a serious threat, if not a terrible scourge, for all countries, including the great Powers, to which terrorism dictated the external and internal policies they were to follow if their interests throughout the world were to remain unharmed.

24. Nor did the report refer to other acts which had been mentioned in the 1954 draft: conspiracy to commit any of the offences defined as offences against the peace and security of mankind, direct incitement, complicity and attempts to commit any of the offences defined as offences against the peace and security of mankind, which were as much criminal acts as the offences themselves. For example, conspiracy by a State or a group of States to break up, divide, dismember or even completely destroy another State by fomenting civil strife and encouraging various religious groups to kill one another was both a crime against the peace and security of mankind and, in some cases, the crime of genocide.

25. He was not a historian describing the factors in the Lebanese tragedy or a witness in a case duly brought before a competent criminal court. Hence he could not venture to point a finger at the perpetrators of the countless offences against the peace and security of mankind that had been committed against Lebanon for so many years. He nevertheless felt duty-bound, as a citizen of that martyred country and a member of the Commission, to draw the Commission's attention to a situation which, although it represented a real danger for the entire world, did not appear to be enough of an affront to the conscience of the world for rules to be elaborated in order to forestall other similar situations. In the face of an international crime, of an offence against the peace and security of mankind, new properly developed obligations of solidarity were needed to replace the present chaotic and anarchical procedures, procedures which, rather than discouraging or preventing the crime, wittingly or unwittingly channelled it in the opposite direction. He reserved the right to comment further in that connection during the consideration of part 2 of the draft articles on State responsibility.

26. The report under consideration was basically a list of offences that were or might be classified as offences against the peace and security of mankind. Chapter I of the report contained a list of the offences covered by the 1954 draft code and chapter II dealt with acts which had been condemned in conventions, declarations and resolutions adopted after 1954 and might be included in the future code as being or constituting offences against the peace and security of mankind. He had no comments to make on chapter II, which listed the international instruments reproduced in the compendium prepared by the Secretariat (A/CN.4/368 and Add. 1). The list did not appear to follow any particular order.

27. The same was not true of chapter I in which the offences covered by the 1954 draft were divided into

three separate categories: (a) offences against the sovereignty and territorial integrity of States; (b) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (c) crimes against humanity, also called crimes of *lèse-humanité*. It was difficult to understand the criterion for that classification. For the purposes of classification by a particular criterion, the distinction that could be drawn between the various offences was in many cases an artificial one that did not stand up under close analysis. Why, for example, were war crimes and crimes against humanity not classified under the same heading? Crimes against humanity, like war crimes, could be committed in time of war or during an armed conflict. In both cases, the victims were always human beings, whether as members of a religious, ethnic, racial or other particular group, as prisoners of war or as wounded or sick members of the armed forces in the field or at sea. That was the meaning of the 1949 Geneva Conventions for the protection of war victims,<sup>16</sup> who were always human beings, just as human beings were the victims of crimes against humanity and had to be protected. In both cases, the offences in question were committed against human beings by violations of human rights. It was perhaps in a chapter with such a title that war crimes, crimes against humanity, genocide and *apartheid* should be classified. In any event, further consideration should be given to the question of the classification of the offences to be covered in the code, something that would be quite difficult to resolve despite its seeming simplicity.

28. He had no comments to make on the list of offences against the sovereignty and territorial integrity of States covered in the 1954 draft code and would merely point out, once again, that it mentioned international terrorism, which was one of the most hateful crimes and had to be included in the new draft code. As the Special Rapporteur noted in his report (A/CN.4/377, para. 19), the list of offences in that category was supported by a very broad conventional base and could not be called into question today.

29. The section of the report dealing with crimes against humanity reproduced the text of paragraphs (10) and (11) of article 2 of the 1954 draft code (*ibid.*, para. 28)—the article which listed the various acts classified as offences against the peace and security of mankind. Paragraph (10) defined genocide, without actually mentioning it, on the basis of the definition of that crime contained in the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>17</sup> while paragraph (11) defined crimes against humanity in general, without actually naming that category of crimes. For the sake of greater precision, it might be advisable, with the definition of typical offences, such as crimes against humanity and the crime of genocide, to use the designation given to them in the relevant instruments of international law.

30. In referring to the acts listed in paragraphs (10) and (11) of the above-mentioned article 2 as constituting the crime of genocide, on the one hand, and a crime against

humanity, on the other, the Special Rapporteur noted (*ibid.*, para. 29) that “all these acts constitute genocide”. In fact, all those acts constituted crimes against humanity. A crime against humanity was not necessarily a crime of genocide. Yet the reverse was true: genocide was necessarily a crime against humanity with characteristics and dimensions of its own. It was, moreover, a concept that the Special Rapporteur faithfully employed by grouping all the acts in question in a separate section entitled “Crimes against humanity”. The Special Rapporteur also drew attention (*ibid.*) to the prevailing opinion that “genocide is a crime against humanity and is covered by that category of offences”. The Special Rapporteur then pointed out (*ibid.*, para. 30) that “article 19 of part 1 of the draft articles on State responsibility highlights genocide by including it in the list of serious violations of international law”. That was precisely the criticism that could be and actually was made of article 19, which appeared to preclude crimes against humanity, of which genocide was only one particular or particularly serious case. Article 19 made no reference to that kind of crime which, in view of the constituent elements, might in some cases be the same as or similar to the crime of genocide in its objective.

31. As a specific example, again taken from the tragic and cruel situation in his country, in Lebanon the “civilian population”—a term employed in the definition of crimes against humanity—was composed of many religious groups that lived together and alongside one another in nearly every town and village throughout the land. According to the definition of the crime of genocide, any act committed with intent “to destroy, in whole or in part” any of those groups was a crime of genocide. According to the definition of a crime against humanity, any act committed for the purposes of “extermination” of any “civilian population” was a crime against humanity: it was not genocide. Nevertheless, such an act could be and sometimes was committed against a group in a number of towns or villages, just as the victims could be and sometimes were all the elements of a group composing the population in more than one village. No crime could ever be as horrible and cruel; a crime—and this was a very important point—prepared, organized and encouraged by the authorities of foreign States.

32. A similar crime against humanity with a special dimension was conspiracy, also prepared, organized and encouraged by the authorities of foreign States, with the intent not actually “to destroy” a religious group, in whole or in part—which would make it genocide—but to use every type of coercion and force the members of that group into mass emigration, into the most inhuman kind of “deportation”—within the meaning of a crime against humanity, not within the meaning of the crime of genocide—for inordinately egotistical political reasons. What was taking place in Lebanon was not a civil war, even if the situation was often presented as such by the international community so that it could evade its obligations. He reserved the right to revert to that point during the consideration of part 2 of the draft articles on State responsibility.

<sup>16</sup> See footnote 14 above.

<sup>17</sup> United Nations, *Treaty Series*, vol. 78, p. 277.

33. In analysing the concept of crimes against humanity, the Special Rapporteur had sought to highlight their most distinctive basic feature, within the overall context of violations of human rights. He had, quite rightly, pinpointed it in the motive for the act. He drew a distinction (*ibid.*, para. 32) between a violation of human rights and a crime against humanity: in the first case, the individual as such was affected, while in the second case the individual was affected merely because of his religion, race or culture. In other words, the feature of a crime against humanity, whether it took the form of "murder", "extermination", "enslavement", "deportation" or "persecutions" committed against parts of "the civilian population", was basically the motive or the fact that the victims belonged to a particular religion, race or culture. Legal writers were unquestionably unanimous on that point, namely on the fact that it was the motive, a motive of that kind, that formed the essence of a crime against humanity.

34. A crime, however serious, that affected the individual as such and not as a member of a religious, racial or cultural group was certainly not a crime against humanity. It could in some cases simply take the form of an international crime and, accordingly, be governed by international law. That was why he experienced difficulty in understanding the meaning and scope of some passages in the report, such as the following: "Mass violations of human rights by a State within its own sphere of sovereignty are no different, in essence, from crimes of *lèse-humanité* committed by a State against the nationals of another State" (*ibid.*, para. 34); "... beyond a certain point, violations of a human right are in substance tantamount to crimes against humanity" (*ibid.*, para. 37); "If the violation [of human rights] goes beyond a certain point, it falls within the category of international crimes and, depending on its seriousness, it may be at the top of the scale, in other words it may be a crime against humanity. There is strictly speaking no difference of nature between the two concepts, only a difference of degree. Once they exceed a certain degree of seriousness, violations of human rights are indistinguishable from 'crimes against humanity'" (*ibid.*, para. 40). It should again be emphasized that the seriousness of a violation of a human right could make the violation a crime under international law, but not necessarily a crime against humanity.

35. Again, it had to be borne in mind that the status of the author of the crime also played a decisive role in the legal classification of the crime. According to the definition of a crime against humanity contained in the 1954 draft, the act must have been committed by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities in order for it to be classified as a crime of that kind. That condition had not been laid down in the corresponding definition contained in the Charter of the Nürnberg Tribunal.<sup>18</sup> It had been added by the Commission, as the Commission had explained in its commentary to article 2, paragraph (11), of the 1954 draft, "in order not to characterize any inhuman act committed by a private in-

dividual as an international crime".<sup>19</sup> It would be helpful to know what the Commission thought now. In that connection, it should be noted that genocide could be regarded as such if it had been committed by private individuals, although, in view of its dimensions, it could in fact be committed only by the authorities of a State or with the toleration of such authorities. The Commission's commentary to subparagraph (c) of Principle VI of the "Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal"<sup>20</sup> also seemed to indicate that the Commission tended to be of the opinion that crimes against humanity could continue to be classified as such if they were committed by a State against its own population.

36. He reserved the right to comment at a later stage on chapter II of the report, which dealt with offences classified since 1954. At this stage he would merely endorse the list of acts in chapter III of the report (*ibid.*, para. 79). Nevertheless, it might be necessary to add other acts, such as the unlawful seizure of aircraft and unlawful acts against the safety of civil aviation. The Special Rapporteur's comments on the criterion of extreme seriousness (*ibid.*, paras. 8 and 12)—a highly subjective criterion which was bound up with the state of the international conscience at a given moment, since there was no objective dividing line between the most serious and the less serious and, even if such a dividing line did exist, it would shift with changes in international opinion—were entirely relevant. They reflected an undeniable state of affairs that could explain why the unlawful seizure of aircraft and unlawful acts against the safety of civil aviation had been excluded from the list of offences the Special Rapporteur was proposing to include in the future draft code. Members of the Commission would remember how outraged international public opinion had been by such acts at the time when the Convention for the Suppression of Unlawful Seizure of Aircraft<sup>21</sup> and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>22</sup> were being elaborated and when crimes against the safety of international civil aviation had been taking place with alarming frequency. He was convinced that, at that time, there would never have been the slightest hesitation to classify such acts as offences against the peace and security of mankind. It nevertheless remained to be seen whether the "state of the international conscience at a given moment" should be regarded as the decisive element or determining factor in all cases, since the seriousness of a criminal act was often determined by the nature of the act itself.

37. Mr. THIAM (Special Rapporteur) said that, although he would not for the time being comment on the substance of the observations by Mr. Malek, he would point out, in order to channel the discussion, that the general part would of course deal with some aspects of the questions of conspiracy, direct incitement, complicity or attempts to commit criminal offences. With regard to

<sup>19</sup> *Yearbook ... 1954*, vol. II, p. 150, document A/2693, para. 50.

<sup>20</sup> *Yearbook ... 1950*, vol. II, p. 377, document A/1316, paras. 120-124.

<sup>21</sup> United Nations, *Treaty Series*, vol. 860, p. 105.

<sup>22</sup> *Idem*, *Juridical Yearbook 1971* (Sales No. E.73.V.1), p. 143.

<sup>18</sup> See footnote 10 above.

Mr. Malek's comment concerning the first sentence of paragraph 29 of the report, the word "genocide" was an error of transcription and should be replaced by the words "crimes against humanity".

38. Mr. RAZAFINDRALAMBO said that the Special Rapporteur was to be commended for his second report's clarity and concision, which had also been the features of the first report. The Special Rapporteur began the report (A/CN.4/377, paras. 2-6) with a reminder that, at its previous session, the Commission had decided to submit to the General Assembly two controversial questions, on the subject's content *ratione personae*, and on the implementation of the code. The Special Rapporteur then moved on immediately to the question of the scope *ratione materiae*, proposing to formulate a list of offences against the peace and security of mankind. The Special Rapporteur had thus confined his task, for the time being, to preparing the list of offences that might be included in the code and had decided to revert to the two above-mentioned questions, which had been left pending, after the General Assembly and Governments had provided replies. However, in view of their preliminary nature, it would have been preferable not to leave aside general questions at the current stage. In particular, it was advisable to include in the draft an introductory part enunciating the general principles of international criminal law and the criteria to be used to classify offences against the peace and security of mankind. In the absence of any opposition in the Commission on grounds of principle and in the light of the favourable reactions of many delegations in the Sixth Committee of the General Assembly, he considered that priority should be given to considering the principles to be included in a preliminary part and to reaching consensus on that point, so as to avoid any doubts about the Commission's position.

39. Admittedly, in article 2, paragraph (13), and article 4 of the 1954 draft code, the Commission had already formulated a number of general legal concepts, but those provisions in no sense constituted an exhaustive list of the general principles of general criminal law applicable in international law. Was it enough, as the Special Rapporteur had stated in his first report (A/CN.4/364, para. 49), to say that some general principles of criminal law were an integral part of public international law? The general principles in question would still have to be clarified. The Commission itself had found it necessary to deal in part 1 of the draft articles on State responsibility with state of necessity (art. 33) and self-defence (art. 34)<sup>23</sup> as circumstances precluding wrongfulness, although the latter concept had already been dealt with in Article 51 of the Charter of the United Nations. But those were justifications which, in the 1954 draft, had either been mentioned too specifically (article 2, paragraphs (1) and (3), referred only to self-defence against aggression) or been totally overlooked (there was no reference to state of necessity). It was none the less important to specify the instances in which a state of necessity could be invoked as an excuse for conduct contrary to

international law and to describe its effects: a state of necessity did not remove the unlawful nature of an act and could only exonerate the author from punishment.

40. There were other principles whose application to criminal law was not always recognized by every legal system, such as the principle of the non-retroactivity of criminal laws, which the common-law system did not apply, or the principle of the non-applicability of statutory limitations to war crimes and crimes against humanity, which was expressly embodied in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>24</sup> An examination of the international instruments relating to war crimes and offences against the peace and security of mankind, as well as of international practice and the practice of States, could also lead to a generally recognized definition of such crimes and to the general criteria on which they were based. Indeed, the Special Rapporteur himself had done just that by expressing the view that the seriousness of an offence against the peace and security of mankind was evaluated in terms of the breach of universal values affecting "peoples, races, nations, cultures, civilizations and mankind" (A/CN.4/377, para. 8). In his own view, account had to be taken of such criteria in determining the minimum and maximum content of the list of offences classified after 1954. Those same criteria might also justify, in the eyes of the international community, the choice ultimately proposed for the content. For that reason, a general definition of an offence against the peace and security of mankind had to be included in an introduction to the draft code.

41. With regard to the list of offences drawn up by the Special Rapporteur (*ibid.*, para. 79), a judicious distinction was drawn between offences covered by the 1954 draft and offences covered by later instruments. The division of the offences listed in the 1954 draft into three categories (*ibid.*, para. 15) was also particularly relevant. In that connection, the offences violating the prohibitions and limitations on armaments should be radically amended because, as formulated in article 2, paragraph (7), of the 1954 draft, they were plainly outdated. It was also essential to determine the extent to which the pretext of national defence could be validly invoked in order to prevent application of the international disarmament instruments in force. In addition, a special provision should be devoted to prohibitions, through bilateral or multilateral treaties, on the use of weapons of mass destruction and chemical, biological and atomic weapons.

42. As to crimes against humanity, the Special Rapporteur had rightly raised the question of the specificity of human rights in the general context of such crimes, rightly pointing out, however (*ibid.*, para. 34), that violations of such rights beyond a certain point might, as Mr. Malek had observed, fall into the category of crimes against humanity. The same criteria as those used to classify crimes against humanity should be used to determine that point. In that regard, violations of the right to life, as well as murders or assassinations by groups, whether or not they were acting on behalf of the lawful

<sup>23</sup> Yearbook ... 1980, vol. II (Part Two), pp. 34 *et seq.*

<sup>24</sup> United Nations, *Treaty Series*, vol. 754, p. 73.

authorities, might, like genocide, constitute an example of a qualitative or quantitative shift to the category of crimes against humanity.

43. He agreed with the Special Rapporteur's minimum list of offences classified after 1954. Colonialism and *apartheid*, to take only two examples, would be unanimously regarded as crimes, but mercenarism might give rise to some objections, as illustrated by the difficulties encountered in the Sixth Committee of the General Assembly in connection with the elaboration of an international convention against the recruitment, use, financing and training of mercenaries. It should not be forgotten that General Assembly resolution 3103 (XXVIII) of 12 December 1973, which qualified the use of mercenaries as a criminal act, had been adopted by an overwhelming majority, yet 13 of the most important countries had voted against it. However, as stressed in article 1, paragraph 3, of the Convention for the Elimination of Mercenarism in Africa, adopted by OAU in 1977,<sup>25</sup> the crime of mercenarism was "a crime against peace and security in Africa", a rule that had repeatedly been observed in the practice of African courts.

44. Should the minimum list proposed by the Special Rapporteur be extended? In that connection, the Special Rapporteur had referred to the proposals made by Vespasien Pella in his work on the codification of international criminal law. In the present state of international law and international practice and in the light of the criteria mentioned earlier, it would be difficult to regard the five acts listed by Pella and cited by the Special Rapporteur (*ibid.*, para. 70) as offences against the peace and security of mankind, particularly since some of them were usually nothing more than internal offences covered by national criminal codes. However, economic aggression, which was characterized by the flagrant interference of one State in the internal affairs of another State in breach of the principle of the sovereignty of peoples over their natural resources and wealth, might be serious enough to be classified as an offence against peace. That was not a purely academic possibility, for in resolutions 2184 (XXI) and 2202 (XXI) of 12 and 16 December 1966, the General Assembly had expressly regarded violations of the economic and political rights of indigenous peoples as crimes against humanity. Unless, as the Special Rapporteur had proposed, a more appropriate term could be found, economic aggression might if necessary be included in a revision of article 2, paragraph (9), of the 1954 draft, which considered it an offence for the authorities of a State to intervene in the internal or external affairs of another State by means of coercive measures of an economic character.

45. Lastly, in view of the renewed outbreak of acts of piracy, accompanied by serious acts of violence and murders, consideration should also be given to the possibility of deeming such acts to be crimes against humanity.

*The meeting rose at 1 p.m.*

<sup>25</sup> See footnote 15 above.

## 1817th MEETING

*Thursday, 10 May 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

### **Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)**

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. REUTER said he welcomed the moderation and good sense displayed by the Special Rapporteur in pinpointing the questions, texts and problems to which the Commission should confine itself, more particularly since the topic could lend itself to flights of fancy and not necessarily to moderation. He agreed, not without regret and only after considerable reluctance, that the Commission should refrain from tackling the general problem of violations of human rights. Needless to say, in today's world, a violation of human rights—even a right of the individual—came under international law when it was characterized, but it did not constitute a threat to the peace and security of mankind. Accordingly, the Commission should examine only intentionally collective violations of human rights that were an actual threat to the peace and security of mankind.

2. On the important question of methodology, after careful reflection he was of the opinion that the Special Rapporteur's proposal that the various offences to be covered by the draft should be considered one after the other was, in the final analysis, the best possible course, both at the present stage and later on. The elaboration of a draft code would take a long time and it must meet the requirements of Governments, which nowadays were more concerned about the utility of works of codification. The problems would thus have to be examined carefully and comprehensively. By not replying to the two questions submitted to it, the General Assembly had very wisely left it to the Commission to shed light on the matter, to take up the problems itself, to pin-point its task and, first of all, to define what constituted an international crime. Naturally, the General Assembly knew,

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

as did all members of the Commission, what an international crime was in the moral sense and in the emotional sense—and emotion was a sound and valid criterion. Yet the members of the Commission were, first and foremost, jurists. Hence, to define an international crime meant, first of all, determining the legal consequences of conduct that would be deemed to constitute an international crime.

3. The Commission had already tackled that aspect of the question by formulating article 19 of part 1 of the draft articles on State responsibility, but that article was simply a frame that still had to be filled. The Commission could start by specifying the régime governing international crimes. Two problems were resolved in the draft articles on State responsibility proposed by Mr. Riphagen, articles which established that certain crimes were imprescriptible and that international crimes were directed against all States and thus entailed rights and obligations for all States. But many of the issues still had to be resolved. To that end, when it was not possible, as in systems of internal law, to determine all of the consequences of the concept of a crime, the Commission could also study each international crime, find out in each case what was established in the conventions and resolutions and, in the absence of any specific provisions, determine what it could itself propose. It was an empirical method whereby the Commission could more easily delimit the subject-matter. After such an overview, the Commission would see whether it was in a position to formulate a number of general rules of international law on international crimes.

4. In his second report (A/CN.4/377, para. 44), the Special Rapporteur listed a number of relevant legal instruments and the Commission should, in principle, examine all of them. After verifying the ones that genuinely related to the special crimes constituted by offences against the peace and security of mankind, the Commission should move on from the offences that were most clearly defined because they formed the subject of a widely ratified convention, and those that were fairly clearly defined because they formed the subject of a General Assembly resolution adopted by a large majority, to the offences that were more open to question and less clear-cut. Only then could it take a position. It could, for example, start with genocide and aggression. Nevertheless, he had reservations regarding a number of “potential” offences. For instance, the non-physical, yet social, cultural and moral destruction of minorities was deplorable, but it was quite difficult to deal with because it involved too many tragedies and too many States that were torn apart for the sake of survival. In any event, that should not act as the point of departure. Again, the use of nuclear weapons eluded law, and to some extent even *jus cogens*, because of the very nature of such weapons. In that connection, members were aware of arduous endeavours undertaken by ICRC and by experts in that field since 1977.

5. For each kind of international crime, the Commission would have to determine the questions to be considered and decide first of all whether it was to examine the problem of criminal responsibility of the State or

criminal responsibility of the individual, or indeed both types of responsibility. A number of comments were called for in that regard. The Special Rapporteur had cited three cases (*ibid.*, paras. 54 *et seq.*) and it was obvious that, in the taking of hostages, some acts were committed by States and others were not. The same was true of mercenarism, for some mercenaries were demonstrably agents of the State, whereas others acted for economic or ideological groups. Again, terrorism by individuals existed alongside terrorism by the State. Accordingly, the Commission, in examining crimes committed in each of those instances, would have to examine both the crime as committed by the individual and the crime as committed by the State. In his opinion, in public international law there could be no comprehensive régime for criminal responsibility on the part of the State because of a problem that was absolutely insoluble: namely the problem of punishment. It was difficult to see how a general, impersonal rule could be formulated to determine in advance the nature and scope of the punishment to be inflicted on a State committing a crime. Each time it would involve one single case and hence a political matter, for as Professor Tunkin had pointed out, criminal responsibility of a State was political responsibility.

6. On the other hand, a partial régime for criminal responsibility on the part of the State did exist, in that it was possible to establish the offence that constituted a crime and the conditions under which the crime was attributed to the State and its organs. In any event, even if the Commission decided to consider only crimes by individuals, in order to define them it would be compelled to take a position regarding crimes by the State. For instance, if it sought to establish rules for the punishment of natural persons responsible for a war of aggression—which was an act by a State—it would first have to establish the crime of the State, and only then could it establish the criteria for the punishment of State agents recognized as guilty, in the organs of the State, of being instruments of the crime committed by the State. Hence the Commission would have to examine matters case by case, for it would be unable to lay down general rules. It was easy for some acts constituting crimes by a State to be attributed to a natural person and to punish, for example, a soldier who had cut off the hands of a prisoner of war. It was not so easy in the case of other crimes, such as the use of nuclear weapons—if indeed that were recognized as a crime. One of the two people who had dropped the only two nuclear bombs used so far in wartime had not known what he was doing; after he had found out, he had retired to a monastery.

7. Still other matters would have to be considered. Reference had been made to the imprescriptibility of crimes, something that was admissible in the case of individuals since it was limited by natural death. However, he was reluctant to accept it in the case of crimes committed by a State, which was enduring, because imprescriptibility would constitute a legal obstacle. He would none the less rally to the view of the majority. The principle of the non-retroactivity of criminal laws, mentioned by Mr. Razafindralambo (1816th meeting), was acceptable if the crime in question was genuinely new. However, for a

crime defined in a convention or elsewhere, could not the law be made retroactive so as to bring support to a moral doctrine that had been flouted? Certainly the Commission could look into that matter, but in the knowledge that the problem would vary depending on the crime. There again, the Commission would not be able to lay down too general a rule. It would also have to say whether it was ready to endorse the death penalty, when the trend under criminal law in a number of countries was to abolish it. Other technical problems also arose, such as provocation, attempted crime, complicity and acts of justification.

8. The Commission would have to proceed very cautiously on the question of creating an international criminal jurisdiction. From the outset, it should avoid subordinating everything to the establishment of a system of international criminal jurisdiction, and should bear in mind that no such thing had ever existed, for even the Nürnberg Tribunal had been no more than the joint court of several States. On the other hand, the Commission could consider the question of creating an international organ, even one with powers that were only very weak, such as establishing optional reports on the facts, and could go further at a later stage in its work. It should therefore make a choice, for each crime, and determine whether the crime came within the jurisdiction of an international organ or a national court. In the latter case, the Commission would have to resolve the problem of the formulation of rules if the competent courts were national courts, for example in such matters as the obligation to enforce punishment and extradition.

9. Lastly, the Commission could not, for offences against the peace and security of mankind, which would always have a political aspect to them, establish penal rules as strict as was possible in the case of national rules. Nevertheless, it must at least formulate rules that were fairly precise.

10. Mr. CALERO RODRIGUES said he was always somewhat sceptical about the topic under discussion. It was as if one were to build a house knowing it could never be made habitable. One might have the necessary theoretical and practical foundations, one could construct the walls—prepare a list of offences—one could put in doors and windows—establish penalties—but one could never give it a roof, because no solution would be found to the problem of a jurisdiction. Nevertheless, the second report of the Special Rapporteur (A/CN.4/377) was the kind that facilitated the Commission's work: it was concise, contained no non-essentials and allowed for consideration of the issues in a specific manner.

11. He agreed with the statement by the Special Rapporteur (*ibid.*, para. 4) that the Commission should confine itself to less controversial questions until more precise replies were received from Governments. He also recognized, as the Special Rapporteur stated (*ibid.*, para. 5), that the right approach would be to reconsider the 1954 draft code and expand the list of offences therein as appropriate, not so much in light of the need to arrive at a minimum agreement as to implement General Assembly resolution 38/132 of 19 December 1983, in which

the Commission was requested to elaborate “as a first step, an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report”.

12. The Special Rapporteur pointed out in his second report (*ibid.*, para. 6) that his purpose was to formulate a list of offences today considered as offences against the peace and security of mankind, in other words to bring up to date the list prepared by the Commission in 1954. Although that would provide a good starting-point, it would only partly fulfil the Commission's mandate under General Assembly resolution 38/132. The Commission might, of course, feel it was preferable at the present stage not to embark upon the introduction but to start with the less difficult matter of preparing a list of offences, in which case it should explain its reason to the General Assembly by developing what was said in the last paragraph of the Special Rapporteur's report (*ibid.*, para. 83).

13. Furthermore, in paragraph 69 of its report on its thirty-fifth session<sup>4</sup> the Commission had taken the view that the international offences to be covered by the code should be determined by reference to a “general criterion”, an idea put forward by the Special Rapporteur in his first report (A/CN.4/364), paras. 51-52). The Special Rapporteur had said then that such a criterion would have the advantage of serving to link the list of offences to a common denominator and so make it clear that the list would be provisional and not exhaustive. In the second report, that concept of a common denominator, which the Special Rapporteur had seemed to consider essential, had apparently been reduced to the single criterion of seriousness. However, seriousness, though undoubtedly important, could not be regarded as the sole criterion and an attempt should therefore be made to achieve greater precision in that regard, preferably by reference to the peace and security of mankind, as in the title of the code, so as to distinguish crimes against the peace and security of mankind from other international crimes. In making that comment, he fully realized that an apparent link with the peace and security of mankind could be found in certain generic definitions of international crimes, such as the definitions by Georges Scelle and Vespasien Pella and, of course, in article 19 of part 1 of the draft articles on State responsibility.<sup>5</sup>

14. As to the list of offences in the 1954 draft code, the Special Rapporteur concluded in his second report (A/CN.4/377, para. 41) that, subject to the wording of the articles, that list should be maintained. It was possible to agree with that conclusion, provided any modification of the wording was not just cosmetic, for it had not been the Commission's intention that the 1954 draft should be final.

15. The Special Rapporteur had divided the offences listed in the 1954 draft code into three categories (*ibid.*, para. 15), presumably for the sake of presentation alone

<sup>4</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 16.

<sup>5</sup> See 1816th meeting, footnote 12.

and not in order to maintain the division in the list to be established. The first of the three categories related to offences against the sovereignty and territorial integrity of States (article 2 of the 1954 draft), and in that connection he agreed in principle with the Special Rapporteur's affirmation (*ibid.*, para. 19) that the list of offences was supported by a very broad conventional base and could not be called into question today.

16. The first offence covered by article 2 of the 1954 draft, aggression, left no room for doubt. However, the second offence, threat of aggression, involved perhaps too subjective a criterion; for instance, at what point would such a threat be deemed to arise? The same applied to the third offence in that category, namely preparation of the employment of armed force. Did such preparation in fact differ from threat of aggression? At what point did preparing armed force cease to be mere preparation and become preparation to employ it? Indeed, it could be argued that the ultimate purpose of such preparation was to employ armed force. Hence those first three offences should be modified and even combined into a single offence along the lines of the Definition of Aggression.<sup>6</sup>

17. The fourth and fifth offences, which involved the same problem, dealt respectively with organizing, tolerating or participating in armed bands, and with undertaking or tolerating organized activities to foment civil strife in another State. Was permitting the organization of an armed band to be a crime from the outset? At what point should the State be held responsible for tolerating the organization of an armed band? When did a group of individuals become an armed band? The same could be said for organizing and fomenting civil strife, for in both cases it was difficult to establish an offence before it had been committed. It must not be forgotten that the draft code was not a resolution or declaration in which loose wording was possible, and sometimes even necessary, if agreement was to be reached; it was a legal instrument that would give rise to specific legal consequences in that responsibility for the crimes in question would be attributed to individuals.

18. The sixth offence was terrorism, which was central to the code in the modern world, since States believed that only international co-operation and possibly penal provisions could help to combat it. Annexation of territory, the seventh offence covered, was plainly a crime; but the wording of the eighth offence, "intervention ... in the internal or external affairs of another State, by means of coercive measures of an economic or political character", was inadequate. At what point did intervention actually occur? When did economic measures become coercive? He trusted that the Special Rapporteur would find a more convincing formula.

19. The second category of offences, covered by paragraphs (7) and (12) of article 2 of the 1954 draft, related to violations of the prohibitions and limitations on armaments or of the laws and customs of war. As to the first of the two offences in that category, he took the view

that, if a State was bound by treaty to some form of disarmament, failure to comply with its obligations under the treaty could be regarded as an offence against the peace and security of mankind. The wording, however, was somewhat old-fashioned and a more general formula would be preferable. The second offence, "acts in violation of the laws or customs of war", must be deemed a crime, but he wondered whether every violation—even of a minor technical nature—of the 1949 Geneva Conventions and the Protocols thereto,<sup>7</sup> should also be regarded as a crime. The Conventions themselves made some distinction on that score and it would therefore be advisable to be more precise.

20. The third category of offences involved crimes against humanity, which were covered by paragraphs (10) and (11) of article 2 of the 1954 draft, and dealt in effect with the concept of genocide. In his second report (*ibid.*, para. 31), the Special Rapporteur discussed the wider problem of crimes against humanity in the context of human rights in general, which implied that certain new crimes might be added to the third category. He would revert to that question later in the debate.

21. Mr. NI said that the Special Rapporteur, with a sound sense of judgment, had selected as a point of departure the compilation of a catalogue of the offences to be included in the draft code in the light of the development of international law on the subject since 1954. The controversial questions of the content *ratione personae* and of the feasibility of preparing a statute for an international criminal jurisdiction could await more mature consideration and clearer guidance from Governments and the General Assembly.

22. That did not mean, however, that the offences—and particularly new offences not covered by the 1954 draft—were entirely divorced from the concept of violations committed by States. Indeed, there were situations in which the offence could be committed only by a State, with the result that inclusion of that offence in the catalogue implied that States should be considered as subjects of violations of international law. The list of offences was therefore clearly tentative, a situation which left the Special Rapporteur the latitude not to submit draft articles at the present stage.

23. The question now before the Commission was that of the content *ratione materiae* or, in other words, of what constituted an offence against the peace and security of mankind. Extreme seriousness should serve as a criterion in that respect, but the question then arose of how the abstract term "seriousness" was to be understood and evaluated. An offence against the peace and security of mankind differed from other offences because of its impact, since it affected not only individuals but also the fundamental interests of certain groups and institutions, thereby threatening the basic rights and interests of all mankind. Offences against the peace and security of mankind could be distinguished from human rights violations in that the victims of the latter were usually individuals and thus the internal law of a State was involved. Yet when human rights violations reached

<sup>6</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>7</sup> See 1816th meeting, footnotes 13 and 14.

a certain magnitude and frequency, they could become offences against the peace and security of mankind. One example in that respect was provided by the draft convention against torture and other cruel, inhuman or degrading treatment or punishment, now under consideration in the Commission on Human Rights.

24. In his second report (A/CN.4/377, para. 15), the Special Rapporteur's division of the offences covered by the 1954 draft code into three main categories was generally acceptable and his analysis of the distinguishing characteristics of an offence against the peace and security of mankind, despite its brevity, was admirably lucid and precise. However, the Special Rapporteur called into question the condemnation of the use of nuclear weapons because of the suggestion in some quarters that prohibition of such use would run counter to the strategic concept of deterrence (*ibid.*, para. 27). It was said (*ibid.*, para. 52) that atomic weapons, despite their capability for mass destruction, were supposed to afford protection, in other words to safeguard peace and security. The Special Rapporteur had therefore asked the Commission to take a decision in that regard and to establish whether special reference should be made in the draft code to the use of such weapons.

25. However, it was doubtful whether the deterrent effect of nuclear weapons could provide genuine peace and security for mankind. Admittedly, the question was being considered in disarmament forums, but lawyers could not remain indifferent to the legality or illegality of the use—at least the first use—of such weapons of mass destruction. It served no useful purpose to ask whether they were intended to provide protection. If such weapons allegedly possessed a kind of “deterrent effect”, one might well ask: “who deters whom?”. The constant struggle for supremacy in “power of deterrence” would only lead to an intensification of the arms race and the production of weapons of mass destruction which endangered the peace and security of mankind. He appreciated the complexities of the problem, but wished to express his gratitude to the Special Rapporteur for raising it in connection with the work on the draft code.

26. As to the offences classified since 1954, the Special Rapporteur's list of relevant instruments, although not exhaustive, was most helpful. The list of new offences given in the report (*ibid.*, para. 79, sect. B) was rightly headed by the heinous crimes of colonialism and *apartheid*. As to the others, items 12 (the taking of hostages) and 16 (the taking of hostages organized or encouraged by a State) should be merged, since the latter constituted a particular case of the former; besides, inclusion of item 16 in the list would prejudge the question as to whether States should be held liable for crimes in international law.

27. In the matter of mercenarism (item 13), it should be stressed that, in practice, mercenaries were used by colonial and racist régimes against national resistance movements, as was apparent from General Assembly resolution 3103 (XXVIII) of 12 December 1973, and from the Convention for the Elimination of Mercenarism in Af-

rica adopted by OAU in 1977.<sup>8</sup> The serious threat posed by mercenarism was not, however, confined to Africa and the inclusion of item 13 thus met the requirements of the modern era.

28. In the case of item 14 (the threat or use of violence against internationally protected persons), the title should be reworded so as to give an indication of the seriousness and brutality of violations. It did not seem justifiable to include in a list of offences against the peace and security of mankind all individual cases of violence against diplomats.

29. He experienced similar doubts regarding item 15 (serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person). The Special Rapporteur emphasized in his report (*ibid.*, para. 57) the duty of internationally protected persons under the 1961 Vienna Convention on Diplomatic Relations to respect the laws and regulations of the host State. Yet disregard for local laws could not be considered as an offence against the peace and security of mankind. The concept of a threat to public order was, moreover, a relative one, and the question of interference in the internal affairs of the receiving State was in fact already included in the list of offences covered by the 1954 draft: by article 2, paragraph (9), concerning intervention by a State in the affairs of another State.

30. He entirely agreed with the Special Rapporteur's decision to exclude from the list of offences such acts as the counterfeiting of banknotes and the forgery of passports (*ibid.*, para. 78). The issue of “economic aggression” was worth studying in depth, bearing in mind that political independence was purely theoretical in the absence of economic independence. The Special Rapporteur was right, however, in saying that it was not easy to determine what constituted economic aggression (*ibid.*, para. 80). Perhaps economic aggression began with foreign interference and domination in economic matters, but the question of when such interference and domination amounted to aggression remained largely uncertain.

31. Mr. McCAFFREY said he shared the scepticism expressed by Mr. Calero Rodrigues regarding the viability of the present topic and admired the Special Rapporteur's courage and earnest efforts to advance the consideration of such a sensitive and difficult subject. Without dwelling too much on the substance of the report (A/CN.4/377), he wished at the present stage to give a preliminary indication of his reasons for finding it difficult to accept. In the first place, the Commission might well be putting the cart before the horse by drawing up a list of offences against the peace and security of mankind before it had elaborated a sufficiently precise criterion—or rather set of criteria—for identifying those offences.

32. At a time when the Commission had not yet developed analytical tools for compiling a list of offences, he would, for his part, refrain from commenting on most of the items on the Special Rapporteur's proposed list (*ibid.*, para. 79). Many of them were political in tone and amounted essentially to labels. The problem was, of

<sup>8</sup> *Ibid.*, footnote 15.

course, an inherited one and definitely not the fault of the Special Rapporteur. If, however, a particular act or practice was proposed for inclusion in the code because it had been the subject of certain resolutions, declarations or conventions, then a thorough analysis of the position as to the voting and ratification of those instruments, as well as their historical background and current significance, was imperative. Only in that way was it possible to determine whether they represented nothing more than aspiration or whether, to use the language of the commentary to article 19 of part 1 of the draft articles on State responsibility, they were supported by “all the essential components of the international community”.<sup>9</sup> Furthermore, the vagueness and generality of most of the proposed items would make it nearly impossible for a tribunal to determine whether a violation had taken place. The items would be very difficult to evaluate in the abstract without an assessment of the context in which they operated. As already pointed out by a previous speaker, a set of general introductory provisions was essential in that connection.

33. That consideration brought him back to his earlier point, namely that the Commission might find itself putting the cart before the horse. His reasons were both procedural and substantive. From the procedural point of view, it should be remembered that the General Assembly, in paragraph 1 of resolution 38/132 of 19 December 1983, had invited the Commission to continue its work on the elaboration of the draft code by elaborating “as a first step” an introduction as well as a list of offences. In paragraph 2 of the resolution, the Secretary-General had been requested to seek the views of Member States and intergovernmental organizations regarding the questions raised in paragraph 69 of the report of the Commission on its thirty-fifth session.

34. A number of conclusions could be drawn from that resolution. To begin with, the “first step” in the Commission’s work must be the formulation of a set of introductory provisions. Such an approach was indeed only logical, and also a substantive reason for deferring any attempt to formulate a list of offences until the general part—which constituted the foundation of any code—had been elaborated.

35. His second conclusion was that it would be premature to embark upon the elaboration of a list of offences before receiving and analysing the replies to the Secretary-General’s inquiry mentioned in paragraph 2 of General Assembly resolution 38/132. Clearly the content of any list would be significantly affected by the answers to such questions as whether States as well as individuals should be subjects of the code, and whether the draft should be accompanied by the establishment of an international criminal court. It was extremely doubtful whether all countries would recognize the same kind of universal jurisdiction in respect of all the items on the Special Rapporteur’s proposed list as States had historically recognized in connection with piracy.

<sup>9</sup> *Yearbook ... 1976*, vol. II (Part Two), p. 119, paragraph (61) of the commentary.

36. For those procedural and substantive reasons, the Commission should proceed with all the caution that the present delicate topic required, and first formulate a set of introductory provisions as the necessary foundation for the edifice it proposed to build. He further suggested that, before attempting to build that edifice, the Commission should draft a set of criteria for identifying offences against the peace and security of mankind. In that regard, he fully associated himself with the remarks made by Mr. Reuter at the present meeting.

37. Formulations such as “the most serious of the most serious offences” were of doubtful value, constituting, as they did, little more than slogans. In that connection, he welcomed the clear analysis by Mr. Calero Rodrigues. It was essential to determine what actually constituted an offence against the peace and security of mankind before the Commission could hope to decide whether, and to what extent, certain human rights violations constituted violations of the code. Indeed, that point had to be clarified even for the purpose of evaluating the items already listed in the 1954 draft code. To give an example, was an embargo an “activity calculated to foment civil strife”? A similar problem arose with regard to radio broadcasts, whether by a private entity protected by freedom of expression or by a State-run broadcasting authority. The meaning of “intervention . . . in the . . . external affairs of [a] State” was also unclear.

38. He shared the doubts expressed by Mr. Calero Rodrigues regarding such concepts as the threat of aggression and preparation for the employment of armed force and endorsed his comments on the important difference between the formulation of a code of offences against the peace and security of mankind and the drafting of a resolution or even a declaration. The difference was vital in that the provisions of the code were intended to have precise legal—and indeed penal—consequences. It was therefore essential to be precise in identifying and defining the offences in question.

39. In conclusion, he urged the Commission to attempt, as a first step, to elaborate an introduction and, as the next step, to formulate more precise criteria for the identification of offences against the peace and security of mankind.

#### Drafting Committee

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the Drafting Committee should consist of the following members: Mr. Mahiou (Chairman), Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair and Mr. Ushakov, together with Mr. Evensen, *ex officio* member in his capacity as Rapporteur of the Commission. As in previous years, any other members of the Commission could attend the Committee’s meetings if they so wished.

*It was so agreed.*

**Programme, procedures and working methods  
of the Commission, and its documentation**

[Agenda item 9]

**MEMBERSHIP OF THE PLANNING GROUP  
OF THE ENLARGED BUREAU**

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed that the Planning Group of the Enlarged Bureau should consist of the following members: Mr. Sucharitkul (Chairman), Mr. Al-Qaysi, Mr. Díaz González, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Stavropoulos, Mr. Thiam and Mr. Ushakov, together with Mr. Evensen, *ex officio* member in his capacity as Rapporteur of the Commission. The special rapporteurs were invited to attend the Group's meetings, where appropriate, and any other members of the Commission could attend if they so wished.

*It was so agreed.*

*The meeting rose at 12.40 p.m.*

**1818th MEETING**

*Friday, 11 May 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Draft Code of Offences against the Peace and Security of  
Mankind<sup>1</sup> (continued) (A/CN.4/364,<sup>2</sup> A/CN.4/368  
and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)**

[Agenda item 5]

**SECOND REPORT OF THE SPECIAL RAPPORTEUR  
(continued)**

1. Mr. AL-QAYSI said that, although some aspects of the topic under consideration might appear to be illusory, the Commission should not be unduly sceptical about its viability and should remember that, in its resolution 38/132 of 19 December 1983, the General

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

Assembly had recalled its belief that the elaboration of the draft code could contribute to strengthening international peace and security. As a body of independent experts, the Commission had to follow the General Assembly's instructions and, while remaining alive to political realities, it had to strive to reach solutions that were applicable in practice, leaving it to Governments to make political assessments of those solutions. Only when sufficient efforts had been made in the Commission and political judgments of the results achieved had been reached by the competent bodies could the question of viability be decided.

2. As the Special Rapporteur had pointed out, the sole aim of his second report was to have the Commission determine the list of acts classified as offences against the peace and security of mankind and hence delimit the subject *ratione materiae* (A/CN.4/377, para. 6). He agreed with the Special Rapporteur that it would have been pointless for him to submit draft articles prejudging the existence of offences that had not yet been recognized as such by the Commission. The Special Rapporteur had, moreover, not had any other choice. The debates in the Sixth Committee of the General Assembly had not dispelled uncertainty with regard to the content of the topic *ratione materiae* (see A/CN.4/L.369, paras. 55-95) and the General Assembly had not provided guidance on the questions submitted to it by the Commission. Until more precise replies were received from the General Assembly and from Governments; the Special Rapporteur was right to concentrate on less controversial questions.

3. His own view was that the words "as a first step" in paragraph 1 of General Assembly resolution 38/132 applied both to the elaboration of a list of offences and to the elaboration of an introduction, in contradistinction to the controversial issues mentioned in paragraph 2 on which the views of Governments and intergovernmental organizations had been requested. The reference to paragraph 69 of the Commission's report on its thirty-fifth session in both paragraph 1 and paragraph 2 of that resolution confirmed that interpretation. The views requested might, however, not be forthcoming for some time, thereby creating difficulties for the Commission because of the interrelationship between the contents of the topic *ratione materiae* and *ratione personae* and between those elements and the question of implementation.

4. The criterion of "extreme seriousness" adopted by the Commission to characterize offences against the peace and security of mankind was admittedly an abstract and highly subjective notion that was, as the Special Rapporteur had indicated, "bound up with the state of the international conscience at a given moment" (A/CN.4/377, para. 8). That was, however, also true of concepts such as "the peace and security of mankind" and "international public order". Mankind, nations and order did not exist in a vacuum, but only in relation to the international community and to States, in other words in relation to political entities. The political tone of the offences to be included in the draft code was thus perfectly understandable.

5. The cardinal point was, however, what conduct the political entities collectively considered to be prohibited

conduct constituting offences against the peace and security of the collectivity. In view of the lack of guidance and the general, abstract and highly subjective nature of the criterion chosen, the only way the Commission could solve the problems it might face was to follow an empirical approach. The general criterion should be linked to the relevant conventions and declarations, which were the political expression of the parameters of prohibited conduct partaking of the nature of offences. For each offence, the Commission should determine the issues to be examined from the viewpoint of the criminal responsibility of States and of individuals. The final political decision would, of course, be left to States.

6. There was no denying the fact that the 1954 draft code, discussed in chapter I of the report, should be the starting-point for the Commission's current work. It must, however, be borne in mind that the particular circumstances which had prompted its elaboration had been those of the Second World War. Times had changed since then and the provisions of the 1954 draft code therefore had to be adapted and refined in the light of present-day circumstances and developments since 1954. The Special Rapporteur's analysis of the distinctions between crimes against humanity and violations of human rights (*ibid.*, paras. 31-42) was of particular interest. The Special Rapporteur had in particular raised the question whether the category of offences grouped under the term "crimes against humanity" was governed by a régime distinct from the general régime of the protection of human rights (*ibid.*, para. 31). As far as human rights and the régime governing them were concerned, there was often a tendency to lose sight of differences in levels of social and economic development, cultural background and outlook; but in a heterogeneous world community, over-generalizations of that kind were dangerous to say the least. The Special Rapporteur's opinion in that connection (*ibid.*, paras. 37 and 40) was to be commended.

7. With regard to chapter II of the report, dealing with offences classified since 1954, he said he agreed with the basic thrust of the minimum content approach. It was, however, not yet clear whether the Special Rapporteur would include definitions of the offences to be listed in the draft code or whether he would simply refer to offences covered in existing conventions. In the latter case, it was clear that some of the offences to be included would still have to be defined in terms that were universally acceptable. A case in point was that of mercenarism, on which a United Nations *Ad Hoc* Committee was still trying, not without considerable controversy, to prepare a convention. It was to be hoped that the successful completion of the *Ad Hoc* Committee's work would eliminate any difficulties that might arise.

8. With regard to nuclear weapons, the Special Rapporteur had been right to state (*ibid.*, para. 53) that "the Commission must choose between what is desirable and what is possible and maintain a reasonably realistic stance". As to the argument concerning the deterrent effect of nuclear weapons, two points were in order. The first was that, in all likelihood, what would be sought was a prohibition on the first use of nuclear weapons, and such a prohibition would not destroy the deterrent

effect of such weapons. The second was that, if the deterrence argument were taken to its logical conclusion, it would amount to a complete negation of non-proliferation, which would mean that some States were allowed to deter their potential enemies, and others were not.

9. That question, like all the other questions involved in the topic under consideration, was inevitably a political one. As Mr. Ni had pointed out (1817th meeting), lawyers could not remain silent on the question of the legality or illegality of nuclear weapons. As Mr. Reuter had said, however (*ibid.*), the members of the Commission could, as lawyers, only express their personal opinions on that question and they must do so, even if their convictions were to be rejected by political bodies.

10. In the absence of a clear definition of the term "economic aggression", he was inclined to agree with the view expressed by the Special Rapporteur (A/CN.4/377, para. 80) that that expression was more suited to political parlance.

11. Mr. SUCHARITKUL said he fully agreed with the arguments put forward by the Special Rapporteur in his excellent report (A/CN.4/377). The need to draw up a list of offences against the peace and security of mankind had already been amply demonstrated and the Commission now had to move forward by taking the 1954 draft code as a starting-point. Some of the offences covered by the 1954 draft had, of course, become somewhat out of place because, as part of its study of State responsibility, the Commission had formulated a number of basic principles, such as the one relating to circumstances precluding the wrongfulness of an act that would otherwise be wrongful. Article 19 of part 1 of the draft articles on State responsibility was, in fact, a framework article that had to be supplemented. For the time being, the legal consequences of the international crimes referred to in that provision had not been clearly defined, but the Commission's discussions at its previous session had shown that the present study related only to crimes under international law, as opposed to ordinary international crimes, extra-national, transnational or transboundary crimes, and organized crimes that were internationally recognized or punishable. There appeared to be agreement that, for a crime to be classified as an offence against the peace and security of mankind, it had to be a crime under international law. In traditional international law, that requirement had, moreover, long governed the crime of piracy on the high seas.

12. The extreme seriousness of the international crimes which constituted offences against the peace and security of mankind was another characteristic to which the Special Rapporteur had drawn particular attention. The seriousness of a crime depended on circumstances and, in particular, on the number of victims or the amount of destruction it caused. On the basis of those two characteristics, the Commission should be able to move forward and leave aside political problems, as well as basic principles, such as those relating to attempted crimes, complicity, conspiracy or justified acts.

13. The Commission must, however, try to find other characteristics and criteria to identify offences against

the peace and security of mankind. To that end, the wording of the topic under consideration might be instructive. Although he himself would not go as far as to contrast offences against peace and offences against security, as Mr. McCaffrey had suggested (1817th meeting), he did think that a distinction might be drawn between the three concepts of peace, security and mankind. The concept of the international community dated back to the beginnings of international law, to the time of Grotius, when it had been confined to the European States, if not to the Mediterranean coastal States. Although Thailand had already exchanged diplomatic missions with France and the Netherlands as early as the seventeenth century, it had not been until the first Peace Conference held at The Hague in 1899 that it had become part of the international community along with China, Japan and Persia. Only at the second Peace Conference, also held at The Hague in 1907, had 16 Latin-American countries become part of the international community. Even in 1945, the authors of the Charter of the United Nations had referred to international peace and security, rather than to the peace and security of mankind. The concept of mankind was thus relatively new; previously, it had been mentioned only in connection with piracy on the high seas, since pirates had been regarded as enemies of mankind. Humanitarian law was an even more recent concept. There was thus quite a marked difference between the original concept of the "international community" and that of "mankind". Many United Nations resolutions and, in particular, General Assembly resolution 1514 (XV) of 14 December 1960, containing the Declaration on the Granting of Independence to Colonial Countries and Peoples, nevertheless indicated that those two concepts should be brought closer together and that the international community should, one day, encompass all human beings. It was on that basis that the Commission should try to identify the elements making it possible to classify certain crimes under international law as offences against the peace and security of mankind.

14. It should first be noted that, unlike a crime under internal law, a crime under international law was the result of a violation directed not against an individual, but against a State. Offences against the peace and security of mankind were committed not only against a particular State and, in some cases, against one or more private individuals, but rather against the international community as a whole. An offence of that kind could therefore be committed by a State or by a nation acting on behalf of a State, but also by a group or organization of private individuals, if the offence was so serious that it warranted classification as an offence against the peace and security of mankind. The repercussions of the offence against peace or security must, moreover, be felt world-wide, not only locally. The Commission therefore had to start by studying the most serious international crimes, namely those which endangered the peace and security of mankind as a whole.

15. To that end, the Special Rapporteur had identified three categories of offences (A/CN.4/377, para. 15). The first were offences against the sovereignty and territorial integrity of States. Any offence of that kind, even if it was committed against only one State, might en-

danger the peace and security of mankind. As for aggression and its offshoots, he was of the opinion that reference should be made to the Definition of Aggression adopted in 1974.<sup>4</sup> He was, moreover, not sure whether acts regarded as offshoots of aggression would not be covered by the general principles to be included in the draft code. In the second category, the Special Rapporteur had included offences violating the prohibitions and limitations on armaments or the laws and customs of war. Although that category must be retained, some of the offences it included were outdated and had to be considered in the light of recent instruments such as the Additional Protocols to the 1949 Geneva Conventions.<sup>5</sup> It was open to question whether the crimes in the third category, namely crimes against humanity, existed as such and whether they did necessarily endanger the peace and security of mankind.

16. He agreed with the Special Rapporteur that the Commission should confine itself to determining the minimum content of the draft code. There was no doubt that colonialism was covered by *jus cogens* and that it endangered the peace and security of mankind, particularly since it was an obstacle to the birth of new States. He also shared the Special Rapporteur's doubts with regard to *apartheid*, the use of nuclear weapons, serious violations of human rights and economic aggression. In the case of mercenarism, the crucial factor was its purpose. If its aim was to prevent the birth of a State, to destroy a national liberation movement or to perpetuate a colonial régime, it was more in the nature of participation in an act of aggression or in maintaining colonialism. Mercenarism in itself could not be regarded as an offence against the peace and security of mankind when its aim was a legitimate one. Siam had had such an aim when it had started to recruit Portuguese and Japanese mercenaries in the seventeenth century.

17. Mr. MAHIOU said he would confine his comments to some of the problems raised by the Special Rapporteur in the extremely clear and straightforward report under consideration (A/CN.4/377). The topic could be approached in two ways. The Commission could either start by enunciating general principles and then go on to identify and classify the offences to be included in the draft code; or it could, as the Special Rapporteur had suggested, first try to reach agreement on the offences that endangered the peace and security of mankind. The second method would be more appropriate because, if general principles were defined first, it might be more difficult to identify offences against the peace and security of mankind. For example, the statute of limitations could not apply in the same way to all offences in that category, whether they were attributable to private individuals or to States. The non-applicability of the statute of limitations was easier to accept in the first case, since the responsibility of private individuals was limited in time. In the second case, the non-applicability of the statute of limitations would mean that future generations would have to pay for the wrongful acts of a Govern-

<sup>4</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>5</sup> See 1816th meeting, footnote 13.

ment. The Special Rapporteur's approach was therefore more realistic.

18. The 1954 draft code would be a good starting-point for the Commission's work, even though it had some drawbacks both in terms of substance and in terms of form, as several members has pointed out.

19. The Special Rapporteur was obviously of the opinion that the future draft should have a minimum content. He had not given a very convincing description of the maximum content and had not failed to point out that what the General Assembly had in mind was a code relating only to offences against the peace and security of mankind. Although he himself thought that the Special Rapporteur was right, he emphasized the need to identify the criteria that would make it possible to elaborate the list of offences to be considered.

20. Although the criterion of extreme seriousness applied to all offences against the peace and security of mankind, it could probably not be used to classify each of those offences individually. The Commission would have to find features that were common to "families" of offences. On the basis of such a general criterion, it would have to find criteria that applied to each family or criteria by which each offence could be classified separately. It would have to determine at what point a violation of human rights came within the higher category of a crime against humanity. From the legal point of view, it could not be said that every violation of human rights was a crime against humanity. For a crime against humanity to exist, perhaps a number of human rights violations had to have been committed. It was, in any event, quite obvious that some violations of human rights could constitute crimes against humanity and that they would have to be taken into account in the draft code. It would, however, be necessary to determine the most suitable criteria for identifying them.

21. It would probably be necessary to proceed from the simple to the complicated in order to determine which offences should be taken into account. In that connection, the offences listed in the report (*ibid.*, para. 79) would serve as a good basis for discussion. Most of them were without any doubt offences against the peace and security of mankind, although some of them would require further clarification. The Commission would probably have to shorten that list and further refine the proposed criteria, since mere threats or preparations could be regarded as constituting such offences only if certain conditions were met. The Commission would, for example, have to determine when interference by a State in the internal or external affairs of another State or acts causing serious damage to the environment actually constituted offences against the peace and security of mankind.

22. Two other subjects warranted particular attention because of their political repercussions. The Commission must, for example, adopt the right approach to the issue of nuclear weapons. In his report (*ibid.*, para. 52), the Special Rapporteur had introduced that issue by drawing attention to the ambiguous nature of nuclear weapons, which were a problem case both from the doctrinal and

from the legal and political points of view. Nuclear weapons could be regarded as both the best and the worst possible thing for mankind. For a small country, they might be an effective means of deterring a great Power which had only conventional weapons. Should the use of such weapons as weapons of aggression be prohibited and their use as weapons of deterrence or protection be tolerated? In his view, account had to be taken primarily of the devastating consequences of the use of such weapons, a point which the Special Rapporteur had not overlooked. The Commission could not pass over that problem in silence; it had to draw the attention of States to the legal issues involved and find a means of restricting or prohibiting the use of nuclear weapons.

23. Economic aggression, which covered a wide variety of activities, also had political implications. It was open to question at what point acts of economic hostility became crimes and, in particular, offences against the peace and security of mankind. For economic aggression to exist, there had to be a number of acts designed to destabilize a State and to cause social and economic disturbances or serious unrest amounting to interference in the internal affairs of a State. The problem had been raised in article 2, paragraph (9), of the 1954 draft code, but it would require further consideration. The Commission would have to request the point of view of Governments on that issue, as well as on others.

24. Despite the difficulties to which the topic under consideration gave rise, he saw no reason for pessimism. In his view, the report under consideration would be an excellent basis for further work on the subject-matter dealt with in article 19 of part 1 of the draft articles on State responsibility.

25. Mr. DÍAZ GONZÁLEZ said that he too wished to commend the Special Rapporteur for his clear and concise report (A/CN.4/377), which was acceptable both in form and in substance. With regard to the proposed approach, he agreed with the Special Rapporteur that the Commission must go beyond the much too general criterion of seriousness, which was difficult to assess—if, indeed, agreement could ever be reached on which body would assess it—and base itself on the principle that any offence against the peace and security of mankind was an international crime, whereas every international crime was not an offence against the peace and security of mankind.

26. As to the offences to be included in the future code, he endorsed the list proposed by the Special Rapporteur (*ibid.*, para. 79), who nevertheless had some doubts about two offences, namely the use of atomic weapons and economic aggression. Although it was quite true that the first offence gave rise to a problem of considerable importance that was not only legal, but also moral and political in nature, the Commission must state its view on that problem because the law was not a purely speculative undertaking: it was supposed to govern a particular society and hence take full account of the circumstances in which that society lived.

27. He did not agree with the comments made by the Special Rapporteur concerning the lack of precision and

the political nature of the concept of economic aggression (*ibid.*, para. 80). All the offences listed in the report under consideration were of a political nature and had political repercussions, and the concept of economic aggression had been quite clearly defined by the General Assembly, particularly in the Charter of Economic Rights and Duties of States<sup>6</sup> and in the resolutions it had adopted on the protection of the environment and of non-renewable resources. Economic aggression was a new form of aggression to which the Powers which had hegemonistic and imperialist designs, and which had been deprived by international law of their right to colonial aggression, often resorted in order to bend small States to their political will. Those Powers had even gone so far as to establish international organizations which, on the pretext of aiding the economically weaker countries, were in fact used as means to exert pressure. It was thus obvious that the concept of economic aggression, like that of cultural aggression, was well enough developed to be classified as an offence against the peace and security of mankind, in the same way as aggression proper, particularly since political independence could not exist without economic and technological independence. The Commission would, accordingly, only have to adapt article 2, paragraph (9), of the 1954 draft to the realities of the modern world.

28. In conclusion, he said he was also of the opinion that colonialism had to be included in the future draft Code of Offences against the Peace and Security of Mankind.

*The meeting rose at 11.40 a.m.*

<sup>6</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

## 1819th MEETING

*Monday, 14 May 1984, at 3.05 p.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.

**Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)**

[Agenda item 5]

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

## SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. The CHAIRMAN said that the start of the second week of the Commission's session coincided with a triple anniversary: the 2608th anniversary of the birth of the Indian Prince Siddhartha, the Buddha; the anniversary of his attainment of Nirvana 80 years later; and the anniversary, 35 years after his birth, of his discovery of the four noble truths, namely suffering, the causes of suffering, the elimination of suffering and the key to the elimination of suffering. That fact had a certain relevance to the topic under discussion inasmuch as the first of the five Pancha Sila, or basic principles, was to refrain from taking life.

2. Mr. USHAKOV said that, although he was a free thinker, he respected all religions and, on the occasion of the anniversaries to which the Chairman had just referred, he wished to congratulate the members of the Commission who were of the Buddhist faith.

3. He was very disappointed with the progress of the Commission's work on the draft Code of Offences against the Peace and Security of Mankind. Not only was the work still at the preliminary stage, but the Special Rapporteur had deemed it advisable, for the time being, to limit the topic to less controversial matters until more specific replies had been received from the General Assembly and Governments to the questions which had been raised by the Commission and which were, in his own opinion, fanciful and beside the point.

4. The Commission had, for example, requested the General Assembly's views on the subjects of law to which international criminal responsibility could be attributed or, in other words, on the question whether the international criminal responsibility of States existed. It could be asked whether that question arose only in connection with the draft code under consideration, which was, in his view, a code of offences entailing the individual criminal responsibility of certain persons, or whether it also arose in connection with the topic of the international responsibility of States, on which the Commission might also await the replies to see whether the criminal responsibility of States existed and how it should be dealt with in the context of the corresponding draft. The unknown factor was the "criminal responsibility of States", as opposed to the responsibility of private individuals, which was well established and, in the case of the most serious ordinary crimes, entailed the death penalty or detention.

5. Until hypothetical replies had been given to the Commission's questions, the Special Rapporteur had presented a report (A/CN.4/377) that dealt only with the content of the topic *ratione materiae* and thus contained only a list of offences against the peace and security of mankind. What were those offences? Offences by States or offences by individuals? The question remained unanswered because the content of the topic *ratione materiae* could not be dissociated from the content *ratione personae*. The Special Rapporteur was of the opinion that international crimes had been defined, but that was not at all true. Article 19 of part 1 of the draft articles on

State responsibility,<sup>4</sup> which provided that an international crime resulted from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, defined only international crimes by States. That definition could not be applied to private individuals, in respect of whom it would first have to be determined whether, as such, they had international obligations and, if so, which ones. The definition of an international crime by a private individual was not at all the same as the definition of an international crime by a State.

6. The Special Rapporteur had drawn up a list of offences (*ibid.*, para. 79) which made no distinction between offences by States and offences by individuals. He had proposed, for example, that the future code should include the threat or use of violence against internationally protected persons, on the basis, *inter alia*, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>5</sup> If the crimes covered by that Convention were international crimes, they were international crimes committed by individuals, as clearly indicated in the definition of the "alleged offender" given in article 1. There was, to his own knowledge, no example of any State which had committed any such crime. The same was true of the crime of piracy, which had been defined in article 101 of the United Nations Convention on the Law of the Sea.<sup>6</sup> An act of piracy was an international crime which could be committed only by private individuals. If it was committed by a State, it became "aggression". The same was also true of the crime of taking hostages, which was always committed by private individuals, not by States. Moreover, if a State committed a crime, that crime did not, unfortunately, always entail the responsibility of private individuals, such as statesmen, and an international crime committed by a private individual did not always entail the responsibility of a State.

7. Would the list of crimes *ratione materiae* to be prepared by the Commission be a list of crimes by States or a list of crimes by private individuals? In that connection, he recalled that, within the context of the draft on State responsibility, the Commission had not drawn up a list of international crimes by States. It had merely given examples in article 19, paragraph 3, of part 1 of the draft articles to explain the definition given in paragraph 2. Its approach had been quite different. It had also not considered the possibility of referring, in those draft articles, to the question of the criminal responsibility of private individuals linked with crimes by States. Should it, within the framework of the topic under consideration, deal with State responsibility and establish the legal con-

sequences of crimes by States? In his view, the draft Code of Offences against the Peace and Security of Mankind must relate only to the international criminal responsibility of private individuals. He thus fully agreed with the comments on the draft code made by the German Democratic Republic,<sup>7</sup> which had stated that the concept of individual criminal responsibility should be one of the underlying principles of the code, and that that did not mean annulling or replacing the international responsibility of States. The Commission might include in article 1 of the code a provision stating that individual criminal responsibility did not affect the international responsibility of States. Moreover, the reverse was also true when there was a very close link between a crime by a State and a crime by certain persons, such as statesmen. The German Democratic Republic had further expressed the view that offences against the peace and security of mankind were international crimes the prosecution of which was a universal duty. In his opinion, that should be the basic principle of the future code.

8. In its comments, the German Democratic Republic had also stated that the obligation to prosecute and punish such crimes was part of the international responsibility of States and made it incumbent upon States, within the scope of their national legal systems, to adopt relevant legislative and other measures under which persons guilty of grave international crimes could be prosecuted and punished, without distinction as to their citizenship or the place of commission of the crime and irrespective of the public office they might hold. Where offences against the peace and security of mankind committed by individuals in breach of that obligation had been organized, supported or tolerated by a State, a private individual could be presumed to have acted on behalf of the State. In such a case, the applicable provision would be article 8 of part 1 of the draft articles on State responsibility,<sup>8</sup> which stipulated that there was an internationally wrongful act of that State either by commission or by omission and not necessarily as a result of a crime—an act that would have to be assessed in terms of the criteria laid down in article 19 of those draft articles. As the German Democratic Republic had indicated in its comments, however, such responsibility was separate from the individual criminal responsibility of the perpetrators of the crime, which was assessed in accordance with the international conventions in force or with international custom. Crimes by private individuals did not, merely because they had been organized by a State, become crimes by that State. Referring in that connection to the Special Rapporteur's second report (*ibid.*, para. 11), he noted that the Nürnberg Tribunal had not tried the Nazi German Government for the individual crimes of the major war criminals, but had, rather, tried the perpetrators of those crimes themselves. The same distinction between State responsibility and the responsibility of private individuals must be made in connection with offences against peace, which could therefore not be considered only *ratione materiae*.

<sup>4</sup> See 1816th meeting, footnote 12.

<sup>5</sup> General Assembly resolution 3166 (XXVIII) of 14 December 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 74.

<sup>6</sup> *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

<sup>7</sup> A/37/325, paras. 13-14.

<sup>8</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 31.

9. He agreed with the Special Rapporteur (*ibid.*, para. 13) that the Commission must not limit itself to the excessively general criterion of seriousness and that it must base its study on the practice of States and the relevant international instruments. To that end, the 1954 draft code would serve as a satisfactory basis for the Commission's work. He noted that the Special Rapporteur had divided the offences to be covered by the draft code into three categories (*ibid.*, para. 15): (a) offences against the sovereignty and territorial integrity of States; (b) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (c) crimes against humanity, also called crimes of *lèse-humanité*. With regard to the second category, he was of the opinion that the expression "prohibitions and limitations on armaments" did not reflect the true situation, since there were instruments that prohibited the use of a particular weapon or weapons, but not the use of "armaments". As to the third category, he considered that in the future code the term "humanity" must be taken in the sense of the community of human beings and not in the humanist sense of the Charter of the Nürnberg Tribunal.

10. Referring to the offences classified after 1954, he said he did not understand why the Special Rapporteur had had doubts about the inclusion in the draft code of the use of atomic weapons, describing such weapons as weapons of peace and having practically nothing but praise for them (*ibid.*, para. 52). How could it be said that atomic weapons could serve peace and security? Atomic weapons could destroy civilization on earth, as the General Assembly had stressed in the Declaration on the Prevention of Nuclear Catastrophe.<sup>9</sup> The Commission must draw inspiration from the wording of that Declaration by making the use of atomic weapons one of the offences against the peace and security of mankind to be covered by the draft code.

11. He agreed that the crime of colonialism should be included in the future code, provided that that term, which was still extremely vague, had been defined. He also thought that the crime of *apartheid* should be included in the draft code, which should make it clear that *apartheid* was a State crime, but also a crime which could be committed by a private individual independently of a crime by a State. The same was true of the crime of genocide.

12. In his view, the international instruments referred to by the Special Rapporteur in connection with the protection of the environment (*ibid.*, para. 51) did not relate directly to such protection. Did the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof cause damage to the environment? Did the exploration and use of outer space, including the moon and other celestial bodies, also cause damage to the environment? Those were matters that related more to disarmament. In fact, he did not think that there were any international instruments which related to the protection of the environment and which provided for

individual criminal responsibility in the case of damage to the environment.

13. Was the crime of taking hostages an individual or a State crime? In time of war, it could be a State crime, but could it in peacetime? At worst, a State might tolerate the taking of hostages. In his view, the taking of hostages was an individual crime which could be an international crime within the meaning of the International Convention against the Taking of Hostages,<sup>10</sup> but he did not think that it could be an offence against the peace and security of mankind.

14. With regard to acts of violence against internationally protected persons, he pointed out that the Commission had never envisaged the possibility that a State might commit such acts: at worst, it might tolerate such acts. There again, he doubted that such acts could constitute offences against the peace and security of mankind. Nor did he really see how a State could "organize" the breach by an internationally protected person of the obligation to respect the laws and regulations of the receiving or host State, as the Special Rapporteur stated (*ibid.*, para. 57). A diplomatic agent was, in fact, acting on behalf and in the name of the State which had sent him: if he breached that obligation, there was an act of the State; if he was disavowed or removed from his functions, there was no act of the State. It would also have to be made clear how a diplomatic agent could disturb the public order of the receiving or host State.

15. He was convinced that the crime of mercenarism was not a State crime: it was always an individual crime which engaged the individual's criminal responsibility. If a State recruited or trained mercenaries to invade another State, it was quite simply committing an act of aggression. It was therefore open to question whether the crime of mercenarism should be regarded as an offence against the peace and security of mankind.

16. Referring to chapter II, section C, of the report dealing with the maximum content of the draft code and, in particular, to the concept of economic aggression, he said he hoped that States would be able to reach agreement on a definition of that concept on the basis either of the draft submitted by the Soviet Union to the Special Committee on the Question of Defining Aggression in 1953<sup>11</sup> or of any other proposal. The Commission would have to wait until economic aggression had been defined to decide whether or not it was an offence against the peace and security of mankind.

17. He noted that, in international law, the concept of the non-applicability of the statute of limitations did not exist as far as subjects of international law and, in particular, States were concerned. It existed only in internal law, under which many crimes were, indeed, statute-barred. An agreement would therefore have to be concluded on the non-applicability of the statute of limitations to certain crimes under internal law and, in

<sup>9</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>10</sup> General Assembly resolution 34/146 of 17 December 1979, annex; see also United Nations, *Juridical Yearbook 1979* (Sales No. E.82.V.1), p. 124.

<sup>11</sup> See *Official Records of the General Assembly, Ninth Session, Supplement No. 11 (A/2638)*, annex, document A/AC.66/L.2/Rev.1.

particular, war crimes and crimes against humanity within the meaning of the Charter of the Nürnberg Tribunal.

18. In conclusion, he expressed the hope that the Special Rapporteur would be able to submit a report containing draft articles at the Commission's next session.

19. Mr. LACLETA MUÑOZ said that the Special Rapporteur's brief, clear and moderate report had made the topic under consideration look simple, although it was not. The problems to which the topic gave rise warranted some scepticism. The General Assembly had been aware of those problems, as shown by its discussions (see A/CN.4/L.369, sect. B). It had, moreover, not answered the questions the Commission had submitted to it. Until the replies of the General Assembly and Governments had been received, therefore, the Special Rapporteur had been right to consider only the less controversial questions. Even if those replies took some time, the report under consideration (A/CN.4/377) should enable the Commission to make progress in its work. He therefore agreed with the Special Rapporteur's suggestion that, as a first step, the Commission should draw up a list of the offences that were now regarded as offences against the peace and security of mankind. That step nevertheless involved a risk because, once the catalogue of offences had been elaborated, it might not be possible to go much further. In that connection, it would not be at all satisfactory simply to update the 1954 draft code because, in 1954, the situation had been completely different from what it was now. The draft code had been elaborated after the Second World War, at a time when the question of the offences that were attributable to States had been settled. It was because the aggressor States that had already been punished by the victorious Powers that the draft referred to the "authorities" of a State. Its purpose had been to punish offences committed by private individuals on behalf of a State. That difference in circumstances would have to be borne in mind when the Commission elaborated the new draft code.

20. He also had some reservations about other questions. Borrowing the metaphor used by one member of the Commission, he drew attention to the problems involved in erecting the building's walls—if that were possible—and to the need for the building to have a roof, in other words implementation machinery. As a rule, it could be said that, after the Second World War, general and conventional international law had developed more from the point of view of its content than from that of its application and the settlement of disputes arising out of its application. It seemed to him that, if the draft code did not provide for implementation machinery, if only to establish and categorize the acts in question, the building's walls could be used only as weapons in a purely political discussion or unilaterally to justify acts of revenge against a conquered political enemy.

21. The terms used in the report also gave rise to problems. The Spanish version referred indiscriminately to *delitos*, *crímenes* and *actos ilícitos* endangering the peace and security of mankind and a list of which had to be drawn up. According to the title of the topic, *delitos* were what was being discussed. The Special Rapporteur

had stressed the fact that what should be taken into account were not just any *delitos*, but rather the most serious ones or, in other words, the *crímenes* referred to in article 19 of part 1 of the draft articles on State responsibility. The term *delitos* appeared to have originated in the terminology used between 1945 and 1954, when it had applied to private individuals who had committed certain criminal acts, whether or not such acts were attributable to a State. The Commission would eventually have to solve that terminology problem.

22. For the time being, it had to choose a criterion and the criterion of seriousness was not adequate. The problem was to determine which offences under international law constituted offences against the peace and security of mankind, but a list of such offences could not be elaborated until the terms "peace" and "security" of mankind had been defined. The second term would be particularly difficult to define.

23. In his second report (*ibid.*, para. 15), the Special Rapporteur had divided the offences covered by the 1954 draft into three categories. The first were offences against the sovereignty and territorial integrity of States. It was quite plain that those offences should be referred to, rather more explicitly in some cases, in the new draft. The wording of article 2, paragraph (3), of the 1954 draft would, in particular, have to be much more specific; that provision, which related to the preparation of the employment of armed force, did not take sufficient account of future developments. The wording of paragraph (9) of the same article was also too vague. It did not specify what measures could be regarded as coercive measures of an economic or political character or what "advantages of any kind" a State could obtain from another State by means of such measures. In economic relations of any kind, it was quite common to exert pressure in order to obtain an advantage, but the problem was to determine at what point such pressure became a coercive measure amounting to economic aggression. As Mr. Ushakov had pointed out, a definition of the concept of economic aggression would be essential.

24. Offences in the second category, namely those violating the prohibitions and limitations on armaments or the laws and customs of war should also be included in the future code. Violations of treaties designed to safeguard international peace and security by means of restrictions or limitations on armaments were, at present, of enormous importance to mankind, which was seeking to bring about general and complete disarmament. It was quite obvious that some provisions of the 1954 draft code, particularly those relating to fortifications, should be updated. It might seem paradoxical that offences against the laws and customs of war also endangered the peace and security of mankind. Indeed, it could be asked what had become of the peace that was to be kept when offences could violate the laws and customs of war. Those offences should nevertheless be referred to in the code, not only because they were serious, but also in order to ensure respect for certain human values, even in time of war. They would, however, have to be referred to in carefully considered terms so that the paradox would not be too striking.

25. Crimes against humanity, which constituted the third category, definitely endangered the security of mankind, even in the absence of any threat to peace. Account would have to be taken of that distinction. With regard to isolated violations of human rights, he agreed with the views expressed by the Special Rapporteur (*ibid.*, para. 34). Although it was true that a violation of human rights characterized as such came under general international law, as Mr. Reuter had pointed out (1817th meeting), an isolated violation could not be regarded as a threat to the peace and security of mankind.

26. It was open to question whether a list of offences against the peace and security of mankind could be elaborated only on the basis of their material content. In some cases, the existence or absence of a threat to the peace and security of mankind depended less on the characteristics of the acts constituting that threat than on those committing those acts. In many areas, particularly that of human rights, a criminal act committed by a single private individual could not be compared with the same act committed by a private individual with the support and tolerance of a State.

27. With regard to the offences to be added to the 1954 draft, it would be essential to refer to the relevant international instruments. The inclusion of colonialism and *apartheid* should not give rise to any problems, although colonialism would have to be defined very precisely. There was no denying the fact that nuclear weapons had a deterrent effect and that their use could not be prohibited. Otherwise, a State would be unable to deter another State by threatening to respond to its attack by means of a prohibited weapon. In fact, the point at issue was not so much the problem of the prohibition of nuclear weapons as that of aggression. It was difficult to outlaw such weapons, since what was illegal was the use of armed force and war. In that connection, he agreed with the conclusion reached by the Special Rapporteur (A/CN.4/377, para. 53), namely that the provisions of the draft code concerning the violation of prohibitions, limitations and restrictions on weapons should cover the hypothesis of a prohibition of atomic weapons, should such a prohibition be laid down at some stage in special conventions.

28. Referring to the obligation of an internationally protected person to respect the laws and regulations of the receiving or host State, he said he could not agree with the Special Rapporteur's conclusion (*ibid.*, para. 57) that any breach of that obligation which might pose a threat to public order in the receiving country was an international offence and that, if the breach were organized by a State, it was likely to be a threat to peace. He did not, however, deny the fact that such a breach might be committed and that it might pose a threat, if not to the peace of mankind as a whole, then at least to the peace of some countries.

29. The recruitment of mercenaries was not in itself an unlawful practice. In his view, States which, like his own, enlisted mercenaries in a regular army were merely following a practice which had been very widespread until the French Revolution and had never been considered reprehensible. In itself, the fact of hiring soldiers for

pay was not a crime. It was the purpose for which they were hired that was decisive. In that connection, the use of bands of mercenaries, a frequent practice in Africa, should be prohibited.

30. The list of offences which the Special Rapporteur had presented at the end of his report (*ibid.*, para. 79) gave rise to a few problems. The "organization of armed bands by a State for incursions into the territory of another State", "the undertaking or encouragement by a State of activities calculated to foment civil strife in the territory of another State" and "the annexation of the territory of a State by another State" were all offences committed by or on behalf of a State. It could be said that those offences raised a problem *ratione personae*. The "taking of hostages" and the "taking of hostages organized or encouraged by a State" also gave rise to doubts. It was obvious that the taking of hostages by a private individual could not be regarded as an offence against the peace and security of mankind unless it involved some participation by a State.

31. In conclusion, he said that he endorsed the final comments made by the Special Rapporteur (*ibid.*, paras. 80-81) and that he agreed with the Special Rapporteur's decision not to try, for the time being, to elaborate an introduction to the draft code. Just as the titles of draft articles were always prepared after the texts of those articles themselves had been elaborated, so the general principles should not be formulated until the body of the new code had been drafted.

32. Chief AKINJIDE said the Special Rapporteur, who had presented an outstanding report (A/CN.4/377), must not be discouraged by criticism, from whatever source. Work on the topic had started some 40 years earlier and the end was still not in sight, so it was clear that the Special Rapporteur faced an almost impossible task. The peace and security of mankind were, however, the pith and marrow of the Charter of the United Nations: without them, the objectives of the United Nations would mean nothing. In his own view, the work on which the Commission was engaged was, moreover, possibly the most important assignment the General Assembly had ever given any of its subsidiary bodies and it was infinitely more important than the work that had led to the adoption of the United Nations Convention on the Law of the Sea.

33. Another exercise on a smaller scale was being conducted by the Commonwealth, a grouping of 43 nations, all members of the United Nations. For some years, the Commonwealth Ministers of Justice had been endeavouring to find ways and means of determining what constituted an international crime and of combating such crime. At a meeting of jurists held in Hong Kong in September 1983, he had presented a paper which had served as the basis for discussion and which he hoped to make available to the Commission secretariat.<sup>12</sup> The aim of that meeting had been to carry out an in-depth study of the problem as it concerned the 43 Commonwealth na-

<sup>12</sup> "Facilitating conviction of international criminals", *Papers of the 7th Commonwealth Law Conference, Hong Kong, 18-23 September 1983* (London, Commonwealth Secretariat Publications, 1983).

tions, but, again, no solution was yet in sight. One thing had, however, been crystal clear, namely the enormity of the problem and the untold suffering that international crime and the absence of any sanctions caused throughout the world.

34. While a tribute was due to those who had produced the 1954 draft code, the circumstances under which it had been prepared were very different from present circumstances. After the devastation of the Second World War, people had decided that such wholesale destruction should never be allowed to happen again. Little had they known that, by 1984, the world would be in possibly even greater danger than before.

35. Turning to the list of offences contained in the Special Rapporteur's second report (*ibid.*, para. 79), he said that, while he was in broad agreement with the Special Rapporteur, he also considered that the Drafting Committee should take account of the very constructive comments made by Mr. Ushakov. He had, however, been somewhat surprised at Mr. Ushakov's suggestion that the Special Rapporteur should produce another report, since that would only prolong the Commission's discussions. His own view was that a draft code should be prepared immediately on the basis of the various documents produced by the Secretariat, the Special Rapporteur's two reports and the comments made by the members of the Commission.

36. He had a number of suggestions to make in that connection. First, a list of offences should be compiled on the basis of the list prepared by the Special Rapporteur, together with an indication of what constituted such offences. Secondly, the offences should be grouped into two categories, political and non-political. Thirdly, provision should be made for penalties, since that was too subjective a matter to be left to any court that might be set up. The penalties should match the gravity of the crime and he would strongly urge that they should include reparation, since circumstances might arise in which a custodial sentence passed upon individuals would not suffice. Fourthly, a court should be set up. He for his part saw no reason why a second court could not be established, in addition to the ICJ, to deal with criminal matters. Since the offences listed by the Special Rapporteur could be committed in peacetime as well as in time of war, any such court would certainly have enough to do. Lastly, specific provision should be made for the enforcement of penalties.

37. Although he understood why Mr. Calero Rodrigues (1817th meeting) and Mr. McCaffrey (*ibid.*) were sceptical, he believed that there was a solution to every problem. The Commission should not be deterred by the enormity of the task at hand. In view of the conflicting interests of different nations, however, he also recognized the need to be extremely realistic where certain political offences were concerned.

38. From a realistic point of view, there were three interest groups. The first was the group of small nations, those which were economically, militarily and politically weak and which, of course, comprised the developing countries, including his own. With every passing year, the gap between developed and developing countries widened and the developing countries became economic-

ally and militarily weaker. The power they had at their disposal was completely out of proportion with that of the United States of America, the Soviet Union and certain European countries. It was thus quite clear that those that stood to benefit most by the study of the topic under consideration were bound to be the small, weak developing nations. It was in their interest that the Commission should be able to reach a decision that would be acceptable to all concerned.

39. Secondly, account had to be taken of the possibility of a conflict between a great Power and a small nation. The great Powers were the ones that possessed all the technology and know-how and if one of them attacked a small country like his own, that country would be helpless. If, however, provisions of an international nature, such as those now under consideration, were adopted and generally accepted and ratified, smaller nations would be protected.

40. Thirdly, the most important and difficult problem was that of a conflict between two great Powers. There could be no doubt that international security was essentially in the hands of the great Powers. In that connection, the Special Rapporteur had drawn attention to the issue of nuclear weapons. As he himself saw it, the problem related only to two great Powers, although a number of other countries had, to varying degrees, developed nuclear-weapon technology. One thing was certain: the problem of nuclear weapons could not be left out of the present exercise. Indeed, all the Commission's efforts on the topic under consideration would be in vain if the problem of nuclear weapons were ignored. The main threat to world peace at the present time came precisely from such weapons.

41. He could also not accept the theory of deterrence, according to which the threat of the use of nuclear weapons could serve to ward off the danger of war. In his view, the more nuclear weapons there were in the world, the nearer mankind came to another world war. History showed that, once a weapon was developed, it was invariably used to make war. The huge quantities of nuclear weapons, missiles and other weapons of mass destruction that were now being produced would inevitably be used one day. A war lasting only a few hours would not only destroy the great Powers using those weapons, but would also directly or indirectly affect all the countries of the world, developed and developing alike.

42. The greatest importance must therefore be attached to measures to prevent atomic war and the theory of deterrence must be firmly rejected. He fully realized that, if the work on nuclear weapons under the present topic were to succeed, it would be a means of obtaining through the back door what it had not been possible to achieve in the bodies dealing with disarmament. The Commission should, however, not be deterred by that consideration. On the contrary, it should take the view that its discussions were helping to prevent a world war. Despite the comments made by the Special Rapporteur in his report (A/CN.4/377, para. 52) and the analysis he offered (*ibid.*, paras. 26-27), the Commission should therefore make specific provision for nuclear weapons in the draft code so that it would be illegal not only to possess nuclear

weapons, but also to manufacture them. The problem of existing stocks could be discussed in other bodies.

43. As to war crimes, it had been pointed out that much depended on who was the victor and who was the vanquished. If an aggressor won a war, who would try that aggressor? That was a problem to which the Drafting Committee should pay due attention. In any event, the Commission must do everything in its power to help prevent war, so that there would be no winners or losers.

44. The work on the topic under consideration involved a number of assumptions. The first was that a stage had been reached in international relations when nations and, in particular, the great Powers were prepared to subordinate their national interests to their international obligations. Aggression and mercenarism, for example, were instruments of foreign policy. Foreign policy was, however, invariably an extension of domestic policy and it was therefore difficult for the leaders of a great Power to subject national interests to international obligations. If work on the topic under consideration succeeded, it would constitute a move towards a form of world government, since a world court with jurisdiction over very critical issues would be set up and provision would be made for implementation and sanctions. If the results of the Commission's work on the present topic were accepted, they would mean that ideological conflicts had been overcome. One of the causes of disputes in the world and of every case of war by proxy was precisely the existence of an ideological conflict between communism and capitalism.

45. With regard to the problem of mercenarism, he said that there was no intention of outlawing forces such as the French Foreign Legion or the Gurkhas of the British Army. The term "mercenarism" was intended to cover the case of men hired to overthrow Governments and destabilize nations. The situations envisaged were clearly cases of war by proxy, since mercenaries always had a paymaster; wherever mercenaries were used, there was always a foreign power behind them. Mercenarism should therefore be regarded as an international crime, not only for individuals but also for States. In that connection, he said that he could not agree with the subtle distinction proposed by Mr. Ushakov. Mercenarism was a very grave problem for the developing countries because mercenaries were being used against them, both overtly and covertly. If those who hired and paid mercenaries knew that their actions constituted crimes and that, if they were discovered, they would be condemned by world bodies, they might be more careful in their actions.

46. He agreed that there could be no question of any statutory limitation on such grave crimes as offences against the peace and security of mankind. As to the concept of the "peace and security of mankind", he disagreed with Mr. McCaffrey (1817th meeting): "peace" and "security", linked as they were by the conjunction "and", were indissolubly connected and could on no account be separated. There could be no peace without security and no security without peace. In the draft under consideration, the concept of the peace and security of mankind had to remain indivisible.

*The meeting rose at 6 p.m.*

## 1820th MEETING

*Tuesday, 15 May 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Sir Ian SINCLAIR noted that there had been a division of opinion in the Commission on the question of whether the Special Rapporteur had been right to devote his second report (A/CN.4/377) to a list of offences for possible inclusion in the draft code or whether he should have begun by elaborating an introduction along the lines indicated by the Commission in paragraph 67 of its report on its thirty-fifth session. In that connection, the mandate given by the General Assembly in paragraph 1 of its resolution 38/132 of 19 December 1983 was not very clear: the Commission had been invited to elaborate an introduction, "as well as a list of offences in conformity with paragraph 69 of that report". That paragraph 69 did not actually suggest that the next step must be to draw up such a list. It simply indicated that the draft code should cover "only the most serious international offences", which would be determined by reference to "a general criterion and also to the relevant conventions and declarations pertaining to the subject".

2. As the Special Rapporteur had pointed out, however (*ibid.*, para. 8), the criterion of "extreme seriousness" was a highly subjective one and would not, in itself, provide much guidance. That point could be illustrated by examples taken from internal law. Under the penal code of certain countries, adultery was a criminal offence; in other countries, it constituted grounds for divorce in civil law but did not come within the scope of criminal law. In pastoral societies, cattle theft was regarded as a particularly grave crime; other societies would treat it as a lesser offence. Moreover, a society changed with time, as did its value judgments. Two centuries earlier, sheep stealing had been regarded as a particularly grave crime in the United Kingdom and had

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

sometimes been punished by transportation. Today, that offence would, of course, be treated much more lightly. Certain types of conduct that had formerly been treated as criminal were nowadays no longer regarded as such.

3. The criterion of “extreme seriousness” was thus inadequate. Something more was needed to justify the inclusion of an offence in the draft Code of Offences against the Peace and Security of Mankind: the offence in question also had to be of such magnitude and intensity as to outrage the conscience of all mankind. It was necessary to find the equivalent of the concept of *hostis humani generis*, which had, in classical international law, justified the exercise of universal jurisdiction in relation to piracy under the law of nations. The key element in that respect was that the international community of States as a whole recognized the crimes in question as offences against the peace and security of mankind. A distinction had to be drawn between conduct which was offensive to the moral conscience of all right-thinking people and conduct which was so barbaric and so disruptive of even minimum international public order as to qualify the offender as *hostis humani generis*.

4. The Special Rapporteur’s second report contained a depressing catalogue of the horrors that affected contemporary international society. No continent had escaped the contagion of indiscriminate violence and terror pursued for motives that could in no way justify the suffering inflicted. Mr. Malek (1816th meeting) had given a moving account of the troubles which rent his country, but the cycle of violence, terror and genocide was visible everywhere. In the face of such a litany of evils, the Commission’s efforts would inevitably appear puny, but the Commission was bound to carry out the task entrusted to it by the General Assembly, even if individual members might be sceptical of the results that could be achieved.

5. Turning to the catalogue of offences, he said he agreed with the Special Rapporteur that the 1954 draft code should be taken as a starting-point, although some of its formulations would, of course, have to be modified to take account of more recent developments, such as the adoption of the Definition of Aggression.<sup>4</sup>

6. There appeared to be virtual unanimity that the crimes of direct and indirect aggression should be included in the draft code. The Special Rapporteur would no doubt propose a revised version of article 2, paragraphs (1)-(6) and (8), of the 1954 draft, with due regard for the wording of the generally accepted instruments that had since been adopted by the General Assembly.

7. As to the problem of intervention, which was the subject of paragraph (9) of article 2 of the 1954 draft code, he shared Mr. Calero Rodrigues’ doubts (1817th meeting). The draft code adopted by the Commission at its third session in 1951<sup>5</sup> had contained nothing specific on the subject, probably because the disastrous con-

sequences of unlawful intervention had been covered by earlier paragraphs dealing with armed bands, civil strife and terrorist acts.

8. He also had serious reservations about article 2, paragraph (7), of the 1954 draft relating to violations of restrictions or limitations on armaments. The commentary to that provision<sup>6</sup> revealed that it was based on the view of the League of Nations Committee on Arbitration and Security that failure to observe conventional restrictions on armaments could, under many circumstances, raise a presumption of aggression. That view had reflected the experience of the 1920s and 1930s, but it was no longer valid, particularly in the light of recent disarmament treaties providing for the suspension of the treaty obligations of the States parties in exceptional circumstances, when their national security was or might be seriously jeopardized. That fact cast some doubt on the provision in question, except perhaps where the material breach was accompanied by evidence that the defaulting State was preparing to commit an act of aggression.

9. The Commission would also have to pay careful attention to the content of article 2, paragraph (12), of the 1954 draft dealing with violations of the laws or customs of war. It was doubtful whether every violation of that kind could be held to constitute an offence against the peace and security of mankind. Perhaps that characterization should be attached only to “grave breaches”, a notion which was familiar in international humanitarian law.

10. Finally, the 1954 draft included crimes against humanity. In that connection, there was no doubt that the list to be drawn up should include the crime of genocide and the other crimes against humanity referred to in the “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal”.<sup>7</sup> It must, however, be decided whether the Commission should go any further and, with regard to human rights violations, he particularly agreed with the analysis by the Special Rapporteur (A/CN.4/377, paras. 31-40). Violations of individual human rights were not all offences against the peace and security of mankind, but a pattern of gross and systematic violations of human rights did constitute a crime against humanity. Obvious examples of such crimes were the all too common recent cases of the disappearance and torture of political opponents as a result of acts by State organs or groups of private individuals.

11. Turning to chapter II of the report, dealing with offences classified since 1954, he said he agreed with the comment by the Special Rapporteur (*ibid.*, para. 80) that the meaning of the concept of “economic aggression” was not sufficiently clear; for that and other reasons, he did not think that economic aggression should be included in the list of offences to be drawn up. That was also true of “colonialism” and “mercenarism”. As to the first of those terms, he endorsed the proposal that the

<sup>4</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>5</sup> *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, document A/1858, para. 59.

<sup>6</sup> *Ibid.*, p. 136.

<sup>7</sup> *Yearbook ... 1950*, vol. II, pp. 374 *et seq.*, document A/1316, paras. 95-127.

draft code should include a reference to the abhorrent concept of the subjection of a people to alien domination and exploitation and of the forcible denial to it of the fundamental right of self-determination. The concept and the term should, however, not be confused. Historically and technically, the term "colonialism" could mean a particular form of governmental structure, even when that structure corresponded to the wishes of the people concerned. The Commission must be very precise in its use of legal terminology and, although he was all in favour of the inclusion of the concept of colonialism in the draft code, he had reservations regarding the way the term had been used.

12. Similar considerations applied to the use of the term "mercenaryism", with the additional complication that a United Nations *ad hoc* committee was now trying to formulate the text of a convention of the subject of the activities of mercenaries. Those activities were, of course, universally condemned, but it should be recognized that it was the endemic instability of some newly independent States which had created a market for the secret recruitment of mercenaries in developed States. That market was composed of disturbed individuals, but it could not be tapped without the activities of persons seeking to reverse the results of a *coup d'état* in their own countries. As to the problem of determining who was and was not a mercenary, he could accept the Special Rapporteur's conclusion (*ibid.*, para. 60) that a mercenary was motivated primarily by money. Human motives were, however, complex and it would be difficult to distinguish between an individual who accepted money, but was motivated primarily by political convictions, and an individual whose motive was primarily one of gain. Nationality could be a guide, but not in every case. He therefore had doubts about the inclusion of "mercenaryism" in the draft code.

13. *Apartheid* was generally condemned as an affront to human dignity, but while branding it as a denial of fundamental human rights, the international community as a whole was divided in its assessment of whether that evil practice constituted a crime against humanity. The list of parties to the International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>8</sup> (A/CN.4/368/Add.1) revealed that no State from the Western European and Others Group had even signed, much less ratified that Convention and that only relatively few Latin-American States had done so. There had also been a consistent pattern of dissent and abstention by those same States and even by some African States on General Assembly resolutions characterizing *apartheid* as a crime against humanity.

14. The other items in the Special Rapporteur's additional list were less controversial. Consideration should certainly be given to the inclusion in the draft code of the crime of taking hostages and of acts of violence against diplomats and other internationally protected persons. Those were offences which, by their very nature, tended to disturb international peace and security. Obvious examples had been the taking of United States diplomatic

and consular staff in Tehran as hostages a few years previously and the very recent case in London of the flagrant and criminal violation of diplomatic law which had involved a grave abuse of diplomatic immunities and in which a young policewoman had been killed by shots fired from diplomatic premises.

15. He would, however, caution against the inclusion in the draft code of "acts causing serious damage to the environment". That term was much too vague. For example, oil spills which damaged the environment certainly gave rise to civil liability and the persons responsible could also, in some cases, be charged with criminal negligence; but it would be going too far to characterize such damage to the environment as an offence against the peace and security of mankind.

16. Referring to the problem of nuclear weapons, he said the Commission was not called upon to enter into the political and other arguments for or against the prohibition of first use of such weapons. That question was a deeply controversial one and such a prohibition could not be considered in isolation from other disarmament measures, since it would inevitably tilt the military balance in favour of those States which enjoyed superiority in conventional armaments and manpower. He therefore suggested that the Commission should not include any specific reference to the use of nuclear weapons in the list of offences to be drawn up.

17. In addition to the offences mentioned in the Special Rapporteur's second report (*ibid.*, para. 79), he suggested that consideration should be given to the inclusion in the draft code of two others, namely piracy and slavery. Those offences were not by any means outmoded. There had been recent instances of piratical acts in the seas off Africa and South-East Asia. Piracy was, moreover, already recognized as a crime under international law in relation to which all States were entitled to exercise jurisdiction. Slavery and the slave-trade had been largely stamped out in the twentieth century as a result of international co-operation, but there were still some parts of the world where they continued to be practised.

18. In conclusion, he said he thought that the 1954 draft code could be taken as the basis for the Commission's work, although it would have to be reviewed carefully. He agreed with some of the additions proposed by the Special Rapporteur, but he thought that one or two further offences should be included in the list. It would, however, be premature at the present stage to try to draw up a list of offences against the peace and security of mankind because of the large number of variables involved. The Commission would need more objective criteria to determine what offences should be included in the list or, in other words, to select from among the many practices condemned by right-thinking people those which qualified to be treated as offences against the peace and security of mankind.

19. Mr. CALERO RODRIGUES said that, in his previous statement (1817th meeting), he had discussed chapter I, sections A and B, of the Special Rapporteur's second report (A/CN.4/377). He now wished to comment on section C, dealing with crimes against humanity.

<sup>8</sup> United Nations, *Treaty Series*, vol. 1015, p. 243.

The first of those crimes was genocide, which had been defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide<sup>9</sup> and on which there was no need to dwell at length, since that Convention itself provided, in article IV, that persons committing that crime would be punished and, in article VI, that they could be punished by any international penal tribunal that might have jurisdiction.

20. The second category of crimes against humanity was that of inhuman acts “committed against any civilian population on social, political, racial, religious or cultural grounds” by the authorities of a State or by private individuals. The list of inhuman acts given in article 2, paragraph (11), of the 1954 draft code was, however, not exhaustive. It had been taken from the Charter of the Nürnberg International Military Tribunal, annexed to the London Agreement of 8 August 1945,<sup>10</sup> and from the “Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal” adopted by the Commission at its second session in 1950.<sup>11</sup> Both of those texts required a particular connection for an act to be qualified as a crime against humanity. The Charter of the Nürnberg Tribunal specified that the act had to be committed in execution of or in connection with “any crime within the jurisdiction of the Tribunal”.<sup>12</sup> The “Principles” stated that the acts in question had to be committed “in execution of or in connection with any crime against peace or any war crime”.<sup>13</sup> That connection had been replaced in the 1954 draft by the requirement that the acts in question had to be committed “on social, political, racial, religious or cultural grounds” (art. 2, para. (11)). He did not think that there was any need for that requirement. Most of the inhuman acts referred to would indeed be committed on those grounds, but even if they were otherwise motivated, their gravity would in no way be diminished. It would also be necessary to dispel any doubts that might arise in connection with the use of the words “any civilian population”, which seemed to imply that the acts in question had to be committed against a collectivity and that acts committed against private individuals were excluded. It was, moreover, difficult to see why crimes committed against military personnel should appear to be excluded as well. In his view, the list of inhuman acts should be expanded to include torture and involuntary disappearances, which had unfortunately become all too common.

21. Human rights included a wide variety of specific rights: some, such as the right to life, liberty and security of person, were individual, while others were individual rights which were enjoyed collectively and included the right to self-determination, the right of the members of a group or minority to maintain their own cultural life and trade union rights. Human rights were enjoyed essentially within a national society and were protected and

guaranteed by the State. At the same time, States had recognized, in such international instruments as the United Nations Charter and the Universal Declaration of Human Rights, a general international obligation to protect human rights within their jurisdiction. Some specific obligations concerning certain rights had also been recognized by particular conventions, such as ILO conventions and those relating to discrimination. Accordingly, a State which denied human rights to a person or group of persons committed a breach of an international obligation—a breach which engaged its international responsibility. That breach would, however, not constitute a crime because the concept of an “obligation . . . essential for the protection of fundamental interests of the international community” (art. 19 of part 1 of the draft articles on State responsibility) could not be interpreted so broadly as to bring every breach of an international obligation within its scope. There was, moreover, no indication that the international community would be prepared to recognize as a crime the breach of any and every obligation in the field of human rights. It would therefore not be justified to include in the draft code a provision that would qualify breaches by a State of its international obligations concerning human rights as international offences against the peace and security of mankind.

22. His own conclusion was that the question should not be approached in a general or theoretical fashion. The Commission should examine whether there were some actions which might be described as human rights violations in international instruments and which, because of their seriousness and their implications for the peace and security of mankind, should be included in the code. That was precisely what the Special Rapporteur had done in chapter II of his second report.

23. Section A of chapter II listed no less than 23 international instruments which had been elaborated since 1954 and might be used to update the list of offences against the peace and security of mankind; section B analysed the offences which should, in the Special Rapporteur’s view, be included in the list, while section C referred to offences which should not be included, such as the counterfeiting of money and the dissemination of false news.

24. He supported the Special Rapporteur’s minimalist approach and would even take it one step further. The code that was being prepared was a very special instrument: it would define certain international crimes that would entail very specific and serious legal consequences. Those crimes would engage the international responsibility of the State, as well as the responsibility of private individuals, even if they had committed such crimes in the exercise of governmental authority. It necessarily followed that the code would cover only offences against the peace and security of mankind that were distinguished by the “horror and cruelty, savagery and barbarity involved”, to use the Special Rapporteur’s terms (A/CN.4/377, para. 77).

25. The fact that a particular act was not covered by the code did not, of course, mean that it would go unpunished. The State involved would be responsible under

<sup>9</sup> See 1816th meeting, footnote 17.

<sup>10</sup> United Nations, *Treaty Series*, vol. 82, p. 279.

<sup>11</sup> See footnote 7 above.

<sup>12</sup> Art. 6 (c) of the Charter (see footnote 10 above).

<sup>13</sup> Principle VI, subpara. (c): “Crimes against humanity” (see footnote 7 above).

international law and the private individual concerned would be liable under internal law. In many cases, States were being placed under an international obligation to punish certain crimes, and so-called "universal jurisdiction", which extended the right of States to bring to trial and punish individuals regardless of the place of commission of the crime or the nationality of the criminal, was being given wider application.

26. Turning to the list of offences which the Special Rapporteur proposed to include in the code (*ibid.*, para. 79), he noted that colonialism was generally recognized as being contrary to the fundamental interests of the international community; as such, it was an impediment to the peace and security of mankind, as stressed in the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>14</sup> The General Assembly had repeatedly declared that the continuation of colonial rule threatened international peace and security. Although it was therefore justified to include colonialism in the list of offences, he would suggest that instead of referring to "colonialism", which was an historical concept, it would be preferable to refer to "the denial of, or interference with, the right of peoples to self-determination". Such wording would be in keeping with the wording of article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights<sup>15</sup> and would have the advantage of going beyond a purely historical approach and of being applicable to other possible violations of the right to self-determination that were equally harmful to the peace and security of mankind.

27. There was no doubt that the list of offences should include *apartheid*, which was a violation of the principle of the equality of all human beings proclaimed in article 1 of the Universal Declaration of Human Rights and of the principle of non-discrimination embodied in article 7 of that Declaration.

28. The taking of hostages, a practice that was all the more repulsive in that it often affected the personal security of individuals who were not involved in the dispute that had given rise to it, was the subject of the International Convention against the Taking of Hostages adopted by the General Assembly in 1979.<sup>16</sup> The States Parties to that Convention had agreed to make the taking of hostages punishable by law and to establish and exercise jurisdiction even when the offence in question had not been committed in their territory; they had also agreed to facilitate extradition. If that Convention were properly applied, the taking of hostages would not go unpunished and he doubted whether there was sufficient reason to classify it as an offence against the peace and security of mankind. That offence was indeed a serious one, but it was not on a par with such crimes as aggression or genocide. The liability of a State in connection with the taking of hostages would, moreover, be covered by the draft articles on State responsibility. He was

therefore of the opinion that the inclusion of the taking of hostages in the draft code would not do a great deal to strengthen the international community's defences against that scourge.

29. He also had doubts with regard to acts of violence against internationally protected persons and with regard to a serious disturbance of public order by a diplomat or an internationally protected person. To deal with the first of those offences, the international community had adopted the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>17</sup> Their inclusion in the code would, in his view, do virtually nothing to strengthen the measures of protection and punishment provided for in that Convention and he seriously doubted whether those offences could be said to relate to the peace and security of mankind. If a provision were to be included on the subject, it would have to be less general and relate only to the few cases, such as the murder of a head of State, in which the implications for international peace were clear. As to the second type of offence, article 41 of the 1961 Vienna Convention on Diplomatic Relations did, of course, establish the duty of diplomatic agents "to respect the laws and regulations of the receiving state" and provided that the "premises of the mission must not be used in any manner incompatible with the functions of the mission". Lately, however, abuses had been committed and it had become clear that States needed protection against certain acts by internationally protected persons. Although he was not convinced that the code would be the best way of achieving that result, the problem was a real one and he would welcome any elaboration by the Special Rapporteur on his suggestion.

30. While he agreed with the general condemnation of the abhorrent practice of mercenarism, he was inclined to take the view that it could not be classified as an offence against the peace and security of mankind. The OAU Convention for the Elimination of Mercenarism in Africa<sup>18</sup> defined the crime of "mercenarism", established measures for the punishment of mercenaries under internal law and provided for universal jurisdiction and for extradition. That Convention was being used as a basis for the work of the United Nations *ad hoc* committee that was elaborating a more general instrument. He was therefore not at all certain that the punishment of mercenarism would be more effective if it were included as an offence in the future code. More importantly, he doubted whether the nature of acts of mercenarism would justify their inclusion in the code.

31. Turning to the question of acts causing serious damage to the environment, he pointed out that there was a great difference between damage inflicted by a country to its own environment and damage inflicted directly or indirectly to the environment of another country. The damage must, moreover, be the result of wilful action. Although intent to cause damage did not have to be present in every case, the State concerned should at least be aware that the action it undertook or permitted

<sup>14</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>15</sup> General Assembly resolution 2200 A (XXI) of 16 December 1966, annex.

<sup>16</sup> See 1819th meeting, footnote 10.

<sup>17</sup> *Ibid.*, footnote 5.

<sup>18</sup> See 1816th meeting, footnote 15.

might have harmful effects and entail international consequences. If the Special Rapporteur could draft a provision that took those points into account, he would be prepared to consider it.

32. As an independent jurist, he would consider a general prohibition of the use of nuclear weapons as a positive development in international law. As a member of the Commission, however, he would hesitate to recommend that the Commission should venture into that field because the question of the use of nuclear weapons had, as yet, never been dealt with in positive law. In the circumstances, any suggestion by the Commission that the use of nuclear weapons constituted an offence against the peace and security of mankind was very unlikely to be accepted by most of the Governments which possessed such weapons. The Commission should, however, draw the attention of the international community to the fact that it would be highly desirable to formulate a rule of international law prohibiting the use of nuclear weapons.

33. He did think that the inclusion in the code of the offences of piracy and slavery, to which Sir Ian Sinclair had referred, was worth considering. Piracy had revived in recent years and slavery had not entirely disappeared: the Working Group on Slavery of the Commission on Human Rights had found evidence that it still existed. Accordingly, it would be no anachronism to include piracy and slavery in the code.

34. In conclusion, he suggested that the Special Rapporteur should reconsider the list of offences in the light of the current debate and of any Government comments that might be forthcoming, with a view to submitting a preliminary list of offences to the Commission in 1985. It should be possible to use that preliminary list to establish general criteria for the classification of offences. The Special Rapporteur might also consider the possibility of drafting an introduction recalling the general principles of criminal law, as indicated in paragraph 67 of the Commission's report on its thirty-fifth session. He nevertheless urged the Special Rapporteur to concentrate primarily on the preparation of the list of offences and to deal with the introduction and the general criteria only if time allowed.

35. Mr. OGISO said that the Special Rapporteur's second report (A/CN.4/377), which was concise and characterized by a spirit of moderation, made a valuable contribution to the Commission's work. The first point of a general nature that he wished to make related to the need to ensure the fair application of the Code of Offences against the Peace and Security of Mankind and to his doubts regarding the preparation by the Commission of a list of offences before either the General Assembly or Governments had given any indication of their reactions to the two questions raised by the Commission and, in particular, the question whether the Commission would be entrusted with the task of considering the establishment of an international criminal jurisdiction. If a list of offences were prepared before that question had been clarified, it was quite possible that a conqueror might, by an arbitrary selection of procedure and its own interpretation of the list, apply the code in such a way as to impose sanctions unilaterally upon the conquered.

That would not be in keeping with the wishes of the General Assembly.

36. With regard to the problem of the criterion for the classification of offences raised in the second report (*ibid.*, para. 8), he said that, although the Special Rapporteur had referred to the Commission's unanimous agreement on the criterion of "extreme seriousness", his own feeling was that any agreement on that score had been more passive than positive: the criterion of extreme seriousness had been accepted simply because there had been no adequate alternative and no one had dared object to it. The matter should therefore be given further consideration to determine whether any other valid criterion could be applied. In that connection, he noted that the Special Rapporteur had stated (*ibid.*, para. 12) that the difficulty lay in separating the most serious and less serious offences and that, even if a dividing line did exist, it would shift with changes in international opinion: in other words, the adoption of the criterion of "extreme seriousness" could mean that a given act would be regarded as an offence in one situation, but not in another. Adoption of the premise that the position could differ according to which party was the conqueror and which the conquered might be contrary to the principle *nulla poena sine lege*. As the Special Rapporteur had therefore wisely observed (*ibid.*, para. 13), the Commission should not limit itself to the "excessively general criterion of seriousness". So long as there was only the one subjective definition and no specific supplementary criteria, however, the danger to which he had drawn attention would subsist. If the Commission did decide to draw up a list of offences at the present time, it should ensure that the terms used were as precise as possible in order to rule out any ambiguity.

37. Although it was essential to clarify the basic question of the criterion to be adopted, it was equally important to elaborate an introduction to the draft code, in accordance with General Assembly resolution 38/132, and he considered that the Commission should begin the elaboration of a draft introduction simultaneously with its examination of the list of offences. In view of the different opinions that were likely to be expressed, it would be useful if the Special Rapporteur could prepare two or more alternative drafts of the introduction, which might encourage the General Assembly to reply to the question the Commission had already raised.

38. As to the list of offences to be included in the draft code, he, unlike the Special Rapporteur, considered that the provisions of article 2 of the 1954 draft code required further examination both as to form and as to substance.

39. Referring to article 2, paragraph (3), of the 1954 draft, he said it would be difficult to determine, at a point prior to the "employment of armed force", whether "the preparation by the authorities of a State" of such an act for any purpose other than self-defence had in fact taken place; in practice, the inevitable result would be that, after hostilities had ended, the conqueror would unilaterally determine the existence of such "preparation".

40. The interpretation of the words "encouragement by the authorities of a State" in article 2, paragraph (5),

could differ according to the social and political system of the State concerned. In a free society, political parties and the press were free to criticize the policy of the Government of another State for the benefit of the opposition in that other State. Should criticism of the policy of a foreign Government by the normally State-controlled press of the socialist countries be regarded as "encouragement by the authorities of a State" of certain activities or would such an act come under "toleration by the authorities"? The codification of such acts without due precision could lead to confusion and unnecessary disputes.

41. Although article 2, paragraph (6), referred only to the "undertaking or encouragement by the authorities of a State of terrorist activities", terrorist activities in themselves should constitute an international crime of the most serious nature and should be classified as an offence against the peace and security of mankind. In such an event, the encouragement by a State of terrorist activities perpetrated by an individual could be regarded as an act of incitement or assistance that would be covered by the draft articles on State responsibility.

42. In article 2, paragraph (8), the words "by means of acts contrary to international law" seemed ambiguous; if the annexation in question meant annexation by force, the wording used in article 3 (a) of the Definition of Aggression<sup>19</sup> would be more suitable.

43. The wording of article 2, paragraph (9), could give rise to many different interpretations and he had particular difficulty in understanding what was meant by "intervention by the authorities of a State in the ... external affairs of another State".

44. As for offences violating the prohibitions and limitations on armaments or the laws and customs of war, the existing legal instruments covered not only basic obligations, but also technical matters, and he therefore wondered whether a violation of a technical nature would be classified as an offence. It would be necessary to define more precisely what kind of offences could constitute an offence against the peace and security of mankind. There was also the problem of participation in the relevant multilateral conventions, which had both contracting States and non-contracting States, the latter not being bound, technically speaking, by the terms of such instruments. What, therefore, would be the consequence of the different legal status of contracting States and non-contracting States when they committed the same act?

45. In that connection, the Special Rapporteur had also considered the problem of nuclear weapons, although he had not referred, in the context of disarmament, to the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water,<sup>20</sup> which had been one of the main achievements of the disarmament negotiations. Violations of that treaty might well be considered to constitute an offence against the peace and security of mankind, in which case there would again be

a problem of participation in the Treaty, since important countries such as China and France were not contracting parties to it. Another point was whether violations of bilateral agreements, such as the Treaty between the United States of America and the USSR on the Limitation of Anti-Ballistic Missile Systems,<sup>21</sup> should also be regarded as offences against the peace and security of mankind. Those questions would have to be settled at some later stage. Since the Special Rapporteur had, moreover, noted (*ibid.*, para. 27) that there was "no text prohibiting the use of nuclear weapons for combat purposes", he himself considered that, if the use of nuclear weapons was to be made an offence against the peace and security of mankind, a convention prohibiting the use of such weapons would first have to be concluded. Such a prohibition would not, however, be effective unless the production and possession of such weapons by all States were gradually reduced and ultimately banned.

46. With regard to human rights violations, he agreed with the Special Rapporteur that they should not be confused with crimes against humanity (*ibid.*, para. 32), that "when violations of human rights attain a certain *dimension* or a certain degree of *cruelty* within a State, they offend the universal conscience and tend to fall within the province of international law" (*ibid.*, para. 34) and that "beyond a certain point, violations of a human right are in substance tantamount to crimes against humanity" (*ibid.*, para. 37). He also agreed that it was difficult to distinguish crimes against humanity from war crimes. For instance, to detain prisoners of war for the purpose of making them perform forced labour for a long period of time after the end of hostilities would be not only a war crime, but also a crime against humanity.

47. In the light of the foregoing, he considered that, if the Commission decided at present to examine the list further, the content of each offence should be carefully reviewed; many of the elements in the 1954 draft code would, however, provide a starting-point for the elaboration of a list of offences. Even more careful examination would be required in the case of acts classified as offences since 1954, particularly in view of their political character. He was not suggesting that such acts should be excluded from the list, but rather emphasizing the need to define them in precise legal terms. With regard to mercenarism, a matter that was currently under examination by a United Nations *ad hoc* committee, he would simply point out that the definition contained in General Assembly resolution 3103 (XXVIII) of 12 December 1973 and referred to by the Special Rapporteur in his report (*ibid.*, para. 61) lacked clarity. On the other hand, there seemed every reason to include *apartheid* in the list of offences, in view of the international community's conviction that *apartheid* was a crime against humanity which should be severely condemned by that community as a whole.

48. The Special Rapporteur referred to a number of acts for possible inclusion in the list (*ibid.*, para. 70).

<sup>19</sup> See footnote 4 above.

<sup>20</sup> United Nations, *Treaty Series*, vol. 480, p. 43.

<sup>21</sup> Signed at Moscow on 26 May 1972 (*United States Treaties and Other International Agreements*, 1972, vol. 23, part 4, p. 3435); Protocol to the Treaty signed at Moscow on 3 July 1974 (*ibid.*, 1976, vol. 27, part. 2, p. 1645).

Though serious, however, those acts could not, in his view, be classified as extremely serious and he therefore agreed with the Special Rapporteur's conclusion that they should not be covered by the codification (*ibid.*, para. 78).

49. With regard to the list proposed in chapter III of the report, offences such as acts causing serious damage to the environment and the threat or use of violence against internationally protected persons called for further careful consideration: the former had never been examined in depth from the point of view of international crime, while the latter could be appropriately dealt with in the same legal framework as piracy. Lastly, he expressed his general agreement with the Special Rapporteur's views on economic aggression (*ibid.*, para. 80).

*The meeting rose at 12.45 p.m.*

## 1821st MEETING

*Wednesday, 16 May 1984, at 10.25 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (*continued*) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. QUENTIN-BAXTER thanked the Special Rapporteur for his report (A/CN.4/377), and said that he had made a very difficult subject seem almost straightforward. He wished at the outset to raise the question of nuclear weapons, since it was an issue that stood alone. As had rightly been said, the existence of nuclear armaments tended to defeat the whole rationale of international law, and it was therefore only appropriate for members of the Commission, as lawyers, to express their concern, as nuclear scientists and medical men had already done. Nuclear war was a spectre that dwarfed humanity; it was significant that the instruments pre-

pared by the Conference on International Humanitarian Law held at Geneva from 1974 to 1977<sup>4</sup> were generally regarded as applicable to conventional warfare only, which clearly showed that nuclear warfare yielded neither to the law nor to any other human discipline. Consequently some discussion of the topic in the report was called for, with an indication that lawyers too believed that a total ban on the manufacture and use of nuclear weapons might well be the only key to human survival. Furthermore, international law was made not only by precept and exhortation, but was essentially the result of the practice of States as identified and expounded through the endeavours of a body such as the Commission. However, the Commission had to recognize its limitations: if nuclear weapons were one day to be banished from the earth's surface, it would not be because a text on the subject had been prepared by a group of experts serving in a personal capacity, but because nations had found the will to take such a decision and the means to implement it. The Commission could only hope that day would come and bring its influence to bear on the international community by increasing the awareness of the dangers.

2. The general rule that the Commission must always relate what it did to reality was somewhat difficult to follow in the case of the topic under consideration; that was because the Commission had a limited mandate, being required to keep to the guidelines laid down by the General Assembly. If it had had a free hand, it might have reached a rather different conclusion about the timeliness of dealing with the topic and the chances of success in doing so; ideally, it would have examined the notion of an international crime more thoroughly before beginning to draw up a list. Yet he was not criticizing the Special Rapporteur for adopting the course he had followed. Since the extremely important question of who could commit an international crime had been raised and had received diametrically opposite answers, the Commission was obviously bound to set it aside for the time being, in so far as that was possible; however, in any legally oriented consideration of the contents of a list of offences against the peace and security of mankind, it would undoubtedly be driven back to that question from time to time.

3. In regard to the assistance which the Commission might give the Special Rapporteur, the process whereby each member stated what he thought should or should not be included in the list of offences had obvious limitations. The Commission could not act as a surrogate for States in matters of policy. Rather, it should analyse the situation systematically and provide States with criteria for a decision. In that connection, whereas war crimes stood in a class very much apart, the other two kinds, those against peace and those against humanity, covered every offence proposed for inclusion in the code. Broadly speaking, as the Special Rapporteur pointed out in his report, the Commission should concern itself with offences against the integrity of States on the one hand, and offences against the various human qualities on the

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> See 1816th meeting, footnote 13.

other. That was in full accord with the United Nations Charter, which proclaimed that maintenance of peace was the first aim and went on to provide that a more peaceful world order must be established, based among other things on a regard for human values that transcended national frontiers. The categories of offences provided for in the 1954 draft code might therefore be taken up and extended to cover the new offences.

4. That led to the question of the seriousness of the offence. If there was one clear point of agreement in the Commission, it was that the Commission would not, at the present stage, endeavour to enumerate every offence that was or might be an international crime, but would aim more at a limited code of offences directly affecting the peace and security of mankind. The seriousness of the offence, however, was a very inadequate criterion. Those who had spoken on that point seemed to have been driven back, at least indirectly, to the question of the content *ratione personae* of the subject: in other words, was the Commission dealing with the conduct of States or with that of individuals?

5. He had always taken the view that it would be disastrous for the development of the law if the Commission were to confuse the question of defining State responsibility, and especially the most serious form of it, crimes of the State, with the very different question of the establishment of an international criminal jurisdiction. He had raised that point in connection with article 19 of part 1 of the draft articles on State responsibility proposed by Mr. Ago, the Special Rapporteur for part 1 of that topic; he had then suggested that, to avoid any confusion, some term other than crime should be used.<sup>5</sup> Mr. Ago's reply had been that international practice, particularly in the United Nations, had already attached the word "crime" to the most serious breaches of international law, and had thus determined his choice of that term. Mr. Ago had also said that unfortunately, the same legal term was sometimes used in wholly different contexts.<sup>6</sup> Nevertheless, those contexts had a common link in that they all concerned crimes involving the participation of leaders or Governments.

6. Much as it was desirable not to confuse the question of international responsibility with that of an international code of offences, it had to be acknowledged that when examining offences that merited inclusion in a code of offences against the peace and security of mankind the Commission was, overtly or covertly, making a judgment as to the extent to which they implicated Governments. That became clearer on examining the list of offences set forth in the Special Rapporteur's second report (A/CN.4/377, para. 79). Aggression, for instance, was bound to be committed by persons occupying senior positions in the service of States. In that connection, he recalled that the indictments at the Nürnberg and Tokyo Tribunals had described the crimes committed against peace as a conspiracy by persons exercising important functions in government service to plan, launch or wage

an aggressive war. The connection between the two questions was therefore quite plain, even if the aims followed were very different. The offences mentioned under items 2 to 6 in the list proposed by the Special Rapporteur were bound to be committed by individuals wielding power and influence derived from their positions in their national Governments. Accordingly, if the Commission wished to develop the criterion of seriousness, it would have to acknowledge that the scale of the crime had a connection with the exercise of governmental authority of a sovereign State. Also, the test of government involvement, if applied to "minor" war crimes, would give a reasonably clear indication of what did or did not belong in a code of offences against the peace and security of mankind.

7. He did not mean by that to belittle any of the offences against the laws of war: indeed he was deeply convinced of their importance. However, the ordinary war crimes which were committed by individuals in conventional conflicts and which their Governments and armed forces had a duty to repress could not really be regarded as offences against the peace and security of mankind. Obviously, even among the offences which were grave breaches of the 1949 Geneva Conventions,<sup>7</sup> there were certain offences which, by their very nature, could not be committed without the connivance or even the encouragement of States. He had in mind, for example, forcible enlistment of prisoners of war in an enemy army. Perhaps it was at the point at which the offence became a matter of government policy that it should be considered to fall within the scope of the code of offences against the peace and security of mankind.

8. Turning to crimes against humanity, he paid tribute to the Special Rapporteur for the objectiveness and delicacy with which he had set that kind of crime against the general background of human rights. It was virtually impossible to dissociate crimes committed by individuals against international law from the history of the law of human rights. If individuals could be held accountable for their misdeeds, they themselves must have rights under the legal system which ordained their duties and their liability for punishment if they failed in those duties. It was not surprising that, in the aftermath of the Second World War, there had arisen a determination that human rights should be given a new scale of values; the Special Rapporteur had summed up that attitude (*ibid.*, para. 37) by saying that, in certain cases, violations of human rights were in substance tantamount to crimes against humanity.

9. The action taken by the United Nations system to promote respect for human rights, despite all its limitations, was one of the most far-reaching and successful aspects of its work. One of the tests evolved by the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities to determine whether a violation of human rights was sufficiently serious to be removed from the sphere of internal law to that of international law was that the violation was on a massive scale or that there was a

<sup>5</sup> *Yearbook ... 1976*, vol. I, pp. 79-80, 1375th meeting, paras. 6-8 and 14.

<sup>6</sup> *Ibid.*, p. 89, 1376th meeting, para. 25.

<sup>7</sup> See 1816th meeting, footnote 14.

consistent pattern of violation, the latter circumstance being an essential ingredient of the notion of seriousness. The Commission on Human Rights was not, of course, concerned with crimes committed by individuals, but with the international responsibility of States for events that occurred within their own borders and which, in a less sophisticated period of international law, would have been regarded as merely an internal affair of the State. Also, the expression "consistent pattern of violation" indicated that people were thinking, probably if not necessarily, of behaviour by Governments as well as behaviour by the individuals who led or influenced those Governments. It should therefore be possible to give the topic a broader dimension by saying that offences against the peace and security of mankind were nearly always those that involved the conduct of States themselves. There was no reason to ignore history and to refrain from saying that the fact that something was done in the name of the State did not excuse the individuals responsible from answering before international law. But if the list of offences was to be convincing there had to be some design and consistency behind it.

10. The taking of hostages, another new offence proposed for inclusion in the list, was of course an extremely serious phenomenon and one that required international co-operation if it was to be suppressed. But the taking of hostages, no matter how disagreeable, was not in itself a threat to the peace and security of mankind. If, however, a Government made a policy of encouraging the taking of hostages, or of internally destabilizing other sovereign States to such an extent that such conduct amounted to an intervention in their internal affairs, the matter would then be sufficiently serious to be described as an offence against the peace and security of mankind.

11. Those general remarks were made in response to the General Assembly's desire that the members of the Commission should, individually and collectively, give it what help they could, but he was not absolutely confident that the world was ready to make progress on that front. In his view, it would have been preferable for many of the questions at issue to have been considered first in the context of State responsibility, which would have meant greater logic in the development of the law. In the present circumstances, he considered that the Commission should place emphasis upon the clear doctrinal difference between questions of State responsibility and questions relating to the criminal responsibility of individuals, while recognizing that, if it was required to deal with the latter, it could not fail to associate the criterion of seriousness with the connection between individual acts and acts of States. In a world in which multinational corporations and other entities which, strictly speaking, were not subjects of international law disposed of great power—greater in some cases than that of many sovereign States—it was perfectly possible that, in the future, the need for a code of offences against the peace and security of mankind would arise because of the activities of those entities. For the moment, however, the Commission should not be blinded to the fact that the law should protect individuals and that most of the responsibility rested with Governments of sovereign States.

12. Mr. FRANCIS said that, in his view, the list of offences proposed by the Special Rapporteur (A/CN.4/377, para. 79) provided an acceptable basis for discussion. However, the offence mentioned under item 15 (Serious disturbance of the public order of the receiving country by a diplomat or an internationally protected person) should be deleted, since incidents in which diplomats or other internationally protected persons committed such an offence were wholly exceptional. On the other hand, he was in favour of piracy and slavery being included in the list.

13. So far as the taking of hostages was concerned, although there was another instrument on the subject, as Mr. Calero Rodrigues had pointed out (1820th meeting), the inclusion of that offence in the list would serve as an added deterrent and also as an indication of how strongly mankind felt about it.

14. With regard to mercenarism, it had been said that a mercenary was a person who entered into a private contract under which he hired out his services for reward; killing for money, however, was particularly abhorrent and should be classified as an offence against the peace and security of mankind, at least as far as Africa was concerned.

15. Some members had voiced reservations about the inclusion of *apartheid* in the list of offences. He had had an opportunity to go into that matter a little more deeply in the wider context of the Namibian question and he wished to bring certain facts to the Commission's attention. First, in 1967, the South African Government had enacted the Act to prohibit terroristic activities<sup>8</sup> and had made it retroactive for a period of five years preceding its promulgation. Secondly, in 1969, the South African Department of Bantu Administration had ruthlessly moved and resettled 44,000 Damoras in an area of 4,800 hectares where a new homeland of Damoras was to be established. Thirdly, between 1969 and 1970, 2,000 Damoras had been driven from their homes in Usakos and a further 500 Damoras had been transferred to new homelands. Lastly, in 1969, 35,000 Namas had been arbitrarily uprooted from their homelands. In every instance the areas vacated had become areas reserved for whites. Those were but a few examples of the odious character of *apartheid*; if there was one offence that had its rightful place in the list of offences against the peace and security of mankind it was *apartheid*.

16. Turning to the problem of nuclear weapons, he said that public opinion strongly condemned the use of those weapons, although their manufacture was lawful for some States; fortunately few States had the necessary know-how. The stockpiling of nuclear weapons was not unlawful either. Consequently, the issue before the Commission was whether it should regard the use of nuclear weapons as a crime. In his view, there was enough documentary material available to the Commission to enable it, as a body of experts, to pronounce on that issue. The

<sup>8</sup> Act to prohibit terroristic activities and to amend the law relating to criminal procedure; and to provide for other incidental matters, of 12 June 1967 (*Statutes of the Republic of South Africa, 1967*, part II, Nos. 63-105, p. 1236, No. 83).

scientific facts were well known. It was also known how difficult it was to aim nuclear weapons at precise targets. The terrible effects of nuclear weapons on human beings and on the environment therefore made their use totally unacceptable. Public opinion in the major Powers was strongly opposed to the use of nuclear weapons but it did not object to their being kept as a deterrent. He therefore supported wholeheartedly the view that the Commission should include in the draft code a provision making the use of nuclear weapons an offence against the peace and security of mankind. Such a statement would not in any way affect the deterrent influence of those weapons, to which the Special Rapporteur had referred in his report (*ibid.*, para. 52).

17. The Special Rapporteur observed (*ibid.*, para. 4) that the General Assembly, in resolution 38/138, had not answered the questions put to it by the Commission in paragraph 69 of its report on its thirty-fifth session. That paragraph actually raised three basic questions: (a) the question of the subjects of law to which international criminal responsibility could be attributed; (b) the question whether the Commission's mandate extended to the preparation of the statute of a competent international criminal jurisdiction for individuals; (c) the question whether such a jurisdiction should also be competent with respect to States. The position appropriately taken by the General Assembly had been to ask Governments for comments before pronouncing on those three points. As he saw it, the only essential point remaining to be clarified was whether a State ought to be made amenable to an international criminal jurisdiction. The Commission was divided on that issue and it was significant that even those members who favoured the concept of criminal responsibility for the State considered that such responsibility should be subject to a special régime, in view of the specific nature of legal entities. He himself felt there could be no doubt about the possibility of attributing criminal responsibility to States within the meaning of the Code of Offences against the Peace and Security of Mankind. On that point it was sufficient to refer to the list of offences proposed by the Special Rapporteur (*ibid.*, para. 79); several of the offences mentioned in it could only be attributed to States.

18. The Special Rapporteur had confined his second report to the question of the list of offences to be included in the code, thereby fulfilling—at least in part—the mandate given to the Commission by the General Assembly. It would in fact have been possible for the Special Rapporteur to go somewhat beyond the stage of drawing up a mere list of offences. In any event, he could not agree with the implication by the Special Rapporteur (*ibid.*, paras. 6 and 82) that the only alternative would have been the formulation of draft articles.

19. In the course of the present discussion many useful suggestions had been made on such general questions as the approach to a definition of offences against the peace and security of mankind and the criteria to be adopted, as well as on questions such as non-applicability of limitations and the subjects of law to be held criminally liable. He proposed that those suggestions should be presented in writing, so that the work on the general

provisions could progress side by side with the consideration of the list of offences.

20. Mr. JAGOTA said that the Special Rapporteur's second report (A/CN.4/377) formed an excellent basis for discussion. The Special Rapporteur had adopted a combination of the deductive and inductive methods. He had used the deductive method in identifying the basic criteria and the inductive method in proposing a list of offences divided into two parts, comprising the offences covered by the 1954 draft code and certain violations of international law recognized by the international community since then. In accordance with the instructions of the General Assembly, the Special Rapporteur had reviewed the 1954 list in the light of the progress of international law since 1954.

21. The Commission's study of the draft Code of Offences against the Peace and Security of Mankind dated back to the period 1949-1954. The General Assembly, in resolution 177 (II) of 21 November 1947, had directed the Commission, on the one hand, to formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal and, on the other hand, to prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the above-mentioned principles. The terms of that resolution thus established a link between the code and the Nürnberg Principles. There had been a difference of views in the Commission on some aspects of the code, but the sentiment had been unanimous that its preparation would be of value for the peace and security of mankind. The Commission had accordingly prepared a draft code at its third session in 1951<sup>9</sup> and, following the discussions in the General Assembly, had revised it in 1954.

22. Between 1954 and 1981 there had been many developments on relevant matters, perhaps the most important of them being the adoption by consensus of the Definition of Aggression.<sup>10</sup> That definition had been framed in general terms but contained a non-exhaustive list of acts which qualified as acts of aggression and had been destined to serve as guidelines for the Security Council. Another important development during that period had been the elimination of colonialism, which had had the effect of trebling the membership of the United Nations. Yet another had been the great strides made in technology, with their obvious impact on peace and security. Equally important had been the work on disarmament, which aimed at avoiding another world catastrophe.

23. In that context the General Assembly had come to the conclusion that it was desirable to revise the 1954 draft code of offences and had thus, in 1981, invited the Commission to deal with the subject. In its report on its thirty-fifth session, the Commission had put a number of questions to the General Assembly. Although the Assembly had not given a categorical reply to those questions in resolution 38/132 of 19 December 1983, answers to a number of them—and they substantive

<sup>9</sup> See 1820th meeting, footnote 5.

<sup>10</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

questions—could be found in the Sixth Committee's discussions (see A/CN.4/L.369, sect. B). There had been conflicting views on some points but usually a preponderant view in each case. At all events, the fact that the General Assembly has preferred to wait for written comments by Governments did not prevent the Commission from going ahead with its work.

24. In paragraph 1 of resolution 38/132, the General Assembly had invited the Commission to prepare an introduction in conformity with paragraph 67 of its report on its thirty-fifth session, as well as a list of offences in conformity with paragraph 69 of that report. In the light of that, it would perhaps have been appropriate for the Special Rapporteur either to have included an introduction in his report or to have explained in the report his reasons for not doing so. Despite the absence of an introduction, however, it was perfectly appropriate for the Special Rapporteur and the Commission to begin considering the list of offences right away. He would merely suggest that the Commission's report on the present session should state the reasons why it had postponed consideration of the introduction requested by the General Assembly.

25. Consideration should nevertheless be given to the elements to be included in the introduction, such as provisions on the scope and structure of the whole draft. The 1954 draft code actually contained a number of articles in the nature of a general introduction and the Special Rapporteur's second report dealt with such general matters as the criteria for characterizing offences as offences against the peace and security of mankind. Moreover, the Commission should decide what was meant by the "seriousness" of an offence—which would warrant its inclusion in the code—and define the notion of "peace and security of mankind", which was the basis of the code's entire scope and structure. In that regard, it would have to be seen whether the terms "peace" and "security" should be taken jointly or separately. The introduction should also deal with exceptions, justifiable acts and mitigating factors. Since some of those general questions had been dealt with in part 1 of the draft articles on State responsibility,<sup>11</sup> the Commission would have to see whether and to what extent the results of its work on that topic were applicable to the present topic.

26. With regard to the application of the code *ratione personae*, no guidance was provided by the 1954 draft, which was based on the Nürnberg Principles. It was a well-known fact that the Nürnberg Tribunal had adhered exclusively to the idea of individual liability. Accordingly, in formulating the Nürnberg Principles at its second session in 1950, the Commission had taken the position that there was no such concept as the criminal liability of the State. It had stated in its commentary that crimes could only be committed by individuals and not by abstract entities such as States.<sup>12</sup> The 1954 list of offences had therefore been confined

to the acts of individuals; even acts of State were treated in it as acts of the individuals who had performed them on behalf of the State. The records of the discussions in the Commission in 1950 clearly showed that intention of attributing acts of the State to individuals.

27. But it was necessary to take account of developments since 1954. In the Commission itself, the adoption of article 19 of part 1 of the draft articles on State responsibility,<sup>13</sup> which divided internationally wrongful acts into "international crimes" and "international delicts", had been an important step. The Commission should examine the legal foundation for the action which the Security Council could take pursuant to Article 42 of the United Nations Charter. Clearly, it was only if an act constituted a crime that collective military sanctions could be applied against the offending State under that Article "to maintain or restore international peace and security". Lastly, account must be taken of the various international conventions providing for the prosecution and punishment of crimes against humanity and of certain other international crimes. Many of those instruments made provision for universal jurisdiction and they usually required States either to prosecute or to extradite the offenders.

28. Turning to the list of offences proposed by the Special Rapporteur (A/CN.4/377, para. 79), he agreed that it should be limited to those international crimes which affected the peace and security of mankind. It was not the mandate of the Commission to prepare an international penal code covering all crimes under international law. The Commission would, of course, have to define the concept of "the peace and security of mankind", at the latest in the report on its next session. Only in that way would it be possible to determine what offences should be included in the code. The list of offences which the Special Rapporteur proposed to exclude (*ibid.*, chap. II, sect. C) was acceptable to him; none of those offences normally affected the peace and security of mankind. The code could, of course, cover any exceptional cases in which the offence did so.

29. On the subject of method, he agreed that the 1954 list must be revised, but with due account being taken of the considerable work that had gone into its preparation. The Special Rapporteur himself had in fact revised some of the items on the 1954 list. The wording which he used in his proposed list differed in some cases from that used in 1954. In any case the precise drafting would have to be re-examined in the light of developments which had taken place since 1954. For example, the item on aggression would have to be carefully revised in the light of the Definition of Aggression adopted by the General Assembly.

*The meeting rose at 1 p.m.*

<sup>11</sup> *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>12</sup> Commentary to Principle I (*Yearbook ... 1950*, vol. II, p. 374, document A/1316, para. 99).

<sup>13</sup> See 1816th meeting, footnote 12.

## 1822nd MEETING

Thursday, 17 May 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. JAGOTA, continuing the statement he had begun at the previous meeting, said that, in his second report (A/CN.4/377), the Special Rapporteur had divided the offences covered by the 1954 draft code into three categories: (a) offences against the sovereignty and territorial integrity of States; (b) offences violating the prohibitions and limitations on armaments or the laws and customs of war; (c) crimes against humanity. That categorization had not existed in the 1954 list of offences, but its origin could be traced to the Charter of the Nürnberg Tribunal. No classification of that kind had been attempted for the offences classified since 1954. Although he had no objection to that method of work, he thought that in due course the Commission would have to prepare a single list of offences and that, to that end, a number of items would have to be merged.

2. The first category of offences covered by the 1954 draft, namely offences against the sovereignty and territorial integrity of States, would have to be reviewed in the light of the Definition of Aggression.<sup>4</sup> For the purposes of the code, the Commission did not need to be as comprehensive as the General Assembly had been in that Definition; it would be sufficient to retain the provisions of article 1.

3. The second category of offences, those violating the prohibitions and limitations on armaments, raised the question of the position of the nationals of a State which was not a party to an arms limitation treaty. At a later stage, the Commission might also consider the relationship between the draft code and the special conventions

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

on arms limitations and whether a plurality of régimes would exist in that respect. In the context of the elaboration of the draft code, the conventions on arms limitations merely provided the Commission with evidence of positive law. Also in the second category, offences violating the laws and customs of war needed to be brought up to date in the light of recent developments, including the prohibition of bacteriological warfare, the use of certain weapons in outer space and the military use of environmental modification techniques. Mention should also be made of the 1980 Convention prohibiting the use of certain conventional weapons,<sup>5</sup> such as booby traps.

4. With regard to the third category, namely crimes against humanity, he noted that, although the Special Rapporteur's starting-point had, of course, been the 1954 draft, he had had to make that list more comprehensive by referring expressly to genocide and taking account of the condemnation, since 1954, of *apartheid*, terrorism of various kinds and human rights violations.

5. The Special Rapporteur had adopted a straightforward approach with regard to genocide and *apartheid* and had proposed sound criteria for determining which human rights violations should be covered by the draft code. A human rights violation constituted an offence against the peace and security of mankind when it affected a person not as an individual, but rather as a member of a given nation, ethnic group or political or religious grouping; the criterion of seriousness also came into play in that connection.

6. As for terrorism, international law had developed along three lines as a result of the adoption of conventions relating to unlawful acts against the safety of aircraft and passengers; crimes against internationally protected persons, including diplomatic agents; and the broad subject of the taking of hostages. To determine whether those three types of offence should be included in the draft code, account had to be taken of the scope of the topic under consideration and of the gravity of the offences in question, which had to endanger the peace and security of mankind.

7. Offences which, according to those criteria, fell outside the scope of the draft code would still be crimes under international law. The fact that they were not covered by the draft code would not affect the application of such instruments as the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.<sup>6</sup> The principle of universal jurisdiction would still be applicable.

8. With regard to offences classified since 1954, the first was colonialism, whose inclusion in the draft code he wholeheartedly supported, although he recognized that some drafting changes might be necessary. Article

<sup>5</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, and Protocols thereto (United Nations, *Juridical Yearbook 1980* (Sales No. E.83.V.1), pp. 113 *et seq.*).

<sup>6</sup> See 1819th meeting, footnote 5.

19 of part 1 of the draft articles on State responsibility<sup>7</sup> classified “the establishment or maintenance by force of colonial domination” as an international crime. The term “colonial domination” was perfectly clear and did not need to be defined, although the wording used in the above-mentioned article 19 might be refined and particular reference might be made to the denial of the right to self-determination, which constituted an offence against the solidarity of mankind.

9. Turning to mercenarism, a general definition of which was contained in article 1 of the 1977 OAU Convention on the subject,<sup>8</sup> he said that the real issue was not the supply of and demand for services, but rather the object and purpose for which the individuals concerned were used. Mercenaries were recruited to oppose self-determination, to intervene in the internal affairs of a State or to threaten a State’s internal stability. The crime of mercenarism came squarely within the scope of the draft code and the Special Rapporteur had proposed sound criteria in that respect. If necessary, the question would have to be reviewed in the light of any definition that might emerge from the work being carried out in the United Nations on mercenarism. In a sense, the subject was not new; it could properly be said to fall within the scope of article 2, paragraph (4), of the 1954 draft code, dealing with “armed bands”.

10. The Special Rapporteur had mentioned the threat to the environment arising out of the use of prohibited weapons. That problem would, of course, be covered by the provision relating to those weapons, but it had to be decided whether threats to the environment in general should be covered by a broader provision. To that end, he suggested that the applicable criteria should be the seriousness of the threat, the international character of the damage, the wrongfulness of the act and the fact that it endangered the peace and security of mankind. The relevant provision should perhaps also give examples.

11. He could, moreover, not agree with the argument concerning the deterrent effect of nuclear weapons or with the Special Rapporteur’s decision to exclude the use of such weapons from the draft code on the grounds, as indicated in the report (*ibid.*, para. 53), that its inclusion would be desirable but not realistic. It had also been pointed out that there were no provisions of positive law—in other words, in international conventions—which prohibited nuclear weapons. If that were true, his view would be that it was incumbent upon the Commission to be of service to the international community by contributing to the development of international law in the matter. There were, however, several international instruments that expressly condemned the use of nuclear weapons, the most recent being the Declaration on the Prevention of Nuclear Catastrophe,<sup>9</sup> which described the first use of nuclear weapons as the gravest crime against humanity, for which both States and statesmen would be held accountable.

12. The General Assembly had invited the Commission to prepare the draft code in the light of the progressive development of international law. In that connection, he referred to article 15 of the Commission’s statute, which stated that the expression “progressive development of international law” meant the preparation of draft conventions on subjects which had “not yet been regulated by international law”. The fact that no convention had yet been concluded on a particular subject did not, therefore, constitute valid grounds for excluding that subject from a draft if the Commission was otherwise convinced of its usefulness. In view of the capacity for mass destruction of nuclear weapons and their terrible long-term effects, which endangered life itself, he was convinced that the Commission should make every effort to prohibit the use—and not only the first use—of those weapons. The question of the prohibition of the manufacture and stockpiling of nuclear weapons could be decided on at a later stage by the Governments concerned. Lastly, he suggested that the draft code should contain a provision stating that “The use of nuclear weapons is a crime against humanity”. That draft rule might be placed in square brackets to show that the Commission was divided on the question.

13. The Special Rapporteur had not included economic aggression in the list of offences he had proposed. That question, which related mainly to the problem of natural resources and their development by a State which did not have the necessary technology and capital for the purpose, was to some extent covered by article 2, paragraph (9), of the 1954 draft, dealing with intervention. He nevertheless thought that, even if that provision were retained, a separate paragraph dealing with economic aggression would still be needed.

14. He had no comments to make on section A (offences covered by the 1954 draft) of the list of offences proposed by the Special Rapporteur (*ibid.*, para. 79), although he would suggest that some rearrangement might be necessary. In section B, dealing with violations of international law recognized since 1954, he suggested that items 12, 14, 15 and 17 should be placed in square brackets. The Commission would have to determine whether those items came within the scope of the draft code and, if so, under what terms. A provision should also be included on the question of nuclear weapons.

15. With regard to the question of the application of the code *ratione personae* and that of an international criminal jurisdiction, his view was that the Commission would lose nothing by awaiting the decisions of the General Assembly. Decisions on those questions would have to be taken in due course, but they were not essential at the present stage of the Commission’s work. It was, moreover, worth nothing that the international conventions on the prevention and punishment of the crimes of genocide and *apartheid* did not contain any provisions on sanctions and jurisdiction.

16. Mr. KOROMA said that the elaboration of a draft code of offences against the peace and security of mankind was a delicate and complicated task, but one which continued to be timely and relevant. One of the main

<sup>7</sup> See 1816th meeting, footnote 12.

<sup>8</sup> *Ibid.*, footnote 15.

<sup>9</sup> General Assembly resolution 36/100 of 9 December 1981.

reasons for the complexity of the topic was that it involved both international law and criminal law, which was part of internal law. Since the structure and sources of international law and criminal law were different, the treatment of the topic gave rise to a great many problems. The topic touched on values shared by all, affected the collective conscience of mankind and was of universal, non-regional interest, so that the desired results could not be achieved by examining it from a purely regional point of view, although different bodies had admittedly approached it in different ways. By entrusting the study of the topic to the Commission, the General Assembly had paid a tribute to the Commission's objectivity and had shown its confidence in the Commission's capacity to discuss the subject without passion.

17. He agreed with the minimalist approach or, in other words, with the idea of including in the draft only what the international community would be prepared to accept. He nevertheless considered that the main desiderata with regard to the topic were: (a) to prevent and punish aggressive war; (b) to prosecute offences against the peace and security of mankind whenever aggression had taken place; (c) to protect human rights and prevent massive human rights violations, which shocked the conscience of mankind; and (d) to ensure that, if war did break out, it was conducted humanely and without unnecessary suffering to both the civilian population and the combatants. All those criteria were in keeping with the purposes and principles of the Charter of the United Nations, namely the maintenance of international peace and security and the promotion and protection of human rights and fundamental freedoms.

18. With regard to the elaboration of the list of offences against the peace and security of mankind, the criterion of extreme seriousness proposed by the Special Rapporteur constituted a valid test. The concept of extreme gravity was, of course, known in internal criminal law, particularly when it classified offences as felonies or as misdemeanours. In international law, the concept of "offences of extreme seriousness" covered crimes against peace, war crimes and crimes against humanity which threatened international public order and involved the greatest danger. The magnitude of the offences in question was another relevant factor. Thus, under the Definition of Aggression,<sup>10</sup> not every use of force qualified as an act of aggression. A certain dimension was necessary apart from the requirement of gravity. The offence in question also had to be contrary to certain international interests; it had to jeopardize the interests of certain States or a group of States to be included in the draft code. Common values and universal interests had to be at stake in order to bring about general agreement on the need to prosecute the offence.

19. On the basis of those criteria, the Special Rapporteur had appropriately taken the list contained in the 1954 draft code as a starting-point. The Commission now had to consolidate and update all the offences to which those criteria applied and which were recognized by customary international law, by multilateral and bilat-

eral treaties and by General Assembly declarations and resolutions. It also had to group as many of those offences as possible under one heading.

20. On the basis of Article 2, paragraph 4, of the United Nations Charter, which prohibited the threat or use of force against the territorial integrity or political independence of any State, the Definition of Aggression specified the types of conduct that were prohibited by international law. For the purposes of the draft code, those provisions would have to be made more specific.

21. Crimes against humanity, as defined in the Nürnberg Principles,<sup>11</sup> had, for example, prefigured the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>12</sup> The fact that some States had not ratified conventions of that type in no way detracted from the principles embodied therein.

22. As for the offences recognized by the international community since 1954, there appeared to be general agreement that forcible colonialism, which violated the right to self-determination, constituted an offence against the peace and security of mankind and should be regarded as an international crime. He recalled that the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>13</sup> had been adopted by the General Assembly in 1960 without a single negative vote and with only a few abstentions. In that connection, it should be stressed that the future code was not intended to be retroactive. His own country, like many other former colonies, maintained cordial relations with its former administering Power. A provision condemning colonialism would not constitute an indictment against any former administering Power. It would apply only to those States which had persisted in forcible colonialism; there were some unrepentant colonial Powers which should have to explain their conduct to the international community.

23. Some members of the Commission had suggested that there was no need for any new provision on *apartheid* since the International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>14</sup> was adequate. *Apartheid* was, however, one of the most insidious forms of institutionalized racism and it was lacking in any pretence to equality under the law. It was built into the South African system and way of life, involving as it did the oppression by the South African Government of an overwhelming majority of citizens solely on the grounds of their ethnic origin. It was an affront to human dignity, a brutal political system under which even children who demonstrated against unequal educational opportunities could be shot and killed, as had happened at Soweto. Between 1979 and 1983, it had involved the uprooting of 3.5 million persons, who had been sent to "tribal homelands" they had never even seen. It was the policy of the *apartheid* régime to carry out armed attacks against neighbouring States, thereby

<sup>11</sup> See 1820th meeting, footnote 7.

<sup>12</sup> See 1816th meeting, footnote 17.

<sup>13</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

<sup>14</sup> See 1820th meeting, footnote 8.

<sup>10</sup> See footnote 4 above.

threatening international peace and security. As a Member of the British Parliament had recently stated, *apartheid* was an intolerable affront not only to the coloured races of Africa and to the rest of the world, but to any basic concept of humanity. It was, moreover, linked to the underlying philosophy that permeated war crimes, genocide and crimes against humanity. *Apartheid* was thus a prime candidate for inclusion in the list of offences against the peace and security of mankind: first, because it involved massive violations of human rights which shocked the collective conscience and, secondly, because its continued existence posed a threat to international peace and security. Shared human values dictated that the International Convention on the Suppression and Punishment of the Crime of *Apartheid* should be observed. For all those reasons, he supported the Special Rapporteur's proposal (A/CN.4/377, para. 50) that *apartheid* should be included in the list of offences to be punishable under the future code.

24. Mercenarism should also be included in that list. Mercenaries were contemptuous of human values and did not even respect the rules of war. They caused terrible carnage among the civilian population of the areas in which they operated. Accordingly, mercenarism qualified, both under the heading of war crimes and under that of crimes against humanity, for inclusion in the proposed list.

25. The Special Rapporteur had pointed out (*ibid.*, para. 53) that the prohibition of the manufacture and use of nuclear weapons had not been dealt with at all in positive law, whereas the unlawful use of infinitely less fearsome weapons had been prohibited by international conventions. If the use of explosive and expandable bullets, asphyxiating gases and bacteriological agents was banned, it followed that the use of the most destructive of all weapons should be regarded as an offence against the peace and security of mankind. The inclusion of such an offence might, however, prevent the members of the Commission from adopting and submitting to the General Assembly a list of offences on which they could all agree. He therefore considered that, until a consensus could be reached, that offence should be omitted from the list.

26. The prohibition of economic aggression was implicit in Article 2 of the Charter of the United Nations and had also been provided for in a number of United Nations declarations, such as the Charter of Economic Rights and Duties of States.<sup>15</sup> In view of its controversial nature and in line with the minimalist approach, however, economic aggression should, for the time being, be omitted from the list of offences.

27. As to the question of the content of the draft *ratione personae*, theory and practice seemed to support the view that both States and individuals should be held accountable for prohibited conduct. There were certain crimes that could be committed only by a State and for which only the State concerned should be held responsible; but when individuals had, for example, committed genocide or crimes against humanity, they too

should be held directly responsible and a plea that they had been acting on behalf of the State should not exonerate them or, indeed, the State. Historically, States had been found guilty of and punished for crimes against peace and humanity. The draft code should therefore provide for both individual and State responsibility, where appropriate.

28. With regard to methodology, some members had suggested that the Special Rapporteur should first formulate principles for the identification of offences against the peace and security of mankind. However, in view of the dual nature of the topic, which involved both international law and criminal law, he would favour an empirical approach whereby conduct which had been identified and proscribed would be declared contrary to international law. That approach, which had also been recommended by the Special Rapporteur, did not rule out the possibility of formulating principles of criminal law at a later stage.

29. The viability of the topic would, in his view, depend largely on the Commission's ability to produce realistic proposals. For the time being, however, the Commission should concentrate on drawing up a list of offences which would be acceptable to all its members, in accordance with the mandate entrusted to it by the General Assembly.

30. Mr. NJENGA congratulated the Special Rapporteur on the high quality of his report (A/CN.4/377) on a very intricate subject. The elaboration of a list of offences against the peace and security of mankind would be no easy task, particularly since a suitable criterion had yet to be established. In that connection, he noted that, in paragraph 48 of the report of the Commission on its thirty-fifth session, it had been agreed that the draft code would relate only to crimes of "especial seriousness" and that such seriousness could be measured either by the extent of the calamity in question, or by its horrific character, or by both together. In his view, a criterion based on the "seriousness" or "horrific" nature of the act committed was too subjective, particularly since the need for an international criminal jurisdiction continued to be questioned by some. The criterion of an offence's international dimension, suggested by the Special Rapporteur (*ibid.*, para. 8), did not really solve the problem since the international community was far from having reached agreement on the universal values referred to. It was clear from the cynical way in which the major Powers interpreted the notion of the sovereignty and territorial integrity of small States, as well as from their naked aggression against those whose policies they regarded as inimical, that the international community was returning to the law of the jungle, where might was right.

31. In his view, a way should be found of placing the test of the seriousness or the horrific nature of the act committed on a more solid foundation and, in that connection it seemed to him that article 19, paragraph 2, of part 1 of the draft articles on State responsibility<sup>16</sup> would provide a better criterion. The fact that an act of aggres-

<sup>15</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

<sup>16</sup> See 1816th meeting, footnote 12.

sion resulted in the death of only a few individuals and did not have any horrific or serious consequences, such as when a "dictatorship" was overthrown and "democracy" was restored, should not exonerate the perpetrators from the consequences of committing a criminal offence against the peace and security of mankind. The seriousness or horrific character of the criminal act should be determined not by the quantum, but by the nature of the act.

32. Referring to the first of the three categories into which the Special Rapporteur had divided the offences covered by the 1954 draft (offences against the sovereignty and territorial integrity of States), he said he agreed that all the offences listed were supported by a very broad conventional base and that, at least in substance, they must be included in the future code. That did not, of course, preclude the reformulation of certain notions which might have no place in a criminal code.

33. In defining aggression, account must, moreover, be taken of the Definition of Aggression.<sup>17</sup> Notions such as the threat and preparation of aggression were, however, too nebulous to be incorporated in a code that provided for the possibility of criminal sanctions and other legal consequences. Otherwise, the salient elements of the 1954 draft code and, in particular, the offences covered by article 2, paragraphs (4), (5), (6) and (8), deserved the place they had been given in the list proposed by the Special Rapporteur (*ibid.*, para. 79).

34. At the same time, he could not agree to the way in which article 2, paragraph (9), of the 1954 draft had been eased out of the proposed list of offences, since that paragraph referred to the intervention by a State in the affairs of another State "in order to force its will and thereby obtain advantages of any kind". All the offences in question involved that one inadmissible aim and it was precisely that situation that the code of offences should take into account. Southern Africa was at present the victim of the most pernicious form of economic aggression, which the racist South African régime was carrying out against neighbouring independent States in order to subvert their policies in the interests of its heinous designs. The land-locked countries of the region which dared to resist that régime were gradually being strangled by being deprived of transit facilities. Their economic infrastructure had been systematically sabotaged by that same régime, which had resorted to the use of mercenaries. The predictable end result would hardly have been different in the case of outright military aggression. He could not therefore agree with the Special Rapporteur, who had stated (*ibid.*, para. 80) that the term "economic aggression" was more suited to political than to legal parlance. What was at issue was the very principle of the survival of those States as sovereign entities and, even though it would be difficult to define economic aggression, that was no justification for shirking responsibility in the face of such a grave offence against the peace and security of mankind.

35. As to the second category of offences covered by the 1954 draft code (offences violating the prohibitions

and limitations on armaments or the laws and customs of war), he said that it was important to avoid doing anything that might interfere with the 1949 Geneva Conventions and the Protocols thereto,<sup>18</sup> which were applicable world-wide. The prohibitions and limitations on armaments were a relic of the Second World War—a restriction imposed by the victors on the vanquished—and were of little relevance at the present time. Existing treaties between the super-Powers on the limitation of nuclear weapons were, moreover, so full of loopholes that it would be pointless to make any violation of them an offence against the peace and security of mankind.

36. With regard to the third category of offences covered by the 1954 draft code (crimes against humanity), he said he agreed on the whole with the Special Rapporteur's analysis. In particular, not every violation of human rights committed by a State within its own jurisdiction could be regarded as an offence against the peace and security of mankind. As the Special Rapporteur had also noted, however (*ibid.*, para. 34), a State could not always hide behind its internal jurisdiction when it engaged in massive violations of the human rights of its own citizens. Recent tragic events in various parts of Africa had brought the African States face to face with that reality and had led to the adoption by OAU in 1981 of the African Charter on Human and Peoples' Rights.<sup>19</sup> When that Charter came into force, no State would again be able to shelter behind the cloak of its sovereignty while engaging in massive violations of the human rights of its people.

37. Turning to the offences classified since 1954, he said that the resolutions, declarations and conventions referred to by the Special Rapporteur (*ibid.*, para. 44) would serve as an excellent basis for the elaboration of the list of offences to be included in the draft code. He also endorsed the Special Rapporteur's minimum content approach. The first of those offences was colonialism. With the adoption in 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>20</sup> the condemnation of colonialism had entered the realm of *jus cogens* and there could be no doubt that colonialism was an offence against the peace and security of mankind. He had therefore been surprised to hear Sir Ian Sinclair (1820th meeting) refer to a variant of colonialism as a form of government with the consent of the governed. That was a contradiction in terms. He was also unable to agree with Mr. Calero Rodrigues (*ibid.*) that the notion of the denial of a people's right to self-determination should be substituted for the concept of colonialism, since such a substitution would make for confusion and defeat the purpose of the draft code. It would also be in keeping with the wishes of those who were intent on destroying the territorial integrity of States and would encourage secessionist movements claiming that they had been denied their right to self-determination. Mr. Calero Rodrigues might therefore wish to reconsider his suggestion.

<sup>18</sup> See 1816th meeting, footnotes 13 and 14.

<sup>19</sup> Adopted at the 18th Assembly of Heads of State and Government of OAU, held at Nairobi, 24-28 June 1981 (CAB/LEG/67/3/Rev.5).

<sup>20</sup> See footnote 13 above.

<sup>17</sup> See footnote 4 above.

38. He had been dismayed to hear Sir Ian Sinclair say that *apartheid* should not be included in the proposed list of offences. In view of the provisions of article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,<sup>21</sup> Sir Ian could surely not be unaware of the horrors of a system which, by law, subjugated one race for the benefit of another minority race and for the benefit of Western capitalists. Nor could he be unaware of the forcible removal of millions of indigenous inhabitants to barren, overcrowded wastelands described as “homelands”. The fact that many Western countries had not voted in favour of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or in favour of many other resolutions on the subject attested to the vast profits that those countries and their multinational companies reaped from a system designed to reduce the black man to near slavery and to make him a source of cheap labour. If the Commission failed to include *apartheid* in the list of offences against the peace and security of mankind, it would deserve to become the laughing-stock of the international community.

39. He could also not see how any such list could fail to include the use of atomic weapons. After all, the whole purpose of the exercise was to preserve the human species, and the use of nuclear weapons would have precisely the opposite effect. He therefore disagreed entirely with the view expressed in the report under consideration (A/CN.4/377, para. 52) according to which such weapons, by their deterrent effect, safeguarded peace and security. Sooner or later, the wholesale stockpiling of nuclear weapons and the frantic arms race would lead to catastrophe. The least the Commission could do was to declare that the first use of such weapons was an offence against the peace and security of mankind.

40. Mercenarism, particularly as practised in Africa, likewise deserved to be added to the list, in carefully delineated terms. It did not involve hired soldiers, such as the British Gurkhas or the French legionnaires, but soldiers of fortune, who were hired to kill and to maim, and their colonial, racist and imperialist paymasters, who were seeking to suppress the struggle for national liberation. It was against that background that mercenarism had been defined in article 1, paragraph 2, of the OAU Convention for the Elimination of Mercenarism in Africa.<sup>22</sup> In view of the horror and destruction, not to mention the destabilization, caused by acts of mercenarism, particularly in Africa, the most careful attention should be paid to the possibility of including mercenarism in the proposed list.

41. He fully agreed with the considerations which had led the Special Rapporteur rightly to reject the maximum content approach (*ibid.*, para. 77), which would have had the effect of including in the list offences such as counterfeiting of money, forgery of passports, the dissemination of false news, and others (*ibid.*, para. 70). However, he had difficulty in accepting the offences listed under items 12, 14, 15 and 17 of the list proposed

by the Special Rapporteur (*ibid.*, para. 79). Although he did not mean to minimize the serious nature of those offences, he did not think that they had reached the threshold of gravity required for inclusion in the list of offences against the peace and security of mankind. Those offences were, moreover, already covered by conventions and, if a State organized or encouraged such offences, article 19 of part 1 of the draft articles on State responsibility would apply.

42. He fully supported Sir Ian Sinclair's proposal (1820th meeting) that the list should include piracy and slavery, which were still rife in the world. In that connection, he informed members of the Commission that, on 15 May 1984, the BBC had reported the arrest, in March 1984, of the captain of a Greek-registered ship who had ordered 11 Kenyan stowaways to be thrown into the Indian Ocean in a shark-infested area: there were no known survivors. Mankind had to be protected from atrocities such as those committed against the “boat people”. The Commission must now give the Special Rapporteur a firm mandate to prepare an introduction to the draft code, as well as draft articles on those offences which commanded a general consensus.

43. Mr. CALERO RODRIGUES said he realized that his suggestion that colonialism should be referred to in terms of its content, namely the denial of the right to self-determination, might give rise to ambiguity or abuse, since the concept of self-determination was open to different interpretations. As he saw it, however, the correct interpretation was that, once the right to self-determination had been exercised, it became irrelevant from the point of view of international law, since, as soon as a State had exercised that right, it became independent and its internal problems were no longer covered by that concept. If that interpretation was accepted, he did not think that the right to self-determination could be used to the detriment of the independence of States. On the other hand, if the term “colonialism” was adopted, it would unduly confine a criminal act to its historical content. That was the idea he had wished to put forward for the Commission's consideration.

44. Mr. DÍAZ GONZÁLEZ, referring to the question of colonialism, said he agreed with the comments made by Mr. Njenga and, in part, with those made by Mr. Calero Rodrigues. Although colonialism was, of course, an anachronism in that practically all the States which had been subjected to a classical colonial régime had achieved independence, it did continue to exist either in the form of the denial to an indigenous people of its right to self-determination or in the form of the occupation of a territory by a colonial State, as in the typical cases of Hong Kong, the military bases at Guantánamo in Cuba, the Panama Canal, the Malvinas and Gibraltar. It followed that decolonization involved either the granting of a people's right to self-determination or the restitution of occupied territory to the State which had been deprived of it. Colonialism had been and continued to be a threat to the peace and security of mankind and it must therefore be included in the future Code of Offences against the Peace and Security of Mankind, provided that it was very precisely defined.

<sup>21</sup> See 1820th meeting, footnote 8.

<sup>22</sup> See 1816th meeting, footnote 15.

45. Sir Ian SINCLAIR explained that what he had wished to point out in his earlier statement (1820th meeting) was that the term "colonialism" was used as a label to cover a wide variety of situations. It was therefore necessary to be quite clear about what was to be included in the list. The term "colonialism" should not be used to denote an offence against the peace and security of mankind.

46. Mr. LACLETA MUÑOZ said he was in favour of the inclusion of colonialism in the future Code of Offences against the Peace and Security of Mankind. That concept had to be carefully defined because, as Mr. Díaz González had pointed out, there was a wide variety of colonial situations. In any event, and contrary to what Mr. Calero Rodrigues had stated, that concept did not mean only the denial of the right to self-determination.

*The meeting rose at 1 p.m.*

## 1823rd MEETING

*Friday, 18 May 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. Diaz Gonzalez, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

### Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (continued) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. McCAFFREY said that a logical starting-point for the formulation of criteria for the identification of offences against the peace and security of mankind might be to seek to identify the interests to be protected by the draft code. It had rightly been observed that international law in the matter had two branches: the criminal aspects of international law and the international aspects of internal criminal law. The first branch consisted of "internationally defined proscriptions", a term introduced by Professor Cherif Bassiouni in his book entitled *International Criminal Law: A Draft International Criminal Code*.<sup>4</sup> That concept apparently

involved certain universally shared values and expectations whose maintenance required the adoption of minimum standards of behaviour by the members of the international community. Any breach of those standards constituted interference by the actor with interests whose preservation was essential to minimum world order. On that basis, offences against the peace and security of mankind were *prima facie* offences that posed the most serious threat to minimum world order. In that connection, there were two factors to be weighed: the quality of the interest in question, in terms of its importance to minimum world order; and the degree or quantity of the interference.

2. Accordingly, one of the Commission's first tasks should be to identify the main categories of interests whose protection or preservation was necessary to minimum world order. Two categories of interests had emerged from the two sections of the Special Rapporteur's list of offences (A/CN.4/377, para. 79): security interests and humanitarian interests.

3. Security interests were exemplified by many of the offences against the sovereignty and territorial integrity of States listed in the 1954 draft code. In the light of the provisions of Article 2, paragraph 4, of the Charter of the United Nations, even isolated interference in such interests would amount to an offence under the draft code. The question whether an act sufficiently disturbed minimum world order to amount to an offence against the peace and security of mankind could, however, also be decided on the basis either of the degree of interference or of a precise definition of the interests at stake. The latter approach would seem to be more in keeping with the maxim *nullum crimen sine lege*. The Commission should therefore examine more closely the empirical data bearing on whether the international community considered that threats of and preparation for aggression posed such a serious danger to minimum world order as to rise to the level of offences against the peace and security of mankind.

4. Humanitarian interests were those that reflected the community's interest in protecting the integrity of humankind, a term he used to refer to humanity as a whole, as well as to groups and individuals whom the community of nations had an interest in protecting against certain acts. It might be useful to consider whether such acts, when directed against a group, constituted a more serious infringement of an interest than acts against individuals. In that connection, a distinction had to be drawn between conduct serious enough to amount to an international crime and conduct posing such a threat to world order as to amount to an offence against the peace and security of mankind. There was, for instance, substantial authority for the proposition that a consistent pattern of gross violations of individual human rights, as well as systematic racial discrimination, amounted to an international crime and could also rise to the level of an offence under the draft code. The Commission might wish to consider to what extent that held true.

5. One possible criterion for identifying offences was the nature of the object of the act or practice in question, whether a State, a community, an individual or a group of individuals. An act committed against an individual might be less likely to constitute an offence under the

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part one).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part one).

<sup>4</sup> Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, p. 22.

code than an act committed against a State, since there was less likelihood of a grave disturbance of world order. Some State interests were, however, less important to the maintenance of minimum world order than certain individual interests.

6. That was where a second possible criterion, namely the importance of the right violated or the interest interfered with, might come into play. In that case, the test was whether interference with the State, group or individual interest in question threatened minimum world order. The rights or interests of three different types of objects of crimes were at stake. First, States, whose interests could range from security interests to interest in, for example, the integrity of currency or the integrity of official documents of nationality. In the latter two cases, the interests of the international community in maintaining minimum public order were probably not at stake. Secondly, groups, whether national, ethnic, racial or religious, which might be threatened with destruction or systematic persecution. And, thirdly, individuals, who might be the victims of a consistent pattern of gross violations of human rights or, in other words, of violations which were particularly shocking because of the importance of the right violated or because of their gravity and which might be a good candidate for inclusion in the code.

7. A third possible criterion was the gravity of the violation or interference and, in that case as well, there was a sliding scale: the more important the right or interest, the less frequent or aggravated the violations would have to be to threaten minimum world order. On the other hand, an unjustified summary execution, no matter how barbarous, would probably not threaten world public order so as to constitute an offence against the peace and security of mankind.

8. A fourth criterion might be the objective or purpose of the act in question. For instance, was the act justified or excused as an act committed in self-defence? Was the act committed for private or official ends, and what was the nature of those ends? Mercenaries, for example, could serve legitimate as well as illegitimate ends.

9. A fifth criterion, but one that might, in some instances, relate only to mitigation of punishment, was the circumstances in which the alleged violation had been committed.

10. A sixth criterion was the extent to which *mens rea*, or criminal intent, was present. The questions to be considered in connection with *mens rea* were: Was the act intentional? Was the interference in question the result of an omission, such as failure to monitor a certain activity? Was the interference a foreseeable consequence of, or substantially certain to follow from, the act or omission in question? To what extent was the alleged perpetrator actively involved? Since different degrees of culpability were usually taken into account in the penalty phase of a criminal prosecution, those questions highlighted the need to provide for penalties in the draft code: it would, in his view, be impossible to formulate a catalogue of offences without knowing more about the scope of the draft code *ratione personae* and how it was to be implemented.

11. A final criterion was whether or not the act in question would be recognized as an offence against the peace and security of mankind by the international community as a whole.

12. If, as he assumed, there was to be universal jurisdiction for the offences to be covered by the code, prosecution and punishment would be left to any State that seized an offender. A question that might be worth pursuing for purely practical reasons was whether all States would agree that the act in question posed such a serious threat to international peace and security that it could be punished by any State that seized the offender.

13. As to nuclear weapons, he said that, like other speakers, he thought that the Commission must see things the way they were, not the way it would like them to be. Such highly controversial matters had to be considered in the context of the disarmament effort as a whole.

14. In general, he would enter a plea for a lawyer-like approach to the identification of offences and the use of terminology. Some of the items in the list proposed by the Special Rapporteur—such as colonialism, *apartheid* and mercenarism—were more political or emotional labels than legal terms. Those labels could cover both permissible and impermissible conduct and, instead of using them, the Commission should identify the act or practice that was to be prohibited. The term “colonialism” might, for example, be replaced by the words “subjection of a people against its will to alien domination”, possibly followed by the words “and consequent denial of its right to self-determination”. The term *apartheid*, which had the serious drawback of referring to the unconscionable practices of only one country, should be replaced by a reference to the actual acts and practices that were considered to pose a grave threat to the peace and security of mankind, as set forth, for example, in the definition contained in article II of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.<sup>5</sup> As far as mercenaries were concerned, he agreed that the main consideration should be the object and purpose of their use, in accordance with the three categories of acts referred to in the OAU Convention for the Elimination of Mercenarism in Africa.<sup>6</sup>

15. Mr. AL-QAYSI, referring first to the nuclear weapons issue, said that, as he saw it, the relevant paragraphs of the second report (A/CN.4/377, paras. 26-27 and 52-53) did not convey any definite opinion on the Special Rapporteur's part: on the contrary, those paragraphs reflected the various points of view regarding nuclear weapons and left it to the members of the Commission to express their opinions on whether the use of such weapons should be considered an offence under the code. Perhaps the problem was one of translation. Divergent as members' views were, it was clear that their respective positions could only be strengthened by impeccable reasoning that would depend on the basic premise adopted, namely whether the Commission was thinking in terms of disarmament or of the disastrous consequences to which the use of nuclear weapons would

<sup>5</sup> See 1820th meeting, footnote 8.

<sup>6</sup> See 1816th meeting, footnote 15.

lead. In his own view, the only course open to the Commission was to await the reaction of the Sixth Committee of the General Assembly to the Commission's debate. He would be very hesitant about putting a question to the General Assembly on the matter, as had been suggested.

16. He would like to know exactly what type of definitions were going to be included in the list of offences when it came to questions that had already been defined in other international conventions or to concepts that had not been defined. Criteria of the kind referred to by Mr. McCaffrey would, of course, be useful, but even they would not make for the necessary precision. A measure of eclecticism in the matter was indicated.

17. He also wondered how the Commission was going to formulate criteria for the determination of the concept of "the international community as a whole". Was it going to adopt the criterion of the essential elements of the international community and, if so, what were the criteria for determining those essential elements? How was the Commission planning to proceed? On the basis of the voting records of the Member States of the United Nations on the relevant instruments? On the basis of the number of parties that had acceded to a particular legislative instrument? In his view, there was still a need for precise and objective criteria and it was therefore inevitable that some element of subjectivity would creep into the determination of the concept of "the international community as a whole".

18. Lastly, with regard to methodology, he considered that the Special Rapporteur should proceed to prepare draft articles for consideration by the Commission on the basis of his report. There was no need to wait for the replies of Member States and international organizations to the two questions which the Commission had put to the General Assembly in 1983. Even if such replies were immediately forthcoming, the Commission should adopt a functional approach to determine the basis for a consensus on the offences to be included in the code. The achievement of such a consensus, which did not necessarily have to apply to all offences, would of itself encourage Member States to make their positions known on the two questions that had been raised.

19. Mr. BALANDA said he had received only one of the working documents before the opening of the current session. As the Planning Group had observed at the previous session, it would be desirable for the members of the Commission to be able to acquaint themselves with the documents and prepare themselves for their work well before the Commission's sessions began.

20. The fact that, at its thirty-eighth session, the General Assembly had not replied to the two questions submitted to it by the Commission concerning the scope of the topic *ratione personae* and, in particular, the criminal responsibility of States—and the problem of the statute of the future international tribunal had confirmed his belief that the topic under consideration deserved special attention and that it should have been dealt with as a separate item on the General Assembly's agenda, as had been the case at the thirty-sixth and thirty-seventh sessions. Had that been so, the Member

States of the United Nations would have found it difficult to shirk their responsibility by evading those questions.

21. The offences referred to in the report under consideration (A/CN.4/377) had been divided into three categories: offences against peace, as covered by the 1954 draft; crimes against humanity, including genocide, certain violations of human rights and *apartheid*; and offences against the security of mankind, such as acts causing damage to the environment and mercenarism. One important problem which arose was that of the criteria the Commission should apply in selecting and defining the offences in each category. The Special Rapporteur had, on the basis of the Commission's almost unanimous majority view, adopted the criterion of "extreme seriousness", which would have to be assessed in the light of the consequences of the act in question.

22. Other important criteria mentioned by Mr. McCaffrey, namely the nature of the act itself and the nature of the right violated, should, however, also be taken into account. For example, if the offence violated a fundamental principle of *jus cogens*, it unquestionably had to be punished. In any event, the criteria selected would have to be objective, not subjective, as some members had proposed, since the provisions of criminal law were subject to strict interpretation. Whereas, in internal criminal law, it was easy to perceive the perpetrator's criminal intent in the case of an individual, it was less so in international law, especially where a State was concerned. Despite the difficulties involved in establishing the criminal responsibility of States, the draft code should also apply to States. Mr. McCaffrey had also referred to the object of the criminal act. It was, of course, important to know the circumstances in which an individual might have committed a criminal act and to take them into account; but, there again, while such circumstances were easy to determine in internal law, they were less so in international law, where establishing the international criminal responsibility of States would be an inextricably difficult problem. It was in the light of such considerations that the criterion of the degree of active participation had been proposed. All those criteria were interesting, but they were much too subjective to be adopted by the Commission as criteria for classifying offences against peace, offences against the security of mankind and crimes against humanity.

23. With regard to the question whether violations of human rights should be regarded as an international crime, he agreed with the Special Rapporteur that such violations were essentially directed against individuals, whereas an international crime did not strike at the individual as such but, rather, as a member of a particular ethnic, racial or political group. In that connection, he pointed out that, unlike the corresponding European or international instruments, the African Charter on Human and Peoples' Rights<sup>7</sup> dealt not only with the individual's rights, but also with his obligations towards the group to which he belonged; that reflected the patriarchal or community way of life that was so common in Africa.

<sup>7</sup> See 1822nd meeting, footnote 19.

24. Another question that had been raised was whether offences already covered by international instruments should be included in the draft code. Some members took the view that the reaffirmation of principles which had already been proclaimed would merely weaken them, but practice showed that that was not at all the case: the Manila Declaration of the Peaceful Settlement of International Disputes<sup>8</sup> and the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty<sup>9</sup> to quote only two examples, gave effect to fundamental principles of the United Nations Charter. In his view, such a reaffirmation of fundamental principles in no way attenuated their value, but actually strengthened them. Of all the offences in question, the Commission should therefore select those which fitted precisely into the framework of the draft Code of Offences against the Peace and Security of Mankind. Such a minimalist approach offered the advantage of allowing the Commission to define the issues before it without becoming bogged down in considerations which, interesting as they no doubt were, had no relevance to the draft code.

25. He agreed with the Special Rapporteur that the future code should also include offences that had been classified since 1954. Opinions in the Commission were divided on which of those offences should appear in the code. His own view was that colonialism was still an undeniable reality and that it should therefore be included, however it might be defined.

26. The same was true of *apartheid*. Although that crime involved only one country, South Africa, it contained elements which overlapped with the acts listed in article 2, paragraph (10), of the 1954 draft code as being offences against the peace and security of mankind. The policy of *apartheid* could be categorized as “killing members of the group”, in that members of the African National Congress and South African blacks in general were the targets of a policy of physical elimination; it could also be classified as “causing serious bodily or mental harm to members of the group”, since the South African police used barbaric methods, especially when conducting interrogations; it could be described as “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction”, since “bantustanization” was designed to subject South Africa’s black population to disgraceful economic and sanitary conditions; and, lastly, it could be characterized as a measure “intended to prevent births within the group”, since the electric shocks applied, in particular, to the genitals of blacks made them impotent and incapable of procreation, and the separation of husbands working in cities from their wives, who were not permitted to live with them, contributed to the decline in the birth rate of South Africa’s black population. The Commission should therefore not hesitate to declare that the policy of *apartheid*—even if it were designated by some other term—was a crime against humanity.

27. Although some members of the Commission did not think it advisable to discuss acts causing damage to the environment at the current stage, his own view was that the Commission should at least take account of such acts before drafting the future code, since the quality of life depended precisely upon the individual’s natural environment and the security of mankind could therefore not be dissociated from environmental protection.

28. The taking of hostages did, of course, form the subject of an international convention, but the unfortunate tendency of certain States to make the taking of hostages an instrument of national policy would justify its inclusion in the future code as a means of promoting good relations among States and international co-operation.

29. With regard to acts of violence against internationally protected persons and, in particular, diplomats, he pointed out that the security of mankind depended on the security of States and Governments and that international co-operation could not effectively be established unless those who were its instruments benefited from genuine protection. It would therefore be useful to define their rights and obligations in the future code.

30. Mercenarism was regarded as a crime under the OAU Convention for the Elimination of Mercenarism in Africa.<sup>10</sup> Africa was, however, not the only continent to suffer from mercenary activities; all independent States were at the mercy of incursions by mercenaries. The inclusion of mercenarism in the future code was therefore justified. Although he agreed with the Special Rapporteur (*ibid.*, para. 60) that a mercenary was motivated primarily by money, he had reservations about the Special Rapporteur’s second affirmation, namely that “a mercenary is not a national of, and has no ties to, the country for which he is fighting other than a contract of service with the group or entity for which he is fighting”. In support of those reservations, he pointed out that the mercenaries who had twice attacked his country, Zaire, had been fighting to help their own country recover a colonial position they had believed to be lost.

31. As to the use of atomic weapons, which was not prohibited by any international instrument, he said he agreed with Mr. McCaffrey that the Commission was called upon to draft a code of offences against the peace and security of mankind, not rules governing the use of nuclear weapons. It should therefore leave aside the subterfuge of the policy of deterrence and deal only with the use of nuclear weapons as such, as Mr. Jagota had proposed (1822nd meeting). The whole of mankind was threatened with destruction by the deployment of nuclear weapons; their use should therefore be considered to constitute an offence against the peace and security of mankind.

32. Referring to the question whether international criminal responsibility could be attributed to a State, he pointed out that the OAU Convention for the Elimination of Mercenarism in Africa provided expressly for the criminal responsibility of States and for that of natural

<sup>8</sup> General Assembly resolution 37/10 of 15 November 1982, annex.

<sup>9</sup> General Assembly resolution 2131 (XX) of 21 December 1965.

<sup>10</sup> See 1816th meeting, footnote 15.

and legal persons. The 1954 draft also provided for the criminal responsibility of States—without, however, using that term—in that some of the acts it listed could be committed only by a State, thereby engaging its criminal responsibility. There was thus no doubt that such responsibility existed in legal theory.

33. As to future work, he said that at the next session he would like the Special Rapporteur to submit a general part that would enable the Commission to express its views on the contents of the definitions and on the non-applicability of statutory limitations to offences against the peace and security of mankind. The Commission would also have to decide whether or not the draft code should make it an obligation for States to punish or surrender criminals seized in their territory.

34. The CHAIRMAN, speaking as a member of the Commission, said it was clear from the Commission's debate that there were two main and interrelated issues: on the one hand, the classification of offences and the main criteria to be applied in that connection and, on the other, the importance of an introductory part including a definition of offences against the peace and security of mankind, together with an indication of their constituent elements and scope and of the general principles of applicable criminal law. Both of those issues involved substantive and methodological aspects which called for further detailed study and the promising exchange of views that had already taken place had pointed in the direction that the Commission's discussions should take. Those issues also involved the use of both the deductive and the inductive approaches. A general definition would, by its very nature, depend more on deduction, but it should also be supported by knowledge of the facts. The criteria would be no more than abstract formulae if they were not substantiated by an evaluation of the practical significance of specific acts in terms of the danger they posed to the fundamental interests of the international community. The Special Rapporteur had demonstrated his ability to follow that approach.

35. There were also two aspects to the question of the criteria to be adopted for the classification of offences: the qualitative aspect (the nature of the offence) and the quantitative aspects (the magnitude of the offence). So far as the latter was concerned, it was important to remember that not all international crimes were involved, but only offences against the peace and security of mankind. Those qualitative and quantitative parameters were, moreover, connected by an intrinsic link, namely the social danger, or danger to the very foundations of society, that they represented. That was a dynamic factor which could differ in significance depending on prevailing perceptions of social values. Some penal doctrines, including that of his own country, Bulgaria, used the expression "degree of social danger", which contained elements of evaluation and objective criteria. On that basis, he suggested that, in addition to the elements referred to by the Special Rapporteur, the Commission should adopt the following qualitative criteria: the importance of the interests affected by the offence; the cruelty and destruction caused; and the horrific nature of the act. It might also adopt the following quan-

titative criteria: the magnitude of the harmful effect; the seriousness of that effect; and gross, massive and persistent violations on a large scale. Those criteria would, in his view, also provide guidelines for a possible definition.

36. Turning to the catalogue of offences presented by the Special Rapporteur (A/CN.4/377, para. 79), he said that section A of the list was generally acceptable to him, subject to certain adjustments. With regard to aggression and the threat of and preparation for aggression (item 1 of the list), he considered that the notion of aggression as defined in 1954 should be reconsidered in the light of the Definition adopted by the General Assembly in 1974<sup>11</sup> and of any other appropriate elements. As for the violation of restrictions or limitations on armaments (item 4), the list of instruments should be completed and updated to include all the General Assembly resolutions which qualified nuclear war as a crime against humanity. Since 1978, the General Assembly had adopted at least eight resolutions which reflected the state of the world conscience in the matter. They included the Declaration on the Prevention of Nuclear Catastrophe<sup>12</sup> and recognized, *inter alia*, that it was impossible to limit the deadly consequences of nuclear war, that the use of nuclear weapons was contrary to the human conscience and to reason, and that the use or threat of use of nuclear weapons should be outlawed. There was also a draft Convention on the Prohibition of the Use of Nuclear Weapons.<sup>13</sup> He therefore favoured the inclusion of the use of nuclear weapons in the list of offences. The arguments against its inclusion were well known, namely that it was a political issue of a controversial nature and that, as there was no positive law on the matter, many Governments would not agree to classify the use of nuclear weapons, which they claimed were a deterrent, as an offence against the peace and security of mankind. However, it sufficed to recall the many United Nations resolutions, including those on racial discrimination and *apartheid*, which had, when adopted, been considered premature or not to reflect the views of Governments in order to realize that the Commission should fulfil its mission of promoting the progressive development of international law and make its views known in an objective manner. The Commission's report would reflect all the proposals that had been made, including any dissenting views, and on that basis the General Assembly would arrive at a decision.

37. Referring to section B of the Special Rapporteur's proposed catalogue of offences, he said that colonialism was a well-established notion which should be elaborated, together with its constituent legal elements. The same applied to *apartheid*. He had some reservations about the inclusion in the list of the taking of hostages and the threat or use of violence against internationally protected persons. In his view, they should not be dealt with in the same way as the offences included in section A of the list unless they had been committed intentionally and had caused serious damage. He did, however,

<sup>11</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>12</sup> General Assembly resolution 36/100 of 9 December 1981.

<sup>13</sup> General Assembly resolution 38/73 G of 15 December 1983, annex.

think that economic aggression should be included in the list, since there was evidence that it could endanger the peace and security of mankind.

38. Lastly, the definition itself should be general enough to encompass all offences against the peace and security of mankind and, at the same time, as precise as possible so as to limit the scope of the draft code to offences against the peace and security of mankind. The next step would be to evolve general principles of criminal law which would serve as a good basis for discussion at the Commission's next sessions.

39. Mr. THIAM (Special Rapporteur), summing up the debate, said that he had not, of course, expected unanimous agreement on his report in its entirety and that he was aware of the shortcomings and gaps that had been drawn to his attention. He nevertheless wished to explain that the reason he had not mentioned General Assembly resolution 38/132 was simply that his report, dated 1 February 1984, could not logically have been expected to refer to a resolution whose text had been distributed on 23 January 1984. The text of that resolution had, moreover, not been sent to him. It might be a good idea for the Planning Group to consider the possibility of establishing more regular contacts between the Commission secretariat and the Special Rapporteurs. In any event, General Assembly resolution 38/132 would not have changed his approach in any way. What the General Assembly had invited the Commission to do in that resolution was to prepare a draft code by elaborating, as a first step, an introduction, as well as a list of offences. That was the end result which the General Assembly had in mind, but neither the Commission nor the Special Rapporteur could be tied down to any particular means of achieving that result. The General Assembly had also requested the Secretary-General to seek the views of Governments and international organizations on the questions raised by the Commission and to report on them to the General Assembly. The Assembly would then be in a position to give the Commission the necessary guidance. For the time being, it had merely requested the Commission to elaborate an introduction and a list of offences, but that did not mean that the Special Rapporteur necessarily had to start with the introduction.

40. It would, moreover, be necessary to determine exactly what an "introduction" would involve. The introduction to the study of a topic usually consisted of a statement of the problem and of its constituent elements, but what the General Assembly had had in mind might have been a statement of the general principles governing the subject-matter. If so, it should be noted that those principles had already been enunciated in his first report (A/CN.4/364) and that, at the present stage, it would be too early to choose from among the general principles listed. A solution also had to be found to the problem of method that had dominated the debates from the start: should the first step be to state the general principles and indicate a general criterion or should it be to analyse the facts? That was the crux of the eternal argument between those in favour of the deductive method and those who advocated the inductive method. In a field as controversial as the one under consideration, it might be dangerous to

begin by stating principles derived from abstract reasoning. Reality would inevitably have to be the starting-point. The majority of the members of the Commission had, moreover, opted for the inductive method. In any case, what counted was the end result and the reason he had chosen that method was that he had found it more appropriate. In the case in question, it was necessary to proceed from the particular to the general, even though, in absolute terms, it might be more elegant to start from a principle and deduce all its consequences.

41. With regard to the question whether criminal responsibility could be attributed to a State, he had, for the sake of clarity, deliberately decided to deal initially only with the responsibility of individuals. He did not, however, rule out the possibility of considering the responsibility of States at a later stage. Some members of the Commission had pointed out that certain crimes, such as *apartheid*, annexation or genocide, could be committed only by States. Yet the State was not an abstraction; behind a State were individuals acting in its name and on its behalf. It followed that any offence liable to be committed by a State could also be committed by an individual. The comments by the German Democratic Republic to which Mr. Ushakov had referred (1819th meeting) were altogether pertinent: the recognition of offences by individuals did not preclude State responsibility. Just as, in internal law, an offence by a principal could engage both his responsibility and that of his agent, so, at the international level, an individual who committed a breach of international law would be held accountable for it, although State responsibility would not be precluded for all that.

42. Pending the General Assembly's replies to the questions submitted to it by the Commission, the draft code should therefore deal with the criminal responsibility of individuals, and the question of the criminal responsibility of States, which was more complex than it might seem, should temporarily be left aside. Several members of the Commission had pointed out that the question of the imprescriptibility of crimes differed depending on whether the perpetrators were States or individuals. If sanctions were one day provided for, distinctions would also have to be made depending on whether they were to apply to States or to individuals. In that connection, he wished to make it clear that he had never said that those questions already lent themselves to codification. On the contrary, he had implied in his first report that they belonged to the realm of science fiction (A/CN.4/364, para. 45).

43. Turning to the question of the criterion of extreme seriousness, he said that any criterion was difficult to identify and that, once it had been identified, it should not be confused with a definition. Whereas a definition tended to be as precise as possible, a criterion was merely a sign which helped to distinguish an object, but not necessarily its constituent elements. The criterion of extreme seriousness was, admittedly, a subjective one, but in international and internal criminal law, there was bound to be some element of subjectivity. According to article 19 of part 1 of the draft articles on State responsibility,<sup>14</sup> a breach of international law was an

<sup>14</sup> See 1816th meeting, footnote 12.

international crime if it was "recognized" as such by the international community as a whole. There, too, a subjective element came into play. In that connection, it should be noted that a judge in a criminal court always enjoyed broad powers of appraisal; he not only weighed the facts, but also probed the conscience of individuals. In assessing the seriousness of an offence, whether in terms of attenuating or aggravating circumstances, intent or premeditation, a subjective element was always involved. Any code, even in civil law, inevitably contained some points that were not clear. It was up to the judge to interpret the code's provisions one way or the other and sometimes even to engage in law-making. If the Commission's ambition was to draft a code that would not give rise to any controversy, it was fighting a losing battle.

44. He also pointed out that the criterion of extreme seriousness varied from one country to another. When his own country had been under colonial domination, he had personally noted that the African members of a jury at an assize court were particularly severe in cases of crimes of violence, while the European members were so in cases of the misappropriation of public funds. As far as the seriousness of offences was concerned, every opinion was thus equally defensible.

45. Several members of the Commission who were anxious to achieve perfection had held that a distinction could be drawn between offences against peace, offences against the security of mankind and crimes against humanity. In his own view, it would not only be difficult, but also pointless, to draw a distinction between offences against peace and offences against the security of mankind. The concepts of the peace and the security of mankind went together. In particular, any breach of the peace, even in the form of a localized war, was in today's world a threat to the security of mankind. It was also difficult to distinguish between war crimes and crimes against humanity. For example, the use of a prohibited weapon was a war crime that could be distinguished only with great difficulty from an offence against the security of mankind. As for crimes against humanity, such as genocide and *apartheid*, their perpetration in certain parts of the world was unquestionably a threat to the peace of mankind. As one member of the Commission had pointed out, the South African Government's policy of *apartheid* endangered peace in southern Africa. His own view was therefore that, despite its apparent diversity, the concept of the peace and security of mankind formed an indivisible whole. Several authors had treated it as a concept *sui generis* which should not be split up into separate parts.

46. During the debate, he had been advised to classify the relevant international instruments—conventions, resolutions and declarations—in descending order of importance and to look into the circumstances in which they had been adopted. He was not sure that such a classification would be realistic. It was a moot point whether a convention was necessarily more important than a resolution or a declaration and whether the Declaration on the Granting of Independence to Colonial Countries and Peoples<sup>15</sup> did not have the same binding legal force as a convention. It was doubtful whether the subject-matter

of a resolution was of less consequence to the international community than the subject-matter of a convention just because conventions were one of the recognized sources of international law.

47. His own research had shown that the relevant international instruments (see A/CN.4/368 and Add.1) had been adopted under the following circumstances: the International Covenant on Economic, Social and Cultural Rights, by 81 States; the International Covenant on Civil and Political Rights, by 78 States; the Optional Protocol to the latter Covenant, by 33 States; the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, by 77 States; the Declaration on the Prevention of Nuclear Catastrophe, by 82 States; the basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, by 83 States; the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, by 109 States; The Declaration on the Granting of Independence to Colonial Countries and Peoples, by 89 States; the Declaration on the Elimination of All forms of Racial Discrimination, unanimously; the Definition of Aggression, by consensus; and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, without a vote.

48. It might seem surprising that instruments which had been so widely accepted by the international community should nevertheless give rise to problems. An examination of the attitudes of various States with regard to those instruments showed that one group of countries often cast negative votes. The question whether the draft code should be adopted in the form of a General Assembly declaration or as a convention was therefore of considerable importance. In matters relating to the codification of international law, it had to be borne in mind that there was no higher authority that could exert pressure on States. Such codification was very different from codification at the internal level. Diplomacy and negotiations accounted for a great deal at the international level and the reason certain resolutions were adopted by consensus or without a vote was that they were unlikely ever to command enough votes.

49. Referring to Mr. Malek's criticism (1816th meeting) of the classification of the offences included in the 1954 draft code, he explained that, as he had said in the oral introduction to his report (*ibid.*), the classification was meant only as a starting-point for the Commission's work. The reservations expressed by some members of the Commission with regard to the wording of the list were fully justified. Not only were such terms as "fortification" outdated, as Mr. Laclela Muñoz (1819th meeting) had pointed out, but the use of new weapons might also have to be mentioned in the draft. Some members had also stressed the fact that certain offences implied a breach of treaties by States and that, since not all States were parties to the instruments in question, they could not all be considered to have breached them. In that connection, he emphasized the importance of custom in matters of war. Certain practices that were not condemned by any text could probably be considered contrary to general humanitarian law.

<sup>15</sup> General Assembly resolution 1514 (XV) of 14 December 1960.

50. With regard to offences classified since 1954, it had been pointed out that the term "colonialism" had a political connotation and applied to ideologies or systems. His own view was that it could on no account be said that colonialism was just a thing of the past. It was because the colonial spirit still existed that terms such as "neo-colonialism" and "imperialism" were now used by certain States. The best course might be to adopt as a basis the definitions of such terms contained in the relevant international instruments. "Self-determination" was, for example, a very vague concept that could be applied as readily to peoples forming part of a national community as to established nations. That term must, of course, be retained and its meaning had to be made to correspond to that of decolonization.

51. Replying to the assertion that the term *apartheid* applied only to one particular country and that a broader term should be used, he said that, in his view, the word *apartheid* should be retained because it designated a system of government with a particular content and had nothing to do with the racial discrimination practised in some States. Moreover, the International Convention on the Suppression and Punishment of the Crime of *Apartheid*<sup>16</sup> enunciated moral principles of *jus cogens* that applied to all States, including those which had not adopted that instrument.

52. There was, in the modern world, no denying the importance of acts causing serious damage to the environment. Acts that were serious enough to upset the ecological balance of the universe should definitely be included in the draft code.

53. A distinction obviously had to be drawn between mercenarism and the recruitment of forces such as the Papal Guard. Generally speaking, States could organize their national defence in a variety of ways. They could introduce compulsory military service, voluntary service or a combination of the two. Mercenarism was something different. It was a practice whereby States having a regular army resorted to the use of mercenaries because, in the modern world, they must not be seen to be participating in attempts to interfere with decolonization. The problem that arose in connection with mercenarism was one of ascertaining where mercenaries were recruited and how they were paid. Mercenarism existed and was characterized by its purpose. To try to link it to decolonization, aggression or interference with a State's sovereignty would be to deny its specificity.

54. Certain intentions had been wrongly attributed to him during the discussion. He had, for example, never said that he was opposed to the inclusion of a reference to the use of nuclear weapons in the draft code. Far from making "war propaganda", he had stated in his report (A/CN.4/377, para. 52) that "the prohibition of the use of atomic weapons is based on impeccable logic" and that "it fits into the general framework of the prohibition of weapons of mass destruction, of which atomic weapons are the prototype". He had, moreover, confined himself to putting forward two points of view, that held by those who considered that the prohibition of

atomic weapons would nullify their deterrent effect and that advocated by those who wanted such weapons to be formally prohibited. His conclusion had been that it was for the Commission to take a decision in that connection and to state whether a special reference should be made in the draft code to the use of atomic weapons. He had also stressed the fact that few States possessed nuclear weapons and that, if those States refused to conclude a convention prohibiting the use of such weapons, they could not be compelled to do so.

55. He emphasized the fact that he had never denied the existence of economic aggression. He had said that the term "economic aggression" had been associated with military aggression for so long that it was perhaps no longer adequate. There was, however, no doubt that the phenomenon of economic aggression did exist and that economic pressure was indeed exerted on certain States as a means of influencing their policies. A decision would have to be taken in due course on the extent to which the Commission would be able to work on the basis of the 1954 draft code in dealing with the question of economic aggression.

56. The reason he had not expressly referred to slavery was that he had assumed that the future draft would incorporate all the offences listed in the 1954 draft code, including "enslavement", as referred to in article 2, paragraph (11), of that draft. He did, however, have some doubts about piracy. In 1954, the Commission had taken the view that piracy, particularly on the high seas, could not be considered so widespread that it threatened the peace and security of mankind. The same appeared to be true of air piracy today. In his view, an international offence was all the more serious if it involved participation by a State.

57. Lastly, he said that, since diplomacy was the essential means of maintaining peace, he regarded the threat or use of violence against diplomats as an offence against the peace and security of mankind that should be included in the draft code. Recent events in Addis Ababa and London showed that there were diplomatic representations which had been converted into arsenals and which endangered public order. Such acts, which could not really be described as terrorism, should be taken into account by the Commission in its work of codification.

58. The CHAIRMAN, thanking the Special Rapporteur for so admirably summing up the discussion of the draft Code of Offences against the Peace and Security of Mankind, said he was sure that the report to be submitted at the next session would mark a great step forward in the consideration of a very important and complex topic.

59. Mr. FRANCIS requested the floor on a matter arising out of some of the comments made by the Special Rapporteur during his summing up.

60. The CHAIRMAN said that a special rapporteur's summing-up normally closed the debate on an agenda item. When the Commission came to consider its draft report on the work of the current session, the discussion of the chapter on agenda item 5 would provide an

<sup>16</sup> See 1820th meeting, footnote 8.

opportunity for any brief comments that members might wish to make on that item.

61. Mr. FRANCIS said that his comments, which did not relate to the actual substance of the draft code, could not wait until the draft report was considered.

62. Sir Ian SINCLAIR said that those comments might lead to statements by other members of the Commission.

63. Mr. THIAM (Special Rapporteur) said he was ready to reply to any comment that members might wish to make. In the debate on any agenda item, the Special Rapporteur was entitled to speak last.

64. The CHAIRMAN said that, at the beginning of the next meeting, some time would be devoted to agenda item 5 and hence to the comments by Mr. Francis and any other member, as well as to the Special Rapporteur's replies.

65. Mr. CALERO RODRIGUES said that the Commission would thus have an opportunity to give the Special Rapporteur instructions on how to proceed with his work. The debate thus far had not provided any guidance on that point.

*The meeting rose at 1.15 p.m.*

## 1824th MEETING

*Monday, 21 May 1984, at 3.05 p.m.*

*Chairman:* Mr. Alexander YANKOV  
*later:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Diaz Gonzáles, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov.

### **Draft Code of Offences against the Peace and Security of Mankind<sup>1</sup> (concluded) (A/CN.4/364,<sup>2</sup> A/CN.4/368 and Add.1, A/CN.4/377,<sup>3</sup> A/CN.4/L.369, sect. B)**

[Agenda item 5]

#### SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. The CHAIRMAN said that the Commission had concluded its discussion on the substance of the item at

<sup>1</sup> For the text of the draft code adopted by the Commission in 1954, see 1816th meeting, para. 1.

<sup>2</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

the previous meeting with the Special Rapporteur's summing-up, but the floor had been requested on a matter relating to the manner in which the work on the item should now proceed.

2. Mr. FRANCIS said that he would be speaking on a matter that was unrelated to the substance of agenda item 5 and arose out of the Special Rapporteur's summing-up. He had begun consultations with certain other members and was requesting a brief suspension of the meeting to enable him to complete the consultations.

3. Mr. MALEK said that, in his opinion, the Commission should provide the Special Rapporteur with some guidance regarding the continuation of his work, as Mr. Calero Rodrigues has suggested at the previous meeting. If the Commission's high scientific standards were to be maintained, it was essential to encourage and facilitate personal research by its members, but they could not at the present time gain even a general idea of the content of the Special Rapporteur's next report. For his own part, he was unable to receive the Commission's documents in time, for the reasons he had indicated at the 1816th meeting. Accordingly, he would be deeply interested to know which matters would be dealt with in the Special Rapporteur's third report. Moreover, guidance should be given in the interests not only of the members, but also of the Special Rapporteur himself.

4. The CHAIRMAN speaking as a member of the Commission, said that the future work on the topic could take three main directions: first, further elaboration of the criteria for defining offences against the peace and security of mankind; secondly, consideration of the possible contents of the introductory part of the draft, as indicated in the Special Rapporteur's second report (A/CN.4/377) and in General Assembly resolution 38/132 of 19 December 1983, such as the general principles of criminal law applicable to the subject, together with any other general provisions that the Special Rapporteur might see fit to include in the draft; thirdly, consideration of any additions, mergers or alterations to be made in the Special Rapporteur's excellent catalogue of offences (*ibid.*, para. 79). For all those suggestions, due regard would of course be paid to the views expressed, and to be expressed, by Governments, either in the Sixth Committee of the General Assembly or in written comments.

*The meeting was suspended at 3.30 p.m. and resumed at 4.05 p.m.*

5. Mr. FRANCIS said that he had been uneasy about any possible non-compliance with the General Assembly's instructions, which might create difficulties for the Chairman when he came to represent the Commission at the next session of the General Assembly. His informal discussions with the members from Africa and with Mr. Jagota during the recess, however, had fully allayed his concern and he was convinced that the Assembly's requests would be met with regard to both the introduction envisaged in paragraph 67 of the Commission's report on its thirty-fifth session and the list of offences.

6. Sir Ian SINCLAIR said that there could be no question of the Commission giving instructions to the Special

Rapporteur. He broadly associated himself with the suggestions regarding three guidelines for the Special Rapporteur in his future work, but would not necessarily take them in the same order.

7. It seemed desirable for the Special Rapporteur to cover three areas in his third report: first, the matter of the introductory articles, if any; secondly, further elaboration, in the light of the discussion in the Commission and in the Sixth Committee, of the criteria for identifying the offences to be included in the list; thirdly, indications—in the light of those same discussions—of the possible content of a list of offences. He was not suggesting the formulation of detailed provisions or specific articles, but simply an indication of the extent to which certain categories of offences, including those in the 1954 draft code, could encompass other offences identified in the discussions in the Commission and in the Sixth Committee.

8. Mr. THIAM (Special Rapporteur) said that he had taken note of the statement by Mr. Francis. The comments and suggestions by members were very useful, particularly those regarding the continuation of his work, but did not appear to have been made in the form of strict instructions. It was his intention to continue the private talks he had embarked upon with his colleagues.

9. The CHAIRMAN thanked the Special Rapporteur for his excellent work and conveyed the Commission's best wishes for continued success in his task. There appeared to be general agreement that the three elements he himself had mentioned earlier, as a member of the Commission, could provide general guidance to the Special Rapporteur, who would of course judge to what extent it could be followed.

*Mr. Sucharitkul, First Vice-Chairman, took the Chair.*

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/374 and Add. 1-4,<sup>4</sup> A/CN.4/379 and Add.1,<sup>5</sup> A/CN.4/382,<sup>6</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)**

[Agenda item 4]

DRAFT ARTICLES SUBMITTED  
BY THE SPECIAL RAPPORTEUR<sup>7</sup>

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

10. The CHAIRMAN invited the Commission to consider agenda item 4 and called upon the Special Rapporteur to introduce his fifth report (A/CN.4/482).

<sup>4</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>5</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>6</sup> *Idem*.

<sup>7</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

11. Mr. YANKOV (Special Rapporteur), introducing his fifth report (A/CN.4/382), said that it was essentially a progress report, mainly intended to establish a link between what had been done so far and the work that lay ahead. He had submitted his fourth report (A/CN.4/374 and Add.1-4) at the previous session, when the Commission had discussed one part of it; but consideration of the other parts, particularly of draft articles 20 to 23, had been held over until the present session.

12. In his fifth report, he had endeavoured, first, to set out the present status of work on the draft articles and the stage that had been reached in considering each one, and secondly, to indicate the main points that had arisen with regard to the articles singled out during the discussion in the Sixth Committee of the General Assembly, starting with an account of some of the comments on draft articles 1 to 8, which the Commission had provisionally adopted.

13. As explained in the fifth report (A/CN.4/382, paras. 10-15), no new substantive elements had emerged from the discussion in the Sixth Committee. As on earlier occasions, most of the views expressed had related to the Commission's methods of work and to the Special Rapporteur's approach to the topic, both of which had given rise to certain comments and reservations. The overall view regarding the Commission's progress at the previous session had been favourable and some representatives had even suggested that the Commission might be able to complete consideration of the topic during the present term of office of its members. There had, of course, been some criticism on a number of issues but most, if not all, had related to points of drafting and arrangement.

14. With regard to draft articles 1 to 8 (dealing with the scope of the articles, the use of terms and certain general provisions), the main problem discussed had been the question of whether provision should be made for international organizations and national liberation movements. As to the status of the courier, the main suggestion had been that article 9 should become part of article 8. Actually, since then, the Drafting Committee had decided to delete article 9 and include its content in the commentary to article 8, where reference would be made to the possibility of two or more States using the same person as a diplomatic courier.

15. With regard to draft articles 20 to 23, consideration of which would now be resumed by the Commission, a suggestion had been made to delete, in article 20, on the personal inviolability of the diplomatic courier, the last clause of paragraph 2, "and shall prosecute and punish persons responsible for such infringements", on the grounds that it would be going too far to require the receiving State or the transit State to prosecute and punish the persons in question. As he saw it, however, there was evidence in State practice that such abuses were in fact prosecuted and punished. Nevertheless, he would not insist on retaining the clause in question.

16. Article 21 dealt with the inviolability of temporary accommodation and paragraph 3 had attracted the most criticism, with suggestions to delete it, despite the many

qualifications and restrictions it placed on immunity of temporary accommodation from inspection or search.

17. Some speakers in the Sixth Committee had found that the provisions of article 22, on the inviolability of the means of transport, were adequate, whereas others had suggested deleting paragraph 2 for reasons similar to those advanced in connection with paragraph 3 of article 21.

18. Article 23, on immunity from jurisdiction, was a complex article and had also been the subject of considerable comment. The main criticism had centred on the terms of paragraph 4, namely that the diplomatic courier was not obliged to give evidence as a witness. Some representatives had felt that such an exemption was not consistent with the diplomatic courier's duty, under paragraph 5 of the same article, to assist the competent jurisdiction in a lawsuit arising from an accident caused by a vehicle used or owned by him. Some suggestions had also been made to simplify article 23, more particularly in view of the temporary nature of the courier's presence.

19. Section III of the fifth report (*ibid.*, paras. 40-81) contained a brief analytical survey of State practice, compiled in the interval between the previous session and the present one. He wished to express his gratitude to the Secretariat for its valuable assistance in that regard and to point out that the survey should be read in conjunction with the material on State practice contained in the fourth report (A/CN.4/374 and Add.1-4). The main purpose of the survey was to explain which of his proposals were supported by recent State practice. The position was, quite objectively, that some of his proposals were backed by recent State practice, whereas others were not.

20. Section IV of the fifth report (A/CN.4/382, paras. 82-84) offered brief suggestions on the way in which the Commission should deal with the draft articles at the present session. It should first resume its discussions of articles 20 to 23 before referring them to the Drafting Committee, and then proceed to the consideration of articles 24 to 42. Articles 24 to 30 related basically to the facilities to be granted to the courier and to the *ad hoc* courier, articles 31 to 39 to the status of the bag, and articles 40 to 42 contained miscellaneous provisions.

21. In conclusion, he expressed the hope that the Commission would be able to complete the first reading of the draft articles at the present session and to conclude its consideration of the topic before the present term of office of its members came to an end.

#### ARTICLES 20 TO 23 \*

22. The CHAIRMAN thanked the Special Rapporteur for his valuable introduction. He invited the Commission to discuss the fifth report (A/CN.4/382) and resume its consideration of draft articles 20 to 23, which read:

\* Resumed from the 1799th meeting, paras. 12-19 (*Year-book ... 1983*, vol. I, pp. 256-257).

#### Article 20. Personal inviolability

1. The diplomatic courier shall enjoy personal inviolability when performing his official functions and shall not be liable to any form of arrest or detention.

2. The receiving State or, as applicable, the transit State shall treat the diplomatic courier with due respect and shall take all appropriate measures to prevent any infringement of his person, freedom or dignity and shall prosecute and punish persons responsible for such infringements.

#### Article 21. Inviolability of temporary accommodation

1. The temporary accommodation used by the diplomatic courier shall be inviolable. Officials of the receiving State or the transit State shall not enter the accommodation except with the consent of the diplomatic courier.

2. The receiving State or the transit State has the duty to take appropriate measures to protect from intrusion the temporary accommodation used by the diplomatic courier.

3. The temporary accommodation of the diplomatic courier shall be immune from inspection or search, unless there are serious grounds for believing that there are in it articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier, provided that the inspection or search be taken without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

#### Article 22. Inviolability of the means of transport

1. The individual means of transport used by the diplomatic courier in the performance of his official functions shall be immune from inspection, search, requisition, seizure and measures of execution.

2. When there are serious grounds for believing that the individual means of transport referred to in paragraph 1 carries articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State, the competent authorities of those States may undertake inspection or search of that individual means of transport, provided that such inspection or search shall be conducted in the presence of the diplomatic courier and without infringing the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays and impediments to the delivery of the diplomatic bag.

#### Article 23. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or the transit State in respect of all acts performed in the exercise of his official functions.

3. No measures of execution may be taken against the diplomatic courier, except in cases not covered by paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as witness.

5. Nothing in this article shall exempt the diplomatic courier from the civil and administrative jurisdiction of the receiving State or the transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by the courier in question, if such damages cannot be covered by the insurer.

6. Immunity from the jurisdiction of the receiving State or the transit State shall not exempt the diplomatic courier from the jurisdiction of the sending State.

23. Mr. McCaffrey, expressing appreciation for the Special Rapporteur's fifth report (A/CN.4/382), said that it provided the Commission with a very useful set of materials for future work. With regard to draft articles 20 to 23, it was important to adopt a cautious approach. The Commission should not risk a conflict with existing law, and should bear in mind that the latter was not represented by all of the four codification conventions. Since the whole purpose of the present endeavour was to protect and safeguard freedom of communication by means of the diplomatic bag, it was the diplomatic bag that should be the focus of attention, for the diplomatic courier required protection only in so far as protection was absolutely necessary to ensure free communication via the bag. Furthermore, the diplomatic courier was not a diplomatic official and did not need the same degree of privileges and immunities. He was simply the vehicle for the delivery of the bag. Any protection accorded to the courier was intended to facilitate free communication and not to protect the inviolability of the courier as such.

24. The diplomatic courier's degree of importance had been well illustrated in the provision originally submitted to the Commission by the Special Rapporteur for what had later become the 1961 Vienna Convention on Diplomatic Relations (see A/CN.4/374 and Add.1-4, para. 49). The guiding principles, therefore, should be to what extent the protection accorded to the courier was necessary for the performance of all his functions, in the light of the delicate balance between the sending State's interest in maintaining free communication with its missions and the receiving State's interest in preserving its integrity and security. Any protection that resulted in undue interference with the interests of the receiving State was likely to defeat the whole purpose of freedom of communication, namely smooth and friendly relations between the sending and receiving States. In that connection, he noted that most of the problems regarding the privileges and immunities of the diplomatic courier tended to arise in the context of *ultra vires* acts. The question therefore was to what extent the courier, as the vehicle for the transmission of diplomatic communications, should be allowed to wrap himself in the cloak of immunity traditionally reserved for heads of State and their representatives.

25. Paragraph 1 of draft article 20 was acceptable in that it was based on the rights of diplomatic couriers as laid down in article 27, paragraph 5, of the 1961 Vienna Convention. However, to make it clear that the inviolability applied to both clauses of the paragraph, the latter should be reworded to read: "The diplomatic courier shall enjoy personal inviolability, and shall not be liable to any form of arrest or detention, when performing his official functions." In that respect, one practical problem concerned the courier's personal baggage, which was not covered by the way-bill. What, for instance, would be the position if a courier refused to open a large brief-case of the kind referred to in the Special Rapporteur's fourth report (*ibid.*, footnote 62)? Interpreted in the light of the second sentence of article 27, paragraph 5, of the 1961 Vienna Convention, such a provision would probably allow inspection of personal baggage if there were reasonable grounds

for suspecting unauthorized activity on the part of the courier.

26. Paragraph 2 of draft article 20 could be deleted without any harm to the principle stated in paragraph 1. An obligation to prosecute and punish was not only an unwarranted extension of existing law, but also clearly incompatible with the domestic law of many countries, since it purported to impose two obligations of result: to prosecute and to punish. In the United States of America such an obligation would run foul of the due process requirements imposed by the federal Constitution.

27. He very much doubted the need for draft articles 21 and 22. The occasions on which a courier accompanied by the bag would stay in a hotel or use a personal means of transport would be so rare that a separate draft article was unnecessary and might even irritate receiving and sending States. Moreover, as none of the four codification conventions contained such a provision, the legal basis for the article was questionable. An interesting question, however, was the interplay between draft articles 22 and 23. In his fourth report (*ibid.*, para. 112), the Special Rapporteur had pointed out that the courier would not be immune from jurisdiction in an action brought by a car-rental company to recover the amount of the rental from a courier who had hired a car. The point was whether paragraph 1 of draft article 22, which referred to "seizure and measures of execution", would in fact operate to prevent the company from repossessing the vehicle; if so, it would be a rather curious result. Moreover, there was nothing in draft articles 21 and 22 to the effect that the bag had to be with the courier in order for his temporary accommodation or personal means of transport to be inviolable.

28. With regard to draft article 23, the Commission should use the guiding principle of what was functionally necessary for the protection of the courier in the light of the balance of interests of the sending and receiving States and ask itself whether it was strictly necessary, according to that standard, for the courier to be immune from the jurisdiction of the receiving State. The fact that the Special Rapporteur had not cited a single case in which immunity from jurisdiction for the courier had been recognized could itself be an indication that such immunity was not necessary, although it might also mean that any disputes had been settled through political and diplomatic channels. In the only two cases discussed in relation to jurisdictional immunity, *Juan Ysmael & Co. v. S.S. "Tasikmalaja"* (1952) (*ibid.*, para. 127) and *Laterrade v. Sangro y Torres* (1951) (*ibid.*, para. 135), the Honk Kong courts and the French courts had held that the couriers concerned had not been immune. At the very least that should counsel the utmost caution in determining the jurisdictional immunities applicable to the diplomatic courier.

29. Moreover in its present formulation draft article 23 was perhaps too broad, given the assimilation in article 3 as provisionally adopted of all types of couriers to the diplomatic courier. Uniform treatment of that kind should again urge the need for caution. A large number of States, including some major receiving States, among them the United States, had not accepted one or more

of the codification conventions, such as the Convention on Special Missions.

30. As to paragraph 1 of draft article 23, he wondered whether the courier should be immune from criminal jurisdiction in the case of acts not performed in the exercise of his official functions. For instance, if a courier committed rape or murder in the receiving State, should he be completely immune from that State's jurisdiction? Recent events suggested that complete immunity would make for friction between the sending and receiving States. The Commission might therefore wish to consider restricting immunity from criminal jurisdiction to acts performed in the exercise of the courier's official functions. That would preserve the balance of interests between sending States and receiving States, would not affect the bag, and would not unduly interfere with the sending State's interest in freedom of communication, since the bag could easily be delivered to its destination by another courier. In his view, the Special Rapporteur's conclusion that the courier should have full immunity from criminal jurisdiction in receiving and transit States did not withstand close scrutiny.

31. Paragraph 2 of draft article 23, relating to immunity from civil and administrative jurisdiction, was properly restricted to acts performed in the exercise of the courier's official functions. In that connection, he agreed with the Special Rapporteur's remarks in his fourth report regarding obligations pertaining to purchases made by and services rendered to the diplomatic courier (*ibid.*, para. 112), and with the opinion which he quoted (*ibid.*, para. 116) that it was for the courts of the host or receiving State to make the distinction between official and private acts.

32. Turning to paragraph 5, which was the logical sequel to paragraph 2, he proposed that, in addition to vehicles used or owned by the courier, a reference should be included to vessels or aircraft, in line with article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States, on which draft article 23 was modelled. Paragraph 5 also limited the courier's amenability to jurisdiction to cases in which the loss in question was not covered by insurance. In that regard, the language of article 60, paragraph 4, of the same Convention should be used and some consideration should be given to including in the draft a provision along the lines of article 56 of the 1963 Vienna Convention on Consular Relations whereby couriers would be required to comply with any applicable laws of the receiving or transit States regarding insurance coverage.

33. Paragraph 3 of draft article 23, relating to measures of execution, was acceptable in so far as it was necessary. Once again, the purpose was apparently to ensure that the courier was not unduly hindered in the performance of his functions. Yet the courier was unlikely to have sufficient assets in a foreign State against which execution could be levied, although he might, for instance, be required to post a bond. If the phrase "except in cases not covered by paragraph 2 of this article" was intended to allow execution in cases where a judgment had been validly rendered under paragraph 2 of the article, it might be clearer to spell that out. Furthermore, the

clause starting with the words "and provided that ..." should be deleted. The exception in the first clause already restricted jurisdiction to acts outside the official functions of couriers, so execution would presumably not interfere unduly with such functions. He doubted whether, in practical terms, a measure of execution would infringe the courier's personal inviolability.

34. As to paragraph 4, he shared the concern voiced in the Sixth Committee of the General Assembly that it seemed contrary to the decision in *Juan Ysmael & Co. v. S.S. "Tasikmalaja"* (1952) (*ibid.*, para. 127) and to article 44 of the 1963 Vienna Convention on Consular Relations. If it were not deleted, a provision could perhaps be added along the lines of that article to allow the receiving or transit State to call upon a courier to give evidence as a witness, but specifying that the authorities should avoid interfering with the performance of the courier's official functions.

35. Lastly, paragraph 6 of article 23 was a sensible provision and should have a place in the draft.

36. Sir Ian SINCLAIR paid tribute to the Special Rapporteur for his fifth report (A/CN.4/382), and particularly section III, which contained a very useful compilation of recent State practice.

37. For the reasons he had stated at the previous session of the Commission,<sup>8</sup> he considered that articles 21 and 22 should be omitted from the draft. With regard to draft article 23, he was in full agreement with many of Mr. McCaffrey's remarks, but had not come to precisely the same conclusion. Although he had suggested in 1983 that there might be a case for including some provision along the lines of article 23, on reflection he was now persuaded that it would be wrong to do so. First of all, it was unnecessary. The Special Rapporteur's lengthy commentary (A/CN.4/374 and Add.1-4, paras. 81-138) gave no real instance of any attempt having been made to arrest or serve process on a diplomatic courier. Hence the Commission's basic approach should be to seek to regulate such problems as had arisen in practice rather than to try to solve all the theoretical difficulties. It was important to bear constantly in mind the fleeting presence of the diplomatic courier in the transit or receiving State. Indeed, it was the fleeting nature of that presence which explained why no case could be found of any attempt having been made to serve legal process on a diplomatic courier. Accordingly, there appeared to be no functional need to go beyond article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, which established that a diplomatic courier was not liable to any form of arrest or detention.

38. Secondly, a provision such as draft article 23 would also be undesirable. Governments were highly reluctant to confer privileges and immunities upon additional categories of persons, particularly when, as recent events had amply demonstrated, such privileges and immunities could be gravely abused. The Commission should be realistic, for there was no point in preparing far-reaching proposals on the basis of a particular doctrinal approach

<sup>8</sup> *Yearbook ... 1983*, vol. I, p. 168, 1784th meeting, para. 8.

if it was convinced that the proposals would not be accepted by the majority of Governments. He had no objection in principle to the Special Rapporteur making comparisons with other codification conventions; indeed, it was his duty to do so. But it was highly dangerous to equate the diplomatic courier with other diplomatic or consular agents who lived a more settled life in the receiving State. The Commission was not engaged in a wholesale review of diplomatic law, although many would argue that such a review was essential because of the increasing evidence of grave abuses of the immunities accorded to diplomatic agents and diplomatic premises. Rather, it was considering the status of the diplomatic courier, and he for one was convinced that, in the present climate of opinion, most Governments would not be prepared, at least so far as the courier was concerned, to go beyond the exemption from arrest and detention provided for under article 27, paragraph 5, of the 1961 Vienna Convention.

*The meeting rose at 5.45 p.m.*

## 1825th MEETING

*Tuesday, 22 May 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier** (*continued*) (A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

ARTICLE 20 (Personal inviolability)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

ARTICLE 21 (Inviolability of temporary accommodation)

ARTICLE 22 (Inviolability of the means of transport) *and*

ARTICLE 23 (Immunity from jurisdiction)<sup>5</sup> (*concluded*)

1. Mr. NI, congratulating the Special Rapporteur on his remarkable and scrupulously researched work, said that draft articles 20 to 23 constituted an entity in themselves and were based on the very nature of the functions of the diplomatic courier, which were eminently confidential, transitory and mobile. Hence the diplomatic courier could not be ranked with diplomatic or consular agents or the administrative and technical staff of a diplomatic mission; but although the courier did not hold a high position, he must benefit from a high degree of protection, in the interests not only of the sending State, but also of the furtherance of relations between the sending State and the receiving State. The draft must be in keeping with the express provisions concerning the diplomatic courier and diplomatic bag contained in the four codification conventions, and must supplement them to some extent.

2. It was essential for the diplomatic courier to enjoy personal inviolability, respect and immunity from jurisdiction in the light of the treatment accorded to diplomatic agents and for him to be protected against any infringement of his person, freedom or dignity. However, the last clause of paragraph 2 of draft article 20 stipulated that the receiving State or the transit State should "prosecute and punish persons responsible for such infringements", a provision that was not only absent from the four codification conventions, but also involved many other problems. To cite an example, paragraph 4 of draft article 23, which stated that "the diplomatic courier is not obliged to give evidence as witness", contradicted paragraph 2 of draft article 20, which required prosecution and punishment of persons responsible for infringements of the person, freedom or dignity of the courier. In such circumstances, how could any effective trial take place if the diplomatic courier did not give evidence in court? Moreover, if draft article 20 in its present form was to become part of a convention, the question arose as to whether States parties would have to enact new laws in order to fulfil the obligation laid down in that article.

3. In the Sixth Committee of the General Assembly, some delegations had pointed out that questions of that kind did not fall within the scope of diplomatic law and consular law but touched upon the question of State responsibility (see A/CN.4/L.369, para. 344). In that regard, the two cases cited by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, paras. 63-64) indicated that the requests made by one side had not been met by the other. Admittedly, the unfortunate incidents in question had occurred before the adoption of the codification conventions. Yet if the new provision proposed by the Special Rapporteur was to be regarded as "a measure of prevention and enforcement, being the logical outcome of the application of the basic rule of

<sup>5</sup> For the texts, see 1824th meeting, para. 22.

freedom of communication",<sup>6</sup> an appropriate provision was already contained in the first two clauses of paragraph 2 of draft article 20.

4. Again, abuses of the inviolability of the person of the courier could take different forms. If minor disputes with airport Customs officers or slight delays due to verification of certifying papers were held to be infringements of the dignity and freedom of the diplomatic courier that called for prosecution and punishment by the receiving State, they would give rise to many unnecessary negotiations. Accordingly, it would be preferable to delete the phrase "and shall prosecute and punish persons responsible for such infringements" in paragraph 2 of draft article 20, or, if the Special Rapporteur deemed that provision to be necessary, to insert the words "when appropriate" after the word "shall", thereby providing for some flexibility.

5. Draft articles 21 and 22, which were similar, were meant to protect the diplomatic courier from any intrusion or access by unauthorized persons who might endanger the safety and integrity of the diplomatic bag. These provisions were well founded, but paragraph 3 of draft article 21 and paragraph 2 of draft article 22 rendered meaningless the inviolability originally accorded to the diplomatic courier. Besides, if a diplomatic courier was suspected of carrying articles prohibited or subject to control by the receiving State or transit State, the Customs could carry out an inspection when the courier entered or left the territory of those States. The temporary accommodation and means of transport of the diplomatic courier would not be subjected to inspection or search, but the courier usually stayed at the embassy or mission of the sending State and the "inviolability" granted to him under articles 21 and 22 was not enough to be of any real significance. Further thought should therefore be given to the question of whether those two articles were in fact necessary.

6. He endorsed the method followed by the Special Rapporteur in formulating draft article 23, but noted that, in the case of immunity from civil and administrative jurisdiction, the approach was different from that of the 1961 Vienna Convention on Diplomatic Relations and the 1969 Convention on Special Missions. In view of the diplomatic courier's special functions, the list of exceptions to immunity from jurisdiction proposed by the Special Rapporteur was scarcely appropriate. How was the expression "in the exercise of his official functions", in paragraph 2, to be understood, and who would make the necessary judgment? The Special Rapporteur had considered the matter in detail in his fourth report (*ibid.*, paras. 113-117), taking the view that, in the event of a dispute, the best settlement would be an amicable solution through diplomatic channels. However, before such a solution was found, a court in the receiving State or transit State might well have handed down a judgment that would become enforceable.

7. In respect of paragraph 5 of draft article 23, the Special Rapporteur affirmed (*ibid.*, para. 134) that State practice was not conclusive and that, for practical

reasons, States tended to settle disputes through diplomatic channels. Accordingly, in view of the divergence of opinion, draft article 23 should be studied in greater depth.

8. Mr. JAGOTA, commending the Special Rapporteur's brief but extremely useful fifth report (A/CN.4/382), said that he had been reflecting on whether the work in which the Commission was engaged was useful and, if so, what form the draft should take in order to be generally acceptable. The question of the diplomatic bag and the diplomatic courier was, of course, already covered by a number of conventions and by State practice, but a further attempt to articulate it was being made with a view to promoting harmonious international relations and avoiding any possible abuses. Accordingly, the role and functions of the diplomatic courier and the inviolability of the diplomatic bag should be dealt with in such a way as to foster smooth and friendly relations between the sending State and the receiving State, while at the same time ensuring that the privileges and immunities conferred in that respect were not used to cloak abuse.

9. The point, therefore, was how to achieve a balance between the twin aims of promoting smooth relations between States and avoiding abuse. In that connection, it was necessary to bear in mind the need to develop the functional aspects of the topic and to include in the draft only articles that would serve that end. Furthermore, the functions of the diplomatic courier were necessarily of a temporary nature inasmuch as the courier remained for only short periods in the transit State or receiving State. His privileges and immunities, which were necessary only in connection with the delivery and collection of the diplomatic bag, could not be equated with those of diplomatic agents, who were accredited to a specific Government and whose privileges and immunities were of necessity required for a longer period. The draft, therefore, should not be unduly voluminous: as a general principle, the fewer articles the better, since the more articles there were, the greater the difficulty would be in striking a balance between the two aspects he had mentioned. Where possible, any provisions pertaining to a single matter should be combined in one article rather than be scattered throughout the draft.

10. Those general propositions could be illustrated, first, by draft article 21. He was not certain that a separate article on temporary accommodation was necessary, since the need for such accommodation might only arise in the transit State. If the sending State had a mission in the country for which the diplomatic courier was bound, the mission would in all likelihood take care of any accommodation problems. But if the Commission felt it advisable from a functional point of view to retain draft article 21, he would propose that it be linked to draft article 19 in the following manner: the sole paragraph in article 19, with the addition of a reference to the inviolability of the temporary accommodation, would become paragraph 1 of that article; paragraph 1 of article 21 would become paragraph 2 of article 19; paragraph 2 of article 21 would be deleted; and paragraph 3 of article 21, more briefly worded, would become paragraph 3 of article 19.

<sup>6</sup> *Yearbook ... 1983*, vol. II (Part Two), p. 51, para. 173.

11. Draft article 22 also seemed unnecessary. Again, the sending State's mission in the receiving State would either receive the diplomatic bag from the diplomatic courier at the airport or would arrange for the courier's transport, in which case the full privileges and immunities enjoyed by the diplomatic mission would apply. Accordingly, paragraph 1 of draft article 22 should be amended to provide that the immunity would last only for the period during which the diplomatic courier performed his functions. He would have no objection, however, if it was felt that such immunity would be useful even in the receiving State.

12. He endorsed the principle embodied in paragraph 1 of draft article 20, but paragraph 2 could give rise to problems of interpretation. Such matters were better left to State practice, and should not be spelt out.

13. Lastly, the basic principle underlying draft article 23 was justified by functional necessity, but in paragraph 1 the scope of the immunity from jurisdiction should be clarified. Possibly, therefore, the phrase "in connection with the performance of his official functions", or the similar wording used in paragraph 2, could be added. Admittedly, the point was covered in draft article 28. (Duration of privileges and immunities), but it was preferable to be explicit about the restriction, rather than rely on cross-references.

14. Mr. RAZAFINDRALAMBO, commending the well-documented reports prepared by the Special Rapporteur, noted that there was a tendency in some quarters to minimize the status of the diplomatic courier. Yet the diplomatic courier was an indispensable link in diplomatic relations, essential to the proper functioning of diplomatic and consular missions. If the courier was to be exposed to intolerable interference merely because he was an alien on the soil of a receiving or transit State, an entire institution might well be placed in jeopardy. If he did not receive adequate protection, his task itself would inevitably be hindered and all the efforts undertaken to expand the scope of the draft to include the couriers of recognized national liberation movements would be meaningless. Again, protection of the diplomatic courier was important for countries unable materially to equip themselves with the most modern means of communication. For that reason, he (Mr. Razafindralambo) took issue with the restrictive trend, which would end up by placing limitations on, or even denying, immunity from jurisdiction for the diplomatic courier. By and large, therefore, he supported the Special Rapporteur's position, as reflected in the draft articles.

15. For the purpose of alignment with previous articles provisionally adopted by the Commission, the word "official" could be deleted from paragraph 1 of draft article 20. Indeed, what function other than "official" could a diplomatic courier have? Consequently, that suggestion was applicable to the draft as a whole. As to paragraph 2, other members had rightly pointed out that the receiving State and the transit State should be required to take appropriate steps to prevent any infringement of the person of the diplomatic courier. Nevertheless, an obligation on the receiving State or transit State to prosecute and punish persons responsible for such in-

fringements was not necessary. In fact, it seemed to run counter to the principle in the legal systems of many countries, including, as noted by Mr. McCaffrey (1824th meeting), systems in which the Government had the power to prosecute and the courts alone had the power to punish. Accordingly, Governments could not punish persons responsible for infringements of the person, freedom or dignity of the diplomatic courier. Besides deletion of the last clause in paragraph 2 would bring the paragraph into line with the wording of article 29 of the Convention on Special Missions. Thus paragraph 2 could simply stipulate that the receiving or transit State should take all appropriate measures to prevent any infringement of the diplomatic courier's person, freedom or dignity.

16. Mr. Jagota was right to say that the objective was not to increase the number of provisions on the status of the diplomatic courier. Draft article 21 might well seem superfluous, particularly in legal systems which recognized the principle of the inviolability of the domicile, even the temporary domicile, of agents of foreign States—a principle protected in criminal law. Nevertheless, paragraphs 1 and 2 would be perfectly acceptable, for it might prove useful to strengthen the idea of the inviolability of the courier's domicile by emphasizing the need for special protection for his temporary accommodation. The terms of paragraph 3 drew on article 25, paragraph 3, of the Convention on Special Missions, and were reproduced virtually word for word in paragraph 2 of draft article 22, which related to the inviolability of the means of transport.

17. The principle of the inviolability of the means of transport of the diplomatic courier dealt with in draft article 22 was acceptable because some national systems evinced a tendency to grant the police exaggerated powers for systematic inspection of the vehicles of private individuals. Despite those considerations, inviolability of the means of transport need not form the subject of a separate article, since it could be covered in article 21 by adding immunity from attachment or execution. By combining the provisions in that way, they would be closer to article 25 of the Convention on Special Missions and could be headed by the same title, namely "Inviolability of the premises".

18. Even though isolated events had induced some people to assimilate the diplomatic courier to any agent of a foreign State, draft article 23, on immunity from jurisdiction, was of special importance in protecting the diplomatic courier. If it was to be effective, however, such immunity must cover all categories of jurisdiction, including criminal jurisdiction. It was all too easy to prosecute in the criminal courts on the most fallacious pretexts. To highlight the fact that the article involved functional immunity, it might be possible, as suggested by Mr. McCaffrey (*ibid.*), to specify that immunity from criminal jurisdiction would apply only in the case of acts performed by the diplomatic courier in the exercise of his functions. Immunity of that kind did pose delicate problems, such as the one noted by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 112), but they also arose in the case of diplomatic

immunity. Nevertheless, in view of the transient nature of the functions of the diplomatic courier, the Special Rapporteur had been right not to include all the exceptions to immunity allowed in paragraph 2 of article 31 of the Convention on Special Missions, although the exception provided for in paragraph 5 of draft article 23 should be placed after paragraph 2, since the exception was in each case immunity from civil and administrative jurisdiction.

19. Lastly, paragraph 3 of draft article 23 was not very clear, because it was drafted in the negative and in the form of a condition. Perhaps the whole of the paragraph could simply be replaced by a much more concise formulation stipulating, for instance, that no measures of execution could be taken against the diplomatic courier for any acts performed or property used in the exercise of his functions. A formulation of that type left no room for ambiguity. The remaining paragraphs of draft article 23 were acceptable, but to meet the concern expressed by some members of the Commission, it might be possible to add, at the end of paragraph 4, the phrase "in cases involving the exercise of his functions".

20. Chief AKINJIDE, thanking the Special Rapporteur for an excellent report that was a reflection of his industry and scholarship, noted that the debate revealed, broadly speaking, three approaches to the topic. The first advocated what could be termed the maximalist approach and was reflected in the Special Rapporteur's report and in the views expressed by Mr. Ni and Mr. Razafindralambo; the second advocated the minimalist approach and was reflected in the views expressed (1824th meeting) by Sir Ian Sinclair and Mr. McCaffrey; and the third fell between the first two and was reflected in Mr. Jagota's views.

21. The question was which of those three approaches the Commission should adopt, a matter that was not as simple as it might appear. The diplomatic courier and diplomatic bag had been described as a link between diplomatic missions, but he would liken them to the cement that held the bricks together. It could, of course, be argued that the role of the diplomatic courier was no longer what it used to be, but the significance of the topic for the advanced countries and for the developing countries was very different. Developing countries still had to rely on methods in use some 50 to 100 years ago, whereas advanced countries unable for some reason to use the diplomatic bag also had other, highly sophisticated means of communication available to them.

22. The problem was a real one, since the diplomatic courier and diplomatic bag were of crucial importance for exchanges between the diplomatic missions of developing countries. In that connection, he recalled that on one occasion a diplomatic courier from his country, travelling from the Middle East, had been delayed for two days in Khartoum because there had been no flight to Lagos: such a situation would have been unthinkable in Europe or America. Again, anyone in Lagos wanting to telephone Abidjan, which was only an hour and a half away by air, had to make the call via Paris. Consequently, the problem must be viewed not only in the context of advanced or semi-advanced States, but glob-

ally, in other words as it affected all the interests of the members of the United Nations.

23. He very much hoped that it would be possible to arrive at a consensus on the matter, in which connection he recalled that, in drafting the United Nations Convention on the Law of the Sea, a consensus had been defined as a decision that was not a majority decision and that had not been arrived at by a vote.<sup>7</sup> If the Commission adopted the minimalist approach, it would be very difficult to secure the support of the General Assembly, since such an approach would not reflect the realities of the world situation. The aim should be to reflect the issues as they affected everybody, and hence there had to be an element of give and take. It was his hope that those guiding principles would assist the Special Rapporteur in the approach to adopt.

24. Sir Ian SINCLAIR said he did not necessarily dispute the charge that he was advocating a minimalist approach, but that approach none the less had to take equal account of everybody's interests. So far as the diplomatic courier and diplomatic bag were concerned, every State, whether developed or developing, was both a sending and a receiving State. Furthermore, the Commission was at the present stage discussing not the diplomatic bag, but the diplomatic courier. The bag, of course, was the essential item, the courier—its carrier—being a modern Mercury. The question, therefore, was what immunities were needed, functionally, for the courier, not for the bag. In terms of the balance of interests that affected his own country as well as the developing countries, he took the view that it was not necessary to confer upon the courier—that peripatetic character—the vast range of immunities proposed by the Special Rapporteur. Interference with the bag, however, was quite another matter.

25. Mr. DÍAZ GONZÁLEZ said that he was among those who advocated the minimalist approach. Existing conventions contained adequate provisions concerning the diplomatic courier and, in seeking to elaborate further provisions, the Commission might well create more problems than it would resolve. However, since it had already embarked on its task, the main point now was to balance the interests of the various States—for all of them were sending States and receiving States—and thus arrive at an instrument acceptable to the international community as a whole.

26. As the Special Rapporteur had explained, the principle of the inviolability of the person of the courier was enunciated in draft article 20 because of the official functions performed by the courier. Yet the diplomatic courier's functions, unlike those of a diplomatic agent, were limited in time. Hence care must be taken not to assimilate the diplomatic courier to a diplomatic agent in every respect. Paragraph 2 of draft article 20 could be deleted, since paragraph 1 was enough to afford a compre-

<sup>7</sup> See *Rules of Procedure of the Third United Nations Conference on the Law of the Sea* (United Nations publication, Sales No. E.81.I.5), p. 17, appendix: "Declaration incorporating the 'Gentleman's Agreement' made by the President and endorsed by the Conference at its 19th meeting on 27 June 1974".

hensive guarantee of the inviolability of the person of the diplomatic courier acting in the exercise of his official functions.

27. Draft article 21, pertaining to the inviolability of temporary accommodation, went far beyond the relevant provisions of the four codification conventions, which were adequate in cases in which the diplomatic courier stayed in the premises of the mission or in the private home of a member of the mission, precisely because inviolability was guaranteed in such instances. On the other hand, if the courier stayed at a hotel, if only for a few hours, it did not seem necessary to guarantee the inviolability of accommodation of that kind. The fact that the person of the diplomatic courier and the bag itself were recognized as inviolable was sufficient. Consequently, draft article 21 appeared to be pointless and might raise problems of interpretation.

28. With regard to draft article 22, no State appeared to make individual means of transport available to diplomatic couriers. Communications between two diplomatic offices inside a country were through means of transport that already enjoyed diplomatic inviolability, namely the vehicles belonging to the missions accredited to that country. Means of transport such as taxis could not be considered as inviolable, but the diplomatic bag and the person of the diplomatic courier were themselves inviolable. As in the case of draft articles 20 and 21, the Commission should confine itself to the minimum in draft article 22.

29. His sole suggestion in connection with draft article 23 was that the words "if such damages cannot be covered by the insurer", in paragraph 5, should be replaced by "if such damages are not covered by the insurer". In virtually all States, a motor vehicle had to be insured. Damages were therefore insured against, but it could well happen that they might not all be covered by the insurer. Subject to that change, draft article 23, for which there was an equivalent in the other codification conventions, was acceptable.

30. Mr. OGISO said that, for the same reasons as a number of other speakers, he too felt that paragraph 2 of draft article 20, especially the concluding phrase "and shall prosecute and punish persons responsible for such infringements", was unnecessary and that paragraph 1 was sufficient to cover the subject.

31. With regard to the inviolability of temporary accommodation, the provisions of draft article 21 went somewhat further than those of the existing conventions. They were, moreover, not altogether in line with the functional approach advocated by the Special Rapporteur himself in his fourth report (A/CN.4/374 and Add.1-4, para. 70). It would not be appropriate to align the courier's privileges and immunities with those of a diplomatic agent, who was stationed for a long time in the same country; a diplomatic courier spent only very short periods in the receiving or transit State. Indeed, the Special Rapporteur had drawn attention to the need for "caution and prudence in order to avoid unwarranted analogies or complete assimilation of the status of the diplomatic courier to that of diplomatic staff" (*ibid.*,

para. 90). Paragraphs 1 and 2 should be deleted because they were unnecessary and the opening words of paragraph 3 should be amended to read: "The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing . . .". The purpose of changing the phrase "shall be immune from" to "shall not be subject to" was, by not making any reference to the concept of "immunity", to avoid the impression that the provision was based on the analogy with the diplomatic agent. Such a formulation would be more in keeping with the functional approach to inviolability of the courier's temporary accommodation.

32. Paragraph 2 of draft article 21 imposed upon the receiving State and the transit State the duty "to take appropriate measures to protect from intrusion" the courier's temporary accommodation, a duty that represented an additional obligation upon those States, and one which was not to be found in any of the existing diplomatic conventions. While he fully recognized that protection of the diplomatic courier was required in order to enable him to exercise his function of delivering the diplomatic bag to its destination, that could be achieved without the provision contained in paragraph 2. His own suggestion would be to reword draft article 15, on general facilities, along the following lines: "The receiving State and the transit State shall accord to the diplomatic courier the facilities and protection necessary for the performance of his official functions." The insertion of the reference to protection and the use of the word "necessary" would avoid giving the impression that there was any intention of establishing an additional duty on the receiving and transit States or of placing too much emphasis on the inviolability of the courier's temporary accommodation.

33. As to draft article 22, the words "shall be immune from inspection, search, requisition, seizure and measures of execution" in paragraph 1 should be replaced by "shall not be subject to inspection or search". "Requisition, seizure and measures of execution" need not be mentioned because those matters were already covered by other conventions.

34. Draft article 23 posed some difficulties, at least in theory. In view of the remarks made by some members, it was apparent that the article, if included in the draft, might deter some Governments from becoming parties to a future convention on the diplomatic courier. When the Commission had prepared its drafts on the privileges and immunities of diplomatic agents and consular officers, it had been able to rely on long standing custom and established practices that had facilitated the work of codification. With regard to diplomatic couriers, however, the Special Rapporteur admitted that the judicial precedents on the subject were very scanty. It would therefore be going too far to try and deduce any customary rule from such a limited body of practice.

35. The purpose of the draft articles under consideration was to meet the practical necessity of securing freedom of official communication, and thus it was desirable to avoid any legal stumbling-block which might induce some Governments to reject a future draft

convention. It should always be remembered that a diplomatic courier stayed only for a very short time in one place. Provisions such as those included in draft article 23 were unlikely to have much practical effect and could well create difficulties when it had to be determined whether an act performed by a diplomatic courier was part of his functions. Despite the arguments advanced in support of draft article 23, he felt that it would have comparatively little usefulness and that the issue of immunity from jurisdiction should be left outside the scope of the draft. Of course, if the diplomatic courier was actually a member of a diplomatic mission, he would already enjoy diplomatic immunity, but it was preferable not to touch upon the question of any immunity from criminal as well as civil jurisdiction that might be conferred on a diplomatic courier as such.

36. The CHAIRMAN, speaking as a member of the Commission, observed that the concept of functional necessity lay behind most of the comments regarding the extent of the privileges and immunities of a diplomatic courier and that draft articles 20 to 23 were limited in scope by that concept. Fortunately, the Special Rapporteur's well-balanced approach took account of the interests of all States and suggested the right measure of privileges and immunities.

37. The concept of inviolability was a dual one, imposing as it did two types of obligations upon the receiving State: negative obligations, namely to refrain from certain acts, and positive obligations, namely to afford protection. Draft articles 20, 21 and 22 properly covered the negative obligations of the receiving State. Paragraph 1 of draft article 20 specified that the diplomatic courier was not liable to any form of arrest or detention when performing his official functions. Paragraph 1 of draft article 21 stated the obligation not to enter the courier's temporary accommodation, and paragraph 1 of draft article 22 stated that the courier's means of transport must not be inspected or searched.

38. As to the positive obligation to afford protection, draft article 20 specified that appropriate measures must be taken to prevent any infringement of the courier's person, freedom or dignity, and the concluding phrase spelled out the duty of prevention and prosecution. The duty of prevention constituted an obligation of vigilance. Again, draft article 21 specified a similar duty with respect to the courier's temporary accommodation.

39. Immunity from jurisdiction, dealt with in draft article 23, was of a different nature from the immunity enjoyed by diplomatic agents. In that connection, it was appropriate to remember that an ambassador enjoyed personal immunity only for the duration of his mission in the receiving State. One could not confer personal immunity of the same kind upon a diplomatic courier; if he returned to the same country, he would not be a former diplomat, but he would still be a courier.

40. Mr. YANKOV (Special Rapporteur), summing up the discussion, expressed his appreciation to the members who had spoken both at the previous session and at the present session for their constructive criticisms and concrete suggestions. Before considering those remarks

in detail, he had some comments to make in reply to certain general observations relating to the nature and scope of the privileges, facilities and immunities of the diplomatic courier.

41. In the first place, he appreciated the warnings and counsels of caution regarding possible government reactions to the draft, but wished to stress that he had adopted an empirical approach, taking into account in the process not only the four existing conventions codifying diplomatic law, but also current State practice on the subject. Admittedly, the case-law was not very abundant, but that was not because of any lack of cases, or indeed of practice in the matter. It was due, in fact, to the delicacy of the subject, for in most cases Governments preferred to settle problems through diplomatic channels instead of referring them to the courts. Hence the existing practice was not readily apparent.

42. He wished to reiterate that his intention was to apply the functional approach throughout the draft and to avoid assimilating the status of the courier to that of a diplomat. In that connection, he had endeavoured to take into consideration what could be regarded as the law now in force: the 1961 Vienna Convention on Diplomatic Relations, which had been ratified or acceded to by 141 States, and the 1963 Vienna Convention on Consular Relations, with 108 States parties. In addition, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, which were not yet in force, provided models closer to the subject-matter under discussion.

43. The important point to remember was that, in the draft, the treatment accorded to the diplomatic courier was not better than that granted to a member of the administrative and technical staff of a mission or delegation. In practice, there was little difference between administrative and technical staff of a special mission or delegation who stayed in a country for a few days and a diplomatic courier, who might well stay much longer if he was required to take back some correspondence after delivering the bag. It was therefore appropriate to grant the courier, as a minimum degree of protection, status similar to that of administrative and technical staff. After all, a courier's task was much more delicate than that of most clerks in a mission, since the courier was called upon to convey instructions to a head of delegation or to carry confidential documents. For his own part, he had in no way suggested that the status of the courier should be modelled on that of a diplomat or even a consul; he was simply proposing that the courier should be granted the same status as a clerk in an embassy or mission.

44. During the discussion, reference had been made to the distinction between the diplomatic courier and the diplomatic bag. He appreciated the reasoning behind that distinction but cautioned that an attempt to dissociate the status of the courier from that of the bag entrusted to the courier should not be taken too far. The facilities, privileges and immunities were granted to the courier not *ad personam*, but precisely because of his functions. Consequently, if the courier was not afforded proper

protection, the result would be to defeat the whole purpose of the diplomatic bag.

45. A number of drafting proposals had been made for draft article 20, paragraph 1, which should be referred to the Drafting Committee. As for paragraph 2, he would be prepared to accept the suggestion to delete the concluding phrase “and shall prosecute and punish persons responsible for such infringements”, or alternatively to accept Mr. Ni’s proposal to insert the words “when appropriate” after the word “shall”.

46. The drafting proposals regarding article 21 should also be referred to the Drafting Committee and careful consideration should be given to the suggestions for harmonizing draft article 21 with draft article 15 or for combining draft articles 21 and 19. However, the substance of article 21 had to be retained; otherwise, there would be a gap in the draft, since the courier, more particularly in view of the difficult conditions in which he had to work, needed protection for his temporary accommodation.

47. The observations made in connection with draft article 22 were similar to those concerning draft articles 20 and 21. With regard to draft 23, on the subject of immunity from jurisdiction, he stressed that the Commission would not be fulfilling its task properly if it failed to provide for immunity from jurisdiction for the diplomatic courier. It must be emphasized that the degree of immunity specified in draft article 23 was the same as that for a member of the administrative and technical staff of a delegation. There was no justification for depriving the courier of the immunity from criminal jurisdiction enjoyed by staff in that grade. As for immunity from civil and administrative jurisdiction, it followed the pattern of the existing codification conventions.

48. Apart from the various drafting suggestions made on individual articles, the Drafting Committee would also deal with the suggestions for reordering the various provisions.

49. Mr. USHAKOV proposed that draft articles 20 to 23 should be referred to the Drafting Committee for consideration in the light of the discussion.

*It was so agreed.*<sup>8</sup>

*The meeting rose at 1.05 p.m.*

<sup>8</sup> For consideration of draft articles 20 and 21 as proposed by the Drafting Committee, see 1862nd meeting, paras. 69-90; for draft article 22, see the decision by the Commission, *ibid.*, para. 92; for consideration of draft article 23 as proposed by the Drafting Committee, see 1863rd meeting and 1864th meeting, paras. 1-22.

## 1826th MEETING

*Wednesday, 23 May 1984, at 10 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz Gonzáles, Mr. Evensen, Mr.

Francis, Mr. Jacovides, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

ARTICLES 24 TO 29

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 24 to 29, which read:

*Article 24. Exemption from personal examination, customs duties and inspection*

1. The diplomatic courier shall be exempt from personal examination, including examination carried out at a distance by means of electronic or other mechanical devices.

2. The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry of articles for the personal use of the diplomatic courier and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not covered by the exemptions referred to in paragraph 2 of this article, or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. In such cases inspection shall be carried out only in the presence of the diplomatic courier.

*Article 25. Exemption from dues and taxes*

The diplomatic courier shall be exempt from taxes, dues and charges, personal or real, national, regional and municipal, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.

*Article 26. Exemption from personal and public services*

The receiving State or the transit State shall exempt the diplomatic courier from all personal and public services of any kind.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol.II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol.II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts.1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol.II (Part Two), pp. 53 *et seq.*

Arts.9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts.15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

*Article 27. Exemption from social security provisions*

The diplomatic courier shall be exempt from the social security provisions which may be in force in the receiving State or the transit State with respect to services rendered for the sending State.

*Article 28. Duration of privileges and immunities*

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or the transit State in order to perform his official functions.

2. If the official functions of a diplomatic courier come to an end, his privileges and immunities shall normally cease when he leaves the territory of the receiving State or, as applicable, the transit State, or on the expiry of a reasonable period in which to do so. However, with respect to acts performed by the courier in the exercise of his official functions, immunity shall continue to subsist.

*Article 29. Waiver of immunity*

1. The sending State may waive the immunity of the diplomatic courier from jurisdiction. The waiver of immunity may be authorized by the head or a competent member of the diplomatic mission, consular post, special mission, permanent mission or delegation of that State in the territory of the receiving State or transit State.

2. The waiver must always be express.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil suit, it shall make every effort to settle the matter justly.

2. Mr. YANKOV (Special Rapporteur) said that draft articles 24 to 27 dealt with the various exemptions accorded to the diplomatic courier, while draft articles 28 and 29 related to the duration of facilities, privileges and immunities and to waiver of immunity.

3. The concept of exemptions had not been defined in the four codification conventions, nor had it even been identified as a specific and distinct notion. It none the less constituted an important component of the body of privileges and immunities accorded to members of missions, consular posts or delegations. The term "exemption", was, of course, used in some of the provisions of those conventions, sometimes with a shade of meaning slightly different from that of "immunity". "Exemption" appeared to have the legal meaning of a right which was granted to a person and relieved that person from certain legally binding duties otherwise incumbent upon everyone under the legal system in question. Thus, under diplomatic and consular law, an exemption entailed special rights, accorded by the receiving State and creating a régime of privileged treatment involving non-application of certain local laws or regulations to the persons enjoying such treatment.

4. Traditionally, exemptions had been granted not as a result of legally binding obligations, but rather as a matter of courtesy, usually on the basis of reciprocity. His fourth report (A/CN.4/374 and Add.1-4, paras.145 *et seq.*) gave a brief account of the evolution that had

taken place in the codification and progressive development of diplomatic law, from the concept of privileges based on comity or courtesy to that of legally binding rules of international law. In that respect, the 1961 Vienna Convention on Diplomatic Relations had marked a most important step forward.

5. As far as the diplomatic courier was concerned, the exemptions were determined by functional necessity, an aspect that was much more apparent in the case of the courier than in that of diplomatic agents or members of missions, consular posts or delegations. Accordingly, because of the very nature of the functions of the diplomatic courier, the model employed was the status of the technical and administrative staff of a mission. Hence, for the purposes of the draft, the provisions of the various codification conventions, and the rules broadly recognized in State practice, had had to be adapted to the requirements of the diplomatic courier.

6. Among the various exemptions recognized by the codification conventions, he had identified four which were relevant to the status of the diplomatic courier (*ibid.*, para. 148) and, in varying degrees, were of practical significance with regard to the courier's functions. For example, exemption from customs inspection was particularly relevant because the courier's main task was to carry the diplomatic bag, which contained confidential material and official communications, to its destination.

7. He wished to reiterate that all the exemptions set forth in draft articles 24 to 29 were a reflection of the status of the administrative and technical staff of missions and delegations. In no case had he introduced any element of full diplomatic immunity. For certain purposes, article 37 of the 1961 Vienna Convention on Diplomatic Relations granted members of administrative and technical staff treatment almost similar to that of diplomatic agents. Since he had taken that article as his model, it naturally followed that, again for certain purposes, the diplomatic courier would be granted some diplomatic exemptions.

8. Draft article 24, on exemption from personal examination, customs duties and inspection, was intended to protect the courier from personal examination, including examinations of his papers, other than the official document attesting to his status. In addition, the courier would be exempt from customs regulations relating to inspection of personal baggage, and entry of articles for his personal use would be permitted, free of customs and similar duties.

9. Since the rules governing the admission of persons and goods into a country pertained to State sovereignty and fell under national jurisdiction, and since protective measures in the matter related to the security and other legitimate interests of the State, exemptions from such rules and measures had to be precise and specific. As to the applicability of those exemptions to the diplomatic courier, the question arose of how far functional necessity justified the various exemptions set forth in the codification conventions. The underlying legal justification for granting the courier such exemptions was the

principle of freedom of communication and the need to safeguard the confidential nature of his task. Accordingly, the prevailing practice favoured the granting of exemptions on the basis of reciprocity. Of course, the receiving or transit State could also extend further facilities as a matter of courtesy.

10. One problem regarding customs inspection was the use of certain sophisticated methods. Hence draft article 24 had to cover examination carried out at a distance by means of electronic or other mechanical devices. Some Governments, in their written comments, had suggested that an inspection of that kind did not infringe inviolability or immunity. With technical progress, however, it was now possible to have a more detailed picture than that provided by a mere X-ray examination and he was not at all convinced that the devices in question could be used without disregard for the inviolability of the diplomatic bag and the confidentiality of the communications carried by the diplomatic courier. Another point was that not all States had the capability of producing or obtaining those sophisticated devices, and the technologically advanced States enjoyed an obvious advantage in that regard.

11. The point of departure for the exemption from customs duties, taxes and related charges was article 36 of the 1961 Vienna Convention on Diplomatic Relations, together with prevailing State practice. Examinations required by quarantine regulations, however, should normally be conducted in the presence of the diplomatic courier or of a member of the diplomatic mission of the sending State.

12. The application of those general rules to the diplomatic courier obviously had to be circumscribed within the confines of functional necessity and he had drawn on the rules on free entry of articles for official or personal use and the exemption from customs duties set forth in article 36 of the 1961 Vienna Convention (*ibid.*, para. 158), an approach that was supported by State practice and also by many national laws and regulations. The case-law on the matter was relatively limited, but most of the known cases endorsed the rule of exemption from customs duty, taxes and inspection for diplomatic couriers.

13. Draft article 25, on exemption from dues and taxes, was based on a rule contained in article 34 of the 1961 Vienna Convention, but one which had already been applied prior to 1961, albeit on the basis of reciprocity. The terms of article 34 had been reproduced in subsequent codification conventions and also embodied in many bilateral treaties. Draft article 25 was patterned on the privileges and immunities applicable to administrative and technical staff and incorporated only the two exemptions laid down in article 34 (a) and (e) of the 1961 Vienna Convention.

14. Draft article 26 dealt with the exemption from personal and public services which applied to the administrative and technical staff of a diplomatic mission under article 37, paragraph 2, of the 1961 Vienna Convention. As far as the courier was concerned, any imposition of such services would run directly counter to

the proper discharge of his mission of delivering the diplomatic bag safely and speedily. The draft article thus embodied a rule which was supported by long-standing practice, customary diplomatic law and treaty law.

15. The exemption from social security provisions, dealt with in draft article 27, was comparatively recent, for it had originated in a proposal made by the Luxembourg delegation at the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, and had led to the adoption of article 33 of the 1961 Vienna Convention. The same rule had been adopted without difficulty for consular staff in article 48 of the 1963 Vienna Convention on Consular Relations and was also reflected in article 32 of the 1969 Convention on Special Missions and in articles 32 and 62 of the 1975 Vienna Convention on the Representation of States. Hence there was good reason to apply the same rule to diplomatic couriers and to afford to them treatment similar to that extended by a receiving or transit State to any official of the sending State temporarily in their territory.

16. Draft articles 28 and 29 were both concerned with the duration of privileges and immunities. Draft article 28 dealt with duration in its strict sense, in other words with the problem of ordinary termination, while draft article 29 covered a special form of termination, namely that of waiver. Both types of termination had important legal implications that deserved careful examination.

17. Draft article 28 raised the question of the duration of the functions and the duration of the privileges and immunities of the diplomatic courier, and the problem of the relationship between those two closely connected, though legally distinct issues was not an easy one. In the matter of prescribing the duration of immunities, there were a number of different doctrines. One possible formula was to state that the courier should enjoy his privileges and immunities "during the journey", yet that formula could lend itself to restrictive interpretations (*ibid.*, para. 182). The 1961 Vienna Convention, for its part, specified in article 27, paragraph 5, that the diplomatic courier enjoyed protection "in the performance of his functions" and article 39 contained important provisions on the commencement and end of the privileges and immunities. The rule proposed in draft article 28 was that the courier would enjoy privileges and immunities from the moment of entry into the territory of the receiving or transit State in order to perform his official functions and they would normally cease when he left the territory of the State in question or on the expiry of a reasonable period in which to do so.

18. Prior to the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, there had been a great deal of diversity in State practice and legal theory regarding the commencement and end of diplomatic privileges and immunities. In the case of commencement, the emphasis had sometimes been placed on notification of appointment, sometimes on entry into the territory of the receiving State and sometimes on the submission of credentials. The 1961 Vienna Convention had adopted the formula put forward by the Commission and had taken as a point of reference the moment when the diplomatic agent entered the territory of the receiving

State in order to take up his post or, if already in its territory, when his appointment was communicated to the receiving State.

19. Article 39, paragraph 2 of the 1961 Vienna Convention stated that privileges and immunities normally ceased when the functions of the person enjoying them came to an end. That provision, however, contained the following proviso: "However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist." Article 53 of the 1963 Vienna Convention on Consular Relations was even more explicit on that important point, providing in paragraph 4: "However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time." A similar proviso for the diplomatic courier had, of course, been included in draft article 28.

20. Since the codification conventions did not contain any special provisions regarding the duration of the facilities, privileges and immunities accorded to the diplomatic courier, a rule on the subject should be included in the present draft. He had accordingly proposed draft article 28.

21. Draft article 29 dealt with waiver of immunity, which constituted voluntary submission to the jurisdiction of the receiving State and therefore directly affected the duration of the immunity. It could thus be considered as a form of suspension or termination of immunity from the jurisdiction of the receiving State. He had taken into consideration the Commission's work on the topic of the jurisdictional immunities of States and their property but had found few cases because of the nature of the issues involved. He had taken as a starting-point article 32 of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the other codification conventions, namely article 45 of the 1963 Vienna Convention on Consular Relations, article 41 of the 1969 Convention on Special Missions and articles 31 and 61 of the 1975 Vienna Convention on the Representation of States. The main problems were, first, who was entitled to waive immunity; secondly, the form in which waiver should be effected; and thirdly, determining the scope of the waiver.

22. On the first question, article 32, paragraph 1, of the 1961 Vienna Convention stipulated that the immunity from jurisdiction of the members of the mission "may be waived by the sending State". The question therefore arose of the authority which would effect the waiver: it could be the central authority, namely the Ministry of Foreign Affairs, or the head of mission or other competent diplomatic agent, or even the actual member of the mission involved. The possible solutions depended essentially upon the domestic laws and regulations of the States concerned and the procedural rules of the local judicial authority. The rule set forth in article 32, paragraph 1, of the 1961 Vienna Convention applied to the diplomatic courier and was restated in paragraph 1 of draft article 29, which also went on to specify that waiver could be authorized by the head or a competent member of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State.

23. As to the method of waiving immunity, paragraph 2 of draft article 29 stated that the waiver "must always be express", a provision that was in keeping with the rule embodied in all the existing codification conventions. Another important point was that the requirements for the validity of the waiver and the other procedural rules must conform to the rules and regulations of the State of the forum (*ibid.*, para. 200). As to the scope and implications of waiver, article 32 of the 1961 Vienna Convention included immunity from criminal, administrative and civil jurisdiction. In that regard, draft article 29 contained rules for the diplomatic courier that were similar to those applicable to the administrative and technical staff of missions.

24. In respect of civil and administrative proceedings, article 32, paragraph 4, of the 1961 Vienna Convention drew a distinction between waiver of immunity from jurisdiction and waiver of immunity in respect of execution of the judgment. A separate waiver was required for the purpose of execution. That rule had been well-established in customary international law and had been confirmed by State practice. There had been some criticism of that "double-waiver" requirement, which was said to defeat the purpose of the waiver of immunity from jurisdiction in respect of civil proceedings. Nevertheless, those criticisms had not found any echo in State practice since 1961 and the provision in question had been incorporated both in the 1969 Convention on Special Missions and in the 1975 Vienna Convention on the Representation of States. In the circumstances, he had incorporated the rule in paragraph 4 of draft article 29.

25. Lastly, paragraph 5 of draft article 29 embodied a rule taken from article 31 of the 1975 Vienna Convention on the Representation of States, which required the sending State either to waive the immunity of the diplomatic courier in respect of a civil suit or, as an alternative, to make every effort to settle the matter justly.

26. Sir Ian SINCLAIR said that, in the context of its consideration of draft articles 24 to 29, it was important for the Commission to know what the current legal position was. In that connection, he referred to the most recent edition of *Satow's Guide to Diplomatic Practice*, which contained a statement to the effect that the only privileges or immunities accorded to the courier were those that were essential for the unimpeded transit of the bag, namely personal inviolability and immunity from arrest and detention.<sup>5</sup> Again, in his fourth report (A/CN.4/374 and Add.1-4, para. 149), the Special Rapporteur admitted that "there are no specific provisions in this field with special reference to the status of the courier", which meant that the draft articles before the Commission constituted progressive development of international law.

27. Referring first to draft article 24, and considering solely the position of the diplomatic courier, he noted that under article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, the diplomatic courier enjoyed personal inviolability—a concept which signified that he should be afforded protection and

<sup>5</sup> 5th edition (London, Longman, 1979), pp.117-118, para. 14.31.

should not be impeded in the performance of his official functions. Was the diplomatic courier impeded if, like anybody else wishing to board an aircraft, he was required to undergo the customary examination carried out "by means of electronic or other mechanical devices" designed to detect the presence of metal? He, for one, happened to think not. The vast majority of people enjoying privileges and immunities willingly complied with the checks carried out on all passengers who travelled by air. Theoretically, they might be entitled to invoke their inviolability, but they were no doubt aware that, if they did so, any airline could refuse to accept them. It would therefore be quite wrong to convey the impression that diplomatic couriers were to be treated as a special case by conferring upon them an exemption which, in practice, was not insisted upon for diplomatic agents, who enjoyed a much fuller range of privileges and immunities.

28. For those reasons, he was strongly opposed to paragraph 1 of draft article 24. One solution would be simply to delete it. Another would be to qualify the exemption from personal examination in the same way as exemption from inspection of personal baggage was qualified in paragraph 3 of draft article 24; that would involve deleting paragraph 1 but amplifying paragraph 3 to read:

"The diplomatic courier shall be exempt from personal examination and his personal baggage shall be exempt from inspection, unless there are serious grounds for believing that he is carrying or that his personal baggage contains articles not covered by the exemptions referred to in paragraph 2 of this article, or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. Any inspection of personal baggage shall be carried out only in the presence of the diplomatic courier."

Of the two possible solutions he preferred the latter, which would respond more readily to the anxieties many Governments felt regarding illicit traffic in foreign currency, drugs and arms. He had no objection of substance to paragraph 2, which seemed to accord broadly with State practice, nor did he experience any real difficulty with paragraph 3, subject to possible amalgamation with paragraph 1.

29. Draft article 25 was based on article 34 of the 1961 Vienna Convention but incorporated only two of the exceptions provided for under that article. The effect was to confer more favourable treatment upon the diplomatic courier than upon the diplomatic agent. That was not all, however, for the diplomatic agent enjoyed exemption from dues and taxes only in the State where he was a member of the diplomatic mission, whereas the diplomatic courier appeared *prima facie* to enjoy such exemption in any receiving or transit State to which he happened to pay a fleeting visit. The courier would likewise appear to enjoy such exemption even in the State of which he was a national or in which he was ordinarily resident for tax purposes. Perhaps the Special Rapporteur would clarify whether that was in

fact the intention, although the very far-reaching consequences of such an interpretation could admittedly be mitigated by the terms of draft article 28. But assuming, for instance, that a diplomatic courier invested in real estate in one of the receiving or transit States which he visited regularly, was he to be exempt from any taxes, dues or charges connected with that transaction? He very much doubted whether the Special Rapporteur intended that particular exemption to be operative worldwide, something which would be quite unprecedented; in his view, no real case could be made out for such an exemption. In that connection, he knew of instances in which individuals faced with criminal charges or civil claims in the United Kingdom had sought and obtained an appointment enjoying diplomatic privileges and immunities precisely for the purpose of trying to plead immunity from such charges and claims. Other members of the Commission were doubtless acquainted with similar cases. Furthermore, the Special Rapporteur's proposal would provide ample opportunity to potential tax evaders, of whom there were all too many in the world.

30. Draft article 25 was also unnecessary. In his fourth report (*ibid.*, para. 167), the Special Rapporteur stated that the diplomatic courier's short stay in a given country would preclude the exercise of rights relating to immovable property or private income that might be subject to taxation. Even if it were unlikely that a diplomatic courier would seek to take advantage of such exemptions, it did not necessarily follow that the exemption should be granted. It could equally well be argued that there was no need to accord the exemption at all. No proper case had been made out for allowing fiscal exemptions for the diplomatic courier. Should any members of the Commission have doubts on that score, they need only consult the Treasury or Revenue Department in their own country. There was nothing in the Special Rapporteur's report to suggest that diplomatic couriers had suffered in the past from the absence of such exemptions and, accordingly, they would not suffer if article 25 were simply deleted.

31. Somewhat similar considerations applied to draft articles 26 and 27. So far as draft article 26 was concerned, he wondered whether the concept of inviolability would not cover the point. In substance it was acceptable that, provided he was not a national of or resident in a receiving or transit State, the diplomatic courier should not be obliged to perform personal or public services in those States, since any requirement of any kind could obviously interfere with his functions. In that connection, the Special Rapporteur stated in his fourth report (*ibid.*, para. 173) that, in practice, the courier's short sojourn in a given country would restrict the probability of him being required to perform such obligations, the conclusion being that an exemption was justified. Again, however, the opposite could equally well be inferred for the reasons he had already given in connection with article 25.

32. Lastly, with regard to draft article 27, the diplomatic courier should not, of course, be expected to pay social security contributions in the receiving or transit States, provided he was not a national of or resident in either of those States; but was the Special Rapporteur aware of any case in which a receiving or transit

State had tried to subject a diplomatic courier to such liability? If the answer to that question was in the negative, precisely because the diplomatic courier's short stay meant that he did not fall within the scope of national legislation in the matter, he wondered whether draft article 27 was really necessary.

33. Mr. McCaffrey said that, prior to the entry into force of conventional law, exemptions had been accorded to the diplomatic courier largely on the basis of reciprocity and as a matter of diplomatic courtesy, a courtesy extended to the State and not to the diplomatic courier *per se*. Accordingly, the basic issue was one of functional necessity, namely which privileges and immunities were necessary in order to ensure freedom of communication as provided for under article 27 of the 1961 Vienna Convention on Diplomatic Relations.

34. He wondered whether there was not a slight tendency in draft article 24 to assimilate the courier to the diplomatic agent and whether anything was added by the Special Rapporteur stating in his fourth report (A/CN.4/374 and Add.1-4, para. 154) that one of the two grounds for exemption from personal examination provided for under paragraph 1 of the draft article was recognition of the diplomatic courier's official functions. The other ground, inviolability of the courier's person, was of course important to ensure unimpeded transmission of the diplomatic bag, but the form which such inviolability should take was a separate matter requiring close examination.

35. Furthermore, none of the four codification conventions apparently provided any precedent for the exemption from personal examination laid down in paragraph 1 of draft article 24. In his own country, the standard practice was for the courier to be subjected to the usual metal detector test at the airport. He very much doubted whether that detained the diplomatic courier or whether there was any need for an exemption from such a practice, or indeed requirement, on the basis of the inviolability of the courier's person. In any event, it was ultimately for the airline to decide whether or not the courier could board the aircraft. Possibly, therefore, the paragraph should be reconsidered, along the lines suggested by Sir Ian Sinclair.

36. With regard to paragraph 2 of draft article 24, his personal preference was for the wording of article 35, paragraph 1, of the 1969 Convention on Special Missions, which underlined the discretionary nature of the receiving State's power to limit the entry of articles for personal use and to grant exemption from customs duties, taxes and related charges.

37. Draft articles 25, 26 and 27 were based on provisions in the codification conventions which, to his mind, were largely inapplicable in the case of the diplomatic courier, given the itinerant nature of the latter's functions. His first reaction had been to question the need for draft article 25, but he also had doubts regarding the basic notion that the diplomatic courier's exemption from taxes should be no less than that for the members of a diplomatic mission. It was not the status of the diplomatic courier but his peripatetic duties which made

it highly improbable that he would be in any State sufficiently long for the matter to become a practical problem. There was also the question of exemption from taxes. In view of the courier's short stay in a given country and in the absence of some profit motive unrelated to the performance of his functions, was the courier likely to become involved in a situation in which it would be necessary for him to be exempted from taxes and would such exemption materially assist him in the performance of his task? That seemed questionable. Moreover, would income tax apply? Even by the very strict standards applied in the United States of America, the fact that a diplomatic courier would be said to have earned a portion of his income while in a receiving or transit State would not make him subject to taxation in that State, but only in the State of his nationality or residence. It might therefore be as well to restrict the scope of draft article 25 to an exemption, if any, from taxes, dues and charges levied by the receiving or transit State. The first part of the article might therefore be reworded to read: "The diplomatic courier shall be exempt from taxes, dues and charges of the receiving or transit State of a personal or real, national, regional and municipal nature, except for . . .". He was making that suggestion without prejudice to his own view that the article did not seem really necessary.

38. With regard to draft article 26, no problems regarding the rendering of personal and public services had been cited, and it was doubtful whether the matter called for regulation. Once again, the very limited duration of a courier's stay in a given State posed the question of the circumstances in which a State would try to press a diplomatic courier into service. For his own part, he had arrived at a conclusion diametrically opposed to that of the Special Rapporteur. Furthermore, the exemptions laid down in draft article 26 were amply covered by other articles, including draft article 4, on freedom of official communication, draft article 17, on freedom of movement, and draft article 20, on personal inviolability. He would like to know from the Special Rapporteur whether any relevant problem had in fact arisen in the case of a courier.

39. He too wondered, for reasons stated by Sir Ian Sinclair, whether draft article 27 was really required. Admittedly, a precedent could be found in the codification conventions, but a precedent that was entirely inapposite in the case of a diplomatic courier, whose sojourn was by definition very short. Presumably, article 37 of the 1961 Vienna Convention on Diplomatic Relations, under which not only administrative and technical staff but also service staff were exempt from social security arrangements, would apply to the diplomatic courier as well, in which case there would be no need for draft article 27. More important from the legal standpoint was the fact that a requirement to make social security contributions would not interfere with freedom of movement and, hence, with the performance of the courier's task. It therefore seemed unnecessary, functionally, to provide for such an exemption, and he would propose that draft article 27 be deleted.

*The meeting rose at 1 p.m.*

## 1827th MEETING

Thursday, 24 May 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (continued)

ARTICLE 24 (Exemption from personal examination, customs duties and inspection)

ARTICLE 25 (Exemption from dues and taxes)

ARTICLE 26 (Exemption from personal and public services)

ARTICLE 27 (Exemption from social security provisions)

ARTICLE 28 (Duration of privileges and immunities) and

ARTICLE 29 (Waiver of immunity)<sup>5</sup> (continued)

1. Mr. McCaffrey, continuing the statement he had begun at the previous meeting and concluding his observations on draft articles 24 to 27, said he had tried to show that, while some of those articles went too far in assimilating the diplomatic courier to diplomatic agents, others were perhaps unnecessary and might not be supported by existing law and practice, for three reasons. First, it had not been demonstrated that there really were problems in the area concerned; secondly, the exemptions in question were generally covered by other articles; and, thirdly, the provisions of the four codification conventions, on which the articles were based, were largely inapposite owing to the fundamental differences

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1826th meeting, para. 1.

between the functions and length of stay of the diplomatic courier, on the one hand, and of diplomatic agents, on the other. Those conclusions, which counselled a minimalist approach, were borne out by the summary records of the Sixth Committee of the General Assembly and by the Special Rapporteur's own summary of the Sixth Committee's discussion in his fifth report (A/CN.4/382, especially paras. 12 and 13).

2. Turning to draft article 28, he pointed out that, since the duration of the diplomatic courier's privileges and immunities was linked to his functions, the real issue was when those functions came to an end. According to paragraph (a) of draft article 13, the answer was upon "completion of his task to deliver the diplomatic bag to its final destination". However, paragraphs 5 and 6 of article 27 of the 1961 Vienna Convention on Diplomatic Relations cast some doubt upon that notion. The question was whether the provisions of draft article 28, whereby the privileges and immunities of the diplomatic courier continued until he left the receiving or the transit State, even if he had already delivered the bag, in fact gave effect to the "basic assumption that the duration of the diplomatic courier's privileges and immunities was subject to 'the performance of his functions'" (A/CN.4/374 and Add.1-4, para. 183). In other words, should his privileges and immunities continue after delivery of the bag or should they end with delivery? Although, as noted in the fourth report (*ibid.*, para. 184), under article 27, paragraph 6, of the 1961 Vienna Convention the functions, and consequently the protection, of a diplomatic courier *ad hoc* ended with delivery of the bag, paragraphs 5 and 6 of that article, read together, suggested that a professional courier's privileges and immunities did not end when he delivered the bag. A possible reason for that provision was that, after delivering a bag, a professional courier might be on his way to collect another bag, which was also part of his functions, and it was therefore necessary, in order to ensure freedom of communication, that he should not be delayed. The point should, however, be reconciled with draft article 13, paragraph (a); that could perhaps be done in the commentary. He would also suggest that, in the last sentence of article 28, the words "continue to subsist" should be replaced by the words "continue to exist" or simply "subsist".

3. With regard to draft article 29, he noted that, as the immunity in question was *ratione materiae* and not *ratione personae*, the article quite properly provided that the sending State was the one which could waive the immunity. The need for the article was, in his view, directly dependent on whether it was decided to retain draft article 23. It was, however, a good example of a case in which it might not be advisable to regulate the matter in too much detail since that would only create problems.

4. Paragraph 1 of draft article 29 would clearly extend to waiver of immunity from criminal jurisdiction as well as from civil and administrative jurisdiction. In his view, that was desirable since the sending State's discretion should not be unduly fettered. Paragraph 2 of the article, which provided that waiver must always be express, had presumably been included because it appeared in the

other codification conventions. But since waiver could also be implied, as was apparent from paragraph 3 of draft article 29, he proposed that paragraphs 1 and 2 should be combined, in which case the provision in paragraph 2 should be reworded to read: "This waiver must be express." If, however, paragraphs 1 and 2 were not combined, paragraph 2 should be amended to read: "The waiver provided for in paragraph 1 must be express." Paragraph 3 was, in his view, a necessary and appropriate provision. The wording of paragraph 4 was nearly identical to that of article 32, paragraph 4, of the 1961 Vienna Convention, but he wondered why the exact wording of the latter paragraph had not been used. He also wondered why paragraph 5 of the article had been limited to civil actions. In his view, a provision along the lines of article 41 of the 1963 Vienna Convention on Consular Relations, which provided in paragraph 1 for prosecution and even imprisonment in the case of a "grave crime", should be considered for draft articles 29 and 23.

5. Mr. QUENTIN-BAXTER said that, in common with other members, he had an uneasy feeling that the provisions should take account of a perfectly ordinary factor, namely the willingness of Governments to undertake further obligations. There was no doubt whatever about the place in international law of the major conventions on diplomatic and consular immunities, without which relations between States would be gravely impaired. The field, therefore, was one in which the influence of foreign offices was predominant: other government departments might have practical points to raise, but in the final analysis they had to give way to the manifest need to enable diplomatic and consular life to continue. His uneasiness probably stemmed from the fact that when members returned to their countries with further proposals expressed in conventional provisions they would not necessarily be enthusiastically received. The selfsame officials who had had difficulties with the main conventions on diplomatic and consular relations would regard it as a splendid opportunity to pursue their objections to those conventions with some vigour and to argue against any extension of them. One only had to recall something as apparently simple as making a change in the form required to be filled in by arriving and departing air travellers to realize just how difficult it was to move the body of bureaucracy. Thus it would simply not be possible to get past the starting-post unless foreign offices were firmly convinced of the value of what was being done, which perhaps explained why certain members had adopted a minimalist approach.

6. Rather than discuss in detail points already raised, he would concentrate on the most tenuous aspect of the draft articles: the position of the transit State. From the standpoint of the receiving State, it was quite easy to extend the privileges and immunities granted to diplomatic and consular staff to the diplomatic courier. That was particularly true in the case of countries which had a large diplomatic and consular presence in each other's territories and where couriers travelled fairly regularly; there was then scope to treat the institution of the diplomatic courier as an important accessory to diplomatic and consular relations, and the normal incidents of dip-

lomatic and consular relations applied. For instance, a diplomatic courier could, like any diplomatic official, be declared *persona non grata*. To that extent, therefore, some aspects of the proposed rules were eminently workable. If, however, it was really of importance for States which relied on diplomatic couriers to have the co-operation of States in which they had no diplomatic, consular or other representation—and he was uncertain about that—then the Commission should take a very close look at the proposed rules in the ultimate context of the transit State, as defined under paragraph 1, subparagraph (5), of draft article 3, which was in a far worse position than the receiving State. A transit State, for example, was not invited, under the rules, to declare that any particular diplomatic courier passing through its territory was *persona non grata*. On the other hand, it was required, somewhat unrealistically, by draft article 4, paragraph 2, to model its practice on that of a receiving State, which seemed to be a rather tall order.

7. Assuming, for example, that a courier from a country with which New Zealand had no diplomatic or consular relations was delayed in Auckland, New Zealand was required under article 4, paragraph 2, to accord him the same freedom and protection as was accorded by the receiving State. But which receiving State? The courier was not even required to disclose the destination of the bag he was carrying, although he did have to have a certificate specifying its contents. It might be known that his country had embassies in States that were on his "run", or that his air ticket would take him to those States, but from the viewpoint of the transit State he was simply somebody who arrived in the country and, in due course, left it. The will-o'-the-wisp character of the diplomatic courier was particularly evident in that context.

8. Moreover, the feeling of reciprocity which could perhaps be developed in the case of a receiving State, and might justify new provisions, would be hard to achieve in the case of a transit State. The problem was not one of diplomatic passports, which always commanded respect, but of the kind of minimum arrangements that served the actual need and would not build up resistance in Governments: it was a matter that troubled him considerably. States would normally do a lot for the travelling representative of a foreign Government, but it was quite another matter to require them to do so, and in all circumstances. The voices of customs departments, agriculture departments, transport departments and numerous other domestic authorities would be raised to temper any enthusiasm shown by foreign services for new obligations in that regard.

9. He made those general comments in the light of the fact that many Governments attached great importance to the introduction of new provisions and that, in order to fulfil their purpose, such provisions would have to have the support of a number of other Governments which were not nearly so keen on the idea. The practical equation was very difficult and draft articles like the one on social security provisions (art. 27) gave him the feeling that problems of no real substance were being raised.

10. He urged the Commission to limit the issues it re-

ferred to the Drafting Committee. It should, for instance, be possible to arrive at an easy consensus on questions such as whether it was realistic to ask a receiving State to exempt the diplomatic courier from personal searches. The Special Rapporteur might therefore wish, in his summing-up, to redefine his objectives, rather than leave to the Drafting Committee questions which involved no real element of drafting at all.

11. Mr. LACLETA MUÑOZ began by congratulating the Special Rapporteur on the clarity, precision and richness of the documentation he had submitted to the Commission. He particularly appreciated the Special Rapporteur's very wide approach to his subject, because he himself favoured a minimalist position.

12. The application of article 27 of the 1961 Vienna Convention on Diplomatic Relations had not, as far as he knew, raised any particular problems so far, and his country, which admittedly made very little use of professional diplomatic couriers but more use of diplomatic couriers *ad hoc*, had not encountered any. He recognized, however, that problems had arisen in other countries and he therefore agreed with the Special Rapporteur that the status of the diplomatic courier should be assimilated to that of members of the administrative and technical staff of the diplomatic mission of the courier's country in the receiving State. His comments on the draft articles submitted by the Special Rapporteur were thus mainly concerned with drafting and, particularly in the case of draft articles 24 to 29, aimed at simplifying and clarifying them.

13. In regard to draft article 24, he considered that the provisions of paragraph 1 went beyond what was necessary and usual, and also beyond what was required for assimilation of the status of the diplomatic courier to that of members of the administrative and technical staff of a diplomatic mission. Indeed, they went beyond the treatment reserved for the head of the diplomatic mission himself. He did not know of any cases in which diplomatic agents had refused to submit to examination at a distance by electronic devices since such devices had been in general use at airports. In his view, paragraph 1 was not realistic; it was also unnecessary, because other draft articles guaranteed the personal inviolability of the diplomatic courier.

14. The provisions of paragraphs 2 and 3 also went beyond what was necessary. That was particularly true of paragraph 2. Admittedly, that paragraph was based on article 36 of the 1961 Vienna Convention and on the relevant articles of the other three codification conventions, but those articles dealt with a different situation: they gave diplomatic agents the right to import, free of customs duty, articles for the official use of the mission and articles for their personal use, that right being accorded to them as residents of the country where they performed their functions, not as mere travellers like the diplomatic courier. Hence it did not seem necessary to specify that the receiving State or transit State must permit the entry of articles for the personal use of the diplomatic courier, in so far as he brought them with him like any other traveller, without infringing the laws and regulations of those States. The case of members of diplomatic missions who remained for some considerable

time at their place of duty and might be authorized to import further articles duty-free, even after their initial installation, was entirely different.

15. He therefore proposed that paragraph 2 be deleted and that paragraph 3 be amended accordingly, by deleting the reference to exemptions, which would no longer be applicable. The present paragraph 3 could be amended to read:

“The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not intended for his personal use or articles the import or export of which is prohibited by law or controlled by the quarantine regulations of the receiving State of the transit State. In such cases inspection shall be carried out only in the presence of the diplomate courier.”

16. Turning to draft articles 25, 26 and 27, he observed that draft article 25, taken literally, quite obviously went too far, in that it would exempt the diplomatic courier from all taxes, dues and charges in whatever country he might be, including his own country. That was certainly not the intention of the provision. He thought that, in trying to simplify or abbreviate article 34 of the 1961 Vienna Convention, the Special Rapporteur had omitted some of the exceptions provided for in that article. The diplomatic courier should enjoy a minimum of privileges, immunities and exemptions, which should be in line with those enjoyed by the administrative and technical staff of the diplomatic mission of the sending State in the receiving State or the transit State.

17. He therefore proposed that draft articles 25, 26 and 27 should be merged in a single article to read as follows:

“The diplomatic courier shall enjoy in the receiving State and in the transit State the same privileges and exemptions relating to taxation, personal services and social security as those enjoyed by the administrative and technical staff of the diplomatic mission of his country in those States.”

That provision would be amply sufficient, since it was difficult to think of a case in which a diplomatic courier had been required to render personal or public services or had been subject to social security legislation in a receiving State or transit State; for it was hardly conceivable that a diplomatic courier could be resident in the receiving State, still less in the transit State, where his stay was normally limited to a few hours or at the most a few days.

18. Draft article 28 raised a problem inasmuch as it did not take account of the special situation of the diplomatic courier *ad hoc*, to which the draft articles were supposed to apply. Normally, a diplomatic courier *ad hoc* was despatched from the diplomatic mission of his country abroad to his own country and his functions began in the territory of the receiving State. It was therefore necessary to specify in paragraph 1 that the functions of the diplomatic courier *ad hoc* began from the moment when he took possession of the diplomatic bag or when he began his journey or when he began to perform his functions. Thus it was insufficient to provide

only that the diplomatic courier enjoyed privileges and immunities from the moment he entered the territory of the receiving State.

19. The wording of paragraph 2 also raised a problem. What would happen if the official functions of a diplomatic courier did not come to an end? The paragraph seemed to be based on the idea that the functions of a professional diplomatic courier were continuous, beginning with his appointment and continuing throughout his journeys and sojourns in various countries. He himself believed that the functions of the diplomatic courier were separate for each journey. There was no need to regard them as being continuous; his privileges and immunities ceased in each case when the diplomatic courier, even if he was a professional courier, left the receiving State. That was in conformity with the provisions of draft article 13. It should therefore be specified that the diplomatic courier enjoyed privileges and immunities from the moment he entered the territory of the receiving State or the transit State and that his privileges and immunities ceased when he returned to his country of origin, not only when his official functions were terminated, but also in the normal case.

20. With regard to draft article 29, he agreed with Mr McCaffrey that the decision the Commission would take must depend on its decision concerning draft article 23. For if the status of the diplomatic courier was assimilated to that of the administrative and technical staff of his country's diplomatic mission in the receiving State or the transit State, he must enjoy immunity from jurisdiction as provided in draft article 23. He therefore approved of the content of draft article 29, except that he thought it would be preferable not to retain in paragraph 1 the enumeration of persons qualified to authorize the waiver of immunity. It would suffice to include the provision of article 32, paragraph 1, of the 1961 Vienna Convention, since it was the sending State which could waive immunity from jurisdiction through the intermediary of the head of the diplomatic mission in the receiving State or the transit State.

21. He pointed out that the draft articles under consideration, at least draft articles 23, 24 and 29, bore on the substance of the topic. He therefore considered it preferable for the Commission itself to take a decision regarding them, at least in the form of directives, rather than to leave that responsibility to the Drafting Committee.

22. Mr. USHAKOV warmly congratulated the Special Rapporteur on the penetrating reports he had submitted to the Commission. On the whole, he had little difficulty with draft articles 24 to 29, except for the fact that they did not deal with the diplomatic courier and his privileges and immunities in cases where he was a national of the receiving State or permanently resident there. It would therefore be useful to add an article along the lines of article 38, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. The transit State was not concerned because it must grant a diplomatic courier who was a national or a permanent resident in its territory full transit facilities.

23. It was self-evident that the privileges and immunities accorded to a diplomatic courier did not attach to his person, but to the sending State. That also followed from draft article 29, which stipulated that it was the sending State which could waive the immunity of the diplomatic courier from jurisdiction.

24. He considered that the draft articles should also be based on the principle of reciprocity, which was at the root of international law, particularly the law relating to diplomatic relations, including communications by diplomatic courier. It would therefore be appropriate to include provisions modelled on article 47 of the 1961 Vienna Convention, in order to avoid any misunderstanding of the principle of reciprocity and the possibility of applying certain rules restrictively, which was recognized by contemporary diplomatic law.

25. Referring to draft article 24, he said that his comments would be confined to paragraph 1, for although paragraphs 2 and 3 might call for comments on drafting, they did not appear to raise any problems of principle. The principle of exemption of the diplomatic courier's personal baggage from inspection, stated in paragraph 3, was indeed established, though it was not a strict rule, for a State entered by the diplomatic courier could inspect his personal baggage if it so desired. But paragraph 1 was new, in that it reflected a situation which had not existed when the four codification conventions had been drawn up. The personal inspection measures now applied for security reasons at airports, and which might later be applied to other means of transport, were designed to prevent terrorist attacks and the hijacking of aircraft. But by applying the rule of courtesy it was possible to exempt accredited diplomatic agents, on the valid presumption that they were neither terrorists nor bandits. In Moscow, for instance, accredited diplomatic agents were not subject to security checks. The diplomatic courier should be exempt from such inspection, not only as a matter of courtesy, but for the obvious reason that he carried an attaché case attached to his wrist by chain, and inspection by ultra-modern methods would compromise the confidential nature of the contents of his attaché case. Paragraph 1 was thus fully justified.

26. In draft article 25 he suggested that the words "in the performance of his functions" should be added after the words "The diplomatic courier", in order to show clearly that the exemption did not apply to any private or personal belongings that he might have in the territory of the receiving State or the transit State, without it being necessary to list all the exceptions stated in the codification conventions.

27. He doubted whether draft article 27 was necessary, since the receiving State and the transit State did not at present claim that persons briefly in their territory, like the diplomatic courier, were subject to their social security legislation.

28. With regard to the duration of privileges and immunities, dealt with in draft article 28, he considered that three different cases should be dealt with in three separate paragraphs: the first paragraph would deal with the professional diplomatic courier, the second with the

diplomatic courier *ad hoc* and the third with a diplomatic courier declared *persona non grata* or not acceptable under draft article 14. Since a diplomatic courier could be a national of the sending State appointed while in the territory of the receiving State and his immunity should apply as from the notification of his appointment, and since a diplomatic courier could return to the territory of the receiving State or the transit State as a private traveller, he proposed that draft article 28 should be amended to read as follows:

“Article 28. *Duration of privileges and immunities*

“1. The diplomatic courier shall enjoy the privileges and immunities to which he is entitled from the moment he enters the territory of the receiving State or the transit State for the purpose of performing his functions or, if he is already in the territory of the receiving State, from the moment his appointment is notified to that State. Such privileges and immunities shall cease at the moment the diplomatic courier leaves the territory of the receiving State or, as the case may be, the transit State. However, in respect of acts performed by the courier in the exercise of his functions, immunity shall continue to subsist.

“2. The privileges and immunities of the diplomatic courier *ad hoc* shall cease to apply when such a courier has delivered to the consignee the diplomatic bag in his charge. However, in respect of acts performed by the courier *ad hoc* in the exercise of his functions, immunity shall continue to subsist.

“3. When the functions of the diplomatic courier have come to an end in accordance with article 14, his privileges and immunities shall cease at the moment he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so. However, in respect of acts performed by the courier in the exercise of his functions, immunity shall continue to subsist.”

29. With regard to draft article 29, he shared the view of other members of the Commission that it was not necessary to specify which organs of the sending State were competent to waive immunity from jurisdiction. It would be sufficient to indicate that the sending State could waive that immunity.

30. Mr. JACOVIDES said he welcomed the efforts being made to harmonize and supplement the existing legal instruments on diplomatic law and looked forward to completion of the work on the important and practical topic under consideration. It was perhaps the only topic which the Commission could hope to finalize within the current term of office of its members; and thanks to the Special Rapporteur’s erudition, objectivity and diligence, it had been possible to go a long way towards achieving that object.

31. Without necessarily adopting a minimalist approach, he shared some of the concern expressed during the discussion about going too far in assimilating the status of a diplomatic courier to that of diplomatic staff or, in some respects, even exceeding that status. The courier should have adequate protection for the proper

exercise of his functions; his personal inviolability, the inviolability of his temporary accommodation and means of transport, his immunity from jurisdiction, his exemption from personal examination and inspection, his exemption from dues and taxes, etc. should also be based on functional necessity so as to avoid abuse.

32. He took that view because of the essential consideration that the Commission’s final draft articles should be acceptable to a large majority of States. A further reason was that his country—and undoubtedly many other small or developing countries—very rarely used regular diplomatic couriers. Those countries were therefore especially sensitive on the subject and naturally somewhat circumspect about extending excessive privileges to the diplomatic couriers of other countries.

33. Those general comments applied not only to draft articles 24 to 29, but also to draft articles 20 to 23, which had been referred to the Drafting Committee, and indeed to the draft as a whole. He welcomed the various substantive and drafting suggestions made during the debate, which went in the direction of his own comments, and trusted that the Special Rapporteur, with his usual open-mindedness, would duly take those suggestions into account and make the appropriate changes, so as to arrive at the best possible result.

34. Chief AKINJIDE said that the Special Rapporteur would derive much benefit from the constructive comments made during the discussion, which were aimed at improving the draft and producing a set of draft articles that could be accepted by the Commission, by consensus at least.

35. He urged the Commission not to try to place the diplomatic courier in a separate compartment of his own. As he saw it, the distinction being made between the diplomatic courier and the diplomatic bag was largely academic. He had three reasons for saying so, the first being the title of the present topic, which showed that the courier was almost inseparable from the diplomatic bag.

36. His second reason related to the position of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations. On that point, he read out the following extract from *Satow’s Guide to Diplomatic Practice*:

The diplomatic bag is accorded under the Vienna Convention a more absolute protection than was given under the previous customary law. Previously it was on the whole accepted that the receiving State had a right to challenge a bag which it believed to contain unauthorized articles. If this occurred, the sending State could elect either to return the bag unopened or to open it in the presence of the authorities of the receiving State. This practice of challenge to a suspect bag is still permitted in the case of a consular bag under the Vienna Convention on Consular Relations. But it is no longer permitted in the case of a diplomatic bag. The bag may contain only diplomatic documents or articles intended for official use, but the authorities of the receiving State may not demand that it be returned or opened even if they suspect that it is being used to smuggle arms or other illegal exports or imports. States were fully conscious of the dangers of abuse, but they were even more aware that any right of search could be abused by officials claiming to have grounds to suspect any bag which they wished to investigate. The receiving State or the airline authorities may subject a bag to detector devices designed to show the presence of explosives, metal or drugs, since this does not involve opening or detaining it, and

if this test disclosed grounds for suspicion, the airlines could decline to carry it. In one incident the customs authorities in Rome realized that a large diplomatic bag destined for Cairo was emitting moans. They seized and opened it and found that it contained a drugged Israeli who had been kidnapped. Some members of the Egyptian Embassy were declared *persona non grata* as a result of this discovery.<sup>6</sup>

37. That passage from a well-known authority showed that an examination of the existing law revealed two things. The first was that there was a distinction between the diplomatic bag and the consular bag. The second was that the protection accorded to the diplomatic bag appeared to be absolute. The conclusion which he himself drew from that analysis was that the differences between the status of a courier and that of a diplomatic bag should not be made too wide.

38. His third reason was that the courier was a servant of the sending State who was performing official functions. He therefore saw no reason to protect the diplomatic bag and not the diplomatic courier. It had been suggested that the protection extended to the courier should be curtailed, on the grounds that he only spent a short time in the receiving or transit State. But the length of his stay seemed hardly relevant. What mattered was that a courier could be carrying communications of vital importance for the maintenance of peace or for dealing with a grave economic situation. In view of the critical character of the papers he carried, a courier could be exposed to attacks or to blackmail. He therefore urged that the protection extended to him should not be weakened.

39. Reference had been made during the discussion to the possibility of abuse. He considered that since abuses could be committed not only by a courier, but also by a receiving State, it was necessary to strike a balance between the two sets of interests concerned.

40. The problems raised by draft article 25 related not so much to substance as to drafting. The wording seemed to him much too open-ended and he suggested that it should be restricted so as to cover only matters pertaining to the courier's functions. He also endorsed the suggestions made by Sir Ian Sinclair (1826th meeting) and by Mr. Ushakov, which were intended to prevent abuse. Mr. Lacleta Muñoz had suggested that the provisions of article 25 should be made acceptable to foreign ministries. For his part, he thought the Commission's aim should rather be to persuade the General Assembly.

41. That being said, he supported the Special Rapporteur's general approach, subject to adoption of the various proposals made to improve the drafting. He himself had two drafting suggestions. The first, relating to draft article 28, paragraph 2, was to replace the first word "If" by the word "When", subject to the other English-speaking members being in agreement. Secondly, in draft article 29, paragraph 1, he found the concluding formula "in the territory of the receiving State or transit State" unduly narrow and suggested that the language should be broadened so as to cover the sending State's missions, consulates or delegations elsewhere.

42. Mr. Balanda said that he wished to make some general comments before discussing the articles under consi-

deration. First of all, he regretted that the footnotes relating to the mimeographed text of the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4) were not placed at the foot of the page but at the end of each document, which made it more difficult to read an otherwise excellent report.

43. It seemed that the members of the Commission who supported the minimalist approach were once again calling into question the usefulness of studying the topic and wished to reduce the privileges granted to the diplomatic courier to practically nothing. If the Commission followed their line it would not be doing what the General Assembly expected of it, namely to define the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. The diplomatic courier played a very important part in international relations, since his main function was to carry the diplomatic bag, and by putting the sending State and the receiving State in contact he helped to bring peoples and nations closer together.

44. The Special Rapporteur had been more or less directly reproached for a tendency in his draft articles to assimilate the position of the diplomatic courier to that of the members of diplomatic missions. That reproach did not seem to be justified. The practice of States bore witness to such an assimilation, as the Special Rapporteur had pointed out in his fifth report (A/CN.4/382, sect. III), although that practice might not perhaps extend to all States, particularly developing countries. Besides, even if the Special Rapporteur's proposals were not based strictly on practice, he could not be blamed for that, since the Commission could contribute to the progressive development of international law, as it had done, for instance, by giving a mandatory character, in its draft articles on diplomatic intercourse and immunities, to exemptions which had previously been based only on courtesy and reciprocity. Moreover, it should not be forgotten that a diplomatic courier could at the same time be a member of a diplomatic mission. If the draft articles gave the diplomatic courier a status entirely different from that of a diplomatic agent, one and the same person might enjoy greater or lesser privileges according to the functions he was performing. Consequently, in view of the specific nature of the diplomatic courier's functions, it would be advisable to depart as little as possible from what was provided in the codification conventions regarding diplomatic agents.

45. With regard to the minimalist thesis, he emphasized that the purpose of granting privileges and immunities was not to benefit the persons enjoying them, but to facilitate the performance of their official functions in the ultimate interests of States. In that respect, the fact that the diplomatic courier's functions were performed during a rather short time should not influence his status. Reasoning *a contrario*, it could be held that if no privilege or immunity was granted to the diplomatic courier, that would not allay the fears expressed by some people regarding the danger to which the political and economic security of States could be exposed by the traffic in arms, drugs, gold or precious stones. Abuses were always possible in that sphere and the emphasis should be placed on sanctions, particularly the waiving of immunity. If he

<sup>6</sup> *Op. cit.* (see 1826th meeting, footnote 5), p. 117, para. 14.30.

proposed going rather further than the minimalists, it was because, like Mr. Laclea Muñoz, he found that the granting of privileges and immunities to the diplomatic courier was not likely to present major problems for his country. That being so, the Commission should be able to go forward, especially as States which were disinclined to accept the provisions proposed by the Special Rapporteur could always make their application subject to the principle of reciprocity. The misdeeds from which some States had quite recently suffered had caused an emotional reaction in the international community which could not justify the desire to impose restraints on the diplomatic courier which would hinder the performance of his functions.

46. The minimalist position did not appear to be in harmony with the existing conventions, especially the 1961 Vienna Convention on Diplomatic Relations. According to paragraph 1 of article 37 of that Convention, the members of the family of a diplomatic agent enjoyed the same privileges and immunities as the agent himself. Under the terms of paragraph 4 of the same article, private servants of members of the mission, who were not nationals of the receiving State, were exempt from certain taxes, while under paragraph 2 of article 38, certain privileges and immunities were even granted to members of the staff of the mission and to private servants who were nationals of the receiving State. The reason why the Convention went so far as to grant facilities to persons not working directly for the sending State was that it had been established that any impairment of their position could indirectly impair the position of the diplomatic agent. As the same reasoning could be applied to the diplomatic courier, he should be granted the appropriate status to enable him to perform his official functions properly. In supporting a minimalist viewpoint, some members of the Commission appeared to forget that every State could at the same time be a sending State, a transit State and a receiving State.

47. Turning to the draft articles under consideration, he observed first that paragraph 1 of draft article 24 had no counterpart in article 36 of the 1961 Vienna Convention. When that Convention had been adopted, the security of aircraft and their passengers had not raised the same problems as it did at present, and personal searches had not been practised. However, as paragraph 1 of draft article 24 did not seem realistic and diplomatic agents and couriers appeared to submit willingly to examination when boarding aircraft, the provision could be confined to personal searches during customs examination. Paragraphs 2 and 3 of draft article 24 had their counterparts in the existing conventions and did not present any difficulties, although the diplomatic courier's stay in the territory of the transit State or the receiving State was sometimes very brief.

48. Draft article 25, on exemption from dues and taxes, was acceptable in principle. In view of the brevity of the diplomatic courier's stay, he should be exempted from dues and taxes in the interests of satisfactory performance of his official functions.

49. The reason for including draft article 26, on the other hand, was not clear. In his fourth report

(A/CN.4/374 and Add.1-4, para 173), the Special Rapporteur himself observed that, in view of the brevity of the diplomatic courier's sojourn, it was unlikely that he would be called upon to perform personal or public services. Subject to that reservation, he endorsed the content of draft article 26.

50. As for draft article 27, he had more serious reservations. In view of the special nature of the diplomatic courier's functions, it seemed that in practice States were not tempted to make him subject to their social security legislation.

51. With regard to draft article 28, on the duration of privileges and immunities, he emphasized the need to distinguish between the regular diplomatic courier and the diplomatic courier *ad hoc*. The privileges and immunities of the latter ceased when the diplomatic bag was delivered, except in regard to acts performed by the courier *ad hoc* in the exercise of his official functions.

52. Draft article 29, on waiver of immunity, had the merit of specifying, in paragraph 1, which organs of the State were competent to waive immunity. As to paragraph 5, he supported the idea of initiation of proceedings as in the case of special missions. In his view, however, the sending State should not have recourse to judicial proceedings, which might be implied by the words "it shall make every effort to settle the matter justly". It should be specified that such efforts should not include litigation.

*The meeting rose at 1.05 p.m.*

## 1828th MEETING

*Friday, 25 May 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol.II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol.II (Part One).

<sup>3</sup> *Idem*.

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

ARTICLE 24 (Exemption from personal examination, customs duties and inspection)

ARTICLE 25 (Exemption from dues and taxes)

ARTICLE 26 (Exemption from personal and public services)

ARTICLE 27 (Exemption from social security provisions)

ARTICLE 28 (Duration of privileges and immunities) *and*

ARTICLE 29 (Waiver of immunity)<sup>5</sup> (*continued*)

1. Mr. OGISO said that, since he had already stated his overall view (1825th meeting), his only general comment now would be to stress the aspect of functional necessity, with the emphasis on practical needs rather than on theoretical principles.

2. With regard to paragraph 1 of draft article 24, he supported the proposal to delete the proviso: "including examination carried out at a distance by means of electronic or other mechanical devices", for it would be going much too far to exempt the diplomatic courier from inspection by such devices. As for the remainder of the article, he even had some doubts as to the need to retain paragraph 1 at all and also agreed with members who had suggested merging paragraphs 2 and 3. All those points, however, were essentially matters of drafting.

3. The wording of draft article 25 should be made more flexible in order to take account of the problems that might arise, particularly with regard to indirect taxes, because the courier normally spent only a short time in the receiving State. An interesting example was provided by the way in which exemption from petrol tax was applied in many countries. A diplomatic agent or consular officer would pay the full price, which included the petrol tax, and subsequently apply for a refund of the tax through the competent authorities of the receiving State. That procedure would be difficult to use in the case of the diplomatic courier. Again, the form of language employed in draft article 25 was much too sweeping and almost seemed to grant tax exemptions greater than for diplomatic agents. The exemption set forth in the opening clause should be qualified by adding a formula such as "as far as possible" or "to the extent practicable". In that way, the article would not impose an unnecessarily difficult requirement upon the receiving State.

4. It would also be noted that draft article 25 and most of the subsequent articles under discussion were couched in terms which implied that the courier was a national of the sending State. It was possible, however, for the

courier to be appointed with the consent of the receiving State, from among the nationals of that State; or he might be a national of the sending State but permanently resident in the receiving State. A national or resident of the receiving State would not normally be accorded tax privileges.

5. As for draft article 26, he agreed that it was not perhaps necessary and that it could create problems, particularly in the case of a courier who was a national or resident of the receiving State. If the Special Rapporteur considered it essential to retain the article, the words "when performing his functions" could be added at the end, so as to obviate difficulties in the case of a courier who was a national or permanent foreign resident of the receiving State.

6. The exemption from social security provisions dealt with in draft article 27 would have very little application in the case of the diplomatic courier. Moreover, it would create unnecessary difficulties with regard to the local staff of missions, which, for reasons of language proficiency, often included nationals of the receiving State or citizens of the sending State permanently resident in the receiving State.

7. The same problem regarding local staff arose in connection with the duration of privileges and immunities, dealt with in draft article 28, since paragraph 1 would be of no assistance if the courier was appointed from among nationals of the receiving State or nationals of the sending State already resident in the receiving State.

8. In draft article 29, dealing with waiver of immunity, the second sentence of paragraph 1 should be deleted. The reference to a "competent member" of the diplomatic mission, consular post or delegation to authorize the waiver of immunity was particularly confusing. The only way to determine the person competent to waive immunity was to refer to the laws and regulations of the sending State. Deletion of the second sentence would mean that the matter would be governed by the internal law of the sending State.

9. As for paragraph 2, the words "and in writing" should be inserted at the end. The formulation "The waiver must always be express" was similar to that in article 32, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, yet the 1963 Vienna Convention on Consular Relations also specified, in article 45, paragraph 2, that the waiver must "be communicated to the receiving State in writing", a requirement that would obviate disputes as to whether a waiver had actually been express.

10. Paragraphs 3, 4 and 5 dealt with immunity from civil jurisdiction, in which connection he wished to recall the views he had already expressed during the discussion on draft article 23 (Immunity from jurisdiction). From the standpoint of functional necessity, it was sufficient to make it clear that the courier enjoyed immunity from arrest and detention, for the purpose of enabling him to deliver the diplomatic bag to its destination. In view of the courier's short stay in the receiving State, there was no practical need for any greater immunity.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts.1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol.II (Part Two), pp. 53 *et seq.*

Arts.9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts.15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1826th meeting, para.1.

11. So far as diplomatic and consular staff were concerned, immunity from jurisdiction had been recognized on the basis of well-established practice and, in claiming immunity for such staff, it was possible to cite abundant case-law to the Ministry of Justice or other competent authority of the receiving State. On the other hand, there was no established practice or consistent case-law in support of a similar claim for the diplomatic courier. The matter of immunity from jurisdiction should therefore be left outside the scope of the present draft. Nothing would be lost by adopting such a course, because no real problems had arisen in that connection for the diplomatic courier. If retained, draft article 23 could well prove to be a stumbling-block to acceptance of the future convention by a number of countries.

12. Mr. CALERO RODRIGUES said that the discussion had revealed a division of opinion that recalled the lack of unanimity among Governments in their comments prior to the General Assembly's decision to invite the Commission to consider the present topic. Some governments had thought the exercise useful, others had had reservations, and yet others had believed that the exercise would be counter-productive and might even affect the application of the existing provisions on the subject of diplomatic couriers contained in the four codification conventions. A decision had none the less been taken to prepare draft articles on the topic, the purpose being threefold: first, to consolidate the existing provisions of the codification conventions dealing with the courier; secondly, to unify the rules so as to ensure the same treatment for all diplomatic couriers; and thirdly, to develop rules to cover practical problems not dealt with in existing provisions. It was on that basis that the Commission should proceed with its work on the item.

13. He agreed with a number of previous speakers that the paramount question was that of the diplomatic bag, but that in itself did not detract from the importance of protecting the courier and of affording him certain minimum guarantees. Normally, the courier's life was a comparatively easy one, yet difficulties could arise on the journey or even at the destination. Therefore adequate guarantees were needed from both the receiving State and the transit State. The Special Rapporteur might sometimes give the impression of proposing an unduly wide measure of protection for the courier, but it was more an impression than a reality. When privileges and immunities had to be spelled out in detail, solutions had to be proposed in each case and the Special Rapporteur had not unduly broadened those privileges and immunities; what he had proposed was a maximum in that respect. That was revealed by the fact that, during the discussion, no one had suggested any additional privileges and immunities. On the other hand, suggestions had been made for reducing them and he himself could agree on some minor curtailments. His own approach was essentially practical. The Commission should seek to provide the courier simply with the protection required for the performance of his duties, and no superfluous burden should be imposed upon the receiving or transit State.

14. In respect of draft article 24, he supported the proposal to delete from paragraph 1 the proviso: "in-

cluding examination carried out at a distance by means of electronic or other mechanical devices". The inclusion of that element in draft article 36 (Inviolability of the diplomatic bag (see 1844th meeting, para. 21)) was justified because there was some risk that the use of sophisticated devices might breach the confidentiality of the contents of the bag, but no such risk existed in the situation envisaged in draft article 24, paragraph 1, where only the person of the courier was involved. As to paragraphs 2 and 3, he supported the suggestions by Mr. Laclea Muñoz (1827th meeting) and others for simplifying the wording.

15. Draft article 25 should be qualified to make it clear that the exemption applied to taxes incurred in the course of the courier's official activities, for the present wording could conceivably be taken to imply that the courier was exempt from all taxation. Obviously, there was no reason to exempt him from taxes on earnings derived from activities totally unconnected with his functions as a courier.

16. Unlike some members, he considered draft article 26 to be necessary, even though the occasion for applying it might not be frequent. For instance, in an emergency situation arising from a natural catastrophe, the local law might require everyone to render services for disaster relief, which would interfere with the performance of the courier's duties if he was not specifically exonerated from such services. On the other hand, no case was likely to require the application of the provisions of draft article 27, which could safely be deleted.

17. As to draft article 28, various useful suggestions had been put forward to make the provisions clearer. The commencement and end of privileges and immunities should be connected with the commencement and end of the functions of the diplomatic courier, dealt with in draft articles 12 and 13. It was also necessary to allow for cases in which the person appointed as courier was already in the territory of the receiving State, a situation that was not covered by the formula used in paragraph 1, namely "from the moment he enters the territory...".

18. With regard to draft article 29, he endorsed the idea of dispensing with the second sentence of paragraph 1 and also proposed that a gap in the provisions of the article should be remedied. Paragraph 5, relating to civil proceedings, stated that the sending State should either waive the immunity of the diplomatic courier or else "make every effort to settle the matter justly". A parallel provision should be introduced for criminal proceedings against the courier, in which case the sending State, if it did not waive the courier's immunity so as to allow him to be tried by the local courts, was under a duty to have him prosecuted and tried by its own courts.

19. Mr. NI said that the order in which the draft articles were placed should be logical, for it should facilitate an understanding of their substance and meaning. In the codification conventions, the exemptions in question related to social security, to dues and taxes, to personal and public services and, lastly, to customs duties and inspection. Admittedly, the 1963 Vienna Convention on Consular Relations was slightly different in that re-

gard, but the Special Rapporteur had rightly reversed the order of the first and last of those categories of exemptions. The change was significant, since the prime feature of the courier's functions was that he travelled frequently from country to country. Hence, in the performance of his functions, the question of exemption from customs duties and inspection was the first that the courier encountered on entering the receiving or transit State. The other problems, such as exemption from dues and taxes, from personal and public services, and from payment of social security contributions, were not only of little significance to the courier, but rarely applied to him. Accordingly, the change made by the Special Rapporteur in relation to the order followed in the four codification conventions was realistic.

20. In the case of waiver of immunity, however, dealt with in draft article 29, the corresponding articles of the four codification conventions related essentially to immunity from jurisdiction and judicial procedures and, with the exception of the Convention on Special Missions, which was somewhat different, the article on waiver of immunity closely followed the article on jurisdictional immunities. In his fourth report (A/CN.4/374 and Add.1-4, para. 192), the Special Rapporteur pointed out that waiver of jurisdictional immunity was based on the fundamental concept of such immunity as an expression of the principle of the sovereignty and sovereign equality of states. Accordingly, placing the article on waiver of immunity immediately after the article on immunity from jurisdiction, as did the 1961 Vienna Convention on Diplomatic Relations, was quite logical.

21. In the same report (*ibid.*, para. 190), the Special Rapporteur maintained that waiver of jurisdictional immunity could be regarded as a form of suspension or termination of diplomatic immunities, so that the article on waiver of immunity should be placed after draft article 28, concerning the duration of privileges and immunities. Such a sequence was questionable. Waiver of immunity had a specific meaning and legal consequences and had no bearing on the question of the commencement and end of privileges and immunities, since immunities could be waived from the outset, in which case the question of suspension or termination would not arise. Consequently, draft article 29 should be placed directly after draft article 23, on immunity from jurisdiction, as in the codification conventions, so as to ensure that waiver was not regarded as one specific case falling within the broader area of termination of immunities.

22. Turning to the content of the articles under consideration, the concept of exemption from personal examination, dealt with in paragraph 1 of draft article 24, was already covered by draft article 20, on the personal inviolability of the diplomatic courier. Hijacking of aircraft and cases of smuggling were becoming increasingly serious, and exemption from personal examination carried out at a distance by electronic devices ran counter to the security requirements of international travel. Furthermore, an examination of that kind involved no contact with the person of the courier, nor did it affect him in the performance of his functions. Accordingly, an ex-

aggerated emphasis on the confidentiality of the official functions of the diplomatic courier, which meant departing from the provisions of the codification conventions and formulating articles on more absolute immunities, seemed neither practical nor necessary.

23. In draft article 25 the Special Rapporteur enunciated the principle of exemption from dues and taxes, in view of the specific features of the official functions of the diplomatic courier, his short sojourn in the territory of the receiving or transit State and the relative scope of his contractual or other relations concerning property rights. The article contained only two of the six exceptions provided for in the corresponding articles of the four codification conventions, something which seemed reasonable at first sight; but in cases not covered by the two exceptions the question arose as to whether a diplomatic courier enjoyed more privileges than those enjoyed by a diplomatic agent. For that reason, all six exceptions should be enumerated in draft article 25, a solution which was not ideal but was relatively safe. In its present formulation, draft article 25 seemed to signify that the diplomatic courier was exempt from taxes in his own country, a point which obviously called for clarification.

24. As to draft articles 26 and 27, it was highly unlikely that the courier would be required to render personal and public services or pay social security contributions. The special aspects of the courier's functions differed from the duties of ordinary diplomatic or consular personnel. Both draft articles could be deleted, or if the Commission considered that it would be better to retain them, they should be merged into a single article.

25. Draft article 28, on the duration of privileges and immunities, was worded along the lines of the corresponding articles of the codification conventions, but paragraph 1 did not provide for instances in which diplomatic couriers were already in the receiving or transit State, a situation which could well occur. The following sentence should therefore be added at the end of the paragraph: "In cases where the diplomatic courier is already in the receiving State or the transit State, the privileges and immunities he should enjoy as a diplomatic courier commence when his appointment is transmitted to the competent authorities of the receiving State or the transit State." In addition, the 1961 and 1963 Vienna Conventions and the Convention on Special Missions included a provision whereby, even in the event of an armed conflict, the privileges and immunities subsisted until the beneficiary left the territory of the receiving State, or until the expiry of a reasonable period in which to leave. International tension and the frequency of armed conflicts were such that a provision of that kind should be included in paragraph 2 of draft article 28, in order to afford better protection of the courier's safety.

26. In connection with draft article 29, concerning waiver of immunity, the Special Rapporteur had rightly cited (*ibid.*, para. 192) the preamble to the 1961 Vienna Convention on Diplomatic Relations, which stated that

... the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States.

Hence it was for the sending State to decide on waiver of immunity, but the codification conventions did not specify which authorities of the sending State were competent in that regard. The Special Rapporteur had pointed to the divergence in legal theory and in State practice on this question (*ibid.*, para. 194). The matter should be viewed in close conjunction with the laws and rules of procedure in the receiving State or transit State. In view of the specific functions of the diplomatic courier, it seemed necessary to add an express provision in paragraph 1 regarding the authority that could exercise waiver of immunity from jurisdiction. The terms of paragraph 4, whereby waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings would not be deemed to imply waiver of immunity in respect of execution of the judgment, were included in the codification conventions and were recognized by the internal law of many countries. Paragraph 5, on the other hand, was modelled on the terms of article 31, paragraph 5, of the 1975 Vienna Convention on the Representation of States, which were not to be found in the other codification conventions. Such a provision merited consideration, but would be difficult to implement and called for further study.

27. Mr. DÍAZ GONZÁLEZ said that the General Assembly had requested the Commission to consider, by a pragmatic method, what privileges and immunities should be accorded to the diplomatic courier so that he could properly exercise his official functions. Yet the Commission now gave the impression of departing occasionally from a pragmatic method. It seemed to take as its starting-point the idea that the diplomatic courier could be assimilated to a diplomatic agent and it was tending to grant the courier the same privileges and immunities as a diplomatic agent. Such an approach overlooked the fact that the question of the status of the diplomatic courier was dominated by two considerations, namely the courier's functions and their transient nature. Two schools of thought were apparent from the discussion. Some members regarded the courier as a "super-diplomat", whereas others were of the opinion that the existing codification conventions afforded sufficient guarantees for free movement of the courier and that accordingly, as few rules as possible were required in order to protect him. He himself was among the members in that latter category and therefore did not intend to make any special comments on the articles under consideration, for the discussion had amply demonstrated that the diplomatic courier's functions, and more particularly their fleeting character, were such that the privileges and immunities of the courier should be kept to a minimum. In any event, the Commission should not go so far as to grant privileges and immunities that the diplomatic agent did not enjoy.

28. Draft article 29, however, did call for a brief comment. Under the terms of the first sentence of paragraph 1, it was the sending State that was competent to waive the courier's immunity from jurisdiction. The sending State was accorded such immunity, in the person of its diplomatic courier, and hence that State itself should obviously be the one to authorize waiver of immunity. The person who was to communicate such waiver to the

authorities of the transit or receiving State should plainly be the head of the mission, regardless of his rank. In that regard, the second sentence of paragraph 1 seemed superfluous and could be deleted. Any provision that departed from article 41, paragraph 1, of the Convention on Special Missions and article 31, paragraph 1, of the 1975 Vienna Convention on the Representation of States would do no more than raise difficulties of interpretation.

29. Lastly, for all the topics it considered, the Commission must decide on the substance of each draft article before referring it to the Drafting Committee. For some time, the practice had emerged of referring articles to the Drafting Committee without any instructions as to how they were to be drafted in the light of the Commission's discussion. The Commission should not make it necessary for the Drafting Committee to re-examine the substance of articles in order to determine how they were to be recast or reworded, or even whether some provisions were to be deleted or replaced by others. If the Drafting Committee was compelled to look into the substance of draft articles referred to it, the Commission would have to do the same when the articles were referred back to it by the Committee.

30. The CHAIRMAN assured Mr. Díaz González that, in the final analysis, it was the Commission that took the decision whether or not to adopt draft articles. It had been the practice, after a preliminary exchange of views by members, for the Special Rapporteur to sum up and make any changes he deemed necessary. The draft articles were then referred to the Drafting Committee, but were transmitted with, and subject to, the observations made by the Commission. Only when draft articles were returned by the Drafting Committee was a decision taken by the Commission.

31. Mr. NJENGA noted that the Special Rapporteur had from the outset recognized that he was engaged in the progressive development of international law and, as was clear from his fourth report (A/CN.4/374 and Add.1-4, para. 149), had placed the subject of the diplomatic courier in its proper perspective. The basis for the privileges and immunities granted to the diplomatic courier was the need to ensure safe, speedy and unimpeded transmission of official and confidential communications. Such privileges and immunities were therefore to be regarded as a functional necessity, not as a further unwarranted extension of the exemptions from local jurisdiction accorded to an ever-increasing number of privileged individuals. While it was true that the effect of the 1961 Vienna Convention on Diplomatic Relations had been to transform into binding rules of international law privileges that were accorded to diplomatic missions and their personnel as a matter of courtesy and on the basis of reciprocity, reciprocity none the less remained the bedrock on which such privileges and immunities were based, a fact stressed in an editorial in *The Times* of London of 16 May 1984. It was a sobering thought for maximalists and minimalists alike that, when it came to diplomatic couriers, every State was potentially not only a sending State, but also a receiving State or, indeed, a transit State.

32. Furthermore, it was generally accepted that privileges and immunities were granted not for the personal convenience of the courier himself but for the benefit of the sending State, in which connection the Special Rapporteur had adopted as a yardstick the privileges and immunities extended to the administrative and technical staff of a diplomatic mission. It was important not to glamorize the role of the diplomatic courier, who had been variously referred to as "peripatetic" or as a "will-o'-the-wisp", yet the importance of his role should not be minimized in an era of technological progress which had brought snooping to such a fine art that official seals and codes were sometimes no more than a laughing matter.

33. It was against that background that he wished to comment on the draft articles, and first of all draft article 24. The Special Rapporteur had provided abundant evidence of the State practice that was reflected in article 36 of the 1961 Vienna Convention and the corresponding articles of the other three conventions codifying diplomatic law. There were thus compelling reasons to include a similar provision to cover the diplomatic courier, and that had been done in paragraphs 2 and 3 of draft article 24. The main difference compared with the 1961 Vienna Convention, however, was that, under paragraph 1, the courier's exemption from personal examination was extended to examination "carried out at a distance by means of electronic or other mechanical devices". Scanning of air passengers and their personal effects by electronic devices had, of course, been introduced to combat hijacking, but the fact that diplomatic agents, irrespective of rank, submitted to such scanning in the general interests of safe air travel did not mean it was not an invasion of the immunity guaranteed under the 1961 Vienna Convention. In that connection, he recalled that at a recent meeting of the council of Ministers of OAU, some Ministers who had refused to undergo electronic scanning had not been admitted to the conference halls until the Minister of Foreign Affairs of the host country had intervened. The latter had subsequently apologized for the incident and had undertaken to ensure that there would be no recurrence.

34. Hence the problem was a real one and it affected not only the traveller, but also his personal baggage. As Mr. Ushakov had pointed out (1827th meeting), the bag could even be chained to the diplomatic courier's wrist and its contents might therefore be photographed by highly sophisticated electronic devices. For all those reasons, paragraph 1 of draft article 24, suitably amended to include a reference to the official nature of the effects carried by the diplomatic courier, should have a place in the draft.

35. With regard to draft article 25, the Special Rapporteur argued in his fourth report (A/CN.4/374 and Add.1-4, para. 168) that, in the case of exemption from taxation, the diplomatic courier should not be placed in a position that was inferior by comparison with members of a diplomatic mission. As worded, however, the draft article actually placed the courier in a superior position, since it incorporated only two of the six exceptions provided for under the 1961 Vienna Convention. In his

view, all six exceptions should apply to the diplomatic courier *mutatis mutandis*. In any event, the fact that the courier stayed in the territory of the receiving or transit State only for short periods, and also the nature of his mission, meant that there was no justification for exempting him from real taxes, dues or charges. Draft article 25 should therefore be amended accordingly.

36. The rationale for draft article 26, which was modelled on article 35 of the 1961 Vienna Convention, was convincingly stated in the fourth report (*ibid.*, para. 173, second sentence) and, since demands on the diplomatic courier in terms of personal and public services would seriously hamper the performance of the courier's duties, he fully endorsed the terms of that draft article.

37. While he had no difficulty with draft article 27, he believed that it could be omitted, since it was somewhat far-fetched to believe that any State would wish to subject to its social security laws anybody who was as much a bird of passage as was a diplomatic courier.

38. He saw no problem either with draft article 28, in which connection the Special Rapporteur had provided a very useful analysis of the evolution of the rules embodied in article 39, paragraphs 2 and 3, of the 1961 Vienna Convention (*ibid.*, para. 187). In particular, the saving clause with respect to acts performed by the courier in the exercise of his official functions was fully justified.

39. Draft article 29 gave rise to three questions: (a) who was entitled to waive immunity? (b) how was the waiver to be exercised? (c) what was the scope of the waiver? The answer to the first question was clear: since the immunities were granted for the benefit of the State and not the courier, and since they were an attribute of the sovereignty of the State, only the sending State could waive them. Moreover, the manner in which the waiver was communicated to the authorities of the receiving or transit State was a matter exclusively for the jurisdiction of the sending State, and he therefore saw no need for the second sentence of paragraph 1 of the draft article.

40. With regard to the second question, namely how the waiver was to be exercised, in practice and under the four codification conventions waiver normally had to be express; but there was also a generally recognized practice of implied waiver, which was reflected in paragraph 3 of draft article 29. Strictly speaking, therefore, paragraph 2 of the draft article should be amended accordingly.

41. As for the scope of the waiver, it seemed only right that, in the case of immunity from civil and administrative jurisdiction, a State should not be subjected to compulsory enforcement measures simply because it consented to the jurisdiction of another sovereign State. Waiver of immunity from the criminal jurisdiction of the receiving or transit State was an entirely different matter, however. For obvious reasons, it was very rare for a State to waive diplomatic immunity, even for criminal offences; but once it had decided to do so, of its own volition, there should not be any question as to the consequences, since the State concerned must already have decided that there was at least a *prima facie* case to

answer. He therefore had some difficulty in accepting the statement made by the Special Rapporteur to the effect that, even when immunity from criminal jurisdiction was waived, a judgment imposing arrest, detention or other measures against the inviolability of a member of a diplomatic mission could not be executed (*ibid.*, para. 205). He would appreciate it if the Special Rapporteur could shed some light on the matter.

42. Mr. MAHIOU said that the approach adopted in draft articles 24 to 29 bore witness to the Special Rapporteur's concern to strike a balance between the privileges and immunities necessary for freedom of communication, on the one hand, and the interests of the receiving and transit States, on the other. The divergent views regarding that balance—quantitative, in terms of the number of articles to be incorporated in the draft, and qualitative, in terms of the scope of the immunities and privileges to be granted—had led to minimalist, maximalist and intermediate positions among members. In some instances he was a minimalist, wishing to simplify or even delete certain provisions, and in others a maximalist, wishing to add yet more provisions. In any event, his own analysis of the subject-matter was based on the functional necessities of the courier's task and a comparison—by analogy, not by assimilation—with the other codification conventions. Plainly, the difficulties of the courier and the possible risks to the receiving and transit States should be neither exaggerated nor minimized.

43. Paragraph 1 of draft article 24 posed a problem, since it might well appear to go beyond the provisions of the codification conventions and accord excessive privileges, more particularly in the matter of exemption from examination carried out at a distance by means of electronic or mechanical devices. If the diplomatic courier and the diplomatic bag were two separate elements, the difficulty was seemingly easy to resolve: even if the courier himself were not exempt from personal examination, the diplomatic bag would not be subject to inspection and there would be no infringement of its confidential character. Yet it was sometimes difficult to establish such a distinction between the courier and the bag. The courier himself could well be subjected to personal examination, but ultra-modern electronic or mechanical devices in current use were capable of checking the contents of a bag and even determining them with great precision. Cases in which the courier and the bag could not be dissociated from each other called for further reflection and the Commission should give the Drafting Committee clear instructions in that regard. Paragraphs 2 and 3 of draft article 24 were acceptable with a few minor changes of form that could be taken up in the Drafting Committee.

44. In theory, draft article 25 gave rise to no difficulties, for the diplomatic courier should enjoy the same exemptions from dues and taxes as did diplomatic staff, including the administrative and technical staff of missions. From the practical standpoint, however, it was difficult to see how the courier's short stay in the receiving or transit State could make him liable to various taxes. Admittedly, some taxes were payable immediately, such as local taxes levied in the City and State of New York, for example on hotel rooms, and diplomatic agents, even

those passing through New York, were exempt from them. It would also be desirable for the courier to be exempt from taxes of that kind. On the other hand, draft article 25, as now worded, seemed to introduce a general absolute exemption for any diplomatic courier in any circumstances and in any country, even if he was a national of the receiving or transit State. The article must therefore specify that exemption from dues and taxes related only to activities performed by the courier in the exercise of his official functions, and not to taxes and dues payable in connection with activities performed outside those functions in the receiving or transit State.

45. The provision in draft article 26 served some purpose, but did not warrant a separate article and could well be inserted as an additional paragraph in draft article 25.

46. Draft article 27, on the other hand, was of questionable value. It was not readily apparent how the diplomatic courier, in view of his time-limited functions in the receiving or transit State, could be subjected to social security provisions. The draft article appeared to be excessively cautious and was hardly likely to be applied because no occasion to apply it would arise.

47. Draft article 28 was acceptable, but called for clarification. Paragraph 1 should indicate precisely when the courier's functions commenced, for they did not necessarily start when the courier entered the territory of the transit State or receiving State. A courier might well move on from the territory of the receiving State with another diplomatic bag and another member of the diplomatic, consular or special mission might be required to accompany a diplomatic bag to the sending State, in which case his functions commenced when he left the receiving or transit State, rather than when he entered it. Paragraph 2 was satisfactory, particularly in that it specified that the courier's privileges and immunities subsisted in connection with acts performed in the exercise of his official functions, even if, in an intervening period at some later time, he had to return to the receiving or transit State in a private capacity.

48. Paragraph 1 of draft article 29 could be simplified by retaining only the first sentence. The second sentence involved a matter that was covered by the internal law of the country concerned. The beneficiary of the immunity was the sending State, in the person of its diplomatic courier, and it was for the sending State to decide whether to waive the courier's immunity from jurisdiction and also to decide which person was empowered to do so. As to paragraph 2, some members had suggested, on the basis of the 1963 Vienna Convention on Consular Relations, that the waiver must not only be express, but also be communicated in writing. However, paragraph 2 was taken word for word from the corresponding provisions in the other codification conventions and posed no problems. Hence it could be retained in its present form.

49. Paragraphs 3 and 4 had their place in the draft article, but he wondered whether, in the case of paragraph 5, waiver should be confined to a civil suit and should preclude criminal proceedings. The sending State, in view of its sovereign rights, could obviously waive jurisdictional immunity and could undoubtedly waive immunity not

only from civil, but also from criminal jurisdiction. Indeed, it was for the sending State to decide on the actual type and scope of the waiver. Yet, by analogy with the codification conventions, particularly the 1975 Vienna Convention on the Representation of States, it was perhaps wise to limit the waiver of jurisdictional immunity to civil suits. The important thing was that, when the sending State decided that proceedings should not be taken against its diplomatic courier, it should none the less compensate any persons affected by the acts or conduct of the courier. It would be remembered that the idea of civil damages existed in criminal proceedings, since any criminal proceedings involved a civil suit when damages were being claimed. All in all, it might be best to maintain paragraph 5 in its present form.

*The meeting rose at 1 p.m.*

## 1829th MEETING

*Monday, 28 May 1984, at 3 p.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC(XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup> (continued)

ARTICLE 24 (Exemption from personal examination, customs duties and inspection)

ARTICLE 25 (Exemption from dues and taxes)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

ARTICLE 26 (Exemption from personal and public services)

ARTICLE 27 (Exemption from social security provisions)

ARTICLE 28 (Duration of privileges and immunities) *and*

ARTICLE 29 (Waiver of immunity)<sup>5</sup> (concluded)

1. Mr. JAGOTA said that, in codifying and developing the law on the topic under study, the Commission should emphasize the functional rather than the doctrinal aspects. In particular, it should bear in mind that the prime object was safe and speedy communication between sending States and their missions, which was of the utmost importance for the conduct of international relations.

2. Referring to draft article 24, he noted that the main point at issue was the provision in paragraph 1 that the diplomatic courier should be "exempt from personal examination, including examination carried out at a distance by means of electronic or other mechanical devices". None of the four codification conventions contained a similar provision and views on the need for it differed. In view of that difference, he wished to propose a modified form of wording which he trusted would resolve the difficulty. He proposed that the phrase "including examination carried out at a distance by means of electronic or other mechanical devices" should be deleted, since that part of the provision could be taken care of by State practice and the principle of reciprocity. The first part of the provision could then be justified on the grounds of functional necessity and on the ground that the diplomatic courier would be carrying a diplomatic bag of a different kind from those entrusted to the captains of aircraft or masters of ships. On that basis, the paragraph could read: "The diplomatic courier, when accompanied by a diplomatic bag, shall be exempt from personal examination in the receiving State and the transit State."

3. The problem raised by draft article 25 was clearly one of drafting. The Special Rapporteur had made it quite clear in his fourth report (A/CN.4/374 and Add.1-4, para. 167) that it was not intended that the diplomatic courier should be exempt from any taxes on private income arising from real estate in the receiving State or transit State. There was, however, a *lacuna* in the provision: it made no reference to the receiving or transit State or, indeed, to whether the exemption would apply in the sending State. He therefore proposed that the reference to "personal or real" taxes be deleted, so as to allow for a broader interpretation; that a reference to the receiving and transit States be added; and that the exemption be related to the services rendered by the diplomatic courier for the sending State. The first part of the article would then read: "The diplomatic courier shall, in the receiving State and the transit State, be exempt from taxes, dues and charges, national, regional and municipal, in respect of services rendered for the sending State, except for indirect taxes...". Alternatively, if it was thought necessary to specify the exception to the exemption from personal or real taxes, the following phrase could

<sup>5</sup> For the texts, see 1826th meeting, para. 1.

perhaps be added: "except for dues and taxes on private income having its source in the receiving State or the transit State".

4. Draft articles 26 and 27 could perhaps be deleted, and the matters they dealt with would then be regulated by State practice.

5. While he endorsed the content of draft article 28, he thought that the extent to which paragraph 2 would apply to the diplomatic courier *ad hoc* would have to be clarified, since article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations provided that the immunities of the courier *ad hoc* ceased on delivery of the bag to the consignee.

6. Lastly, with regard to draft article 29, he agreed that paragraph 1 should stop at the end of the first sentence, and that the question of who would waive immunity on behalf of the State should be left to State practice. As for paragraph 5 of the article, he considered that any civil claim should be settled between the sending State and the claimant; on no account should the paragraph make any reference to litigation under internal law, though that could perhaps be mentioned in the commentary.

7. Sir Ian SINCLAIR said it was clear that a provision on the duration of the privileges and immunities accorded to the diplomatic courier was needed, but draft article 28 was deficient in some respects. As had already been pointed out, it did not cover the case in which the diplomatic courier was in the receiving State when he started performing his functions. Also, the fact that article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations provided specifically that the immunities of the *ad hoc* courier ceased to apply when he had delivered the diplomatic bag carried with it the implication that the inviolability and freedom from arrest and detention of the regular courier might not necessarily cease at the moment he delivered the bag.

8. An authoritative commentator<sup>6</sup> had suggested that the inviolability of a professional courier as opposed to that of an *ad hoc* courier did not cease on his delivery of the bag, but that if he were to remain in the receiving State for a substantial period of leave his inviolability would probably be lost. It was thus an area in which the law and practice required clarification.

9. Referring to Mr. Jagota's comments, he pointed out that an *ad hoc* courier could be a diplomatic agent returning from leave in the sending State to his post in the receiving State. In that case, article 27, paragraph 6, of the 1961 Vienna Convention would apply, inasmuch as the agent would lose his privileges and immunities *qua* diplomatic courier on delivery of the bag, but would simultaneously resume the privileges and immunities he enjoyed in the receiving State by virtue of his status there as a diplomatic agent.

10. There was also a clear link between, on the one hand, draft article 28 and, on the other, draft articles 13 and 14, which dealt respectively with the end of the func-

tion of the diplomatic courier and with a diplomatic courier declared *persona non grata*. All those aspects would require careful consideration by the Drafting Committee in order to arrive at an appropriate form of words.

11. He considered that, if draft article 23 (Immunity from jurisdiction) were deleted, the second sentence of paragraph 2 of draft article 28 should also be deleted. The need for the diplomatic courier to enjoy jurisdictional immunities during his brief stay in the receiving State or transit State had not been demonstrated to his satisfaction. It required a flight of the imagination to envisage circumstances in which he might be exposed to civil claims in respect of acts performed in the course of his official functions. In any event, any such cases would surely be settled out of court if only because of the virtual impossibility of serving process on an itinerant courier.

12. His remarks on draft article 29, concerning waiver of immunity, were subject to the fundamental reservation that he believed it to be unnecessary; for if, as had been proposed, article 23 were not included in the draft there would be no need for article 29. Assuming, however, that the courier would continue to enjoy personal inviolability and freedom from arrest or detention under article 27, paragraph 5, of the 1961 Vienna Convention, it would always be open to a sending State, irrespective of whether or not draft article 29 was included, to waive such immunity from the criminal jurisdiction of the transit State or receiving State as was inherent in the notion that the courier was not liable to arrest or detention.

13. Mr. MALEK observed that the various exemptions accorded to the diplomatic courier under draft articles 24 to 27 must, in principle, be regarded as reasonable, since they did not go beyond the exemptions universally accorded, in various degrees, to diplomatic staff in general by the four codification conventions, in particular the 1961 Vienna Convention on Diplomatic Relations. The Special Rapporteur had extended the exemptions provided for in those conventions to the diplomatic courier only in so far as he judged them necessary for the performance of the courier's functions. In doing so, he had drawn up provisions on the basis of which possible abuses of the privileges and immunities granted to the diplomatic courier could be prevented, without thereby reducing the protection he enjoyed or impeding the proper performance of his official functions. At the same time, he had never lost sight of the difference, in nature and in functions, between the diplomatic courier and diplomatic staff. Thus the text he proposed appeared to be acceptable in the main to most members, as the discussion had shown.

14. The principle of exemption from customs duty and customs inspection, laid down in paragraphs 2 and 3 of draft article 24, which was based on State practice established well before the adoption of the 1961 Vienna Convention and was being continually confirmed, did not appear to meet with any opposition. Nevertheless, the text of those paragraphs had been the subject of various suggestions and proposals which the Special Rapporteur could usefully take into account when he came to

<sup>6</sup> E. Denza, *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry (N.Y.), Oceana Publications, 1976), p. 130.

re-examine the draft articles. On the other hand, he felt some anxiety about the exemption from personal examination provided for in paragraph 1. In his view, exemption from personal examination carried out by electronic or mechanical means should not be granted even to a diplomatic agent.

15. A few years earlier, representatives of States had met under the auspices of ICAO to consider means of dealing with the serious attacks being made against the security of international civil air traffic. They had then constantly blamed the absence in each other's territory, particularly at airports, of effective security measures to prevent the acts of sabotage being persistently carried out against civil aircraft, acts which had become extremely dangerous. Fortunately, the measures since applied included, thanks to the progress of science and technology, electronic devices for detection at a distance, which were considered sufficiently effective to protect civil aviation from terrorism. At the present time, when everything might be exploited for evil rather than for good, it was to be feared that exemption from personal examination by such means might often be used for purposes other than those intended. He hoped that the Special Rapporteur would not press for that exemption.

16. With regard to draft articles 25, 26 and 27, he emphasized that, in view of the special characteristics and functions of the diplomatic courier, it was doubtful whether it could be seriously maintained that the refusal, or even the granting to him, of the exemptions provided for in those draft articles could in any way affect any legal system or disrupt the balance between the legitimate interests of the receiving State and the transit State, on the one hand, and of the sending State, on the other. In any case, it seemed that the fate of the exemption provided for in draft article 27 was already settled, since that exemption was generally considered to be unnecessary or inapplicable in practice. As to the exemptions provided for in draft articles 25 and 26, the Commission should leave it to the Special Rapporteur to take decisions in the light of the discussion.

17. On draft articles 28 and 29, various comments, quite frequently concordant, had been made; he intended to comment on those draft articles at a later stage in the work, when the Commission discussed the texts as they might be amended by the Special Rapporteur in the light of the views expressed.

18. He felt sure that the various observations made on draft articles 24 to 29, though they showed some differences of opinion, would help the Special Rapporteur to revise the texts. Like other members of the Commission, he hoped that none of the texts proposed by the Special Rapporteur would be referred to the Drafting Committee—whose duties seem to have been expanded beyond measure—before the Commission had decided on the matters of principle involved. The texts, as amended by the Special Rapporteur, should be submitted to the Commission itself, if only for a brief exchange of views, before being referred to the Drafting Committee.

19. Mr. REUTER commended the Special Rapporteur for his learning and the clarity of his expositions. It was

clear from the debate that the matters under discussion raised many small but irritating practical difficulties. Some members of the Commission were convinced of the imperative need to deal with the subject, whereas others, including himself, felt some anxiety about it. Personally, he had nothing against any particular privilege or immunity which it was proposed to accord to diplomatic couriers and diplomatic bags. He noted, however, that the fears and reservations expressed emanated not from foreign ministries, but from other ministries. From the point of view of foreign relations alone, there seemed to be agreement that the widest possible privileges and immunities should be granted. But at the present time, considerations of finance, security and health were of decisive importance and those who had expressed reservations had reflected the overall will of States.

20. In that connection, it should be remembered that only one of the four codification conventions that were constantly being cited had really been accepted: the 1961 Vienna Convention on Diplomatic Relations. The 1963 Vienna Convention on Consular Relations had been the subject of numerous reservations, and the majority of States would have nothing to do with the other two conventions. That caused him some concern. In the texts under consideration the Commission was not really proposing anything extraordinary; it wanted diplomatic couriers to be treated in much the same way as tourists. But it should try to show rather more skill in the drafting and presentation of the articles; otherwise they might give rise to discussions which would certainly be interesting, but would lead to reservations. If a conference of plenipotentiaries was convened, the existence of numerous reservations might delay the entry into force of the new convention, which would not be without value since it might establish a custom.

21. The Commission must therefore be realistic; but what could it do to make the text of the draft articles a little less provoking? Generally speaking, it would probably be advisable to merge several articles into one, wherever that was possible. The enumeration in different articles of freedoms, exemptions, privileges and immunities might seem provoking to anyone giving them a cursory glance. It was a subject on which it might be dangerous to go into too much detail, for many of the matters involved depended on factors that were variable or were beyond the purview of the Commission.

22. With regard to draft article 24, paragraph 1, he was convinced that devices which made it possible to violate a certain secrecy with impunity should not be used, since that would be acting in contempt of the functions performed by the diplomatic bag. Nevertheless, he felt some reluctance about enumerating or defining such devices. Perhaps there really were electronic devices by which it was possible to read a whole book contained in a diplomatic bag; that would certainly be unacceptable, but it might be wondered whether the race for technological progress would not enable States to protect themselves against such procedures by using increasingly sophisticated methods. As to mechanical devices, he doubted whether the bag itself should undergo any examination. To combat the traffic in narcotic drugs, dogs were com-

monly used to smell baggage. But the diplomatic courier did not always know exactly what was in the bag he was carrying and it had sometimes happened that unscrupulous official services had taken advantage of the diplomatic bag to engage in drug trafficking. Hence it could not be considered that a State which used dogs to examine a diplomatic bag was interfering with the official functions of the diplomatic courier. He would therefore prefer the Commission to adopt wording which showed that everything depended on the object pursued.

23. Placing a receiving State and a transit State on the same footing, as had been done, left out of account the fact that, geographically, certain States were destined to be transit States while others were not. As the matter of transit might give rise to reservations by many States, it would be advisable to introduce distinctions between the situation of a receiving State and that of a transit State. The text of the articles could be revised to lighten the obligations attaching to transit which were imposed on certain States without reciprocity. It was true that in that sphere reciprocity was hardly desirable, since it could be destructive; for all reciprocity implied a threat of retaliation or even of reprisals. In fact, transit States gave more than they received. Perhaps it could be specified that the courier's route through the transit State must be as short as possible. Another solution would be to leave the problem aside until later.

24. Generally speaking, the Commission considered that the problem of reservations to a text it had drawn up concerned only the plenipotentiary conference convened to examine it. But when it had the impression that States mistrusted a series of articles, would it not be advisable to draw up a text calculated to allay their fears? In the present instance, if it was not possible to lighten the obligations of transit States, the Commission could at least define their content and specify the provisions to which reservations could be made. Such action would not, of course, be in conformity with the Commission's practice, but it was probably worth considering.

25. The CHAIRMAN, speaking as a member of the Commission, said he wished to supplement the general comments he had made at the 1825th meeting on certain notions used in the draft articles. He had spoken then of the notions of "inviolability" and "immunity"; he now wished to refer to the notions of "privilege" and "privileges and immunities". The latter formula was used to refer to the aggregate of privileges, facilities and immunities accorded by a receiving State. The term "privilege" by itself had a positive connotation: the receiving State had a positive duty to grant the privilege. The term "immunity", on the other hand, had a negative connotation: the receiving State had an obligation not to exercise certain powers.

26. In the present set of draft articles, the notion of "exemption" was very important. It represented an exoneration from a liability, such as the liability to pay taxes or dues; that exemption was provided for in draft article 25. Similarly, draft article 24 provided for exemption from the liability to pay customs duties and imposed on the receiving State the duty not to exercise its powers in respect of personal examination of the diplomatic courier.

27. The position with regard to draft article 27 and to some extent with regard to draft article 26 was rather different. The diplomatic courier might not be liable to social security charges, or to personal and public services, and there was no need to exempt him from obligations he did not have. The solution would be to transfer the provisions of those articles to a commentary, which would explain that no liability existed for the diplomatic courier in those matters.

28. As for draft article 28, he agreed with Mr. Ushakov (1827th meeting) on the need to draw a distinction between a professional courier and an *ad hoc* courier. An important point was that the courier only enjoyed inviolability *ratione materiae*. He had no personal immunity, except for inviolability from arrest and detention; otherwise, his inviolability was purely functional and attached to the sending State.

29. Lastly, with regard to draft article 29, he pointed out that, under the 1961 Vienna Convention on Diplomatic Relations, even immunity *ratione personae* which covered the diplomatic agent outside his functions was not a personal prerogative but was granted in the name of his State. The sending State alone could waive the immunity of a diplomatic agent. As for inviolability, it could not be waived at all, and certainly not by the person concerned.

30. Mr. YANKOV (Special Rapporteur), summing up the discussion on draft articles 24 to 29, thanked members for the constructive criticisms and useful suggestions they had made, which had gone beyond the articles in question. Whereas those articles dealt with the status of the diplomatic courier, the Commission would soon be considering the draft articles dealing with the diplomatic bag; it was not possible, however, to dissociate the courier from the bag completely, since carrying the diplomatic bag was his main function.

31. In his work on draft articles 24 to 29, he had taken article 27 of the 1961 Vienna Convention on Diplomatic Relations as his starting-point. But he was well aware that the purposes of the present topic could not be properly served on that basis alone. He wished to stress once again that he had not taken the status of the diplomatic agent as his model; he had adopted a model closer to the status of the administrative and technical staff of diplomatic missions, and had accordingly drawn on the relevant provisions of the codification conventions relating to such staff. At the same time, he had endeavoured to introduce concrete elements which adequately reflected the specific functions of the courier and the practical needs for the discharge of those functions. He wished to dispel any misunderstanding about his basic position: at no time had he attempted to turn the diplomatic courier into a top-level diplomat.

32. As pointed out by Mr. Calero Rodrigues (1828th meeting), the Commission's objective should be threefold: first, to consolidate existing law; secondly, to unify the rules applicable to all diplomatic couriers; and thirdly, to develop rules on matters not covered by existing law. The Commission would have to make an effort to devise rules that were acceptable, viable and useful.

33. During the discussion, the courier had been described as a "vehicle", but he was more than that: he had a legal status as an officer of the State and he performed an official function. He was entrusted with a mission which was sometimes a critical one for the sending State.
34. The essential criterion with regard to the privileges and immunities of the courier was that of functional necessity. When applying that criterion, the short duration of the courier's functions in the receiving State was not the primary consideration; the brevity of his sojourn did not necessarily mean that he required less protection; in fact, he might well require more protection for that reason.
35. The question of the possible reaction of receiving States and transit States was very much in his mind. It must be remembered, however, that those States would also be sending States in other circumstances, so that the element of reciprocity was particularly important. The field of privileges and immunities was one in which reciprocity was particularly effective as a method of striking a balance between opposing interests.
36. A number of general observations had been made suggesting simplifications of the texts of certain draft articles. He was prepared to consider, and to discuss in the drafting Committee, all concrete proposals to that end, but the simplifications should not in any way deprive the courier of the protection necessary for the discharge of his duties.
37. A number of proposals for additional provisions had also been made. In particular, there had been the proposal by Mr. Ushakov (1827th meeting) for a new draft article to deal with the privileges and immunities granted by the receiving State to a diplomatic courier who was a national of, or permanently resident in, that State, along the lines of article 38 of the 1961 Vienna Convention. The suggestion made by Mr. Ni (1828th meeting) regarding the order of the draft articles would no doubt be taken into consideration by the Drafting Committee, as well as the points raised by the Chairman when speaking as a member of the Commission.
38. Referring to the individual articles, he observed that most of the critical comments on draft article 24 had centred on paragraph 1, and mainly on the last phrase of that paragraph: "including examination carried out at a distance by means of electronic or other mechanical devices". He was quite prepared to accept the deletion of those words. The remaining proposals on article 24 mainly concerned drafting and would be duly considered by the Drafting Committee.
39. The discussion on draft article 25 had shown that the simplified text he had put forward was open to misunderstanding. He had, of course, had no intention of conferring any additional tax privileges on the courier. He had taken article 34 of the 1961 Vienna Convention as a basis, and out of the six categories of taxes which that article placed outside the exemption, he had mentioned only the two which appeared to him relevant to the case of the courier. Unfortunately he had given a false impression of the purpose of the article, which was to make the courier's level of tax exemption equivalent to that of a member of the administrative or technical staff of a mission who was neither a national of nor permanently resident in the receiving State. Draft article 25 should therefore be thoroughly re-examined by the Drafting Committee in the light of the constructive criticisms put forward.
40. Several members had proposed the deletion of draft article 26. His own view was that, although that article dealt with a rather remote possibility, it was nevertheless desirable to keep it in the draft. If the majority of the Commission were in favour of dropping it, however, he would suggest that the subject-matter be transferred to a commentary. The question was not one which could be ignored altogether.
41. As to draft article 27, in view of the discussion which had taken place he was prepared to delete it. Nevertheless, he urged that the question of the exemption of the courier from social security provisions in respect of any income accruing to him in the receiving State should be dealt with in a commentary.
42. The discussion had shown that the explanations given in the fourth report in support of draft article 28 (A/CN.4/374 and Add.1-4, para. 183) had not proved very convincing. The wording of the draft article had attracted considerable criticism and he welcomed the many useful drafting proposals made, which would be taken into account by the Drafting Committee. He found most of those proposals acceptable and thought that the Drafting Committee could take as a basis for its work the redraft proposed by Mr. Ushakov (1827th meeting, para. 28).
43. He was opposed to the proposal to delete draft article 29, which would leave a gap in the draft. In paragraph 1 of that article, he could accept the deletion of the second sentence, the contents of which could be moved to the commentary. As to the rest, a number of drafting proposals had been made, many of them relating to paragraph 5, and they would be considered by the Drafting Committee.
44. In conclusion, he proposed that draft articles 24 to 29 be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.
45. Sir Ian SINCLAIR said it was his understanding that the Drafting Committee could eliminate draft article 25 altogether if it came to the conclusion that the diplomatic courier was not liable to tax in any circumstances and therefore did not stand in need of any exemption.
46. Mr. DÍAZ GONZÁLEZ said he did not see why the Commission itself could not take a decision on whether to delete or retain draft article 25. It appeared to be leaving that decision to the Drafting Committee.
47. The CHAIRMAN pointed out that the Commission had not perhaps had the benefit of the views of all members on every draft article. The position now was that draft articles 24 to 29 would be referred to the Drafting Committee with the comments made during the dis-

cussion; when those articles returned from the Drafting Committee, the Commission itself would be able to take a decision on them.

48. Mr. DÍAZ GONZÁLEZ said he would not object to draft articles 24 to 29 being referred to the Drafting Committee. He noted, however, that all the members who had spoken during the discussion had favoured the deletion of draft article 25. Since the Drafting Committee had fewer members than the Commission, he did not see how it could arrive at any different conclusion.

49. Mr. JAGOTA said that Mr. Díaz González was right in principle. In the case in question, however, referring draft articles 24 to 29 to the Drafting Committee at the present stage would not lead to any difficulty. He could not foresee any decision by the Drafting Committee which might prove unacceptable to the Commission as a whole.

50. Mr. YANKOV (Special Rapporteur) said he wished to explain his position on the interesting suggestions made by Mr. Reuter concerning the possibility of dealing separately with the transit State and with reservations. He would not at present take any position on the substance of those suggestions, but assured Mr. Reuter that they would receive very careful consideration at a later stage, either in connection with the miscellaneous provisions or when the whole draft had been completed.

51. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to accept the Special Rapporteur's proposal to refer draft articles 24 to 29 to the Drafting Committee, together with all the comments and suggestions made during the discussion.

*It was so agreed.*<sup>7</sup>

*The meeting rose at 6.15 p.m.*

<sup>7</sup> For consideration of draft articles 24 and 25 as proposed by the Drafting Committee, see 1864th meeting, paras. 23-47; for draft articles 26 and 27, see the decision by the Commission, *ibid.*, paras. 49 and 51.

## 1830th MEETING

*Tuesday, 29 May 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*later:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup> (*continued*)

ARTICLES 30 TO 35

1. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 30 to 35, which were contained in his fourth report (A/CN.4/374 and Add.1-4) and which read as follows;

*Article 30. Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew*

1. The captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command may be employed for the custody, transportation and delivery of the diplomatic bag of the sending State to an authorized port of entry on his scheduled itinerary in the territory of the receiving State, or for the custody, transportation and delivery of the bag of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State in the territory of the receiving State addressed to the sending State.

2. The captain, the master or the authorized member of the crew entrusted with the diplomatic bag shall be provided with an official document indicating the number of packages constituting the bag entrusted to him.

3. The captain, the master or the authorized member of the crew shall not be considered to be a diplomatic courier.

4. The receiving State shall accord to the captain, the master or the authorized member of the crew carrying the diplomatic bag the facilities for free and direct delivery of the diplomatic bag to members of the diplomatic mission of the sending State who are allowed by the receiving State to have access to the aircraft or ship in order to take possession of the diplomatic bag.

*Article 31. Indication of status of the diplomatic bag*

1. The packages constituting the diplomatic bag shall bear visible external marks of their official character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee, as well as of any intermediary points on the route or transfer points.

3. The maximum size or weight of the diplomatic bag allowed shall be determined by agreement between the sending State and the receiving State.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

*Article 32. Content of the diplomatic bag*

1. The diplomatic bag may contain only official correspondence and documents or articles intended exclusively for official use.
2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag.

*Article 33. Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew*

The diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew shall comply with all the requirements set out in articles 31 and 32, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.

*Article 34. Status of the diplomatic bag dispatched by postal services or other means*

1. The diplomatic bag dispatched by postal services or other means, whether by land, air or sea, shall comply with all the requirements set out in article 31, and shall enjoy the facilities, privileges and immunities, specified in articles 35 to 39, accorded to the diplomatic bag by the receiving State or the transit State while on its territory.
2. The conditions and requirements for the international conveyance of the diplomatic bag by postal services, including its visible external marks, maximum size and weight, shall conform to the international regulations established by the Universal Postal Union or be determined in accordance with bilateral or multilateral agreements between the States or their postal administrations. The postal authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag conveyed through their postal services.
3. The conditions and requirements for the dispatch of diplomatic bags by ordinary means of transportation, whether by land, air or sea, shall conform to the rules and regulations applicable to the respective means of transportation, and the bill of lading shall serve as a document indicating the official status of the diplomatic bag. The competent authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag dispatched through the ports of those States.

*Article 35. General facilities accorded to the diplomatic bag*

The receiving State and the transit State shall accord all necessary facilities for the safe and speedy transportation and delivery of the diplomatic bag.

2. Mr. YANKOV (Special Rapporteur) said that draft article 30 was the last article in part II of the draft; it dealt with the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew entrusted with the diplomatic bag. That method of transport and delivery of the bag was of considerable practical importance. It had been used extensively even before the 1961 Vienna Convention on Diplomatic Relations had been adopted. Since then, there had been an enormous increase in its use, and not only by States with limited financial means. At the same time, however, there had been no decrease in the activities of professional couriers.
3. The main problems which arose were: first, that of the rights and duties of the person carrying the bag; secondly, that of the treatment of that person by the

authorities of the receiving and transit States and of the legal nature of his status; and thirdly, the procedure for access to the aircraft or ship by the member of the diplomatic mission of the sending State who was to take delivery of the bag.

4. In his work on draft article 30, he had taken as a basis the existing State practice and the preparatory work for the United Nations Conference on Diplomatic Intercourse and Immunities in 1961. A study of that practice revealed two main trends. The first was to consider the person carrying the bag as little more than a postman delivering mail, no special treatment being accorded to him. The second was to consider that person as performing a mission for the sending State, parallel to his normal duties in the aircraft or ship. On that basis, protection of that person was justified and he should be accorded certain rights for the protection of the diplomatic bag.

5. Certain special situations should also be considered. One was that of a pilot who was appointed as a diplomatic courier: his assignment as a courier was then his more important function. Another case was that of the use of a special aircraft to carry diplomatic bags—a method which had been used in certain parts of Europe by the United States of America. His information on that point was that the practice was not a regular one and seemed to be very little used.

6. For the provisions of draft article 30 he had drawn upon article 27, paragraph 7, of the 1961 Vienna Convention. Both at the 1961 Conference and at the United Nations Conference on Consular Relations in 1963, proposals had been made to grant inviolability to the captain of an aircraft or the master of a ship when carrying a diplomatic bag, but those proposals had been rejected. Nevertheless, in the discussions in the Sixth Committee of the General Assembly, the view had been expressed by some speakers that the captain or master in that situation should not be treated as a common carrier, but should enjoy some degree of functional immunity. It was important to remember that the captain of an aircraft or master of a ship, as the commanding officer, had powers to deal with any situation arising on board. But once the aircraft had landed or the ship arrived in port, all that was required was facilities for delivery of the diplomatic bag.

7. There was also the important legal problem of the liability of the captain or master. Under the rules of ICAO<sup>5</sup> and the provisions of the Convention on the High Seas (Geneva, 1958),<sup>6</sup> the captain or master incurred liability for any damage caused by his negligence or incompetence. The introduction of any element of immunity would run counter to that liability. In the circumstances, it was not appropriate to assimilate the captain or master to a member of the administrative or technical staff of a diplomatic mission, and still less to a diplomatic agent. All that was required was that he should have the necessary facilities for safe delivery of the bag.

<sup>5</sup> *Rules of the Air. Annex 2 to the Convention on International Civil Aviation*, chap. 2, para. 2.3.

<sup>6</sup> Art. 11 of the Convention (United Nations, *Treaty Series*, vol. 450, p. 88).

8. On that matter, very extensive practice existed in bilateral conventions and in domestic laws and regulations. One important point was the requirement for an official document indicating the number of packages constituting the diplomatic bag. In practice, the document required by a captain or master carrying the bag was the same as that given to a regular courier, though, of course, the fact that the document had been issued did not mean that its holder was considered to be a diplomatic courier; it simply meant that he was entitled to be treated with due respect and to have the necessary facilities for delivery of the bag. It was the duty of the receiving State to permit free access to the ship or aircraft by the representative of the diplomatic mission of the sending State who came to take delivery of the bag.

9. With regard to the wording of draft article 30, he noted that the concluding words of paragraph 1 could be simplified in the light of earlier articles adopted by the Commission. That paragraph referred to the captain of a commercial aircraft, the master of a merchant ship "or an authorized member of the crew under his command". In article 27, paragraph 7, of the 1961 Vienna Convention, only the captain of a commercial aircraft was mentioned. That reference had, however, been expanded in the 1963 Vienna Convention on Consular Relations and in subsequent codification conventions to cover also the master of a merchant ship and an authorized member of the crew under the command of the captain or master, as the case might be. He had accordingly used that wider formula in order to meet practical needs and to conform to present usage. As a result of the significant developments in aviation over the previous 25 years, it was no longer appropriate to place the additional responsibility of the diplomatic bag on the captain of a large aircraft who was responsible for the safety of several hundred passengers and a large crew. The best solution was to entrust the bag to a member of the crew authorized for that purpose.

10. Article 31 was the first of the nine articles constituting part III of the draft dealing with the status of the diplomatic bag. The remarks made during the discussion on the status of the diplomatic courier would undoubtedly prove useful for consideration of the draft articles on the status of the diplomatic bag, in view of the similarity in approach to the two subjects.

11. Draft article 31 dealt with the indication of status of the diplomatic bag. Paragraph 1 specified that the packages constituting the bag must bear visible external marks of their official character. That requirement reflected long-standing State practice. The bag could consist of any form of envelope or container and the markings used to identify it could vary, but the bag must always be sealed with wax or lead seals bearing the official stamp of the competent authority of the sending State, usually the Ministry of Foreign Affairs. Sometimes the diplomatic bag was also locked and fastened with padlocks. It had been suggested that a uniform system of external marking might be introduced, but it would be difficult to go into so much detail.

12. The important question was that of official documentation. Regardless of whether the diplomatic bag was

entrusted to a courier, sent by post or shipped, an official covering document was an absolute requirement. When a diplomatic bag was sent by sea, the bill of lading had to specify its particulars.

13. With regard to the maximum size or weight of a diplomatic bag to be allowed, there had been some suggestions in the Sixth Committee of the General Assembly. Such a limitation could act as an indirect safeguard against abuses. When the diplomatic bag was sent by mail, the rules of UPU regarding maximum size and weight would, of course, apply. In draft article 31, the question of the maximum size and weight allowed had been left to be determined by agreement between the sending State and the receiving State.

14. Draft article 32 dealt with the extremely important question of the content of the bag. The basic rule, set out in paragraph 1, was that the diplomatic bag must contain only official correspondence and documents or articles intended exclusively for official use. That rule had, of course, been adopted in article 27, paragraph 4, of the 1961 Vienna Convention. The problem which arose—in the most acute form—was that of verification and the prevention of abuse. Under article 35, paragraph 3, of the 1963 Vienna Convention, if the competent authorities of the receiving State had serious reason to believe that the consular bag contained something other than official correspondence and documents or articles for official use, they could request that the bag be opened in their presence by an authorized representative of the sending State; if that request was refused by the authorities of the sending State the bag would be returned unopened to its place of origin. In many bilateral consular conventions, there was no provision for opening the consular bag, but the receiving State could cause it to be returned unopened if it suspected the contents.

15. An analysis of State practice, including bilateral consular conventions, showed consistent adherence to the principle of absolute inviolability of the diplomatic bag because of the confidentiality of its contents. There had, however, been some difficulties regarding the interpretation of the expression "articles intended for official use". In that connection, he had mentioned in his fourth report the case of films brought into the United States in the French diplomatic pouch without paying customs duty (A/CN.4/374 and Add.1-4, para. 286). His fifth report contained particulars of the most recent practice regarding the contents of the diplomatic bag and the different interpretations of the expression "articles intended for official use" (A/CN.4/382, paras. 64-69).

16. Draft article 32, paragraph 2, laid down in its concluding clause the duty of the sending State to "prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag". That duty was parallel to the one prescribed in draft article 20, paragraph 2, which required the receiving or transit State to prosecute and punish persons responsible for any infringement committed against the diplomatic courier. It would be recalled, however, that during the discussion on draft article 20 a number of speakers had suggested dropping the corresponding provision on sanctions. If the concluding clause of draft article 20, paragraph 2,

were eventually dropped, it would seem appropriate also to delete that of draft article 32, paragraph 2.

17. Draft article 33 dealt with the status of the diplomatic bag when it was entrusted to the captain of a commercial aircraft or the master of a merchant ship, which was the most frequently used method of sending an unaccompanied bag. The procedure of entrusting diplomatic mail to the captain of a commercial aircraft or an authorized member of his crew had proved in practice to have the advantage of economy combined with reasonable safety, since the bag was in the custody of a responsible person. In the past, the masters of merchant ships had been employed for the same purpose, and that was still a common practice where seaborne transport was more economical owing to the size of the consignment.

18. The main problems concerning the status of a bag carried in that way were: (a) that of official documentation; (b) the requirements as to admissible contents; (c) the procedure for the taking of free and direct possession of the bag by an authorized member of the mission.

19. In the first place, he wished to stress that the requirements relating to documentation, to visible external marks and to the legally permissible contents were fully applicable in that situation as well. Secondly, the diplomatic bag, when carried in that way, had to be given the same measure of protection and be accorded the same facilities, privileges and immunities as were granted by the receiving State or the transit State to a bag accompanied by a professional courier or an *ad hoc* courier.

20. In view of the first of those considerations, draft article 32, paragraph 1, had been couched in terms similar to those of article 27, paragraph 4, of the 1961 Vienna Convention. As to the protection to be accorded, his view was that a diplomatic bag which was not in the direct and permanent custody of a diplomatic courier needed an even greater measure of protection and preferential treatment in order to ensure its safe and unimpeded transport. It would be noted that the text of draft article 33 contained a cross-reference to articles 35 to 39. The reference to article 39, which dealt with protective measures in circumstances preventing the delivery of a diplomatic bag, was particularly relevant.

21. Draft article 34 dealt with the status of a diplomatic bag dispatched by postal services or other means—that was to say, a bag not entrusted to any particular person. Clearly, in the case of that form of carriage the bag needed special protection. It might be sent through the public postal services as mail, by letter post or parcel post, or by any ordinary means of transport—motor vehicle, train, merchant vessel or aircraft. Whatever the means of transport used, the diplomatic bag was entitled to special treatment because of its official character.

22. At the same time, there were certain practical matters to be taken into consideration, the first of which concerned a diplomatic bag dispatched through the public postal services. There was no specific provision on that case, but article 27, paragraph 1, of the 1961 Vienna Convention did provide that missions could “employ all appropriate means” of communication, which in State

practice was taken to mean postal services and other means of transport. There were two basic requirements, namely that the rules regarding proof of the status and contents of the diplomatic bag should apply, and that the same protection should be given as for the accompanied bag, particularly in regard to inviolability and expeditious forwarding.

23. The possibility of introducing a special category of “diplomatic mail” had been under discussion in UPU for some time, but as stated in the fourth report (A/CN.4/374 and Add.1-4, para. 314), a large majority of the postal administrations consulted—80 per cent—had refused to consider the creation of a new category of postal items. Views on the maximum weight to be allowed for such items had ranged from 2 kilograms to 30 kilograms, with a clear preference for 10 kilograms. The Executive Council of UPU had, however, indicated that bilateral agreements between postal administrations for the transport of diplomatic bags by post and for special treatment would be quite in order, and a number of such agreements had been concluded, mainly between Latin-American countries.

24. Commercial means of transport were commonly used for the dispatch of heavy consignments and articles such as films, books and exhibits intended exclusively for the official use of diplomatic missions. The four codification conventions did not contain any specific provisions on that type of unaccompanied diplomatic bag, but all the rules regarding official seals and other visible external marks and safety devices applied, and the bill of lading for the consignment could serve as a document indicating the status of the bag. The requirement of inviolability provided an added guarantee of protection and hence of safe delivery of the bag. On that basis, draft article 34 was proposed for the Commission’s consideration.

25. Lastly, with regard to draft article 35, since the main object was the safe and speedy delivery of the diplomatic bag, three different sets of circumstances could be envisaged. First, normal circumstances in which the usual facilities determined by functional necessity would be accorded, for instance in regard to transport, customs clearance and other formalities to expedite delivery of the bag. Secondly, special circumstances of some difficulty, when facilities would be provided upon a reasonable request being made by the courier or the sending State. Such special circumstances would not fall within the scope of *force majeure* and could be regarded as surmountable with the assistance of the sending or receiving State. Thirdly, circumstances that were covered not by draft article 35, but by draft article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag) and 40 (obligations of the transit State in case of *force majeure* or fortuitous event). On that basis, draft article 35 was proposed for the Commission’s consideration. The second set of circumstances to which he had referred could perhaps be dealt with in further detail in the commentary.

*Mr. Yankov took the Chair.*

### Tribute to two former members of the Commission's secretariat

26. The CHAIRMAN said that Mr. Eduardo Valencia Ospina had served the Commission at 18 consecutive sessions, from 1966 to 1983. A graduate of the University of Bogota and the Harvard Law School, he had joined the United Nations Codification Division in 1964 and risen to the level of Senior Legal Officer. In that capacity, he had participated in the preparation of all the codification conventions and in all the codification conferences that had taken place since 1969. That was a considerable achievement and few international civil servants had acquired such a wide range of experience in international law. In addition, Mr. Valencia Ospina had contributed significantly to the work of the Commission's Drafting Committee, where he had been able to make use of his remarkable linguistic skills. Among the many other matters with which he had been closely concerned was the preparation of the volume entitled *The Work of the International Law Commission*.<sup>7</sup>

27. He wished Mr. Valencia Ospina success and happiness in the higher office to which he had been appointed at the International Court of Justice.

28. Mr. Andronico Adede had joined the Codification Division much later though he had been concerned since the 1970s in a number of United Nations legal activities. Of particular note was his contribution to the work of the United Nations Conference on the Law of the Sea, which he had served first as his country's representative and then as a member of the United Nations secretariat. In a situation often fraught with political issues, he had been concerned only with legal questions *stricto sensu*; he had worked, in particular, with the expert group appointed to deal with the provisions on settlement of disputes. He had also continued to make an important contribution to the Commission's work on the various topics under consideration.

29. He wished Mr. Adede well in his new appointment as Legal Adviser to the International Atomic Energy Agency.

30. Mr. REUTER, speaking on behalf of the members from western Europe, said he regretted the departure of two former members of the Commission's secretariat whose culture, devotion and zeal were an honour to their countries of origin. Mr. Eduardo Valencia Ospina and Mr. Andronico Adede, who were friendly and responsive although reserved, had indeed served the Commission to perfection, giving it remarkable material and intellectual support of the greatest value. While regretting their departure, the Commission should nevertheless welcome their advancement.

31. Mr. JAGOTA, speaking on behalf of the Asian members of the Commission, said it was his pleasant duty to place on record their deep appreciation of the quality of service rendered by Mr. Eduardo Valencia Ospina and Mr. Andronico Adede—service on which, in large measure, the acceptability of the Commission's

product depended. Both officers had made extremely valuable contributions, not only when the Commission was in session, but also when it was not, and their amiable and helpful qualities had been much appreciated.

32. The drafting proposals which Mr. Valencia Ospina had made in the Drafting Committee had helped to resolve many difficulties. He had first come to know Mr. Adede personally in connection with the United Nations Conference on the Law of the Sea and had acquired a great admiration for his work. Mr. Adede's contribution to the law extended over a wide field and included a series of lectures delivered before The Hague Academy of International Law on international investment in developing countries—a highly topical subject and one of continuing interest to those countries.

33. It was therefore gratifying to know that both officers had secured advancement by their appointments to the International Court of Justice and the International Atomic Energy Agency, respectively, and that they would continue to make equally valuable contributions in their new posts. He wished them both well for the future.

34. Mr. NJENGA, speaking on behalf of the African members of the Commission, said that he had learnt much from Mr. Eduardo Valencia Ospina, whom he had known since 1969. African countries attached special importance to jurists from Latin America, who had in many respects been the trail-blazers in articulating the legal concerns of the third world. Much had been gained from their wisdom and knowledge and, in that respect, Mr. Valencia Ospina was an outstanding son of Latin America. He was also a jurist in his own right, as was clearly apparent from his valuable contribution to the Codification Division and particularly to the Commission. He would be sorely missed in the Commission, but it was gratifying to know that he had left for such a high office.

35. Mr. Andronico Adede had joined the Ministry of Foreign Affairs of Kenya in 1971 as Deputy Head of the Legal Division and had immediately become involved in the United Nations Conference on the Law of the Sea. Both as a member of the Kenyan delegation and later as a member of the United Nations Secretariat, his interest in legal matters had always been to the fore and many would doubtless remember his contribution to the dispute-settlement provisions of the United Nations Convention on the Law of the Sea. Although he had only been with the Commission for a relatively short time, Mr. Adede had demonstrated his outstanding qualities both as a jurist and as a human being.

36. He wished Mr. Adede well in his new post with the International Atomic Energy Agency. Both he and Mr. Valencia Ospina would always receive a warm welcome from the Commission.

37. Mr. USHAKOV warmly congratulated the two former members of the Commission's secretariat, Mr. Eduardo Valencia Ospina and Mr. Andronico Adede, who had just been called to higher posts and greater responsibilities. Their advancement testified to the efficiency of members of the Codification Division and

<sup>7</sup> United Nations publication, Sales No. E.80.V.11.

their competence in the sphere of contemporary international law. He thanked them for their contribution to the work of the Commission and especially to that of the special rapporteurs. He was convinced that they would be well able to carry out the tasks that awaited them and he wished them every success.

38. Mr. DÍAZ GONZÁLEZ, speaking also on behalf of Mr. Calero Rodrigues and the Spanish-speaking members from Latin America, said he could only feel pride at the praise accorded to two representatives of the third world who had undoubtedly contributed to the progressive development of international law. The departure of Mr. Eduardo Valencia Ospina and Mr. Andronico Adede was regrettable, since the Commission was losing two friends; but their promotion was well deserved. He wished to thank both of them for the help they had given the Commission and wished them all success in their new duties.

39. Mr. LACLETA MUÑOZ said he regretted the departure of Mr. Eduardo Valencia Ospina, with whom he had had cultural and linguistic ties, as well as a bond of friendship. He thanked him for the valuable support he had given the Commission in the performance of its task and congratulated him on his promotion.

40. He also wished to pay a tribute to Mr. Andronico Adede for his efficiency and ability. He hoped that the example of both men would be followed and wished them every success in their new duties.

41. Mr. MALEK said that, as a former staff member of the United Nations Office of Legal Affairs, he particularly welcomed the advancement of the two former members of the secretariat.

42. He remembered the valuable contribution that Mr. Eduardo Valencia Ospina had made to research work and studies, especially those of the Special Committee on the Question of Defining Aggression, the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, and the *Ad Hoc* Committee on International Terrorism. His appointment as Deputy Registrar of the International Court of Justice testified to the solidity and extent of his competence, his experience and his integrity.

43. By his intellectual qualities Mr. Andronico Adede had also made a remarkable contribution to the work of the Office of Legal Affairs and that of the Commission. He was convinced that Mr. Adede would perform with authority his duties as Legal Adviser to the International Atomic Energy Agency, to which he had just been appointed.

44. Mr. FRANCIS joined with previous speakers in offering his warmest congratulations to Mr. Eduardo Valencia Ospina and Mr. Andronico Adede on their advancement and wishing them all success in their future endeavours. During his (Mr. Francis's) term as Chairman of the Commission, Mr. Valencia Ospina had been a tower of strength. The Commission should be gratified that it had provided the posts in which those two legal officers had served their apprenticeship. Through his devotion, efficiency and competence, Mr. Valencia Ospina had left behind an exemplary record of service.

45. In the short time that Mr. Adede had spent with the Commission he had made his mark, and his outstanding contribution was attested to by his appointment so soon to the post of Legal Adviser to the International Atomic Energy Agency.

46. Mr. QUENTIN-BAXTER said that if so many members wished to speak it was because the occasion was one that affected them personally. He had come to realize that behind Mr. Andronico Adede's quiet and unassuming manner lay a keen legal mind and excellence as a draftsman. He had, of course, known Mr. Eduardo Valencia Ospina for much longer and, indeed, tended to think of his own association with the Commission primarily in terms of the personalities of Mr. Torres Bernardez and Mr. Valencia Ospina. There were not many communities to which one belonged in the course of a lifetime that had a special personal significance: such had been Mr. Valencia Ospina's association with the Codification Division—of which he had been one of the great representatives—which had been extremely valuable and would endure, even though the link with the Commission itself had been broken.

47. Mr. MAHIU said he wished to pay a special tribute to Mr. Eduardo Valencia Ospina, who might be called the "memory man" of the Commission due to his knowledge of its members and solid experience of its work, and to congratulate him on his promotion.

48. He regretted the departure of Mr. Andronico Adede, whom he had known mainly through the work of the United Nations Conference on the Law of the Sea. He congratulated him on his advancement, which confirmed his high qualities and competence.

49. Mr. NI said that he wished to speak for two reasons. First, because the two legal scholars to whom the Commission was paying tribute came from the third world, to which he belonged; and secondly, because the occasion showed how much the work of the Secretariat and of the members of the Codification Division, in particular, was appreciated. Both the officers in question had made substantive contributions to the work of the Commission, which would be recorded in the annals of the Organization. Although his acquaintance with Mr. Eduardo Valencia Ospina was not of long standing, the impression he had left was far-reaching. As a friend, he was sincere and warm-hearted; as an administrator, efficient and dutiful; as a scholar, searching and knowledgeable.

50. He had first come to know Mr. Andronico Adede before he had joined the Commission's secretariat, when his writings on the settlement of disputes had attracted attention. He was a star of his continent. Although there was much else to be said, he would confine himself at the present stage to wishing Mr. Valencia Ospina and Mr. Adede every success in the years ahead.

51. The CHAIRMAN proposed that he should send a letter to Mr. Valencia Ospina and to Mr. Adede on the Commission's behalf, enclosing the summary record of the meeting.

*It was so agreed.*

*The meeting rose at 1.20 p.m.*

## 1831st MEETING

Wednesday, 30 May 1984, at 10.05 a.m.

Chairman: Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

**The law of the non-navigational uses of international watercourses (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F)**

[Agenda item 6]

**DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur**

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on the law of the non-navigational uses of international watercourses (A/CN.4/381), as well as the revised outline for a draft convention contained therein, which read as follows:<sup>3</sup>

CHAPTER I

INTRODUCTORY ARTICLES

*Article 1. Explanation (definition) of the term "international watercourse" as applied in the present Convention*

1. For the purposes of the present Convention, an "international watercourse" is a watercourse—ordinarily consisting of fresh water—the relevant parts or components of which are situated in two or more States (watercourse States).

2. To the extent that components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State, they shall not be treated as being included in the international watercourse for the purposes of the present Convention.

3. Watercourses which in whole or in part are apt to appear and disappear (more or less regularly) from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

4. Deltas, river mouths and other similar formations with brackish or salt water forming a natural part of an international watercourse shall likewise be governed by the provisions of the present Convention.

*Article 2. Scope of the present Convention*

1. The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourses and their waters.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> Changes made to the original draft are shown in italics in chapter headings and in the body of the text, and in roman type in titles of articles.

2. The use of the waters of international watercourses for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation.

*Article 3. Watercourse States*

For the purposes of the present Convention, a State in whose territory relevant components or parts of the waters of an international watercourse exist is a watercourse State.

*Article 4. Watercourse agreements*

1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof.

The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present Convention for the watercourse States concerned.

2. A special watercourse agreement should define the waters to which it applies. It may be entered into with respect to an international watercourse in its entirety, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other watercourse States of the waters of such international watercourse is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse may require, watercourse States shall negotiate in good faith for the purpose of concluding one or more watercourse agreements or arrangements.

*Article 5. Parties to the negotiation and conclusion of watercourse agreements*

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to that international watercourse as a whole.

2. A watercourse State whose use of the waters of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected.

CHAPTER II

GENERAL PRINCIPLES, RIGHTS AND DUTIES OF WATERCOURSE STATES

*Article 6. General principles concerning the sharing of the waters of an international watercourse*

1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

2. To the extent that the use of the waters of an international watercourse within the territory of one watercourse State affects the use of the waters of the watercourse in the territory of another watercourse State, the watercourse States concerned shall share in the use of the waters of the watercourse in a reasonable and equitable manner in accordance with the articles of the present Convention and other agreements and arrangements entered into with regard to the management, administration or uses of the international watercourse.

*Article 7. Equitable sharing in the uses of the waters of an international watercourse*

The waters of an international watercourse shall be developed, used and shared by watercourse States in a reasonable and equitable manner

on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the *international watercourse* and its components.

*Article 8. Determination of reasonable and equitable use*

1. In determining whether the use by a *watercourse State* of the *waters of an international watercourse* is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the *international watercourse* concerned. Among such factors are:

(a) the geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the *watercourse* concerned;

(b) the special needs of the *watercourse State* concerned for the use or uses in question in comparison with the needs of other *watercourse States*;

(c) the attainment of a reasonable and equitable balance between the relevant rights and interests of the *watercourse States* concerned;

(d) the contribution by the *watercourse State* concerned of waters to the *international watercourse* in comparison with that of other *watercourse States*;

(e) development and conservation by the *watercourse State* concerned of the *international watercourse* and its waters;

(f) the other uses of the *waters of an international watercourse* by the *State* concerned in comparison with the uses by other *watercourse States*, including the efficiency of such uses;

(g) co-operation with other *watercourse States* in projects or programmes to obtain optimum utilization, protection and control of the *watercourse* and its waters, taking into account cost-effectiveness and the costs of alternative projects;

(h) pollution by the *watercourse State* or *States* concerned of the *international watercourse* in general or as a consequence of the particular use, if any;

(i) other interference with or adverse effects, if any, of such use for the uses, rights or interests of other *watercourse States* including, but not restricted to, the adverse effects upon existing uses by such *States* of the *waters of the international watercourse* and its impact upon protection and control measures of other *watercourse States*;

(j) availability to the *State* concerned and to other *watercourse States* of alternative water resources;

(k) the extent and manner of co-operation established between the *watercourse State* concerned and other *watercourse States* in programmes and projects concerning the use in question and other uses of the *waters of the international watercourse* in order to obtain optimum utilization, reasonable management, protection and control thereof.

2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the *watercourse States* concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

If the *watercourse States* concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention.

*Article 9. Prohibition of activities with regard to an international watercourse causing appreciable harm to other watercourse States*

A *watercourse State* shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an *international watercourse* that may cause appreciable harm to the rights or interests of other *watercourse States*, unless otherwise provided for in a *watercourse* agreement or other agreement or arrangement.

CHAPTER III

CO-OPERATION AND MANAGEMENT  
IN REGARD TO INTERNATIONAL WATERCOURSES

*Article 10. General principles of co-operation and management*

1. *Watercourse States* sharing an *international watercourse* shall, to the extent practicable, establish co-operation with regard to uses, projects, programmes, *planning and developments* related to such *watercourse* in order to obtain optimum utilization, protection and control of the *watercourse*. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all the *watercourse States* concerned.

2. For these purposes *watercourse States* should obtain the appropriate assistance from the United Nations Organization and other relevant international agencies and supporting bodies, at the request of the *watercourse States* concerned.

3. *Watercourse States* should engage in consultations (negotiations) and the exchange of information and data on a regular basis concerning the administration, management and uses of such *watercourse* and other aspects of regional interest with regard to relevant *watercourses*.

4. *Watercourse States* shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the objects and measures provided for in the present Convention.

*Article 11. Notification to other watercourse States.  
Content of notification*

1. Before a *watercourse State* undertakes, authorizes or permits a project or programme or alteration of or addition to existing projects or programmes with regard to the utilization, regulation, conservation, protection or management of an *international watercourse* which may cause appreciable harm to the rights or interests of another *watercourse State* or other *watercourse States*, the *watercourse State* concerned shall submit at the earliest possible date due notification to the other relevant *watercourse State* or *States* about such project, programme, alteration or addition.

2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other *watercourse State* or *States* to evaluate and determine as accurately as possible the potential for appreciable harm to the rights or interests of the other *watercourse State* or *States* by such intended project, programme, alteration or addition.

*Article 12. Time-limits for reply to notifications*

1. In a notification transmitted in accordance with article 11, the notifying *watercourse State* shall allow the receiving *watercourse State* or *States* a reasonable period of time of not less than six months from the receipt of the notification to study and evaluate the potential for appreciable harm arising from the planned project, programme, alteration or addition and to communicate its reasoned decision to the notifying *State*.

Should the receiving *State* or *States* deem that the time-limit stipulated in the notification is not reasonable due to the complexity of the issues or the magnitude of the work involved or for other reasons, they may request a reasonable extension of the time-limit concerned.

2. Should the receiving *watercourse State* or *States* deem that additional information, data or specifications are needed for a proper evaluation of the issues involved, they shall inform the notifying *State* to this effect as expeditiously as possible. Justifiable requests for such additional information, data or specifications shall be met by the notifying *State* as expeditiously as possible and the parties shall agree to a reasonable extension of the time-limit set forth in the notification.

3. During the time-limits set forth in paragraphs 1 and 2 of this article, the notifying *State* may not initiate the works referred to in the notification without the consent of the notified *watercourse State* or *States* concerned.

*Article 13. Procedures in case of protest*

1. If a *watercourse* State having received a notification in accordance with article 12 informs the notifying State of its determination that the project or programme referred to in the notification may cause appreciable harm to the rights or interests of the State concerned, the parties shall without undue delay commence consultations and negotiations in order to verify and determine the harm which may result from the planned project or programme. They should as far as possible arrive at an agreement with regard to such adjustments and modifications of the project or programme or agree to other solutions which will either eliminate the possible causes for any appreciable harm to the other *watercourse* State or otherwise give such State reasonable satisfaction.

2. If the parties are not able to reach such agreement through consultations and negotiations within a reasonable period of time, they shall without delay resort to the settlement of the dispute by other peaceful means in accordance with the provisions of the present Convention, *watercourse* agreements or other relevant agreement or arrangement.

3. In cases where paragraph 1 of this article applies and *where* the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State *may proceed with the planned project, programme, alteration or addition if that State deems that its rights or interests or the rights or interests of another watercourse State or other watercourse States may be substantially affected by a delay. In such cases the notifying State must proceed with the necessary works in good faith and in a manner conformable with friendly neighbourly relations.*

4. *Disputes and issues arising out of measures taken under paragraph 3 of this article must be settled as expeditiously as possible by the States concerned by means of the procedures for peaceful settlement provided for in chapter V of the present Convention, in relevant watercourse agreements or in other agreements or arrangements.*

*Article 14. Failure of watercourse States to comply with the provisions of articles 11 to 13*

1. If a *watercourse* State having received a notification pursuant to article 11 fails to communicate to the notifying *watercourse* State within the time-limits provided for in article 12 its determination that the planned project or programme may cause appreciable harm to its rights or interests, the notifying *watercourse* State may proceed with the execution of the project or programme in accordance with the specifications and data communicated in the notification.

In such cases the notifying *watercourse* State shall not be responsible for subsequent harm to the other *watercourse* State or States, provided that the notifying State acts in compliance with the provisions of the present Convention and provided that it is not apparent that the execution of the project or programme is likely to cause appreciable harm to the other *watercourse* State or States.

2. If a *watercourse* State proceeds with the execution of a project or programme without complying with the provisions of articles 11 to 13, it shall incur liability for the harm caused to the rights or interests of other *watercourse* States as a result of the project or programme in question.

*Article 15. Management of international watercourses. Establishment of commissions*

1. *Watercourse* States shall, where it is deemed *practical and advisable* for the rational administration, management, protection and control of the waters of an international *watercourse*, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other *processes and decision-making* procedures for the purposes of promoting *effective and friendly co-operation between the watercourse States concerned with a view to enhancing optimum utilization, protection and control of the international watercourse and its waters.*

2. To this end, *watercourse* States should establish, where practical, bilateral, multilateral or regional joint *watercourse* commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, *inter alia*, have the following functions:

(a) to collect, verify and disseminate information and data concerning utilization, protection and conservation of the international *watercourse or watercourses*;

(b) to propose and institute investigations and research concerning utilization, protection and control;

(c) to monitor the international *watercourse* on a continuous basis;

(d) to recommend to *watercourse* States measures and procedures necessary for the optimum utilization and the effective protection and control of the *watercourse*;

(e) to serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by *watercourse* States;

(f) to propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of *watercourse* States.

*Article 15 bis [former article 27]. Regulation of international watercourses*

1. For the purposes of the present Convention, "regulation" means continuing measures for controlling, increasing, moderating or otherwise modifying the flow of the waters in an international *watercourse*. Such measures may include, *inter alia*, the storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works.

2. *Watercourse* States shall co-operate in a spirit of good faith and good-neighbourly relations in assessing the needs and possibilities for *watercourse* regulations with a view to obtaining the optimum and equitable utilization of the waters of the international *watercourse concerned*. They shall co-operate in preparing the appropriate plans for such regulations and negotiate with a view to reaching agreement on the establishment and maintenance—individually or jointly—of the appropriate regulation, works and measures and on the defrayal of the costs for such *watercourse* regulations.

*Article 15 ter [former article 29]. Use preferences*

1. In establishing *régimes, rules and recommendations* for equitable participation in the utilization and benefits of an international *watercourse and its waters* by the relevant *watercourse* States, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in *relevant watercourse agreements or other agreements or arrangements, including relevant rules, principles or practices established for the international watercourse concerned*.

2. In settling questions relating to conflicting uses, the requirements for and the effects of *certain pertinent* uses shall be weighed against the requirements for and effects of the other pertinent uses with a view to obtaining the optimum utilization of the waters of the international *watercourse concerned, taking into consideration all pertinent uses for the purpose of providing the reasonable and equitable distribution thereof between the watercourse States and taking into account all considerations relevant to the particular international watercourse*.

3. Installations and constructions shall be established and operated in such a manner as not to cause appreciable harm to other equitable uses of the *watercourse*.

4. When an *issue* has arisen with regard to conflicting uses or use preferences in an international *watercourse*, *watercourse* States shall, in conformity with the principles of good faith and friendly neighbourly relations, *to the extent practicable, refrain from taking measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue.*

*Article 16. Collection, processing and dissemination of information and data*

1. In order to ensure the necessary co-operation between *watercourse* States, the optimum utilization of a *watercourse* and a fair and reasonable distribution of the uses thereof among such States, each *watercourse* State shall, to the extent possible, collect and process the necessary information and data available within its territory of a hydrological, hydrogeological or meteorological nature as well as other relevant information and data concerning, *inter alia*, water levels and discharge of water of the *watercourse*, ground water yield and storage relevant for the proper management thereof, the quality of the water at all times, information and data relevant to flood control, sedimentation and other natural hazards and relating to pollution or other environmental protection concerns.

2. *Watercourse* States shall, to the extent possible, make available to other *watercourse* States the relevant information and data mentioned in paragraph 1 of this article. To this end, *watercourse* States should, to the extent necessary, conclude agreements on the collection, processing and dissemination of such information and data. To this end, *watercourse* States may agree that joint commissions established by them or special (regional) or general data centres shall be entrusted with collecting, processing and disseminating on a regular and timely basis the information and data provided for in paragraph 1 of this article.

3. *Watercourse* States or the joint commissions or data centres provided for in paragraph 2 of this article shall, to the extent practicable and reasonable, transmit to the United Nations or the relevant specialized agencies the information and data available under this article.

*Article 17. Special requests for information and data*

If a *watercourse* State requests from another *watercourse* State information and data not covered by the provisions of article 16 pertaining to the *watercourse* concerned, the other *watercourse* State shall upon the receipt of such a request use its best efforts to comply expeditiously with the request. The requesting State shall refund the other State the reasonable costs of collecting, processing and transmitting such information and data, unless otherwise agreed.

*Article 18. Special obligations in regard to information about emergencies*

A *watercourse* State should by the most rapid means available inform the other *watercourse* State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to the *watercourse* concerned—whether inside or outside its territory—which could result in serious danger of loss of human life or of property or other calamity in the other *watercourse* State or States.

*Article 19. Restricted information*

1. Information and data the safeguard of which a *watercourse* State considers vital for reasons of national security or otherwise need not be disseminated to other *watercourse* States, organizations or agencies. A *watercourse* State withholding such information or data shall co-operate in good faith with other *watercourse* States in furnishing essential information and data, to the extent practicable, on the issues concerned.

2. Where a *watercourse* State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other *watercourse* States shall comply with such a request in good faith and in accordance with good-neighbourly relations.

CHAPTER IV

ENVIRONMENTAL PROTECTION, POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS, SAFETY AND NATIONAL AND REGIONAL SITES

*Article 20. General provisions on the protection of the environment*

1. *Watercourse* States—individually and in co-operation—shall, to the extent possible, take the necessary measures to protect the environment of the *international watercourse* concerned from unreasonable impairment, degradation or destruction or serious danger of such impairment, degradation or destruction by reason of causes or activities under their control and jurisdiction or from natural causes that are abatable within reason.

2. *Watercourse* States shall—individually and through co-ordinated efforts—adopt the necessary measures and régimes for the management and equitable utilization of an *international watercourse* and surrounding areas so as to protect the aquatic environment, including the ecology of surrounding areas, from changes or alterations that may cause appreciable harm to such environment or to related interests of *watercourse* States.

3. *Watercourse* States shall—individually and through co-ordinated efforts—take the necessary measures in accordance with the provisions of the present Convention and other relevant principles of international law, including those derived from the United Nations Convention on the Law of the Sea of 10 December 1982, to protect the environment of the sea as far as possible from appreciable degradation or harm caused by means of the *international watercourse* concerned.

*Article 21. Purposes of environmental protection*

The measures and régimes established under article 20 shall, *inter alia*, be designed to the extent possible:

- (a) to safeguard public health;
- (b) to maintain the quality and quantity of the waters of the *international watercourse* concerned at the level necessary for the use thereof for potable and other domestic purposes;
- (c) to permit the use of the waters for irrigation purposes and industrial purposes;
- (d) to safeguard the conservation and development of aquatic resources, including fauna and flora;
- (e) to permit, to the extent possible, the use of the *international watercourse* for recreational amenities, with special regard to public health and aesthetic considerations;
- (f) to permit, to the extent possible, the use of the waters by domestic animals and wildlife.

*Article 22. Definition of pollution*

For the purposes of the present Convention, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an *international watercourse* through the introduction by man, directly or indirectly, of substances, species or energy which results in effects detrimental to human health, safety or well-being or detrimental to the use of the waters for any beneficial purpose or to the conservation and protection of the environment, including the safeguarding of the fauna, the flora and other natural resources of the *watercourse* and surrounding areas.

*Article 23. Obligation to prevent pollution*

1. No *watercourse* State may pollute or permit the pollution of the waters of an *international watercourse* which causes or may cause appreciable harm to the rights or interests of other *watercourse* States in regard to their equitable use of such waters or to other harmful effects within their territories.

2. In cases where pollution emanating in a *watercourse* State causes harm or inconveniences in other *watercourse* States of a less serious na-

ture than those dealt with in paragraph 1 of this article, the *watercourse* State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The *watercourse* States concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.

3. A *watercourse* State shall be under no obligation to abate pollution emanating from another *watercourse* State in order to prevent such pollution from causing appreciable harm to another *watercourse* State or other *watercourse* States, unless otherwise agreed in the relevant *watercourse* agreement or other agreement or arrangement. *Watercourse* States shall—as far as possible—expeditiously draw the attention of the pollutant State and of the States threatened by such pollution to the situation, its causes and effects.

*Article 24. Co-operation between watercourse States for protection against pollution. Abatement and reduction of pollution*

1. *International watercourse* States shall, when necessary, co-operate through regular consultations and meetings or through their joint regional or international commissions or agencies with a view to exchanging on a regular basis relevant information and data on questions of pollution of the *international watercourse* concerned and with a view to the adoption of the measures and régimes necessary in order to provide adequate control and protection of the *international watercourse* and its environment against pollution.

2. *Watercourse* States shall, when necessary, co-operate with a view to establishing a comprehensive list of *dangerous or persistent* pollutants or other pollutants, the introduction of which into the waters of an *international watercourse* shall be prohibited, controlled or monitored.

3. *Watercourse* States shall, to the extent necessary, establish programmes for adequate measures and with timetables for the protection against pollution and abatement or mitigation of pollution of the *international watercourse* concerned.

4. *Watercourse* States shall, where expedient, establish the procedures and machinery necessary for the effective implementation of measures provided for in this article.

*Article 25. Emergency situations regarding pollution*

1. If an emergency situation arises from pollution or from similar hazards to an *international watercourse* or its environment, the *watercourse* State or States within whose jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all *watercourse* States that may be affected by the emergency together with all relevant information and data which may be of relevance in the situation.

2. The *watercourse* State or States within whose jurisdiction the emergency has occurred shall immediately take the necessary measures to prevent, neutralize or mitigate danger or damage caused by the emergency situation. Other *watercourse* States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and effects caused by the emergency and should be refunded the reasonable costs for such measures by the *watercourse* State or States where the emergency arose.

*Article 26. Control and prevention of water-related hazards*

1. *Watercourse* States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, *inter alia*, entail the establishment of joint measures and régimes, including structural or non-structural measures, and the effective monitoring in the *international watercourse* concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

2. *Watercourse* States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an *international watercourse*.

[Article 27 now article 15 bis]

*Article 28. Safety of international watercourses, installations and constructions, etc.*

1. *Watercourse* States shall employ their best efforts to maintain and protect the *international watercourse* or *watercourses* and the installations, constructions and works pertaining thereto.

2. To this end, the *watercourse* States concerned shall co-operate, consult and negotiate with a view to concluding agreements or arrangements concerning:

(a) relevant *general conditions* and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of the *international watercourse* or *watercourses* concerned;

(b) the establishment of adequate safety standards and security measures, to the extent practicable, for the protection of the *international watercourse* or *watercourses* concerned and the waters thereof, including relevant sites, installations, constructions and works, from hazards and dangers due to the forces of nature, wilful or negligent acts or hazards and dangers created by faulty construction, insufficient maintenance or other causes.

3. The *watercourse* States concerned shall, as far as reasonable, exchange information and data concerning the safety and security issues dealt with in this article.

*Article 28 bis. Status of international watercourses, their waters and constructions, etc. in armed conflicts*

*International watercourses and their waters, including relevant sites, installations, constructions and works, shall be used exclusively for peaceful purposes consonant with the principles embodied in the United Nations Charter and shall enjoy status of inviolability in international as well as in internal armed conflicts.*

[Article 29 now article 15 ter]

*Article 30. Establishment of international watercourses or parts thereof as protected national or regional sites*

1. A *watercourse* State or *watercourse* States may—for environmental, ecological, historic, scenic or other reasons—proclaim an *international watercourse* or part or parts thereof a protected national or regional site.

2. Other *watercourse* States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such *watercourse* State or States in preserving, protecting and maintaining such protected site or sites in their natural state.

CHAPTER V

PEACEFUL SETTLEMENT OF DISPUTES

*Article 31. Obligation to settle disputes by peaceful means*

1. *Watercourse* States as well as other States Parties shall settle disputes between them concerning the interpretation or application of the present Convention by peaceful means in accordance with Article 2 of the Charter of the United Nations and, to this end, shall seek solutions by the means indicated in Article 33, paragraph 1, of the Charter.

2. Nothing in this chapter shall impair the right of *watercourse* States and other States Parties to agree at any time to settle a dispute

between them concerning the interpretation or application of the present Convention by any peaceful means of their own choice.

*Article 31 bis. Obligations under general, regional or bilateral agreements or arrangements*

*If watercourse States or other States Parties which are parties to a dispute concerning the interpretation or application of the present Convention have agreed through a general, regional or bilateral agreement or arrangement or otherwise that such dispute shall, at the request of a party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in articles 33 to 38 of this chapter, unless the parties to the dispute agree otherwise.*

*Article 32. Settlement of disputes by consultations and negotiations*

1. When a dispute arises between *watercourse* States or other States Parties concerning the interpretation or application of the present Convention, the parties to the dispute shall proceed expeditiously with consultations and negotiations with a view to arriving at a fair and equitable solution to the dispute.

2. Such consultations and negotiations may be conducted directly between the parties to the dispute or through a *joint commission* or joint commissions established for the administration and management of the international *watercourse* concerned or through other regional or international organs or agencies agreed upon between the parties.

3. If the parties have not been able to arrive at a solution of the dispute within a reasonable period of time, they shall resort to the other procedures for peaceful settlement provided for in this chapter.

*Article 33. Inquiry and mediation*

1. In connection with the consultations and negotiations provided for in article 32, the *States* parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry or *other fact-finding body* of qualified persons or experts for the purpose of establishing the relevant facts pertaining to the dispute in order to facilitate the consultations and negotiations between the parties. The parties must agree to the composition of the Board of Inquiry or *fact-finding body*, the task to be entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board or *fact-finding body* shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry or *fact-finding body* are not binding on the parties unless otherwise agreed upon by them.

2. The parties to a dispute concerning the interpretation or application of the present Convention may by agreement request mediation by a third State, an organization or one or more mediators with the necessary qualifications and reputation to assist them with impartial advice in such consultations and negotiations as provided for in article 32. Advice given by such mediation is not binding upon the parties.

*Article 34. Conciliation*

PARAGRAPH 1 - ALTERNATIVE A

1. *If watercourse States or other States or other States Parties to the present Convention have not been able to resolve a dispute concerning the interpretation or application of the present Convention by the other procedures for peaceful settlement provided for in articles 31, 32 and 33, they shall submit the dispute to conciliation in accordance with articles 34 to 36, unless they agree otherwise.*

PARAGRAPH 1 - ALTERNATIVE B

1. If a *watercourse* agreement or other regional or international agreement or arrangement so provides, or if the parties agree thereto with regard to a specific dispute concerning the interpretation or application of the present Convention, the parties shall submit such dispute to conciliation in accordance with the provisions of this article or

with the provisions of such *watercourse* agreement or regional or international agreement or arrangement.

Any party to the dispute may institute such proceedings by written notification to the other party or parties, unless otherwise agreed upon.

2. Unless otherwise agreed, the Conciliation Commission shall consist of five members. The party instituting the proceedings shall appoint two conciliators, one of whom may be its national. It shall inform the other party of its appointments in the written notification.

The other party shall likewise appoint two conciliators, one of whom may be its national. Such appointment shall be made within thirty days from the receipt of the notification mentioned in paragraph 1 of this article.

3. If either party to the dispute fails to appoint its conciliators as provided for in paragraphs 1 or 2 of this article, the other party may request the Secretary-General of the United Nations to make the necessary appointment or appointments, unless otherwise agreed upon between the parties. The Secretary-General of the United Nations shall make such appointment or appointments within thirty days from the receipt of the request.

4. Within thirty days after all four conciliators have been appointed, the parties shall choose by agreement the fifth member of the Commission from among the nationals of a third State. He shall act as the president of the Conciliation Commission. If the parties have not been able to agree within that period, either party may within fourteen days from the expiration of that period request the Secretary-General of the United Nations to make the appointment. The Secretary-General of the United Nations shall make such appointment within thirty days from the receipt of the request.

*Article 35. Functions and tasks of the Conciliation Commission*

1. Unless the parties otherwise agree, the Conciliation Commission shall determine its own procedure.

2. The Conciliation Commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

3. The Conciliation Commission shall file its report with the parties within twelve months of its constitution, unless the parties otherwise agree. Its report shall record any agreement reached between the parties and, failing agreement, its recommendations to the parties. Such recommendations shall contain the Commission's conclusions with regard to the pertinent questions of fact and law relevant to the matter in dispute and such recommendations as the Commission deems fair and appropriate for an amicable settlement of the dispute. The report with recorded agreements or, failing agreement, with the recommendations of the Commission shall be notified to the parties to the dispute by the Commission and also be deposited by the Commission with the Secretary-General of the United Nations, unless otherwise agreed by the parties.

*Article 36. Effects of the report of the Conciliation Commission. Sharing of costs*

1. Except for agreements arrived at between the parties to the dispute through the conciliation procedure and recorded in the report in accordance with paragraphs 2 and 3 of article 35, the report of the Conciliation Commission—including its recommendations to the parties and its conclusions with regard to facts and law—is not binding upon the parties to the dispute unless the parties have agreed otherwise.

2. The fees and costs of the Conciliation Commission shall be borne by the parties to the dispute in a fair and equitable manner.

*Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal*

States may submit a dispute for adjudication to the International Court of Justice, to another international court or to a permanent or *ad*

*hoc* arbitral tribunal if they have not been able to arrive at an agreed solution of the dispute by means of articles 31 to 36, provided that:

(a) the States parties to the dispute have accepted the jurisdiction of the International Court of Justice in accordance with Article 36 of the Statute of the Court or accepted the jurisdiction of the International Court of Justice or of another international court by a *watercourse* agreement or other regional or international agreement or specifically have agreed to submit the dispute to the jurisdiction of the Court;

(b) the States parties to the dispute have accepted binding international arbitration by a permanent or *ad hoc* arbitral tribunal by a *watercourse* agreement or other regional or international agreement or specifically have agreed to submit the dispute to arbitration.

#### Article 38. Binding effect of adjudication

A judgment or award rendered by the International Court of Justice, by another international court or by an arbitral tribunal shall be binding and final for States Parties. States Parties shall comply with it and in good faith assist in its execution.

### CHAPTER VI

#### FINAL PROVISIONS

#### Article 39. Relationship to other conventions and international agreements

The provisions of the present Convention do not affect conventions or other international agreements in force relating to a particular international *watercourse* or any part thereof, to international or regional *watercourses* or to a particular project, programme or use.

2. Mr. EVENSEN (Special Rapporteur) said that, in his first report on the topic (A/CN.4/367), he had proposed an outline for a draft convention comprising 39 articles as a basis for the discussion of the topic by the Commission at its thirty-fifth session and by the Sixth Committee of the General Assembly at its thirty-eighth session, in 1983. The discussions in both bodies had strengthened his belief that work on the topic was not purely legal in nature, but had strong political and economic overtones. Consequently, only through solutions that were viable both legally and politically would it be possible to arrive at an acceptable instrument of international law. The right balance must be struck between the interdependence of riparian States, on the one hand, and their sovereign independence and right to benefit from the natural resources within their territories, on the other; between upper riparian States and lower riparian States; and between the various uses of water. The Commission should bear in mind the relationship between non-navigational uses of water and other uses, for example navigation, as well as the varying issues posed by different *watercourses*.

3. As far as the approach to the topic was concerned, the discussions in the Sixth Committee (see A/CN.4/L.369, paras. 359-378) had confirmed that the framework agreement approach chosen by the Commission was preferable to other methods, such as a declaration or proclamation. It had been generally acknowledged that the framework agreement should be based on general legal principles such as good-neighbourly relations, good faith, sharing of resources in a reasonable and equitable manner and avoidance of appreciable harm to others, but that a natural corollary of those principles was that all *watercourse* States were entitled,

within their own territories, to a reasonable and equitable share of the uses of the waters of an international *watercourse*.

4. In his first report, when dealing with the *watercourse* system concept (A/CN.4/367, paras. 67-74), he had expressed the view that the term "international *watercourse* system" could serve as a descriptive tool but not as a basis from which to distil legal principles, and that the "drainage basin" concept, as adopted by the International Law Association in articles II and III of the Helsinki Rules,<sup>4</sup> appeared unacceptable, in view of the opposition it had met with in the Commission and the Sixth Committee. The *watercourse* system concept had in fact been introduced in order to counter the criticism to which the international drainage basin concept had given rise, but it too had met with objections in the Sixth Committee, namely that it represented a doctrinal approach similar to the drainage basin concept, and the introduction of a legal superstructure from which unforeseeable principles might be inferred; that it placed undue emphasis on land areas, which might, if it was adopted, find themselves governed by the provisions of a *watercourse* convention; and that it was even more objectionable than the drainage basin concept because of its greater vagueness. Its use might therefore prove a very serious hurdle in the search for a generally acceptable convention.

5. He had therefore suggested in his second report (A/CN.4/381, paras. 22-23) that the *watercourse* system concept should be abandoned in favour of the simple notions of "international *watercourse*", "*watercourse* States" and "*watercourse* agreements". He had defined and explained the term "international *watercourse*" fairly narrowly, bearing in mind the comments made in the Commission and the Sixth Committee in 1983. The new article 1 represented a substantial change from the article 1 proposed originally, for the reasons he had explained in his second report (*ibid.*, paras. 24-25). International *watercourses* naturally had a wide variety of source components, but their nature, type and relevance varied from one *watercourse* to another and from one region to another, therefore he had thought it best not to itemize them.

6. He definitely believed it was appropriate for the Commission to draft an article explaining the term "international *watercourse*". Paragraph 1 of article 1 was closely related to article 3, which defined a *watercourse* State in terms intended to convey the notion of the unique character of each *watercourse* and of the consequent need to determine its relevant components or parts.

7. He had proposed substantial changes to paragraph 1 of article 4, relating to *watercourse* agreements, since a number of important *watercourse* States had expressed concern that the article as previously worded could seriously have undermined existing agreements. He himself did not altogether share that view. The new paragraph should be read together with article 39, which was

<sup>4</sup> See I.L.A., *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.*; see also *Yearbook ... 1974*, vol. II (Part Two), pp. 357 *et seq.*, document A/CN.4/274, para. 405.

identical with article X of the articles provisionally adopted by the Commission. The question then arose whether articles 4 and 39 should be modified in some way or combined in one article.

8. Turning to chapter II of the draft, relating to general principles, rights and duties of watercourse States, he said that the original article 6 had met with considerable opposition in the Commission and perhaps even more so in the Sixth Committee. The physical, economic and political factors inherent in the management and administration of international watercourses underlined the interdependence of watercourse States and the need for international co-operation across national boundaries, in the form of a modern law of nations based on co-operation and friendly relations among neighbouring countries rather than on the more classical approach of mere co-existence. It had been accepted that watercourse States were entitled to a reasonable share of the benefits arising from uses of an international watercourse, but what had given rise to strong objection was the use in article 6 of the concept of a "shared natural resource". One argument against it had been that it would establish a superstructure from which unforeseeable legal rules could be inferred, with the implicit risk of far-reaching allegations and claims being made in given situations. Other criticisms had been that the article was somewhat unbalanced in form and content; that the waters of an international watercourse should be shared by users in a reasonable and equitable manner; and that a watercourse State should be entitled within its territory to a reasonable and equitable share of the uses of the waters of an international watercourse. He had therefore re-drafted paragraph 1 of article 6.

9. The principle that the use of the waters of an international watercourse should be shared in a reasonable and equitable manner was spelt out in paragraph 2 of article 6 and in articles 7 and 8. Two particular factors to be taken into consideration in deciding whether a use was exercised in a reasonable and equitable manner were provided for in article 8: the attainment of a reasonable and equitable balance between the relevant rights and interests of the watercourse States concerned (para. 1 (c)), and the need for watercourse States, in co-operating with each other on watercourse projects and programmes, to take account of cost-effectiveness and the costs of alternative projects (para. 1 (g)).

10. Chapter III of the draft convention, on co-operation and management in regard to international watercourses, opened with article 10 (General principles of co-operation and management), to which he proposed the addition of a new paragraph 2 dealing with assistance from the United Nations and other relevant international agencies and supporting bodies. The purpose of the addition was to focus attention on the need for watercourse States to receive appropriate assistance from such organizations as the United Nations (Economic and Social Council; Department of Technical Co-operation for Development), FAO, UNESCO and WHO. That principle was formulated in a manner intended to indicate that it was a task of the bodies concerned to provide such assistance.

11. Various changes were proposed in regard to the notification procedure. The first two, in paragraph 1 of article 12, would have the effect of giving receiving watercourse States a reasonable period of time of not less than six months in which to reply to project and programme notifications from other watercourse States, as well as the right to request an extension of that period where the circumstances warranted it. The other change was in paragraph 3 of article 13 and was more fundamental. Under the original provision, if a watercourse State receiving a notification protested against the project or programme proposed, the notifying State could not proceed with it until the two States had reached agreement on the matter or, in the absence of agreement, had exhausted the procedures for peaceful settlement provided for in the draft. That had justifiably been seen in the Commission and the Sixth Committee as tantamount to a right of veto which could easily lead to conflict. He had therefore reworded paragraph 3 of article 13 to provide that, in the absence of agreement, the notifying State might proceed with its plans if it deemed that its rights or interests or the rights or interests of another watercourse State or other watercourse States might be substantially affected by a delay, and provided it did the necessary work in good faith and in a manner conformable with friendly neighbourly relations.

12. Article 13 had a new paragraph 4 which provided that disputes must be settled by means of the procedures for peaceful settlement provided for in the draft, in relevant watercourse agreements or in other agreements or arrangements.

13. A further change related to paragraph 1 of article 29 (now article 15 *ter*), on use preferences. He had endeavoured to reformulate it in order to take account of the need to safeguard uses and practices traditionally established for a special watercourse system under agreements, arrangements, rules, principles or practice.

14. Referring next to the outline for a draft convention, he said that he had considered certain suggestions for restructuring it. He agreed that the proper place for article 27, on regulation of international watercourses, was in chapter III: it now appeared there as article 15 *bis*. The same applied to article 29, which had been transferred to become article 15 *ter*. He proposed that those two articles should become articles 16 and 17, respectively, in which case the present article 16 would become article 18.

15. The revised draft also included certain new ideas, based on the discussions which had taken place on his first report. The first idea related to the inviolability of international watercourses and their waters, constructions and works in armed conflicts, and was embodied in the new article 28 *bis*. The proposed article was couched in general terms and made no reference to the two Geneva Protocols of 1977.<sup>5</sup> It was not part of his remit to

<sup>5</sup> Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

consider whether national watercourses should enjoy such inviolability, although his personal view was that they should.

16. The second new idea concerned the effect of compulsory jurisdiction arrangements in regard to procedures for peaceful settlement of disputes. On the basis of the discussions in the Commission, and above all in the Sixth Committee, he had formed the view that it would be unrealistic to provide in the draft for a separate compulsory jurisdiction procedure for international watercourses. He had therefore introduced two less radical concepts which he trusted would be generally acceptable. The first—in the new article 31 *bis*—provided for existing compulsory jurisdiction arrangements to prevail over the arrangements provided for in articles 33 to 38 of the draft unless the parties to the dispute agreed otherwise. That new provision had been inspired mainly by article 282 of the 1982 United Nations Convention on the Law of the Sea<sup>6</sup> and would be additional to article 37 of the draft, on adjudication by the ICJ, another international court or a permanent or *ad hoc* arbitral tribunal. The second concept related to compulsory conciliation and was embodied in alternative A proposed for paragraph 1 of article 34. Compulsory conciliation had proved a particularly useful settlement procedure in international watercourse disputes and had a precedent in article 297, paragraph 3 (b), of the United Nations Convention on the Law of the Sea.

17. Regarding the procedure to be followed by the Commission in its consideration of the topic, he suggested that as far as possible it should concentrate on the first two chapters of the draft. Chapter I contained the five articles which had already been dealt with by the Commission.<sup>7</sup> Article 1 raised two basic questions: should the Commission consider it immediately, and if so, was its formulation broadly acceptable? Articles 2 and 3, relating respectively to the scope of the articles and to “watercourse States”, were identical with the articles 1 and 2 provisionally adopted, except for the deletion of the system concept. For article 4 he had relied heavily on article 3 as provisionally adopted, with the exception of paragraph 1, which he had reworded for the reasons already explained (para. 7 above). Likewise article 5, on parties to the negotiation and conclusion of watercourse agreements, was modelled on article 4 as provisionally adopted, but again with the deletion of the system concept. He trusted that those five articles at least might be referred to the Drafting Committee.

18. Mr. NJENGA said that the fundamental importance of the topic could hardly be over-emphasized. He welcomed the Special Rapporteur’s second report (A/CN.4/381), a remarkable achievement which took into account the criticisms levelled at the first report

(A/CN.4/367) and represented a realistic effort to meet the concerns of all interested States.

19. The Special Rapporteur’s innovative proposals related mainly to chapters I and II of the draft. The concept which had created most problems during the discussion of the first draft had been that of an international watercourse system. In his first report, the Special Rapporteur had already pointed out that a doctrinal definition of international watercourses would be counter-productive. The discussions in the Commission and in the Sixth Committee had revealed that the concepts of an international watercourse system and a system State were unjustifiable and that their adoption would seriously restrict the sovereign right of the State to take decisions concerning the utilization of watercourses in its territory. By removing the controversial element of an international watercourse system in his reformulation of paragraph 1 of article 1, the Special Rapporteur had gone a long way towards removing the major stumbling-block to progress on the topic. The changes made by the Special Rapporteur in the other paragraphs of article 1 were consequential upon that major modification. The Special Rapporteur had thus produced a purely geographical definition which could form the basis of a comprehensive draft.

20. His only suggestion for article 1 was to remove the brackets surrounding the words “watercourse States” at the end of paragraph 1 and to amend the paragraph to read: “... situated in two or more States, hereinafter referred to as watercourse States”. That change would make it possible to dispense with article 3, which could lead to unnecessary doctrinal disputes reminiscent of those to which the term “system States” had given rise in the past.

21. The changes made by the Special Rapporteur in the other articles of chapter I were largely of a drafting nature. He endorsed the new formulation proposed for article 4, paragraph 1, and agreed with the Special Rapporteur that it should alleviate misgivings as to whether States parties to the convention would have the obligation to amend existing special watercourse agreements, or word new agreements, in strict compliance with the provisions of the framework convention. In saying that, the Special Rapporteur had recognized that the physical characteristics of international watercourses and the political, social and economic problems of the States concerned were immensely diverse, hence the need to allow for the preservation of existing special régimes and the creation of new ones if the parties concerned so desired.

22. Another major improvement introduced by the Special Rapporteur related to article 6, which dealt with the general principles concerning the sharing of the waters of an international watercourse. Previously, that article had been based on the idea that an international watercourse was a shared natural resource. The discussion of the article at the previous session had shown that concept to be totally unacceptable; it not only denied the principle of the permanent sovereignty of the State over its natural resources, but also imposed ob-

<sup>6</sup> See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

<sup>7</sup> For the texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, see *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

ligations on upper riparian States while conferring all the benefits, without corresponding obligations, on lower riparian States, and particularly on the last State in the line. Such a concept could not possibly serve as the basis for an equitable international watercourse régime. The new formulation of article 6, however, provided a fair basis for a realistic international convention acceptable to all States sharing an international watercourse. From the drafting point of view, he suggested that paragraph 2 should be amended to indicate that only significant or appreciable adverse effects of watercourse use should bring the provisions of the article into operation. In its present wording the paragraph was much too broad.

23. He had no substantive comments to make on the remaining articles of chapter II. Article 7 and 9 had commanded broad support both in the Commission and in the Sixth Committee. With regard to article 8, he could accept the proposed changes, including the addition of the new criterion of reasonable and equitable use provided for in the new paragraph (c) of paragraph 1.

24. He fully shared the views expressed by the Special Rapporteur in his second report on the importance of co-operation among watercourse States (A/CN.4/381, para. 59). He found the new articles 10 to 18 a marked improvement on the corresponding articles submitted in the first report, even though the earlier articles had on the whole been acceptable to him. The new paragraph 2 of article 10 was especially welcome because of its importance for developing countries. The new formulations of articles 12 and 13 should prove more acceptable than the previous ones. In article 12, paragraph 1, for instance, the somewhat arbitrary time-limit of six months for replying to notifications had been replaced by "a reasonable period of time of not less than six months" and provision had also been made for a reasonable extension of that period in appropriate circumstances. That provided the necessary flexibility for both the notifying State and the receiving State. Furthermore, the removal of the possibility open to a protesting State under the earlier article 13 of vetoing a disputed project, or at least of postponing it unreasonably, went a long way towards meeting a very real concern of many States. The new article 13 also provided for the expeditious peaceful settlement of any dispute arising out of measures taken by a notifying State to implement a disputed project despite a protest by the receiving State. That innovation should meet with the full approval of the Commission.

25. He would not dwell at length on chapter IV of the draft, since its provisions had proved generally acceptable both in the Commission and in the Sixth Committee, and the Special Rapporteur had made only drafting changes in articles 20 to 29. He could accept the new article 28 *bis* on the status of international watercourses in armed conflicts since he felt that it reflected contemporary international law and did not upset the delicate balance achieved by States in the two Geneva Protocols of 1977.<sup>8</sup>

<sup>8</sup> See footnote 5 above.

26. Chapter V, on the peaceful settlement of disputes, was broadly based on the corresponding provisions of the 1982 United Nations Conventions on the Law of the Sea<sup>9</sup> and was therefore acceptable. He wished, however, to reserve judgment on the new article 31 *bis*, which provided for the operation of settlement procedures that were binding on States through general, regional or bilateral agreements. There appeared to be very few such agreements at the regional or general levels and, to the extent to which they existed bilaterally, they could apply independently of any provision to be included in the present draft. Also, as far as article 34 was concerned, he continued to doubt the value of compulsory conciliation as a means of solving international watercourse disputes and therefore preferred alternative B to alternative A for paragraph 1 of the article. With regard to the final provisions, he had no difficulties with the revised article 39 on the relationship between the draft convention and other conventions and international agreements.

27. Mr. PIRZADA said that he reserved his position generally on the Special Rapporteur's second report (A/CN.4/381), but would nevertheless make certain comments on it at the present stage. Before doing so, he wished to point out that, although Pakistan was a lower riparian State, it had no international watercourse problems in view of the Indus Waters Treaty<sup>10</sup> it had entered into with India in 1960.

28. The Special Rapporteur's second report was a departure from his first report (A/CN.4/367) both in tenor and in spirit. The Commission would recall that the six articles it had provisionally adopted in 1980<sup>11</sup> had been based on the "system approach" to international watercourses. In his second report the Special Rapporteur had abandoned that approach on the grounds of the considerable opposition it had met with in the Sixth Committee of the General Assembly. One of the most remarkable features of the Special Rapporteur's original approach to the topic had been his frank recognition of the political nature of his task and of the necessity of establishing a viable balance between various interests. However, the Special Rapporteur had clearly explained that definitional articles were outside the purview of political reconciliation, and he had advocated the system approach mainly on the premise that those articles were descriptive rather than normative in nature. In his second report the Special Rapporteur had thus abandoned not only the work done on the topic by the Commission, but also his own entire approach to it. Apart from making a general reference to the Sixth Committee debate, the Special Rapporteur had offered no justification for that course of action.

29. A comparison of the original text of article 13, paragraph 3, with the reworded version of that paragraph now proposed would serve to illustrate how the Special Rapporteur had radically altered his original de-

<sup>9</sup> See footnote 6 above.

<sup>10</sup> United Nations, *Treaty Series*, vol. 419, p. 125.

<sup>11</sup> See footnote 7 above.

sign. Both texts purported to deal with what might be called the immediate pre-dispute stage. The original text would have prohibited the notifying State from proceeding with a planned project until the rules on the settlement of disputes had been complied with, except where the project was of the utmost urgency or where delay in proceeding with it might cause damage to the notifying State or to other system States. The reworded text discarded the important concepts of damage, urgency and the exceptional nature of unilateral action in favour of a requirement that the notifying State should proceed with the project "in good faith and in a manner conformable with friendly neighbourly relations". The two versions patently reflected two totally different views of what the relevant norms of law should be. Matters such as massive diversion, inter-basin transference and the use of boundary waters were not dealt with in the draft. He was tempted to say that the Special Rapporteur's reformulation of the paragraph was an attempt to find a political balance. That approach was likely to create more problems than it solved. Nevertheless, he had to endorse the view expressed by the Special Rapporteur in his introductory statement that the draft must aim at solutions which were legally and politically viable and which maintained a reasonable balance between riparian States and users.

30. He noted with satisfaction the new draft article 28 *bis* containing a provision on the status of international watercourses in armed conflicts. It was broadly in line with the views he had expressed at the previous session.<sup>12</sup>

*The meeting rose at 12.20 p.m.*

<sup>12</sup> *Yearbook ... 1983*, vol. I, p. 188, 1786th meeting, para. 33.

## 1832nd MEETING

*Friday, 1 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov.

**The law of the non-navigational uses of international watercourses** (*continued*) (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F)

[Agenda item 6]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>3</sup> (*continued*)

1. Mr. JAGOTA recalled that the Commission had been dealing with the topic of the non-navigational uses of international watercourses since 1971 and that, in the intervening period, developments had taken place in State practice. It was his hope that the Commission would be able to deal with certain important aspects of the topic and to present acceptable solutions to the world community.

2. By and large, he agreed with the Special Rapporteur's attitude, namely that the aim should be to prepare, if possible, a draft convention rather than mere guidelines or a code of conduct. Similarly, the draft convention should be short, having the form of a framework that could be adjusted in order to take into account the special features of particular international watercourses. The framework convention would thus set forth the general principles, leaving it to the States concerned to establish in each case a detailed régime for each international watercourse. The framework convention and the "watercourse agreements", as the Special Rapporteur now termed them, would none the less influence each other. The general principles embodied in the framework convention would be derived from sources which included State practice as reflected in watercourse agreements and, in turn, were bound to influence the detailed elaboration of special régimes in future watercourse agreements.

3. As to the contents of the framework convention, in the main he endorsed the way in which the Special Rapporteur had dealt with the problem of choosing the material to be included in the relevant articles. First and foremost, the Special Rapporteur had placed the emphasis on the uses of water, obviously excluding navigational uses, which were precluded from the topic by definition. That approach underlined the importance of water throughout the world, especially in developing countries, and more particularly those with certain climatic problems. Inland navigation was only one among many means of transport, so there were many alternative ways of replacing the navigational uses of waterways. There was, however, no substitute for water used for consumption, irrigation and other non-navigational purposes.

4. The draft articles appropriately dealt with the rights and obligations of States regarding uses of water and endeavoured to maintain a balance between the interests of all the parties concerned, whether upper riparian States, lower riparian States or States that were at the same time upper and lower riparian. The basic concept was that of the equitable sharing of water uses, in terms of both quantity and quality. Each State was none the less entitled to use its equitable share in the way it deemed desirable, as an expression of State sovereignty, but the freedom of a riparian State in that regard was limited by

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles I to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

its obligation to take into account the rights and interests of the other parties concerned, in other words the legitimate uses by other riparians. Fortunately, the draft also covered matters relating to water quality, environmental protection, and prevention and control of water pollution, and it contained provisions on international solidarity and co-operation in connection with such hazards as floods and drought.

5. With regard to article 1, which sought to explain or define the term "international watercourse", it would be remembered that those who had studied the subject before the Commission had come to consider it had taken "international watercourse" to mean a river which, in its downward course from source to mouth, passed through more than one State. That description raised the further question of how to define the term "river", particularly in the light of the problem of tributaries, which could be regarded either as separate rivers or as part of the river into which they flowed. The whole question of the water cycle and the flow of water had then come to the fore and a new emphasis had been placed on hydrology and hydrogeology. Hence the emergence of the "basin" approach, which had led to the use of the terms "drainage basin" and "hydrological basin". The concept of an international drainage basin was thus a familiar one when the Commission had begun its work on the topic. At an early stage in its work, in 1975, the Commission had sent a questionnaire to States; despite some delay, 32 Governments had, by July 1983, submitted written replies, thereby providing the Commission with a fairly representative set of observations from the various regions of the world.

6. On the basis of the work done by the first two special rapporteurs, the Commission had provisionally adopted six articles in 1980, embodying the concepts "international watercourse system", "system agreement" and "system State". In his second report (A/CN.4/381, para. 16), the present Special Rapporteur, taking into consideration the views expressed in the Sixth Committee of the General Assembly, had found that those terms had attracted the same criticism as the expression "drainage basin" and had concluded that the use of the "system" concept might constitute "a serious hurdle in the search for a generally acceptable instrument" (*ibid.*, para. 18). The Special Rapporteur's hesitations in that respect were understandable inasmuch as a drainage basin was usually defined by reference to a watershed and any rules which might be introduced with regard to a water basin ran the risk of being invoked as applicable to the land area as well.

7. The Special Rapporteur had accordingly done away with the concept of an "international watercourse system", a decision that was, on the whole, regrettable. The Commission should strive to formulate legal rules which promoted co-operation and development, regardless of the form of words used in the draft. It was undesirable to emphasize unduly the surface water aspect and the relations between lower riparian and upper riparian States. The focus should be on the need for international co-operation and development in the utilization of international watercourses, rather than on the sharing

of surface water between the States concerned. However, he would entirely agree to avoidance of the term "system" if the purpose was to rule out the idea of jurisdiction over land areas.

8. While he fully endorsed the concept of "equitable sharing" in the uses of the waters of an international watercourse, the Commission should none the less endeavour to develop a smoother and easier way of ascertaining what constituted "equitable sharing". In particular, difficulties would inevitably arise if the shares were to be determined purely on the basis of surface water. There again, he would be prepared to accept the elimination of the term "system", provided it represented nothing more than a change of wording, and on the understanding that it would in no sense adversely affect the elements of development and co-operation. His approach to the whole matter was entirely pragmatic.

9. In article 4, concerning watercourse agreements, paragraph 1 could create problems of interpretation. In particular, he wished to reintroduce the idea, present in the earlier draft, of a watercourse agreement intended to adjust the provisions of the framework convention, and not merely to apply them. Accordingly, the previous formulation should be reinserted so that paragraph 1 would read:

"1. Nothing in the present Convention shall prejudice the validity and effect of a special watercourse agreement or special watercourse agreements which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof. The provisions of this article apply whether such special agreement or agreements are concluded prior to or subsequent to the entry into force of the present convention for the watercourse States concerned."

10. Article 6 dealt with the somewhat controversial subject of general principles concerning the sharing of the waters of an international watercourse. He agreed with the redrafting of the article and accepted the Special Rapporteur's reasons for the changes (*ibid.*, paras. 47-48). The new form of language was more appropriate, for it referred to the sharing of the waters by the States concerned instead of describing the international watercourse itself as "a shared natural resource", as had been done in the earlier text. The essential point was that, once each State concerned received its equitable share, it had sovereign powers to use that share, provided no injury was done to others.

11. He concurred, on the whole, with the general principles set forth in articles 6, 7, 8 and 9 and particularly welcomed the new subparagraph (c) in paragraph 1 of article 8, since it would serve to promote co-operation. Those articles constituted chapter II of the draft, which itself related to general principles and should therefore incorporate article 15 *ter* (former article 29), on use preferences.

12. Articles 10 to 14 were acceptable in principle, but dealt with matters which, as far as the details were concerned, were more suited to watercourse agreements. Therefore, the rules set forth in those articles should be

expressed in very brief and clear terms, leaving the details to specific régimes established under watercourse agreements.

13. Somewhat similar comments applied to articles 15 to 19, which, in his view, could be reduced to a single article, since the particulars of the management of international watercourses could be covered in watercourse agreements.

14. Articles 20 to 30, on environmental protection, pollution and allied matters, were acceptable and he was even prepared to accept the new article 28 *bis*, mainly for humanitarian reasons and on the understanding that it did not affect the rules embodied in the two Geneva Protocols of 1977.<sup>4</sup> As for the last article in chapter IV, namely article 30, on protected national or regional sites, the Commission should be proud to adopt it.

15. Chapter V of the draft dealt with the peaceful settlement of disputes, a subject which, like that of final clauses, was not usually dealt with by the Commission but was left to the conference or other body that would adopt the convention. By and large, he had no objection to the provisions contained in chapter V, but their consideration should be deferred until the content of the substantive articles was settled. It was not desirable to divert the attention of Governments to provisions on the settlement of disputes while the substantive articles were still being examined. Nevertheless, the terms of article 31 *bis* were acceptable. As for alternatives A and B for paragraph 1 of article 34, they should both be submitted to States in order to establish their preference. In that connection, it was not appropriate to insist on a five-member conciliation commission. Examples could be cited of three-member conciliation commissions that had achieved excellent results, including one on which the Special Rapporteur himself had served with distinction.

16. Mr. EVENSEN (Special Rapporteur) said that at a later stage in the debate he would respond to the three speakers who had made statements so far. For the moment, he would be content with informal discussions with them.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)\***  
(A/CN.4/374 and Add.1-4,<sup>5</sup> A/CN.4/379 and Add.1,<sup>6</sup> A/CN.4/382,<sup>7</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

<sup>4</sup> See 1831st meeting, footnote 5.

\* Resumed from the 1830th meeting.

<sup>5</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>6</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>7</sup> *Idem*.

**DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>8</sup> (continued)**

ARTICLE 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 31 (Indication of status of the diplomatic bag)

ARTICLE 32 (Content of the diplomatic bag)

ARTICLE 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 34 (Status of the diplomatic bag dispatched by postal services or other means) *and*

ARTICLE 35 (General facilities accorded to the diplomatic bag)<sup>9</sup> (continued)

17. Mr. McCAFFREY said that his approach to draft articles 30 to 32 was guided by the fundamental criterion of functional necessity, in other words the conditions and protection needed to assure freedom of communication through safe and unimpeded transmission of the diplomatic bag while maintaining a proper balance in the draft between the sending State's requirements for confidentiality and the legitimate security and other interests of the receiving or transit State.

18. With regard to draft article 30, the Special Rapporteur had pointed out that granting privileges and immunities to an airline captain or a ship's master would be contrary to the international rules on civil aviation and maritime navigation, which made them responsible for the safety of passengers and cargo. His own feeling was that, if immunity was granted but was strictly limited to what was functionally necessary, no problem would arise. Nevertheless, in view of the paramount authority of a captain or master on board, it would not appear to be necessary to confer any privileges on him.

19. Draft article 30 as proposed by the Special Rapporteur was an elaboration of the basic elements contained in article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations and introduced a reference to the master of a merchant ship and to an authorized member of the crew. With regard to crew members, it seemed that under the basic principles of a respondent superior, or agency law, a master or captain would remain liable even if he entrusted a bag to the care of one of his crew members. In any event, paragraphs 1, 2 and 3 of draft article 30 did not appear to represent any great departure from, or extension of, the provisions of article 27, paragraph 7, of the 1961 Convention, other than that of permitting additional classes of individuals to be entrusted with the diplomatic bag, something which appeared to be justified by practical necessity in certain cases.

<sup>8</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>9</sup> For the texts, see 1830th meeting, para. 1.

20. With regard to paragraph 1 of draft article 30, the words "on his scheduled itinerary" should be deleted. Normally, the destination of the bag would, of course, be a point on the regularly scheduled itinerary of the ship or aircraft: but there was no analogous provision in article 27, paragraph 7, of the 1961 Vienna Convention and the formulation in question might be interpreted as precluding a State from chartering a commercial ship or aircraft for the purpose of delivering a diplomatic bag.

21. Paragraph 2 seemed necessary, as did paragraph 3, which was the heart of the article in that it provided that the captain, master or crew member carrying the bag "shall not be considered to be a diplomatic courier".

22. Paragraph 4, on the other hand, was in fact a departure both from existing practice and from the terms of article 27 of the 1961 Vienna Convention. It shifted the spotlight from the member of the mission of the sending State to the captain, master or crew member. Whereas article 27, paragraph 7, of the 1961 Vienna Convention provided only that "the mission may send one of its members to take possession of the diplomatic bag directly and freely from the captain of the aircraft", the proposed text stated that "the receiving State shall accord to the captain, the master or the authorized member of the crew carrying the diplomatic bag the facilities for free and direct delivery of the diplomatic bag to members of the diplomatic mission of the sending State...". Thus the Vienna Convention spoke of the member of the sending State's mission *taking* the bag from the aircraft, while draft article 30 spoke of the captain, master or crew member *delivering* the bag to the member of the mission. By making the captain, master or crew member an actor, the draft article suggested that he should be accorded some form of special treatment, despite the fact that paragraph 3 clearly stated that he "shall not be considered to be a diplomatic courier".

23. The duty of the receiving State should be confined to assuring the member of the mission, consulate or delegation direct and free access to the aircraft or ship for the purpose of taking possession of the bag. Accordingly, paragraph 4 should be recast to read:

"4. The diplomatic mission, consular post or delegation of the sending State may send one of its members to take possession of the diplomatic bag directly and freely from the captain, the master or the authorized member of the crew."

That formulation had the dual advantage of following very closely the terms of the Vienna Convention and of focusing the main attention where it belonged, namely on allowing free and direct access to the aircraft or ship for the purpose of taking possession of the diplomatic bag.

24. As to draft articles 31 and 32, the first articles in part III of the draft, on the status of the diplomatic bag, he noted the Special Rapporteur's comment that "the abuse of diplomatic bags has been sufficiently proved in practice to warrant a more equitable balancing of the interests of the sending State and the receiving State" (A/CN.4/374 and Add.1-4, para. 246). That unfortunate fact had constantly to be borne in mind when considering

proposals which would supplement or even purport to clarify existing law. The assimilation of all kinds of couriers, and especially all kinds of bags, would not help to put an end to abuse, since such assimilation would result in greater protection of some categories of bags than was allowed or required by existing law.

25. As far as the status of the bag was concerned, the greatest care should be taken not to modify or supplement existing law unless there was a sound legal basis, or demonstrated practical need, for doing so. It was important to remember, as pointed out by the Special Rapporteur, that specific aspects of the status of the diplomatic bag had seldom been dealt with in the domestic law and treaty practice of States and that the case-law in that area was very scarce (*ibid.*, para. 249). Accordingly, there was neither a solid legal basis, nor a crying practical need for departing from existing conventional régimes. At the very least, great caution was advisable in the Commission's approach to the issues dealt with in part III of the draft.

26. In draft article 31, the requirement set forth in paragraph 2 regarding a visible indication of an unaccompanied bag's destination and consignee, as well as of any intermediary points on the route or transfer points, was apparently designed to facilitate expeditious delivery of the bag, although the Special Rapporteur's commentary (*ibid.*, paras. 250-273) shed no light on the matter. He had however, taken particular note of the last three sentences of paragraph 250 of the fourth report, as well as the Special Rapporteur's statement that that regulation had been established by practice. He was uncertain about the relationship between paragraph 1 of draft article 31 and draft article 34, which likewise dealt with the external markings of the bag, and was also unsure about the need to include a separate paragraph on matters which the Special Rapporteur had characterized as being of a "secondary and technical character" (*ibid.*, para. 250) and which did not relate to the bag *qua* diplomatic bag. Presumably they applied to any package dispatched via the mail, by ship or by other means.

27. While he had found nothing in the Special Rapporteur's commentary to support the requirement laid down in paragraph 3 of draft article 31, it was apparent from that commentary (*ibid.*, para. 268 *in fine*) that the question of the size and weight of the bag had been dealt with on the basis of reciprocity and State practice. But it was one thing to say that the size and weight of the bag could be limited on the basis of reciprocity and quite another to require States to enter into agreements in that connection. No special problems had arisen in that area, and paragraph 3 should therefore be deleted or, at the most, should provide that the size and weight of the bag could be limited on the basis of reciprocity. In that regard, the reference in the report (*ibid.*, para. 270) to the practice in the United States of America was, in fact, more relevant to draft article 24, something the Drafting Committee might wish to bear in mind when it considered the latter article.

28. In principle he could accept draft article 32, on the content of the bag, if the second clause of paragraph 2, relating to the obligation to prosecute and punish any

person responsible for misuse of the diplomatic bag, was deleted. The difficulty of verifying the official nature of the contents of the bag was a graphic illustration of the difficulty of striking an equitable balance between the sending State's interest in the confidentiality of its official communications and the receiving State's interest in its internal security—a balance that was slightly different in the case of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. The first clause of paragraph 2 of draft article 32 contained a requirement that was not embodied in article 27 of the 1961 Vienna Convention; in his view, it was a wise addition, since it emphasized the importance of the sending State's responsibility to take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1 of draft article 32, and it was consistent with the sending State's obligation under paragraph 1 of draft article 5.

29. Lastly, paragraph 1 of draft article 32 was a departure from article 27, paragraph 4, of the 1961 Vienna Convention, but could be justified on a number of grounds. First, the use of the word "official", instead of "diplomatic", was presumably in keeping with the uniform approach followed by the Special Rapporteur; secondly, the addition of "correspondence" was probably amply justified by State practice, for the inviolability of such correspondence was expressly guaranteed under paragraph 2 of article 27 of the 1961 Vienna Convention. Again, the addition of the word "exclusively" seemed to be a constructive change in that it underlined the fact that the bag should be used to send only those documents or articles whose nature warranted and required the special protection accorded to the diplomatic bag. Furthermore, since the word "official" had been interpreted in a variety of ways, it seemed a good idea to emphasize that it should be interpreted restrictively.

30. Mr. USHAKOV questioned the need for draft articles 31 and 32. Personally, he was not convinced that they should be retained. They had, in fact, been elaborated before the Commission had provisionally adopted draft article 5 (Duty to respect the laws and regulations of the receiving State and the transit State) and draft article 3 (Use of terms). Paragraph 1 of draft article 31 was merely a repetition, in another form, of paragraph 2 of draft article 3. As for paragraphs 2 and 3—and the latter was concerned more with a package constituting a diplomatic bag not accompanied by diplomatic courier than with the diplomatic bag itself—they related to technical matters falling within the purview of postal regulations and the rules on other methods of dispatch, rather than the legal status of the diplomatic bag or the diplomatic courier. Those provisions could, if need be, find a place in draft article 34, although even then they would be superfluous. Similarly, in draft article 32, with merely a few changes in form paragraph 1 did no more than recast the provisions of paragraph 2 of draft article 3, and paragraph 2 the provisions of paragraph 1 of draft article 5. Such repetitions, in differing forms, were fraught with risks regarding interpretation.

31. Draft article 33 could be merged with draft article 30 and the reference it contained to articles 31 and 32

could be deleted if those articles were themselves deleted. Obviously, the validity of the reference in draft article 33 to articles 35 to 39 would depend on the wording of draft article 30.

32. In his view, draft article 30 should deal exhaustively with cases in which the diplomatic bag was entrusted to the captain of a commercial aircraft or of a merchant ship. First of all, the text of paragraph 1 should be amended so as to bring it into line with the corresponding provisions of the conventions codifying diplomatic law. It could, for example, be worded:

"1. A diplomatic bag may be entrusted to the captain of a commercial aircraft or of a merchant ship scheduled to arrive at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a diplomatic courier. By arrangement with the appropriate authorities of the receiving State, the mission, consular post or delegation may send one of its members to take possession of the bag directly and freely from the captain of the aircraft of the ship."

In that way, almost all questions concerning the receiving State were settled. Nevertheless, the question still remained as to whether, in addition to the captain of the aircraft or ship, the member of the mission, consular post or delegation should also have an official document indicating the number of packages constituting the diplomatic bag. It would perhaps be sufficient to specify that the official document for the captain of the aircraft or ship would also be delivered to the member of the mission, consular post or delegation.

33. Another point was that the provisions of the codification conventions simply covered cases in which a diplomatic bag was entrusted to the captain of a commercial aircraft or of a merchant ship by the sending State—in other words, the case of only one destination. But what happened in those cases, covered by the draft articles submitted by the Special Rapporteur, in which a mission, consular post or delegation of the sending State entrusted to the captain of a commercial aircraft or of a merchant ship a diplomatic bag intended for the sending State or for another mission, consular post or delegation elsewhere? Did the requirement concerning an arrangement with the appropriate authorities of the receiving State really apply in that instance? In his view, it could be set forth in draft article 30 in a separate paragraph, possibly reading:

"By arrangement with the appropriate authorities of the receiving State, the mission, consular post or delegation of the sending State may entrust a diplomatic bag to the captain of a commercial aircraft or of a merchant ship scheduled to arrive at an authorized port of entry."

34. However, the draft would also have to settle that matter in the case of the transit State, where the situation was slightly different. A diplomatic bag accompanied by a diplomatic courier might be passing through the territory of a transit State and dispatched from there by another means of transport. On the other hand, a diplo-

matic bag entrusted to the captain of a commercial aircraft or of a merchant ship was not supposed to leave the aircraft or ship: it was supposed to be dispatched direct to the destination. If a merchant ship whose captain was carrying a diplomatic bag entered the port of a State other than the receiving State, could that State be regarded as a transit State within the meaning of draft article 3? The same question might be asked in the case of a commercial aircraft which landed in the territory of a State other than the receiving State but kept the diplomatic bag on board. The difficulty might be solved by specifying that, in those instances too, the diplomatic bag was inviolable. Yet if the bag did not leave the merchant ship or commercial aircraft, it could not benefit from facilities, nor could the captain, since the captain was not considered to be a diplomatic courier.

35. Lastly, with reference to paragraph 1 of draft article 30, it was dangerous to specify that an authorized member of the crew under the command of the captain of a commercial aircraft or merchant ship could be employed for the custody and transportation of the diplomatic bag. Who would give such authorization? The captain had complete authority on a commercial aircraft or merchant ship. Admittedly, he could designate a crew member to watch over the diplomatic bag during the journey, but the authority to do so lay with him alone. The State as such could entrust the bag only to the captain of the aircraft or ship. Hence the only person to be mentioned in the paragraph should be the captain.

36. He had by no means pointed to all of the problems posed by draft article 30 and therefore urged the Special Rapporteur to review the article, both in substance and in form. On the question of form, the word "master" in the English text, could be replaced by "captain", so as to employ the expression used in the corresponding provisions of the conventions on diplomatic law.

37. Mr. CALERO RODRIGUES said that the title of draft article 30 was somewhat misleading. Paragraphs 1 to 3 did, in fact, deal with the status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew, but paragraph 4 went much further. Also, it was unnecessary to provide for an authorized member of the crew to be entrusted with the bag, even though a limited amount of State practice could be cited in that connection. For the purposes of the draft, responsibility in the matter should remain with the captain or master.

38. Paragraph 4 of draft article 30 was not as clear as article 27 of the 1961 Vienna Convention on Diplomatic Relations or article 35 of the 1963 Vienna Convention on Consular Relations and he therefore considered it essential to state in unambiguous terms that facilities should be accorded to a member of the diplomatic mission or consular post to enable him to have access to the aircraft or ship in order to take delivery of or to deliver the bag. Possibly a provision to that effect could be embodied in draft article 33; alternatively, paragraph 4 of draft article 30 should be

reworded to make the position quite clear. Furthermore, paragraph 4 referred solely to access for members of the diplomatic mission. Presumably consular officers and members of a delegation were covered too, but that point could perhaps be referred to the Drafting Committee.

39. With regard to draft articles 31 and 32, he agreed that, strictly speaking, and according to the definitions, a bag without any external markings was not a diplomatic bag; but for the sake of clarity, and even at the risk of repetition, it would be preferable to retain both articles.

40. Draft article 32 raised a difficult problem, since it was virtually impossible to verify the contents of the bag. Nevertheless, he did not think it possible to use any more precise terminology. So far as the expression "official use" was concerned, it could of course be interpreted in several ways. In that connection, he noted that a diplomatic mission could import or export whatever it wished simply by applying for exemption from customs dues: in such cases, the receiving State at least knew what was entering and leaving its territory, whereas there was no such guarantee in the case of the diplomatic bag. In the circumstances, draft article 32 must specify that on no account should the diplomatic bag contain articles whose export or import was prohibited by the law or controlled by the quarantine regulations of the receiving State. Lastly, the second clause of paragraph 2, relating to prosecution and punishment of any person responsible for misuse of the bag, was unnecessary.

*The meeting rose at 1 p.m.*

## 1833rd MEETING

*Monday, 4 June 1984, at 3 p.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property**  
(A/CN.4/363 and Add.1, <sup>1</sup> A/CN.4/371, <sup>2</sup> A/CN.4/376 and Add.1 and 2, <sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf.Room Doc.1 and Add.1)

[Agenda item 3]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>

ARTICLES 16 TO 18

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on jurisdictional immunities of States and their property (A/CN.4/376 and Add.1 and 2) and draft articles 16, 17 and 18, which read:

*Article 16. Patents, trade marks and other intellectual properties*

1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) the right to use a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright which has been registered, deposited or applied for or is otherwise protected in another State, and in respect of which the State is the owner or applicant; or

(b) the right to use a trade name or business name in that other State.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it which relates to:

(a) an alleged infringement by or attributable to a State, in the territory of that other State, of a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright belonging to a third person and protected in that other State; or

(b) an alleged infringement by or attributable to a State, in the territory of that other State, of the right to use a trade name or business name belonging to a third person and protected in that other State.

*Article 17. Fiscal liabilities and customs duties*

1. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its liability for:

(a) value added tax, any duty of customs or excise or any agricultural levy; or

(b) *ad valorem* stamp-duty or a charge or registration fee for registration or transfer of property in the forum State; or

(c) income tax derived from commercial activities conducted in the forum State; or

(d) rates or taxes on premises occupied by it in the forum State for commercial purposes.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (a) and commentary thereto: *ibid.*, p. 100; para. 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (c) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (d) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (e) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

*Part III* of the draft: (h) art. 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

2. Nothing in paragraph 1 shall be interpreted as an exception to the immunity of a State for its diplomatic and consular premises from seizure, attachment or measures of execution, or to allow foreclosure, sequestration or freezing of such premises or of State property otherwise internationally protected.

*Article 18. Shareholdings and membership of bodies corporate*

1. A State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to the determination of its rights and obligations arising from its shareholdings or membership of a body corporate, an unincorporated body or a partnership between the State and the body or its other members or, as the case may be, between the State and the partnership or the other partners, provided that the body or partnership:

(a) has members other than States; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body or partnership in question.

2. Mr. SUCHARITKUL (Special Rapporteur) said that the draft articles on jurisdictional immunities of States and their property consisted of three parts: part I, "Introduction"; part II, "General principles"; and part III, "Exceptions to State immunity". The status of work on the draft articles in parts I and II was explained in the introductory note of the sixth report (A/CN.4/376 and Add.1 and 2, paras. 2-12). Article 11 (Scope of the present part), the first article in part III of the draft, would be re-examined by the Drafting Committee after it had considered all the exceptions. The intention was to relate the exceptions to the general principles and make it possible to accept various conditions as agreed between the parties or States concerned.

3. One such condition often referred to was reciprocity. But reciprocity was not in itself an essential element for jurisdictional immunity, the basis for which lay in the sovereign equality of States. Reciprocity had, however, a very important part to play in the development of the application of the principles of jurisdictional immunity. Its invariable effect was to restrict the application of those principles in various ways. One way was to apply the principle of reciprocity as a kind of condition subsequent: for instance, if immunity was recognized in one State but another State did not apply it or restricted its application, then, if that other State was brought before the courts of the first State, its immunity could be similarly ignored or restricted. Another way in which the principle could operate was as a condition precedent, when it would play a suspensive role, in that the immunity of foreign State property from execution or attachment would be subject to proof that the law of the State owning the property provided for such immunity. In practice, of course, the executive normally had to intervene before the court would be satisfied. There were also other ways in which the principle of reciprocity was applied. The overall trend, however, was towards restriction of immunity.

4. The Commission had already provisionally adopted article 12 (Commercial contracts) and article 15 (Owner-

ship, possession and use of property). Those were the two main exceptions or specified areas in which the doctrine of State immunity had been considered and delimited with a view to determining precisely when immunity would apply. Two other areas were dealt with in articles 13 and 14, relating respectively to contracts of employment and to personal injuries and damage to property; both those articles were before the Drafting Committee.

5. During the debate in the Sixth Committee of the General Assembly, a number of important points had emerged (see A/CN.4/L.369, sect. C). The first related to the irrelevance of differences in ideology. The Commission had avoided the various distinctions drawn, for instance, between *acta jure imperii* and *acta jure gestionis*, or between public and private activities, preferring to examine the specific areas with a view to precise determination of the extent to which the principle of State immunity would apply and not to base its application upon various distinctions that might depend on differences in ideology. The Commission's approach would therefore provide an acceptable solution regardless of any differences in ideology or in conceptions of the official and non-official, or public and private, functions of States.

6. The second point that had emerged related to subtle differences in practice and procedure. It had become clear that some differences were more apparent than real; for instance, whether a court was or was not competent or whether, even though it did have jurisdiction, it could decide not to exercise it. Under some systems there was no option for a court not to exercise its jurisdiction. There was, however, always the possibility of intervention by the executive branches of Government, and recent practice showed a trend in that direction.

7. The third point was that, as the topic became more widely understood, criticism appeared to be abating. There was a growing acceptance of the need to regulate State immunity internationally, rather than allow each country to develop its own case-law irrespective of the case-law of other countries.

8. The previous year had seen some progress in terms of legal development. There had, for instance, been a sharp increase in restrictive practice and there was clear evidence of a strong tendency in favour of further restriction of State immunity in various areas. The most alarming feature was the allowance of attachment of State property and execution in cases that affected the means by which diplomatic intercourse or interchange were conducted. At the same time, there had been a reaction by the courts themselves against that sharp increase in restrictive practice. Courts in the United States of America appeared to have imposed self-restraint by holding that they had no jurisdiction on the grounds, for example, that the injury in question had occurred outside the territory of the forum State or that the commercial transaction in question had had no adverse effect in the United States.

9. The trend towards placing a liberal interpretation on legislation restricting immunity was quite marked. Concern had, however, been expressed in various quarters,

including the Asian-African Legal Consultative Committee, that in practice it was the developing countries which were most often the subject of proceedings and that the costs of litigation were relatively high. In one case quoted in the report of the November 1983 meeting of the legal advisers to the Consultative Committee, the Government of a developing country had had to pay \$US 200,000 in legal costs simply to establish its immunity at first instance, and those costs would have risen to \$600,000 at the appeal stage. That concern had been corroborated by a very recent judgment delivered by Lord Diplock in the United Kingdom House of Lords, in which he had deplored the fact that the costs incurred had exceeded the amount of the judgment debt even before the appeal had reached the House.<sup>5</sup> Because of such cases it had been suggested that, when questions of the immunity of a foreign State and especially of a developing country were at issue, legal assistance could perhaps be furnished, for example, in the United States, the United Kingdom and other developed countries, without the need to involve the foreign State concerned.

10. The law itself had developed in a more balanced way, although as far as the attachment or freezing of the bank accounts of embassies were concerned, there had been some conflicting decisions. The matter would, of course, be dealt with in part IV of the draft, but he raised it at this point to highlight the urgency of the whole topic. Some members of the Asian-African Legal Consultative Committee had even advocated enacting their own national legislation, but it had eventually been decided that the Commission should be allowed time to produce a set of draft articles aimed at uniform regulation of what was a highly complex topic.

11. He had also noted in his sixth report (A/CN.4/376 and Add.1 and 2, para. 47) that there was a continuing absence of judicial practice upholding absolute immunity—which had been recognized in *Berizzi Brothers Co. v. SS "Pesaro"* (1926) and *The "Porto Alexandre"* case (1920) but had since been abandoned.

12. As noted in the report (*ibid.*, para. 51), draft article 16 grouped together three categories of intellectual and industrial property. Industrial and intellectual property rights within the meaning of article 16 were thus rights protected by States, nationally as well as internationally. In that connection, he drew attention to the two different aspects of the protection accorded to literary, musical and other artistic works, which he mentioned in his report (*ibid.*, para. 52 *in fine*).

13. The important feature of article 16 was the basis for jurisdiction and application of the law, namely the protection afforded by the State or by an international convention. A State could be concerned with the article in two ways. First, as the holder of rights protected under the article, it could claim protection under the copyrights laws of another State; secondly, it could be involved in the infringement of such rights in a foreign State. The important element with regard to the exercise of jurisdiction was the existence of an indissociable territorial

<sup>5</sup> *Alcom Ltd. v. Republic of Colombia* (1984) (*The All England Law Reports*, 1984, vol. 2, p. 6, at p. 14).

connection with the State of the forum. In other words, the availability of protection within the territory of the State of the forum constituted the basis of jurisdiction.

14. There was a close analogy between the exceptions provided for under article 16 and those provided for under article 12 for commercial contracts and under article 15 for the use of property. So far as article 12 was concerned, the infringement did not have to result from commercial activities conducted by a State; it could take the form of reproduction or performance for public and non-commercial purposes. But there was some analogy with trade in that, whatever the motivation for the infringement by the State, the marketability of the rights for which the parties were seeking protection would be adversely affected. In that respect the matter might be covered by the wider concept of trading activities, rather than commercial contracts of the State. So far as the connection with article 15 was concerned, industrial and intellectual properties could be viewed as incorporeal hereditaments and, once again, the *lex situs* was that of the place where the protection was afforded. Accordingly, the *forum conveniens* would be the forum of the State in which the system of registration and protection was applicable and in which the rules for protection were recognized.

15. An alternative basis for the exercise of jurisdiction was consent. A State could become involved either as a claimant of a right, in which case it consented to the exercise of jurisdiction, or, if a right was being disputed, as a subject of proceedings, in which case it also had to assert its own right. Accordingly, there was a possibility of implied consent on the part of a State whenever a question of infringement of a right arose, whether for commercial or non-commercial purposes.

16. So far as the practice of States was concerned, there were two important cases, the first of which was *Dralle v. Republic of Czechoslovakia* (1950) (*ibid.*, para. 65), in which the Czechoslovak Government could be said to have been as much a claimant of foreign trade mark rights as the party seeking relief from the court and in which, therefore, an exception had been recognized. Another, less well-known case in which compensation for infringement of copyright had been sought had involved the Spanish Government Tourist Bureau (*ibid.*, para. 67). In that case, the activities of the Spanish Tourist Bureau had been held to be of a private-law nature and hence not entitled to immunity. That exception must be distinguished from the commercial contract exception.

17. With regard to governmental practice, he had cited section 7 of the United Kingdom *State Immunity Act 1978* (*ibid.*, para. 70). Although that provision had no counterpart in the United States *Foreign Sovereign Immunities Act of 1976*, it had been reproduced *inter alia* in Singapore's *State Immunity Act, 1979* and in Pakistan's *State Immunity Ordinance, 1981* (*ibid.*, para. 71). He had also cited article 8 of the 1972 European Convention on State Immunity (*ibid.*, para. 73). It appeared from those provisions that there was a trend towards recognizing an exception to jurisdictional immunity where protection for the use of patents, trade marks and intellectual property was claimed. It was on that basis that he had for-

mulated draft article 16 for consideration by the Commission.

18. Introducing draft article 17, he pointed out that, as noted in his report (*ibid.*, para. 81), the liability of one State for taxation or customs duties levied by another arose only in exceptional cases. But as States extended their activities beyond the confines of their own frontiers, such cases were becoming more numerous. The basis for tax collection was, of course, to be found in the territorial connection with the source of income or the entry of goods into the territory of another State. The territorial State had the power to tax, but if it exercised that power beyond its territorial limits, a dispute could arise. The power to tax could be based on nationality, origin of revenue or residence.

19. He recognized that an express provision on the subject would be of marginal utility, although the exception was quite clear. Fiscal liability and customs duties, once recognized, were payable by all, including foreign States, although collection might prove difficult. He had examined judicial practice and, as he had noted (*ibid.*, paras. 90-92), there had been some cases, especially in the United States, of foreclosure proceedings for tax collection. In the event, the court had not allowed foreclosure procedures, but the tax assessment had not been reversed. Liability had been established and no immunities had been recognized. In international law, however, it was recognized that tax should not be assessed on foreign-owned property used for public, non-commercial purposes. In one case, *Republic of Argentina v. City of New York*, the Court of Appeals of New York (1969) had held that foreign State property devoted to public governmental uses was immune under customary international law from local real estate taxes, but that Argentina's claim for a refund was not timely (*ibid.*, para. 92).

20. Thus immunity was recognized up to a point, but the Commission would have to be careful about its exact extent. Attachment of foreign embassies should not be allowed, but exemption from taxes in the form of services and rates would not be in order. Governmental practice was in a state of flux, some Governments being more willing than others to allow exemptions or reductions of certain duties. For instance, in some cases the fees for registration of transfer of title deeds could be waived either wholly or, on the basis of reciprocity, in part.

21. With regard to national legislation, he had cited section 11 of the United Kingdom *State Immunity Act 1978* (*ibid.*, para. 99), which denied immunity in the case of value added tax and certain other duties. In the United States, the Department of the Treasury's "Notice of proposed rulemaking" provided guidance for taxing foreign sovereigns on their income from commercial activities within the United States. Broadly speaking, income of foreign Governments from investments in the United States in stocks, bonds or other domestic securities, or from interest on bank deposits, was exempt from taxation under section 892 of the *Internal Revenue Code*, whereas amounts deriving from commercial activities were taxable under sections 881 or 882 of that Code (*ibid.*, para. 100). Hence a balance had to be struck in

determining the extent to which States should be exempt from the taxes and duties of another State.

22. He had also examined international and regional conventions, as well as international opinion, but had not reached any final decision. There was a twilight zone where fiscal liabilities and customs duties were concerned, and he felt some doubt about the need for a specific provision on the matter. In case one were deemed necessary in the interests of the progressive development of international law, however, he had proposed draft article 17.

23. If a State bought or held shares in a company constituted and registered under the company law of another State, or acquired equities in or became a member of an association or partnership formed, organized or chartered under the law of another State, it could be said to have entered into a legal relationship in that State. Such action by a State indicated its willingness to recognize the validity of the legal relationship it had entered into under the law of the other State. It was therefore bound to respect the local laws of the State of incorporation or registration and the purpose of draft article 18 was to define the exception to State immunity in that regard.

24. Although doubtful cases could arise, for example, through succession, whether testate or intestate, or some other form of devolution, in the final analysis it was the law of the State of incorporation that would govern the title or rights of the successor as a shareholder or member of a body corporate. Therefore the only *forum conveniens* would appear to be the State in which the company had been formed or the body corporate constituted.

25. Judicial practice was scanty. Where governmental practice was concerned, some evidence was provided by section 8 of the United Kingdom *State Immunity Act 1978*, which provided for the exceptions in question. A similar provision was to be found in the legislation of other countries, such as Singapore and Pakistan. Canadian and United States law, however, had included the matter under the wider exception of commercial activities, as had the 1972 European Convention on State Immunity and other conventions. However, as draft article 12 referred solely to commercial contracts, there might be grounds for including a draft article based on the applicability of the law of the State of the forum, which was the place of incorporation. It was on that basis that he proposed draft article 18 for the Commission's consideration.

26. Mr. USHAKOV said that the three draft articles under consideration dealt with matters involving very specialized terminology which raised problems of meaning and translation. The Special Rapporteur should therefore make sure that the French translation of certain expressions borrowed from the common-law systems was correct.

27. Draft article 16, paragraph 1, was intended to protect the right of every person and every State to use a patent or other intellectual property. That provision covered the rather rare case in which the plaintiff was a State holding the right whose use was to be protected. When that State applied to the court of another State for

protection and the laws of that other State permitted such action, there was no question of immunity from jurisdiction. For the plaintiff State which applied to the court of another State thereby consented to the exercise of jurisdiction, as was clear from the general principles established at the beginning of the draft articles.

28. He wondered whether the notion of copyright could really be applied to a State and whether the terms "owner" and "applicant" has been correctly translated into French by the words *titulaire* and *déposant*. Under the terms of article 16, paragraph 2 (a), a court of another State could not be prevented from exercising jurisdiction in any proceeding brought before it which related to "an alleged infringement by or attributable to a State, in the territory of that other State, of a patent ...". For an internationally wrongful act to be attributable to a State, it must take the form of an act or omission by one of its organs. But how could infringement of a patent be attributed to a State if that State had not made use of it? Should it be understood that infringement of a patent by a private person could be attributed to a State? It would also be advisable to define the moment at which infringement of a patent began. Was it only from the time of entry into force of a copyright convention to which a State was a party that that State could be considered as having infringed a patent covered by the convention?

29. In view of all those questions, he urged the need to make the provisions of article 16 more specific, for fear that they might raise more difficulties than they resolved. It would be wrong to think that the problems raised by article 16 came under private international law. Indeed, they often involved the application or interpretation of international instruments and led to disputes between States which should be settled by the peaceful means recognized by international law.

30. Draft article 17, on fiscal liabilities and customs duties, did not seem really necessary in the context of jurisdictional immunities. The case in point did not depend on the immunities of States, but rather on privileges recognized in bilateral, multilateral or international agreements or by international custom. In the absence of such privileges, every person and every State had a duty to pay taxes. Any dispute between States on the question of whether one of them was required to pay taxes or customs duties to the other was a dispute under international law relating to interpretation of the provisions of an international agreement or of international custom—in other words, a dispute concerning the existence of the privilege of not paying those taxes or customs duties. Such disputes were not within the competence of national courts; they should be resolved by the means of pacific settlement of disputes provided for in Article 33 of the Charter of the United Nations.

31. Moreover, the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2) gave the impression that everything depended on the existence of a privilege established by an international agreement or by international custom. When it had been established that the State in question was required to pay taxes or customs duties and that it had not done so, there was another dispute under international law, which could not be settled by national

courts either, but must be settled by the peaceful means recognized by existing international law. It was because the disputes arising were in all cases international disputes that he doubted the need for article 17.

32. The difficulties raised by draft article 18 were due mainly to the fact that that provision relied on notions peculiar to the common-law systems, which were often difficult for a continental civil jurist to grasp. Moreover, article 18 dealt with problems which did not seem to lend themselves to the statement of a general rule. In principle, when a State participated in an enterprise having the nationality of another State, its participation was governed by the law of that other State, and it appeared impossible to enunciate a general rule applying to an infinity of particular cases. In those circumstances, it would be better to leave the matter to practice, which, according to the Special Rapporteur (*ibid.*, paras. 112-117), was so scanty that no single rule could be derived from it at present. As to the instruments relating to jurisdictional immunities, they generally ignored the problems covered by article 18. To try to cover all the imaginable cases in a single article at the present time would be carrying the progressive development of international law to excess. In view of the complications which draft article 18 would be sure to involve, he seriously doubted its value.

33. Mr. REUTER, referring to Mr. Ushakov's comments, agreed that the French translation of some of the terms should be revised. In draft article 16, paragraph 1, the word "owner" was correctly rendered by *titulaire*; the term "applicant" referred to the provisional status of a person who had carried out one of the formalities for the protection of industrial property, but who had not yet consolidated his rights. In all systems of industrial protection, the acquisition of rights went through several stages. The "owner" was in the last stage, whereas the "applicant" was in a preliminary stage at which he did not enjoy full rights. For the text to be understandable in all languages, it would probably be necessary to refer to the fact that the State was the owner of definitive rights or provisional rights. In draft article 16, paragraph 2, the words "alleged infringement by... a State" had been rendered in French as *non-respect présumé par un Etat*. The term *allégué* would be preferable to *présumé*, though of course it could not be used with the term *non-respect*, since it would appear that the infringement had been alleged by a State.

34. Unlike Mr. Ushakov, he thought that the three draft articles under consideration were very useful. Apart from minor translation problems, article 16 should not raise any great difficulties of principle, for as soon as a State engaged in certain activities, whether commercial or not, which involved the protection of intellectual property, it was required to comply with the rules. On that score, paragraph 2 was as well justified as paragraph 1. If a State was protected as to its rights in intellectual property, it was protected against the acts of private persons, but it could also be protected against the acts of another State. For instance, it might happen that, for a great sporting event, a State chose an emblem for which it had intellectual property rights in accordance

with an international convention, that another State subsequently made use of that emblem and that a dispute arose in a third State.

35. It did not seem possible to assert, as Mr. Ushakov had done, that the rights referred to in article 16 were rights established by conventions and that any question of interpretation of those conventions came under public international law and was not within the competence of national courts. His own view was that conventions relating to copyright were first interpreted in national courts. If a State party to the convention disagreed with the interpretation, it had a right of action under public international law, generally through the mechanism of an international organization. In the first instance, therefore, the State was subject to national law, since it had taken its position on the ground of a property right. True, intellectual property was not like other forms of property, but it had real characteristics: the rights in it were available against others and the protection of rights *in rem* must certainly be entrusted to national courts.

36. As to draft article 17, Mr. Ushakov had been right in saying that it must be presumed that a State was liable to pay taxes. If it was not liable, by virtue of an international exemption, the article would not be applicable. But once a State had acknowledged that it was liable to pay tax, there could be a dispute about the amount of the tax. It must then come to an arrangement with the tax authorities. If it claimed that, by virtue of an international right or convention, it was not subject to the tax because it enjoyed exemption, an international dispute might arise. In that case, however, the foreign State would not be contesting the amount of the tax, but the principle.

37. It did not appear to be the practice of foreign ministries in such cases to instruct the tax authorities to take proceedings in court. Those details could be included in the commentary to the article. After all, nothing justified the deletion of an article providing that a State which had placed itself in the position of a tax payer according to public international law must discuss the question of its taxation with the tax authorities, with the safeguard of a judgment by the courts.

38. Referring to draft article 18, the Special Rapporteur had said that there was little doctrine on the financial participation of States in companies and hardly any practice. In fact, practice was abundant, but it was not known. International jurisprudence was also scarce; at the most, mention might be made of the *Oscar Chinn* case<sup>6</sup> and the *Anglo-Iranian Oil Company* case,<sup>7</sup> tried respectively by the PCIJ and the ICJ.

39. As to the presence in Switzerland of numerous private companies wholly owned by foreign States, that came under public international law and raised the question to what extent there were rules of international law or internal law which denied a foreign State the capacity to hold equity in a private company. That was a question which each country regulated as it saw fit. The

<sup>6</sup> Judgment of 12 December 1934, *P.C.I.J.*, Series A/B, No. 63, p. 65.

<sup>7</sup> Judgment of 22 July 1952, *I.C.J. Reports 1952*, p. 93.

Special Rapporteur had prudently excluded from article 18 the case of a private company whose only shareholder was a foreign State, which would raise the problem of capacity. He had also excluded the case of a private company which had only foreign States as shareholders, which would make it an international enterprise, if not an international organization such as the World Bank group. The Special Rapporteur required that at least two members should not be States. In accepting that situation, the State placed itself under private law and accepted jurisdiction. Perhaps it should be specified that the members which were not States must be private persons; it would then be understood that the Commission considered that the State had had recourse to a form of private law and that it accepted jurisdiction. It could not be said that that was a form of commercial law, for the question depended on internal law. Under the law of some countries, the adoption of a particular form of company, such as the limited liability company, meant that all its activities, whatever the company's object, were commercial activities. But there were cases in which the activities were not commercial, and in the absence of a special text covering them, the Commission would be left with the provision on commercial activities and those cases would not be covered. However, that situation did not seem to present any great danger.

40. Lastly, he believed that a State could be the owner of copyrights. The same applied to international organizations, though, for reasons of caution, few of them were recognized as having that faculty. Those organizations should be protected not only against other organizations or private persons, but also against States.

*The meeting rose at 6 p.m.*

## 1834th MEETING

*Tuesday, 5 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property**  
(*continued*) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem.*

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

## DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>4</sup> (*continued*)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) *and*

ARTICLE 18 (Shareholdings and membership of bodies corporate)<sup>5</sup> (*continued*)

1. Mr. OGISO said that draft articles 16 to 18 were mainly a follow-up to the contents of articles 12 and 15, which the Commission had provisionally adopted. Accordingly, he had no major difficulty with regard to the substance of those articles and his comments would be confined largely to drafting matters.

2. Draft article 16 was unduly detailed and his own preference would be for a text stating as succinctly as possible the general principle of the limitation of State immunity with regard to patents, trade marks and the like. In paragraph 1 (*a*), it seemed hardly necessary to refer to "a patent, industrial design, trade mark, service mark, plant breeders' right or any other similar right or copyright", a form of language taken from the United Kingdom's *State Immunity Act 1978*, where it was of course quite appropriate. A detailed list of that kind, however, was not suitable for an international convention, since some Governments would have to enact national legislation to implement the principles of the convention in their domestic law. Hence the best course was to make the provisions as general as possible, in order to allow the necessary flexibility for implementation in the different national legal systems. The list in paragraph 1 (*a*) could be replaced with advantage by a formula such as "a patent, trade mark or other intellectual property" and paragraph 1 (*b*) could then be deleted altogether, for the expression "other intellectual property" would cover trade names and business names.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (*a*) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (*a*) and commentary thereto: *ibid.*, p. 100; para. 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*c*) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (*d*) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (*e*) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

*Part III* of the draft: (*h*) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95; footnote 220; revised text: *ibid.*, p. 99, footnote 237; (*i*) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (*k*) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1833rd meeting, para. 1.

3. Again, the difference between subparagraphs (a) and (b) of paragraph 2 appeared to be that the latter covered trade names and business names. If paragraph 1 (b) was deleted, paragraph 2 (b) could also be eliminated. Indeed, it should be possible to merge paragraphs 1 and 2 into a single formulation along the following lines:

“A State cannot claim immunity from the jurisdiction of another State if the proceedings relate to:

“(a) A patent, trade mark or another intellectual property which, in the State of the forum, has been applied for, registered or deposited or is otherwise protected in another State, and in respect of which the State is the owner or applicant; or

“(b) An alleged infringement by a State in the territory of that other State of a patent, trade mark or other intellectual property belonging to a third person and protected in that other State.”

4. It would be noted that he was also suggesting the formula “an alleged infringement by a State”, so as to remove the controversial expression “attributable to”. He was not making a firm proposal, but merely putting forward a possible rewording for draft article 16 that the Drafting Committee might take into consideration.

5. As to draft article 17, the words “any agricultural levy” in paragraph 1 (a) should be replaced by some more general formula. In the European Economic Community, “agricultural levy” meant a tax levied on agricultural imports from outside the Community area and, in preparing draft article 17, the Special Rapporteur had drawn upon the language of the United Kingdom *State Immunity Act 1978*, in which the reference to “agricultural levy” was entirely relevant since the United Kingdom was a member of the Community. In the present context, a more general term was obviously desirable.

6. With regard to draft article 18, he had a comment of substance to make arising from the remarks by Mr. Reuter (1833rd meeting) concerning certain corporations, notably of a financial nature, established by international agreement. He had in mind an organization such as INTELSAT, which had been established by an international agreement and whose members included not only States, but also the telecommunications authorities of member countries. In his opinion, organizations of that kind should remain outside the scope of paragraph 1 (a) and he would be grateful to hear the views of the Special Rapporteur and of other members on that point.

7. He had considerable misgivings about paragraph 2 of article 18. The first clause of the paragraph would have the effect of setting aside the provisions of paragraph 1 whenever such a course was so agreed by the parties in dispute. However, the State of the forum might well not be a party to the dispute. It therefore seemed essential to make it clear that, in order to set aside the provisions of paragraph 1, the consent of the State of the forum had to be obtained. If such consent was not forthcoming, then paragraph 1 should apply. The position was the same with regard to the remaining part of paragraph 2, under which the application of paragraph 1

could be set aside by means of a clause contained in the constituent instrument of the body or partnership in question. There again, the State of the forum might not have had an opportunity to give even its tacit consent to the constituent instrument. Indeed, in the case of a private partnership, the State of the forum would play no part whatsoever in the formulation of the constituent instrument. For those reasons, he would welcome clarification from the Special Rapporteur on both of the provisions contained in paragraph 2 of article 18.

8. Chief AKINJIDE said he experienced no difficulty with regard to draft articles 17 and 18. The argument advanced by Mr. Ushakov (1833rd meeting) appeared to be based mainly on differences in the economic systems of States. Personally, he found Mr. Reuter’s remarks (*ibid.*) entirely persuasive and he also agreed with the comments made by the Special Rapporteur (*ibid.*) in his oral presentation. Subject, therefore, to any drafting improvements such as those just suggested by Mr. Ogiso, the Commission could adopt draft articles 17 and 18.

9. On the other hand, he had very serious misgivings about draft article 16, which would have grave economic implications for developing countries. The draft must attract not only the General Assembly’s approval, possibly by consensus, but also, and much more important, ratification by Member States. As it stood, article 16 would draw an economic iron curtain between the developed countries and the developing countries and would sentence the latter to indefinite economic imprisonment.

10. In his sixth report (A/CN.4/376 and Add.1 and 2, para. 51), the Special Rapporteur had divided intellectual and industrial property into three categories: first, patents, including industrial designs and inventions; secondly, trade marks and the like; and thirdly, other industrial or intellectual property such as copyright, translation rights, and so on. In his oral presentation, the Special Rapporteur had also added computer software and computer discs to the third category. Those three categories of intellectual property constituted the life-blood of the economic well-being of the world, especially that of the developing countries. Yet, as the Special Rapporteur had pointed out:

... The system for deposit, examination, investigation and eventual registration is administered in each State in accordance with its prevailing legislation and customs. It is not unusual that, in industrially or economically developed countries, the protection provided is more effective and infringement is discouraged or severely punished, while in less developed or developing countries, such a system may either be non-existent or be at a very embryonic stage, since expert knowledge is required before registration of any invention, patent or industrial design. ... (*Ibid.*, para. 52.)

11. The picture thus drawn by the Special Rapporteur showed that, in connection with intellectual property, the developing countries and the developed countries were engaged in an unequal contest, in which the developing countries could never win and in which the developed countries were always bound to win. It was no exaggeration to compare that contest to a race between a camel and a jet aircraft. He failed to see how it was possible to frame treaty provisions on the subject that would be common to the two groups of countries. The developing

countries had no prospect whatsoever of catching up with the developed countries in the foreseeable future.

12. Article 16, if accepted in its present form, would not only provide total protection for existing inventions, but also inhibit any possible advancement by developing countries. Inevitably, the truth must be faced that industrial espionage was the rule, even among the developed countries themselves. Cases of such espionage attracted attention only when they failed; successful ones remained unknown. When he had been a small boy, a certain country had produced goods generally regarded as cheap and inferior, whereas today its products were synonymous with high quality. That extraordinary result had been achieved by breaking the industrial secrets of others. If, when he had been a child, a provision along the lines of article 16 had been international law, it would have been quite impossible for that country to become the great industrial power it was today. He did not believe for one moment that the developed countries would willingly pass on their industrial secrets to the developing countries. A provision such as article 16 had no place in the draft under consideration, for the developing countries had no intention of resigning themselves to the role of perpetual suppliers of raw materials and consumers of the industrial products of others.

13. In its report, *North-South: A Programme for Survival*, the Brandt Commission stated:

The crisis through which international relations and the world economy are now passing presents great dangers, and they appear to be growing more serious. We believe that the gap which separates rich and poor countries—a gap so wide that at the extremes people seem to live in different worlds—has not been sufficiently recognized as a major factor in this crisis. It is a great contradiction of our age that these disparities exist—and are in some respects widening—just when human society is beginning to have a clearer perception of how it is interrelated and of how North and South depend on each other in a single world economy.<sup>6</sup>

It also went on to affirm:

The transnational corporations, or as they are also called, multinational corporations, are closely involved in many of the areas which are dealt with in this Report: with minerals, commodities, industrialization, food and energy. Many of them have played a large role in bringing technology and capital to developing countries. Oil and food companies have been operating globally since the early years of the century. But in the post-war years the scale and sophistication of their operations have greatly increased, and they have become politically much more visible and have frequently been the centre of controversy. They are now major actors in the world's political economy. They control between a quarter and a third of all world production and are particularly active in processing and marketing. The total sales of their foreign affiliates in 1976 were estimated at \$830 billion, which is about the same as the then gross national product of all developing countries excluding oil-exporting developing countries.<sup>7</sup>

14. The expression "third world" was commonly used to describe the developing countries, but he would be tempted to speak of three categories: (a) a sort of second world, comprising certain countries of Asia and Latin America which had achieved some measure of industrial

progress; (b) the main body of third world countries, whose plight was far worse; (c) the "fourth world" of the least developed countries.

15. In the light of those considerations, his own solution would be to delete article 16, which dealt with matters that should be left to national legislation and to bilateral agreements. It was significant that section 7 of the United Kingdom *State Immunity Act 1978*, quoted by the Special Rapporteur (*ibid.*, para. 70), used the words "in the United Kingdom" in four places. Just like the United Kingdom, many developing countries wanted to be free to adopt national legislative provisions of their own on the subject.

16. He could cite a few examples, taken from his own experience when he had been Attorney-General of his country, to illustrate how the developing countries were placed at a disadvantage with regard to intellectual property. In 1977, a decision unfavourable to his country had been rendered in the United Kingdom by Lord Denning,<sup>8</sup> who had said in effect what had later been embodied in section 7 of the United Kingdom *State Immunity Act 1978*. His own difficult task had been to decide whether to appeal to the House of Lords, and he had been obliged to abandon the idea, partly because of a feeling that the House of Lords was unlikely to overrule Lord Denning and partly because of the enormous cost of litigation in the House of Lords. Again, in a case<sup>9</sup> heard in the United States courts and involving the application of the *Foreign Sovereign Immunities Act of 1976*, he had been compelled to advise against an appeal to the Supreme Court because of the staggering legal costs which such recourse would have involved.

17. A glance at the judicial practice in the matter showed that most cases relating to intellectual property were between a developing country and a developed country and that they were fought at enormous cost. He was therefore strongly opposed to draft article 16 in all its ramifications. It was acceptable only for countries that were on equal terms and could, of course, be applied between developed countries; but it was totally unacceptable from the point of view of developing countries.

18. Sir Ian SINCLAIR said he agreed with the Special Rapporteur (A/CN.4/376 and Add.1 and 2, paras. 20-22) as to the irrelevance of differences in ideology, especially differences stemming from a particular view of the capacities and functions of the State. The notion of the "dual personality" of the State (in other words, the State acting as a sovereign entity and the State acting in the same manner as a private person) had occasionally been put forward as a justification for the restrictive theory of immunity. That had been particularly true in the case of Italy, where as early as 1886 the Court of Cassation of Florence had drawn a distinction between the Govern-

<sup>8</sup> *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* (*The All England Law Reports*, 1977, vol. 1, p. 881).

<sup>9</sup> *Texas Trading and Milling Corp. v. Federal Republic of Nigeria and Central Bank of Nigeria* (1981) (United States of America, *Federal Reporter*, 2nd Series, vol. 647 (1981), p. 300; see also United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 527).

<sup>6</sup> *North-South: A Programme for Survival. Report of the Independent Commission on International Development Issues* (under the chairmanship of Willy Brandt) (London, Pan Books, 1980), p. 30.

<sup>7</sup> *Ibid.*, p. 187.

ment as a body politic (*Governo ente politico*) and as a civil entity (*Governo ente civile*).<sup>10</sup> In France, however, the Court of Appeal of Paris, in a leading case in 1912, had rejected the distinction between *État puissance publique* and *État personne privée*.<sup>11</sup>

19. Doctrinally, the theory that the State could have dual personality was rather suspect. What was significant in the context of State immunity was not the capacity in which the State might have acted but the nature of the act in question. In any event, he agreed wholeheartedly with the Special Rapporteur that it would serve no useful purpose to endeavour to resolve those differences and it was noteworthy that the draft articles did not depend upon acceptance of the theory of the “dual personality” of the State.

20. The distinction between *acta jure gestionis* and *acta jure imperii* lay behind much of the extensive judicial practice of those States which favoured the theory of restrictive immunity. It had some utility, since it helped to confirm that, even under the restrictive theory, immunity still had to be accorded in respect of acts performed by a foreign State in the exercise of its sovereign activity. But the distinction was less helpful when the precise content of what constituted *acta jure gestionis* had to be determined. There were inconsistencies in the judicial practice of different countries, particularly in relation to proceedings arising out of contracts for the purchase of military supplies or out of loan agreements.

21. The distinction would certainly have to be borne in mind as work on the topic proceeded, but perhaps more as a general guideline than as a clearly defined formula for determining when immunity could properly be invoked and when it could not. He therefore agreed with the Special Rapporteur's disclaimer that the distinction did not apply to the draft articles already provisionally adopted by the Commission. Nevertheless, attention would still have to be paid to the difference between *acta jure gestionis* and *acta jure imperii* as a rough guide.

22. With regard to the “subtle differences in practice and procedure” to which the Special Rapporteur rightly drew attention (*ibid.*, paras. 23-26), he had some mild reservations about the analysis in paragraph 23 of the report, the penultimate sentence of which appeared to confuse jurisdictional immunity with a whole series of other grounds on which a court might refrain from exercising jurisdiction. For example, if the subject-matter of the particular dispute did not fall within the jurisdictional rules applied by the court of the forum State, the question of jurisdictional immunity simply did not arise, since the writ would, at least in the common-law system, be set aside for lack of subject-matter jurisdiction. Equally, lack of capacity to sue or be sued on the part of either the plaintiff or the defendant would be an independent ground for setting aside a writ.

23. Similarly, a clear distinction had to be drawn between jurisdictional immunity and the “act of State”

doctrine. The rule of immunity in respect of *acta jure imperii* precluded the courts of the forum State from assuming jurisdiction in a case where a foreign State was directly or indirectly impleaded and where the validity of acts which it had performed in the exercise of its foreign sovereign authority might be at issue. In other words, it operated as a bar *in limine* to the continuation of the proceedings. The “act of State” doctrine, on the other hand, as applied by courts in the United States of America, was not in any sense a bar to the assumption of jurisdiction and could be pleaded even in cases where the foreign State was neither directly nor indirectly impleaded. It operated as a defence to proceedings in which the validity of foreign executive or legislative acts might be at issue.

24. An analogous but distinct example was provided by the notion of judicial self-restraint developed in the leading English case of *Buttes Gas and Oil Co. v. Hammer* (1982),<sup>12</sup> in which there had been uncertainty as to the jurisdiction of the English courts to rule upon an alleged libel by the defendant. The difficulty was that, in order to determine the issues raised in the litigation, the courts would have had to rule on the validity of certain governmental acts asserting sovereignty over areas of the seabed in the Arabian Gulf. The House of Lords had refused to countenance such a pronouncement, relying on the concept of judicial self-restraint to avoid having to rule on the underlying issue.

25. It was essential for the Commission, in its work on the present topic, to confine itself strictly to the jurisdictional immunities of States and their property. Any attempt to cover a wider field would inevitably give rise to great difficulties. There were all kinds of reasons why a court, properly seized of a dispute over which it was entitled to exercise jurisdiction, might refrain from exercising it. Apart from the cases he had already mentioned, the court, acting in accordance with its own rules of private international law, or pursuant to an international treaty by which the forum State was bound, might apply the principle of *forum non conveniens*. It might equally refrain from exercising jurisdiction because proceedings between the same parties were pending before the courts of another State. All those considerations, which the Special Rapporteur referred to in his report (*ibid.*, para. 33), had little or nothing to do with jurisdictional immunity in the strict sense. Admittedly, it was true that, in the courts of certain countries, there had been some occasional confusion between *incompétence* and *immunité de juridiction*, but the fact remained that jurisdictional immunity denoted immunity from a jurisdiction which would otherwise be exercisable by a court. If the court did not initially possess jurisdiction under its own rules to determine the merits of the dispute, the question of immunity did not arise. He accordingly agreed with the Special Rapporteur's conclusion on that aspect of the matter.

26. With regard to the notion of reciprocity, although it was operative in many spheres of international law, it

<sup>10</sup> *Guttieres v. Elmilik (Il Foro Italiano (Rome), vol. XI, part 1 (1886), p. 913).*

<sup>11</sup> *Gamen-Humbert v. État russe (Daloz, Recueil périodique et critique de jurisprudence, 1913 (Paris), part 2, p. 201).*

<sup>12</sup> United Kingdom, *The Law Reports, House of Lords, 1982*, p. 888.

had to be borne in mind that the interests involved were not simply those of the States concerned, but also of private litigants. Since jurisdictional immunity barred the remedy of any potential private litigant, the fact that a foreign State against which he wished to proceed would grant immunity to other States in a similar case did not seem relevant. That did not mean it would be contrary to international law for a State to apply a condition of reciprocity, but the application of such a principle seemed largely to ignore the interests of potential private litigants.

27. The Special Rapporteur had also mentioned *Alcom Ltd. v. Republic of Colombia* (1984)<sup>13</sup> in the context of costs, in which connection his concern was understandable since the costs incurred by a foreign State in establishing its immunity from jurisdiction could be considerable. In the *Alcom* case, each party had had to bear its own costs for the garnishee proceedings, both before the House of Lords and in lower courts. In making his order, Lord Diplock had rightly pointed out that the question of law that was involved was of outstanding international importance. Counsel for the Attorney-General, who had appeared as *amicus curiae* in the proceedings before the House of Lords, and counsel for the appellant had submitted that neither international law nor the terms of the *State Immunity Act 1978* permitted the making of a garnishee order against the current account of a diplomatic mission in London that was used to meet that mission's day to day running costs. That line of argument had prevailed.

28. The question of costs was a tricky one and it should be remembered that the developing countries were not the only countries to suffer in that regard. The United Kingdom Government had on occasion incurred substantial costs in defending proceedings brought against it in foreign States or in intervening in such proceedings to protect a particular Government interest. At all times, however, it was important not to forget the third party—the private litigant wishing to pursue what he regarded as a valid claim against a foreign State; the fact that he also had to weigh in the balance his liability for costs if he was unsuccessful before the courts acted as a powerful deterrent against the pursuit of unmeritorious claims.

29. As to the three new draft articles submitted by the Special Rapporteur, article 16 raised not only technical problems but, in the context of Chief Akinjide's statement, also more substantive issues. He had been somewhat puzzled by that statement, although he fully understood Chief Akinjide's concern at the disparities between the developed and the developing countries so far as lack of expertise in patent matters was concerned. Nevertheless, he genuinely wondered what that had to do with the acceptability or otherwise of draft article 16. Would it be in the interests of Nigeria, and of developing countries in general, if a foreign State were to infringe a patent that had been applied for in Nigeria and then claim immunity in the context of proceedings brought by the owner of or applicant for the patent? Would it be in the interests of Nigeria, and of developing countries in general, if for-

foreign States that applied for a patent in Nigeria then claimed immunity in proceedings brought by a Nigerian national who claimed prior rights in the subject of the patent? Personally he did not know the answer, but he suspected that it would not be in the interest of Nigeria, or of developing countries generally, for a rule of immunity to continue to apply. Furthermore, if a rule of immunity was applicable in such matters, it would apply when a foreign State infringed a patent, irrespective of how many relevant national laws there were.

30. Little objection had been raised to the need for a provision of the type contained in paragraph 1 of article 16, whether it was justified on the basis of close connection with articles 12 and 15 or of implied consent to the exercise of jurisdiction. He wished to assure Mr. Ushakov, who had expressed doubt (1833rd meeting) as to whether a State could rely on copyright, that so far as the United Kingdom was concerned it was certainly possible to do so.

31. Mr. Ushakov had been even more concerned about paragraph 2 of article 16. But if a State was subject to the jurisdiction of the courts of the forum State in regard to property rights of which it was the owner or for which it had applied, why should it not be equally amenable to the jurisdiction of those courts if it had allegedly infringed in the intellectual property rights of third parties in the forum State? As indicated in the report (A/CN.4/376 and Add.1 and 2, para. 78), an alleged infringement inevitably put at issue the question of whether the private party or the forum State was entitled to the protection of the intellectual property right concerned. Even if the courts of the forum State were called upon to interpret and apply the relevant international conventions, that fact caused him no misgivings. Intellectual property rights were essentially rights under private law and national courts regularly interpreted and applied such international conventions on the unification of private law as the 1929 Warsaw Convention in the case of aircraft, and the Hague (1924) and Hamburg (1978) Rules in the case of ships. Indeed, that was how jurisprudence was developed. He therefore had no problems in principle with paragraph 2, although he agreed that the Drafting Committee should consider carefully the implications of the notion that an alleged infringement might be attributable to a State.

32. Similarly, draft article 17 posed no problems, although he noted that Mr. Ushakov considered it unnecessary. Yet for the economy of the draft as a whole some such provision would have to be included, for otherwise the implication would be that the rule of immunity would apply. The Special Rapporteur had rightly stated that it was a twilight zone (*ibid.*, para. 103), since there was very little judicial practice and the basis for a provision of that kind was not very clear, even though something very similar had been included in the United Kingdom's *State Immunity Act 1978*. The 1972 European Convention on State Immunity, for its part, omitted all reference to the matter, leaving it to States to deal with it under their own legislation; the same approach would perhaps provide an alternative solution.

33. Lastly, he considered that there was a clear need for draft article 18; otherwise the implication would be that

<sup>13</sup> See 1833rd meeting, footnote 5.

there was a rule of immunity which could interfere with the way in which companies ran their businesses.

34. Mr. SUCHARITKUL (Special Rapporteur), replying to points raised, said he agreed entirely that the Commission should not rely unduly on the distinctions that were drawn by States. Nevertheless, it had to be recognized that they loomed large in the case-law of many countries and could not be dismissed out of hand. His purpose therefore had simply been to point out the irrelevance of such distinctions in certain respects, without dwelling further on their philosophical or conceptual implications. He likewise agreed that it was first necessary to establish that a court did have jurisdiction; otherwise there could be no question of jurisdictional immunity. That assertion, however, was not always accepted by legal writers. In that connection he recalled that, on one occasion, a former member of the Commission had said that, if he had to defend a foreign Government before a United Kingdom or a United States court, he was not sure whether, in addition to jurisdictional immunity, he would not also raise the question of some other defence. Normally, of course, the court was not bound to decide the question of jurisdictional immunity before other questions.

35. The expression "owner or applicant", in paragraph 1 (a) of draft article 16, raised questions of both substance and translation. In the matter of substance, "applicant" had been included to denote the fact that, in the period before a patent was actually registered, the applicant for registration had a kind of inchoate title to property. So far as questions of translation were concerned, *déposant ou titulaire* ("owner or applicant"), in the French text, appeared in article 8 of the 1972 European Convention on State Immunity, but the Drafting Committee might wish to make some improvement. He agreed, however, that the expression *non-respect présumé* ("alleged infringement"), in paragraph 2, was inelegant. It might be best to adopt the same expression as the one used in the 1972 European Convention.

36. With regard to paragraph 2 of draft article 16, he would not go into the question of the interests of the developing countries, since it was already dealt with, *inter alia*, in declarations adopted by WIPO and in UNCTAD resolutions on the transfer of technology. He would merely say that, in regard to cultural rights, which could be considered as a species of intellectual property, the developing countries were surely as advanced as the developed.

37. A point had been raised in connection with the term "agricultural levy" in paragraph 1 (a) of draft article 17. It had been translated into French as *toute redevance agricole*, but the expression used by the Common Market was *prélèvement*, which meant the sum over and above the import duties payable.

38. The expression "an agreement in writing between the parties to the dispute", in paragraph 2 of draft articles 18, had been included because the choice of law was open to the parties to a dispute. Again, the term "constitution or other instrument" in the same paragraph referred to any instrument regulating the body

in question, such as the Charter of the United Nations. Lastly, although there was little judicial practice, actual practice was constantly on the increase as States invested in companies within or outside their own territory. In such cases they would, of course, be amenable to the local jurisdiction of the State of incorporation.

39. Mr. USHAKOV said he wished to reaffirm that, in his opinion, paragraph 1 of draft article 16, which was concerned more particularly with cases in which the State was the plaintiff, was superfluous. A State could always apply to a court of the forum State for protection of its intellectual property rights. As to paragraph 2, he unreservedly endorsed the argument by Chief Akinjide, for the paragraph was not only entirely contrary to, but also seriously jeopardized, the interests of the developing countries.

40. With regard to draft article 17, he agreed with Mr. Reuter (1833rd meeting) that a State, like any other taxpayer, could institute proceedings relating to, for example, calculation of the amount of taxes or duties, if the court was competent in the matter. But there was really no need for such a provision.

41. Lastly, concerning draft article 18, he too considered that cases in which the State held shares in a company raised formidable problems. He still believed that the formulation of general rules on the basis of concrete, special or highly delicate cases would run into difficult, if not insurmountable, problems.

*The meeting rose at 12.55 p.m.*

## 1835th MEETING

*Wednesday, 6 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balandá, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property (continued)** (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>  
(continued)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) and

ARTICLE 18 (Shareholdings and membership of bodies corporate)<sup>5</sup> (continued)

1. Mr. NI, congratulating the Special Rapporteur on his comprehensive and lucid report (A/CN.4/376 and Add.1 and 2), said that despite the wide divergence of views and practices reflected in the debate in the Sixth Committee of the General Assembly, there did not seem to be any real cause for pessimism. A careful analysis of the material available, with the object of arriving at conclusions acceptable to the great majority of the international community, was central to the inductive method, and the Commission was rightly proceeding with caution, since conclusions should follow—not precede—analysis. As noted by several representatives in the Sixth Committee, in determining the extent to which State immunity should receive world-wide recognition, the interests of all States, irrespective of their size or economic or social system, should be taken into consideration. Failure to devise a set of widely acceptable rules would only plunge the world into greater turmoil.

2. It had been frequently observed in the Commission and in the Sixth Committee that an unduly broad acceptance of exceptions unsupported by a sufficient body of State practice could make the principle of State immunity illusory and the adoption of a set of draft articles extremely difficult. Some representatives in the Sixth Committee had even maintained that the draft articles on exceptions would “erode”, “nullify” or “undermine” the principle of State immunity, or restrict it to such an extent as to reduce it to a “sheer jurisdictional fiction”, or lead to the “extinction of the basic rule itself”. It was

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (a) and commentary thereto: *ibid.*, p. 100; para. 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (c) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (d) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (e) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

Part III of the draft: (h) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1833rd meeting, para. 1.

noteworthy that the delegations in question came from countries with different socio-economic systems.

3. In the articles in part III of the draft, frequent use was made of presumptions of consent or implied consent as grounds for the exercise of jurisdiction. Even before draft articles 16 to 18 had been prepared, one delegation in the Sixth Committee, which was among the foremost advocates of a restrictive attitude to State immunity, had felt obliged to speak against undue recourse to presumptions of waiver of immunity.

4. Reference had been made to the emergence of a trend towards a restrictive practice regarding immunity, but the materials showing that trend came from just a few countries, mainly in Europe and North America; and some European representatives in the Sixth Committee had even pointed out that certain laws of their countries providing for unrestricted immunity had not been taken into account. In a memorandum presented to the thirty-seventh session of the General Assembly, in 1983,<sup>6</sup> the Asian-African Legal Consultative Committee had likewise referred to the limited application of restricted immunity, pointing out that, for the most part, developing countries had not placed any restrictions on the traditional doctrine of sovereign immunity. In the Sixth Committee, it had been said that in drafting exceptions to State immunity, some rethinking appeared to be essential, that the discussions in the Sixth Committee should be taken more fully into account, and that a more detailed study of the legislation and practice of developing and socialist States was necessary if the draft articles were to be widely acceptable. In that connection he referred members to the topical summary prepared by the Secretariat (A/CN.4/L.369, paras. 143-144, 147, 150 and 155). He fully agreed with the Special Rapporteur that the question of jurisdictional immunities of States deserved international attention and should not be left for decision by national courts, or solely to national legislation (A/CN.4/376 and Add.1 and 2, para. 28).

5. He very much doubted the validity of the argument that the absence of judicial decisions in support of unrestricted immunity in recent years was proof of a trend towards restricted immunity. In the first place, State immunity was still firmly established on the basis of the sovereign equality of States as a general rule of international law, and that would continue to be the position so long as States remained sovereign and equal. Even assuming that State immunity was based on a custom that could change with new circumstances, it was for the proponents of restricted immunity to prove that the customary rule had been changed—or had been “eroded” or “nullified”—by contrary practices of such magnitude and consistency that they could be said to reflect the constant and uniform usage of States. Publicists agreed that, for a customary rule to develop, it had to be possible at some stage to infer from the conduct of a group of States that they regarded it as a legal duty to act in a certain way. Such a rule would become a general rule of

<sup>6</sup> The section of this memorandum covering the topic of the jurisdictional immunities of States and their property was distributed at the Commission's thirty-fifth session as document ILC(XXXV)/Conf. Room Doc.6.

international law only if a sufficient number of States accepted it as binding and if the rest of the international community made no protest regarding its application.

6. The restrictive practice of State immunity involved a legal duty of one sovereign State to submit to the jurisdiction of the courts of another sovereign State. Many voices had been raised in protest against that situation, for instance: the diplomatic correspondence and the statements made on behalf of States named as defendants in the courts of other States; the briefs of counsel who appeared for defendant States; and the opinions of regional organizations such as the Asian-African Legal Consultative Committee. It was thus clear that international law was not evidenced by judicial decisions alone, particularly when such decisions had been made in only a few of the States forming the international community. Indeed, to hold that only the decisions of the courts of certain States—which, moreover, were contested by other States—were authoritative evidence of international law would be a gross misinterpretation of article 38 of the Statute of the ICJ and, worse still, would be detrimental to the interests of the newly independent States. Since States which abided by the principles of the sovereign equality of States and their unrestricted immunity did not exercise jurisdiction over foreign States, there was naturally a paucity of cases in which States had appeared as defendants. And since most major business transactions were conducted in the industrially developed States, proceedings against foreign States were for the most part instituted in the courts of the industrial States.

7. Furthermore, the judgments of the courts of States which espoused the theory of restricted immunity were far from constant or uniform. For instance, no criterion had been found by which to distinguish *acta jure imperii* from *acta jure gestionis*, and different States had different views on what constituted an act under public law and an act under private law. A court of the same State could even arrive at a different conclusion at a different time on the same or a similar set of facts. The Special Rapporteur had therefore been right to state in his sixth report that such a distinction was not applicable to the draft articles (*ibid.*, para. 21). Another source of confusion was the question whether the determinative issue was the nature of the transaction or its purpose. Thus it was not only its limited application in geographical terms, but also its lack of uniformity that would prevent restricted immunity from replacing the long-established rule of absolute State immunity. Admittedly, the States of a particular region which all followed a similar practice could set up a régime that was applicable between themselves alone; but such instances were few, and ratification was difficult to secure, as in the case of the 1972 European Convention on State Immunity.

8. The keynote of the whole draft was article 6. A number of representatives in the Sixth Committee had expressed their opposition to that article because it did not clearly establish the principle of immunity as a general rule. But as the Special Rapporteur had stated in his sixth report that there was “sufficient general agreement that immunity is a fundamental principle of international

law” (*ibid.*, para. 9), he would have no objection if the final revision of article 6 was left until later.

9. Other difficulties arose in regard to article 12 of the draft, because of the uncertainty of the applicable rules of private international law and unfairness in the presumption of consent. Some difficulty also stemmed from socio-economic systems in which the State played a major role in the economy, and the relevant comments made in the Sixth Committee should not be lightly dismissed. If a set of draft articles was intended for universal application, it was inadvisable to urge the international community to accept a régime that was mainly suited to a particular region or legal system, when other choices were available or appropriate revisions might alleviate the hardship suffered by a number of States. He considered that a territorial link in the form of an office or agency operating within the forum State, as suggested by the Special Rapporteur, could provide a valid ground for exercising jurisdiction, as provided by article 7 of the 1972 European Convention. It would be even easier if the office or agency was established not by the foreign State itself, but by a State enterprise having independent personality.

10. There was little enthusiasm for the two exceptions provided for in draft articles 13 and 14, and little support for them in the general practice of States. So far as draft article 13 was concerned, the fact that an employee was placed under the social security system of another State could not, in his view, be reasonably construed as consent to accept the jurisdiction of that State. Moreover, such a presumption would not only discourage the foreign State from placing its employees under the local social security system, which would be to their disadvantage, but would also be contrary to the interests of the forum State. Besides, there appeared to be no consistent legal basis for such an exception.

11. With regard to draft article 14, it had been said that there was an emergent trend in favour of the exercise of jurisdiction; but that trend had been deduced from very limited practice, the legislation of just a few countries and one regional convention that had been ratified by only a few States. The requirement of insurance against transport risks would greatly reduce the difficulties on both sides and there was therefore little justification for opening the door to litigation against foreign States.

12. Referring to draft article 16, he noted that in his sixth report (*ibid.*, para. 58), the Special Rapporteur had stated that:

If a State is seeking the protection of another State for the registration of a patent, invention or industrial design, it has clearly consented to the exercise of jurisdiction by the territorial authority from which it is seeking protection ...

and that:

... It would seem logical for consent to be presumed or implicit in the event of infringements, just as in the event of contestation.

That statement was a further extension of the presumptions already adopted in previous articles dealing with exceptions. State practice was not abundant and the two cases cited in support of the draft article (*ibid.*, paras. 65-67) were both mainly concerned with whether the dispute

had arisen out of legal relations in the sphere of public law or of private law: that was the criterion which had given rise to so much controversy and which the Special Rapporteur had therefore rightly abandoned. There was also very little national legislation on the subject. It had, however, been generally recognized that if a State initiated proceedings in the court of another State as a claimant or otherwise in respect of a patent, trade mark or other intellectual property, there would be no grounds on which it could invoke immunity in respect of those proceedings or of any counter-claim arising out of the same legal relationship or facts as the principal claim.

13. As to the impact of article 16 on the developing countries, while in theory both the developed and the developing countries could be said to be protected under its terms, he was inclined to think that in practice more protection would be given to the industrialized countries, because they were far more advanced scientifically and technologically. So far as cultural development was concerned, given the vast number of publications in the developed countries, it seemed to him that copyright holders in those countries were more in need of protection than copyright holders in the developing countries, though he had no statistics on which to base such a finding.

14. There appeared to be little support for draft article 17. The judicial decisions relied upon (*ibid.*, paras. 91-93) came from one country only and seemed merely to suggest that foreign Government-owned property used for public and non-commercial purposes was not taxable, but that any taxes already paid were not recoverable. Case-law on the subject was scanty and a case from another country which had been cited (*ibid.*, para. 95) even went in the opposite direction. There was little national legislation on the matter and it was not supported by judicial practice. Reference had been made to certain instances of the liability or non-liability to tax of the incomes and other revenues of foreign States; but liability to tax was one matter and enforcement by the courts quite another.

15. In his sixth report (*ibid.*, para. 96), the Special Rapporteur had stated that "governmental practice seems to be preponderantly in favour of settlement of this delicate point by bilateral agreements" and had advised that the rules in what he had subsequently described as "a twilight zone" (*ibid.*, para. 103) should be reformulated. To draft a rule that would be acceptable to the international community at large, however, it was necessary to have a firm foundation based on clear and consistent State practice, rather than hastily drawn conclusions.

16. Where State-owned corporations or State enterprises with independent legal personalities had been set up by States that carried on business in other countries, such corporations or enterprises would have little difficulty in complying with the tax laws and regulations of the host States. State enterprises of his own country instituted proceedings and appeared as defendants in the courts of foreign countries. He would, however, sound a note of warning: the inclusion of provisions along the lines of articles 12, 17 and 18, either in internal law or in an international instrument, would in-

cline foreign plaintiffs to sue the State rather than a State enterprise, in order to force the State either to agree to an out-of-court settlement or to defend the suit in the foreign court, which might involve undesired waiver of its immunity. That should be avoided. If, on the other hand, the State carried on business abroad in its own name or through an agency acting on its behalf, any tax dispute would be between two sovereign States and could not be adjudicated by the national courts of the host State. That, of course, was a matter beyond the scope of the topic.

17. Draft article 18, too, relied heavily on a presumption of consent, and little support for it was to be found in judicial decisions, national legislation or regional conventions. The question of the applicability of the law of incorporation, referred to by the Special Rapporteur (*ibid.*, paras. 107-109), might be relevant to the choice of law or to the competence of the courts under private international law, but it did not settle the question of State immunity. Again, if a State enterprise, as an entity distinct from the State itself, held shares in or became a member of a body corporate in another State, there would be no problem. The difficulty seemed to arise from the question as to how the term "State" should be defined. A mere presumption of consent without any convincing reason was rather artificial and would not, in his view, lead to a satisfactory result.

18. The views he had expressed were not perhaps in complete accord with those of the Special Rapporteur, but it had certainly not been his intention to launch an ideological debate. His sole concern had been to put forward some constructive suggestions for dealing with a complicated subject. It should be possible to find some common ground, provided that a one-sided attitude was not adopted. As he saw it, immunity was the basic rule and exceptions must not be too far-fetched if they were to be acceptable to the majority of States. No one system applied in a particular region could conveniently apply in all others. If the Commission was unable to reach agreement at the present stage, it would have time to reflect before the second reading.

19. Mr. BALANDA paid tribute to the Special Rapporteur for the breadth of outlook he had shown in his sixth report (A/CN.4/376 and Add.1 and 2) covering the progress made since the Commission's last session. He was sorry to say, however, that the French text appeared to contain some errors: the words he had in mind were *lettres explosives* in paragraph 17 and *incompétence d'attribution* in paragraph 24.

20. Generally speaking, he fully endorsed the view expressed by the Special Rapporteur concerning the irrelevance of differences in ideology (*ibid.*, para. 20). The Commission would indeed be well advised to avoid taking sides between the two existing theories: that of absolute immunity and that of restricted immunity. The pragmatic middle way proposed by the Special Rapporteur was the way of wisdom.

21. He agreed with the Special Rapporteur on the importance of the notion of reciprocity. The examination of that notion (*ibid.*, para. 32) did not, however, fully

convey the two-way action of reciprocity. It seemed to suggest that it would take effect in one direction only, that was to say that it would determine whether to extend, or not to extend, jurisdictional immunities. But the application of reciprocity, in the primary sense of the word, could equally well mean either extending jurisdictional immunities or restricting them, according to the line taken by the other State concerned in a well-defined field.

22. Having regard to the legal system in force in his own country, which was modelled mainly on the continental and, more particularly, the Franco-Belgian legal system, he was reluctant to agree that a court seized of a case could have discretion to decline to exercise jurisdiction, as stated in the report (*ibid.*, para. 24). In Zaire, the rules governing attribution of competence were a part of public law and were determined by legislation on the organization of the courts and their jurisdiction. Hence a Zairian court seized of a case did not have discretion to exercise or not to exercise jurisdiction.

23. He was grateful to the Special Rapporteur for inviting the Commission to be very cautious in dealing with the question of exceptions to State immunity, especially as views on that question were not unanimous. The restrictive trend, as the Special Rapporteur had described it in his reports, was shown by one particular group of States. It could not be regarded as a trend so general that the existence of a legal rule could be deduced from it, especially since, besides being geographically limited, it reflected only internal case-law. It would be hazardous to derive rules applicable at the international level from national decisions, however valuable they might be for information purposes. The underlying reasons for the restrictive trend were difficult to determine, because of their diversity and their connection with questions of political interest, and also because States tended increasingly to engage in commercial or related activities which went beyond the exercise of their governmental authority.

24. It should be noted, nevertheless, that the trend manifested itself among developed countries which, in their dealings in the territories of other States, had not hesitated to create, as it were, the exception of extraterritoriality to their own advantage, so as to evade the application of local laws. But when less developed States entered into business relations in the territory of developed States, the latter set up barriers and tried to restrict the application of jurisdictional immunities. It was also important to note that the developed countries had shown a curious reluctance to apply among themselves the 1972 European Convention on State Immunity, which had come into force in 1976 only for Austria, Belgium and Cyprus. Lawyers should not remain indifferent to that attitude, especially in a matter as delicate as the jurisdictional immunities of States and their property.

25. Turning to draft article 16, he observed that its provisions were the counterpart, by extension to incorporeal property, of the provisions which protected the movable and immovable property of all States under internal law. Since Mr. Ushakov (1833rd meeting) had

raised the question whether article 16 could be applied to States, he would point out that, if a State could be the owner of movable or immovable property, it was not impossible for it to have rights and obligations relating to intellectual or industrial property. The case of nationalization referred to by the Special Rapporteur (A/CN.4/376 and Add.1 and 2, para. 63) provided the best illustration. But since, as the Special Rapporteur admitted, practice was not plentiful and applications in internal law were rather limited, he wondered whether it was appropriate to speak of "an irreversible trend in support of restriction in this particular area" (*ibid.*, para. 68). The Commission should rather confine itself to taking note of the new situation developing in that new area, and perhaps draw conclusions from the conduct adopted. Nothing, at least for the present, authorized the Commission to affirm without risk of error that there was "an irreversible trend", although in some cases the proposed application of the law of the forum State as the basis for exercise of jurisdiction did seem to be perfectly justified.

26. Referring to the undoubtedly legitimate concern expressed by Chief Ankinjide at the previous meeting regarding the effects of the application of article 16 on developing countries, he noted that a reading of the Special Rapporteur's analysis (*ibid.*, paras. 53-55) and of article 16 itself showed that, for the article to come into play, the right to intellectual or industrial property first had to exist and, secondly, that right had to be protected with respect to the territory of the forum State. Those two conditions were cumulative and indissociable. If the second condition was not satisfied, nothing would prevent a developing country from using, in its territory, techniques protected in other countries. He associated himself with the question put by Sir Ian Sinclair at the previous meeting in reply to Chief Akinjide: was it in the developing countries' interest that developed States should exercise with impunity in the territory of the developing countries rights in intellectual or industrial property which were protected there? In his view, it was in the interest of all States to protect rights in intellectual or industrial property regularly registered in their territory when other States tried to use them or exploit them there. The explanation by analogy with commercial contracts—dealt with in article 12—given by the Special Rapporteur (*ibid.*, para. 56) was not appropriate, because the right to intellectual or industrial property was a right *sui generis* based on the doctrine of unjust enrichment. That was simply a problem of doctrine, however, and he would not dwell on it.

27. As to paragraph 2 of article 16, he was not sure that it was logically consistent with paragraph 1 or that its inclusion was justified. If the object was to provide protection of the right to intellectual and industrial property solely within the territory of the State where that right had been registered, he saw no objection of principle; but if the object was to provide protection of the right beyond that territory, he shared the concern expressed by Chief Akinjide.

28. Draft article 17 was fully justified: it was simply the application of the principle of territoriality. States were

sovereign in their respective territories and had the power to make rules there. Hence there seemed to be no reason why a State carrying out *acta jure gestionis* in the territory of another State should be exempt from fiscal liabilities and customs duties relating to those activities, unless, of course, it was otherwise agreed between the States concerned. The article was useful in that it dispelled doubts as to whether a State actually enjoyed jurisdictional immunity in the territory of a foreign State when carrying on commercial activities there.

29. The expression "Unless otherwise agreed" in paragraph 1 was justified, because it allowed specific relations between the States concerned to be taken into account. The paragraph could be simplified, however, by making it apply only to general situations and not to particular cases. He would submit suggestions for that change to the Special Rapporteur for the attention of the Drafting Committee. At the present stage, he would only propose the addition of the words "as a private person" at the end of paragraph 1 (c), since the acts of a State were *acta jure gestionis* in some cases and *acta jure imperii* in others, and States might carry on commercial activities, for example, as part of the exercise of their sovereign rights. That was true of the State of Zaire, for instance, which engaged in ore and coffee marketing abroad through the Société zairoise de commercialisation des minerais (SOZACOM) and the Office zairois du café (OZACAF), respectively, those activities being conducted under governmental authority. Paragraph 1 (d) was acceptable. Paragraph 2 of article 17 seemed useful, because it clearly showed the important difference between situations permitting exceptions and the recognized jurisdictional immunities.

30. With regard to draft article 18, he subscribed to the propositions put forward by the Special Rapporteur (*ibid.*, paras. 105-106 and 110). A State entering into business relations in the territory of another State by participating in companies constituted and registered under that State's company law had no right to invoke jurisdictional immunity; it was required to observe the law of the forum State, which was the only law applicable, as all the rules of private international law confirmed; and it was considered to have accepted the exclusive jurisdiction of the State in which the company was constituted. Article 18 was useful as a complement to article 12 as provisionally adopted, which dealt only with commercial contracts. Before taking a definitive position on paragraph 1 of article 18, however, he would like to know why the proposed exception would apply only if the company was "a body corporate" and had members other than States.

31. Paragraph 2 of article 18, as worded, was valuable in that it made for greater flexibility and took account of special relations between States. He wondered, however, why there had to be "an agreement in writing". The legal system of his own country made a principle of freedom in the production of evidence in commercial matters. It would be logical to guarantee freedom in the manner in which proof was produced.

32. Mr. REUTER said he did not share the pessimism of some members; the Commission might be going round

in circles, but it was moving in an upward direction. He agreed with Chief Akinjide (1834th meeting) that the cost of justice, whether national or international, was much too high. An attempt should be made to remedy the regrettable situations which resulted, but the problem was so delicate that the Commission could only tackle it in private, if at all. Whereas individuals without means received legal aid, most developing countries could not afford the cost of a major lawsuit.

33. With regard to draft article 16 and the régime governing intellectual property, he also agreed with Chief Akinjide that the present system had aspects which were hardly acceptable to developing countries. He shared the view predominant in UNCTAD that the problem could only be solved by increasing transfers of technology; but the organization of intellectual property raised very great difficulties, besides those arising from the brain drain, which affected developed as well as developing countries. There were not more than 10 countries in the world whose balance of accounts on transfers of intellectual property showed a surplus.

34. It was also true that developing countries could have excellent reasons for not becoming parties to international conventions on the protection of intellectual property. There was no question of giving advice to the developing countries on that point; as sovereign States they were perfectly free to refuse, wholly or partly, to become parties to such conventions. That Chief Akinjide should speak in favour of bilateral agreements and provisions of internal law was perfectly understandable. A case worth considering was that of a remote country with an ancient culture and a rich language whose use was confined to a small area. Works written in that language had only a small market, so it was understandable that the country in question had not become a party to any copyright conventions; thus it could publish in its own language, without paying royalties, any work appearing abroad. It was not surprising that the developing countries adopted a reserved attitude towards copyright conventions when the developed countries themselves carefully selected the conventions on copyright or intellectual property to which they became parties.

35. On one point, however, he did not entirely agree with Chief Akinjide, and still less with Mr. Ushakov. In international law, every problem should be approached from what already existed, namely sovereignty and territoriality. But the existence of international relations made it necessary to add to those concepts. Thus intellectual property first presented a territorial aspect, since it was a purely artificial institution which existed only within a given legal framework. Consequently, it was for the developing countries to decide whether it was in their interest to participate wholly or partly in that institution or to remain outside it.

36. For the moment, the question that had to be settled was, as Mr. Balanda had explained, whether a product or service coming from one State and entering the territory of another State was subject to the laws in force in that other State. In his own view, article 16 meant that when a product or service entered the territory of another State and enjoyed protection there, the protection was gov-

erned by the laws of that State; conversely, if the product or service entered a country where such protection was unknown, it had no protection. In the former case, the State could ask to be protected, but there were limits to such protection, and those limits could bring it into conflict with an interest or right protected under the same system. For it could be held that the State had infringed the right of protection to which it was entitled, in which case it became a defendant. That was why it was not possible to accept paragraph 1 of article 16 and reject paragraph 2. Paragraph 1 was not based on implicit consent, but on the fact that the granting of special protection which existed only in one particular system and one particular territory implied that all questions relating to the limits of such protection would be settled within that system. The situation was the same when a State recognized the capacity of foreign embassies to be owners of real estate. Any private-law dispute relating to such real estate came under the jurisdiction of the local courts.

37. The problem of territoriality raised the more general issue of what position to adopt in regard to immunities. He could conceive of absolute State immunity without any exception, but only if it was associated with a rule which at present did not exist—the rule that a State had no capacity under the internal law of another State: it enjoyed immunity, but could not own property or perform any act, such as an act of commerce. What he would never accept was that States should be left free to participate in international trade, either directly or through an entity they had created. Most of the socialist States resorted to the latter solution, without claiming immunity for entities of that kind. As things stood at present, that choice by States was an exercise of sovereignty. But if absolute immunity was to be established, it would be necessary to abolish that freedom and to specify that henceforth States could act beyond their frontiers only through an intermediary. Such a solution would obviously have advantages and disadvantages. In many cases, theories which seemed to attack the sovereign equality of States and which drew a distinction between *acta jure imperii* and *acta jure gestionis* operated in favour of immunity, because the jurisprudence of States accorded immunity to acts performed by public entities other than States. For instance, issuing banks enjoyed immunity as decentralized entities having the privileges of governmental authority.

38. The Commission would thus have to choose one solution or the other, it being understood that no absolute theory was wholly satisfactory. If it proclaimed the principle of absolute immunity and prohibited States from performing acts within the internal legal systems of other States, the situation would no doubt be clearer, but it would also be more difficult than at present, because immunity had hitherto been granted to entities which were not States. The courts of the foreign State would then be competent to hear all cases relating to acts performed by intermediary entities.

39. If it was prepared on that basis, the draft would no doubt be imperfect, since no legal system provided absolutely safe solutions; but it would not cover all the aspects of the problem either. It should, indeed, be noted

that both States and decentralized entities distrusted foreign courts. One of the major problems in international relations and international trade in general was which State should prevail over the other when two States were equally entitled to make conflicting claims. To that problem there was only one solution, which was beginning to gain acceptance, namely recourse to a third party, whether for arbitration or for conciliation. There was little doubt that the Commission would finally arrive at a more or less satisfactory solution, but it was essential to know whether it would be possible to set up institutions capable of dispelling the misgivings which the draft articles were bound to evoke.

40. Mr. USHAKOV urged the Special Rapporteur to say whether the judgments cited in his report (A/CN.4/376 and Add.1 and 2) had been accepted by the States against which they had been given. Only in that case could they be regarded as valid precedents. The same was true of national laws, which could only be of value from the point of view of international law if they were genuinely endorsed by other States.

41. In his report (*ibid.*, para. 46), the Special Rapporteur maintained that States whose courts had not made any judicial decisions upholding absolute immunity could not be regarded as having adopted a position in favour of that doctrine. In the memorandum (A/CN.4/371) which he (Mr. Ushakov) had submitted to the Commission the previous year, it was pointed out that the vast majority of States, in their written comments, had pronounced in favour of absolute State immunity. On what grounds, then, did the Special Rapporteur assert that an opposite trend was emerging?

42. Referring to draft article 16, paragraph 2, he observed that in many cases that provision would be contrary to the interests of developing countries. If a developing country which was not party to any copyright convention held a cultural exhibition in the territory of another country, showing works translated into its national language, it was exposed to legal proceedings which a third party, the author of those works, could institute against it in the State where the exhibition was held. Developing countries were particularly exposed to such risks because they were seldom parties to the relevant conventions or only acceded to them with reservations. Their national production depended in part on inventions by third parties which were protected abroad, so that any attempt to generalize such protection might place them in an intolerable position. Paragraph 2 of article 16 should therefore be re-examined, so that the development of international law would not be regressive rather than progressive.

43. Sir Ian SINCLAIR drew attention to a basic problem which had bedevilled the Commission's work throughout its deliberations on the present topic. Some members, including Mr. Ni and Mr. Ushakov, assumed that there was a well-established principle of international law whereby absolute immunity had to be accorded to foreign States in respect of proceedings instituted against them in the courts of another State, whereas other members—and certainly he himself—contested that position.

44. Historically, going back to the earliest cases, such as *The Schooner "Exchange" v. McFaddon and others* (1812),<sup>7</sup> one found that basically all that had been decided was that the courts of a foreign State in which proceedings had been taken against a vessel would not encroach upon the sovereign rights of another State. That had been the origin of the concept of sovereign immunity. At that stage in the early case-law, there had been no necessary concept of absolute immunity; it was the sovereign rights of foreign States that had to be protected in proceedings instituted before domestic courts.

45. It was really only at a later stage—in the late nineteenth century—that there had begun to emerge in the courts of some States, including the United Kingdom, a movement towards a more absolute doctrine of immunity. That movement had not been a uniform one; an examination of the decisions of Italian, Belgian and Egyptian courts showed that as early as the 1880s a case-law had begun to develop which applied the so-called "restrictive theory of immunity". And as early as 1891, the Institute of International Law had adopted a draft resolution which in large measure propounded that restrictive theory.<sup>8</sup> It would therefore be inappropriate to start from the presumption that there was an uncontested and well-established principle of international law which accorded absolute immunity to foreign States in proceedings before domestic courts.

46. In the context of domestic legislation embodying the restrictive theory of immunity, Mr. Ushakov had raised the question whether that legislation was contested. As far as the United Kingdom was concerned, he could say that the State Immunity Bill—that was to say, the draft which later became the *State Immunity Act 1978*—had been circulated to the diplomatic missions of all States represented in London, in effect asking for their comments. No immediate adverse comments on that draft had been received and it had then been submitted to Parliament and adopted as law. In considering contestation, one had to bear in mind silence in that type of situation.

47. Chief AKINJIDE said that his remarks on draft article 16 at the previous meeting had related to what actually happened in practice. At the present meeting, Mr. Reuter and Mr. Ushakov had referred to the question of copyright on books. There was of course an international convention on copyright, but his country had decided not to accede to it, and the same decision had been taken by many developing countries. That experience showed that a draft convention containing a provision like article 16 would not be accepted by many developing countries.

48. In the world balance of copyright, the developed

countries accounted for 98 per cent and the developing countries for 2 per cent. The developing countries had therefore decided that copyright had to be controlled by internal law; otherwise, half their budgets would be absorbed by royalty payments. At the moment, countries like his own relied for books on the United Kingdom and some other English-speaking countries such as New Zealand. If they acceded to the international conventions for the protection of intellectual property, their situation would simply be disastrous. Those were stark realities which had to be faced.

49. A very important point had been raised by Mr. Ushakov in regard to the cases cited by the Special Rapporteur, namely that the State involved in a case might not have accepted the decision given. He himself had been concerned, on behalf of his country, in a number of cases, including one in the United Kingdom Court of Appeal<sup>9</sup> and another in a United States court.<sup>10</sup> In both cases, following an adverse decision, millions had had to be paid to the plaintiffs, in addition to enormous costs. In those cases, the losing party had had no choice but to comply with the judgments, since otherwise its aircraft and other property would have been attached; but that did not mean that Nigeria had accepted those judgments. The cases cited should not be taken at face value; they might perhaps indicate a trend, but it was essential also to take into account the reaction of the States concerned.

*The meeting rose at 1.05 p.m.*

<sup>9</sup> See 1834th meeting, footnote 8.

<sup>10</sup> *Ibid.*, footnote 9.

## 1836th MEETING

*Thursday, 7 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Ushakov.

**Jurisdictional immunities of States and their property**  
(continued) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371, <sup>2</sup> A/CN.4/376 and Add.1 and 2, <sup>3</sup> A/CN.4/L.369, sect. C, ILC(XXXVI)/Conf.Room Doc.1 and Add.1)

[Agenda item 3]

<sup>7</sup> W. Cranch, *Reports of Cases argued and adjudged in the Supreme Court of the United States* (New York, 1911), vol. VII (3rd ed.), p. 116.

<sup>8</sup> "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State" (Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, 1957), p. 14).

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem.*

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>  
(continued)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) *and*

ARTICLE 18 (Shareholdings and membership of bodies corporate)<sup>5</sup> (continued)

1. Mr. JAGOTA noted that the Special Rapporteur had begun his sixth report (A/CN.4/376 and Add.1 and 2, paras. 1-29) with an analysis of the background—including the debate in the Sixth Committee of the General Assembly—against which he was proposing the remaining articles dealing with exceptions to State immunity.

2. As had been stressed in the Sixth Committee, it was essential not to lose sight of the objective pursued in dealing with the present topic and of the approach to be adopted to it in the light of contemporary developments. As he saw it, there was a clear choice between two very different approaches. The first started from the principle of State immunity and the second from that of the sovereignty of a State over its territory. The second approach treated immunity as an exception to the supreme norm of territoriality; it followed that immunity, being an exception to a fundamental norm, must necessarily be interpreted restrictively. If, on the other hand, immunity was treated as a basic principle of international law essential to the stability of international relations, the exceptions would be allowed only in so far as was necessary to protect other legitimate interests.

3. The Commission was clearly following the second approach and taking the fundamental norm of State immunity as a starting-point. That norm was stated in article 6, and the exceptions were set out in the subsequent articles of the draft. Being exceptions to the basic norm, they would have to be interpreted restrictively. Those re-

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (a) and commentary thereto: *ibid.*, p. 100; para. 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (c) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (d) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (e) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

*Part III* of the draft: (h) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1833rd meeting, para. 1.

marks took account of the discussion on article 6, to which the Commission had decided to revert after it had dealt with all the exceptions, including those set out in articles 16 to 18.

4. The exceptions provided for in articles 12 to 15 related to activities connected with development, technology and trade. They were intended to take account of contemporary conditions in the world community, including the great increase in the number of independent States and the needs of the developing countries in regard to technology. The exception relating to commercial contracts, set out in article 12, was acceptable. Article 13, on contracts of employment, and article 14, on personal injuries and damage to property, had proved controversial and he thought the Commission would have to re-examine their contents at a later stage. Article 15 should clearly state the basic principle of State immunity and then indicate the exceptions to that principle.

5. The broad rationale of the exceptions stated in articles 16 to 18 was that they were consequential on the restrictive provision adopted in article 12 concerning commercial contracts or had a direct link with the definition of State property in article 15. Articles 16 to 18 dealt with matters that were the outcome of commercial activity by a State and were not covered by article 12, and with matters relating to property which fell outside the scope of article 15.

6. His main criticism of article 16 was that it appeared to change the approach to the whole question of exceptions to immunity: it seemed to treat State immunity as an exception to the principle of territoriality. The article emphasized the concept of territoriality and mainly applied principles of private international law, rather than rules of public international law. It dwelt on the problem of determining how the interests and rights of the owner of a patent, trade mark or other intellectual property would be protected, and laid down that a State owning a patent or other intellectual property was subject to the court of the State of the forum. By virtue of the fact that a State has registered a patent, trade mark or other intellectual property in another State, it was assumed to have waived its immunity from jurisdiction. He could not accept that position, which appeared to him to disregard the facts of the matter.

7. Paragraph 1 of article 16 referred specifically to a “patent”, an “industrial design”, a “trade mark”, a “service mark” and a “plant breeders’ right”. All those terms would have to be defined in accordance with the law of the forum State. The law of that State would therefore determine the very essence of the right to be protected and would, in that respect, prevail over the law of the State which owned the patent or other intellectual property.

8. Another important point to be borne in mind was that the use and protection of patents, trade marks and other intellectual property was not always related to a commercial activity: the activity could well be purely cultural. In his sixth report, the Special Rapporteur himself had drawn attention to the need for “recognition of an author’s rights, regardless of the commercial or non-

commercial nature of the reproduction, performance, publication or distribution" (*ibid.*, para. 52 *in fine*).

9. Patents and trade marks had, of course, a direct connection with trade and development. And because of the existing disparity in development, the developing countries were in constant need of the patents of developed countries covering advanced technology which could speed up their development. For the right to use his patent, the patentee in the developing country was entitled to payment of a royalty, but a condition usually imposed was that of production. If the patent was not used to produce goods, the usual sanction was to grant a licence to someone else, known as a "compulsory licence", which normally did not deprive the patentee of his royalties. But in some cases, the patentee's right might be forfeited or be taken over by the State in the public interest, possibly with compensation. The essential point was that the patentee's right to a royalty had its counterpart in the right of the State concerned to insist on the patent being used for production of the appropriate product, which should be sold at a reasonable price. Provisions to that effect were contained in *The Patents Act, 1970* of India,<sup>6</sup> which also specified the possibility of acquisition of the patent by the State in the public interest. Most developing countries had similar legislation.

10. When a State nationalized a patent, or otherwise acquired it, it would use that patent to produce the products concerned, which it would sell and possibly export. In the State importing the products, however, it might well be faced with a claim from the original patentee alleging that his patent rights had been infringed. In that State, which would be the forum State, the State holding the patent would thus have to defend a suit in which the original patentee asked that the sale of the goods be disallowed and that compensation be paid to him for the infringement of his patent rights. In that situation, the terms of article 16 seemed to him unsatisfactory. They would appear to place the defendant State in the position of having to justify its nationalization or acquisition in the court of the forum State. That court would thus be called upon to give judgment on the validity of a public act of the defendant State. That situation was altogether unsatisfactory, as regards both the promotion of economic development and the fostering of good international relations.

11. He had spoken of that problem as arising for developing countries in their relations with developed countries; but it could equally well arise between developed countries. In any case, it was clear that the remedy could not be left to the courts of any one country. As Mr. Reuter had pointed out (1835th meeting), remedies should not be available in the courts of one State against a public act of another State. The terms of article 16 appeared to ignore the international aspects of the principle of territoriality, which had been expressly recognized by the Special Rapporteur when he had written:

<sup>6</sup> Sections 86 and 102 (India, Ministry of Law and Justice, *Acts of Parliament, 1970* (New Delhi, 1971), p. 207).

The present inquiry is limited to the protection of patents, trade marks and other intellectual properties at the national level; beyond that there exists another layer of protection, at the international level, which might be inter-State or intergovernmental relations or protection offered by an international system or organization ... (A/CN.4/376 and Add.1 and 2, para. 62).

The Special Rapporteur had gone on to refer to the "not ... uncommon phenomenon" of nationalization, not only by developing countries, but also by socialist as well as capitalist countries (*ibid.*, para. 63).

12. The decision to nationalize on the grounds of public interest was a public act, and scrutiny of such an act by the courts of a foreign State would not be countenanced by the nationalizing State. He therefore urged the Commission to concentrate on commercial activities, leaving the public acts of States outside the scope of the draft. Any attempt to combine consideration of both matters would inevitably lead to resistance by States, and by no means only developing States.

13. It was worth noting that the present subject had attracted the attention of UNCTAD, for obvious practical reasons. Three reports had been produced by that organization on the subject of "Economic, commercial and developmental aspects of industrial property in the transfer of technology to developing countries"; they had been issued in 1975 (patents), 1977 (trade marks) and 1982, respectively.<sup>7</sup> That work by UNCTAD clearly showed the interest of the developing countries in the use of patents, interest that had led to a request for the revision of the Convention of Paris for the Protection of Industrial Property.<sup>8</sup> The Berne Convention for the Protection of Literary and Artistic Works, as revised at Stockholm in 1967,<sup>9</sup> recognized the rights of developing countries to translate and reproduce copyrighted material. But if the forum State was not a party to the revised conventions and did not take the interests of the developing countries into account, its courts would regard any such translation or reproduction as an infringement of copyright.

14. Article 16 as proposed by the Special Rapporteur took the position that a State which registered a patent in another State thereby submitted to the jurisdiction of the courts of that State. That position was not correct: the State effecting registration did so in order to seek protection, but it did not thereby waive its immunity. If mere registration in another State were to have the effect of waiver, the State concerned would not register the patent; its goods would be sold in that other State without registration, or possibly not sold there at all. To create a situation of that kind would not be conducive to the improvement of trade relations between States.

15. As he saw it, the act of registration, deposit or ap-

<sup>7</sup> *The role of the patent system in the transfer of technology to developing countries* (United Nations publication, Sales No. E.75.II.D.6); *The role of trade marks in developing countries* (United Nations publication, Sales No. E.79.II.D.5); "Report of the Group of Governmental Experts on the economic, commercial and developmental aspects of industrial property in the transfer of technology to developing countries" (TD/B/C.6/76-TD/B/C.6/AC.5/6).

<sup>8</sup> United Nations, *Treaty Series*, vol. 828, p. 107.

<sup>9</sup> *Ibid.*, p. 221.

plication was simply a measure for obtaining protection; it did not amount to a waiver of immunity. Waiver should be related to the invoking of protection against infringement in the courts of a foreign country, or to some other express action. There could be no question of waiver being assumed from the mere fact of registration. In that connection, he drew attention to the terms of article 9, on the effect of participation in a proceeding before a court. Paragraph 1 of that article made it clear that waiver of immunity resulted from a State instituting proceedings in the courts of a foreign State or intervening in such proceedings. He suggested that a similar approach be adopted in article 16, paragraph 1, which could provide that submission to the jurisdiction of the courts of the forum State resulted from invoking the protection of the laws of that State, not merely from registration of a patent there.

16. Accordingly, he suggested that two clauses should be introduced into the text of article 16, paragraph 2. The first was that its provisions would operate only in the event of express waiver of immunity by the State party to the proceeding. The second was that the court of the forum State could not scrutinize the public act from which the State concerned derived its title. Unless that second point was covered, the court would be sitting in judgment on acts of a foreign State which were not of a commercial character. The two amendments he suggested would have the effect of protecting the interests of all concerned—developing countries and inventors alike.

17. To the best of his knowledge, there had not been a single case in which the acquisition of a patent by a State had been investigated by the courts of a foreign State. For information on that point, it might be useful to approach WIPO and UNCTAD. He recalled that when the Commission had been studying the most-favoured-nation clause, it had received valuable information from GATT.

18. In article 17, he could accept the exception to immunity relating to taxation of the commercial activities of a State, on the understanding that it would take the form of a residual rule, as indicated by the expression “Unless otherwise agreed” at the beginning of paragraph 1. It should be remembered that States often entered into bilateral agreements granting each other complete tax exemption in respect of their shipping or commercial activities in each other’s territory. His own country, India, had concluded a number of such agreements with foreign States.

19. The element of commercial activity was expressly referred to in subparagraphs (c) and (d) of paragraph 1. Subparagraph (b), relating to charges for registration or transfer of property in the forum State, would involve difficulties where the property was purchased to house a diplomatic mission or consular post; he therefore suggested that it be deleted. Lastly, a suitable reference to commercial activity should be introduced into subparagraph (a).

20. The enumeration “seizure, attachment or measures of execution ... foreclosure, sequestration ...” in article 17, paragraph 2, could be misinterpreted as being an

exhaustive list of the measures of execution from which the State was immune in respect of its diplomatic or consular premises. The enumeration should be replaced by some broader formula which left no room for such an interpretation. It was also necessary to redraft paragraph 2 in the form of a residual rule.

21. Article 18, as he understood it, dealt with joint bodies consisting of States and other bodies or persons—international organizations, private individuals, private companies, etc. Paragraph 1 of the article provided that a State which was a shareholder or participant in such a joint venture would have no immunity from jurisdiction. The purpose of paragraph 2 was to indicate that the provision in paragraph 1 was a residual rule. That point should be emphasized by introducing at the beginning of the article some proviso such as “Unless otherwise agreed”.

22. He drew attention to the fact that many joint ventures of the kind contemplated were not commercial. One example was clearing-houses. He therefore suggested that article 18 should be restricted to cover only commercial activities, besides being framed as a residual rule.

23. Mr. FRANCIS congratulated the Special Rapporteur on his excellent report (A/CN.4/376 and Add.1 and 2) and said that he was particularly grateful for his review of draft articles 1 to 15. He fully agreed that the draft should embody a general statement on State immunity.

24. In his view, the Commission would be well advised to concentrate on specifying the fundamental elements of State immunity and formulating the known exceptions within that context. As matters stood, however, the direction the work was taking was frankly alarming. That was due not to any fault of the Special Rapporteur, but to circumstances.

25. With regard to the notion of reciprocity, referred to in the Special Rapporteur’s sixth report (*ibid.*, para. 32), he agreed that any State which adopted a restrictive approach was in fact narrowing the scope of application of State immunity. It should be borne in mind, however, that States which adopted an unrestricted approach in their legislation, such as India and the Soviet Union, might be subjected to restrictive practices by another State, in which case there would naturally be a tendency to reciprocate. He endorsed the remarks made by Mr. Balanda on that point (1835th meeting).

26. The current trend towards restrictive practice could induce States having no direct relationship with States that adopted a restrictive approach to enact “blanket” legislation of a restrictive nature. It could also place other States which had not resorted to restrictive practice in a position where they could only wait and see or, at most, endeavour to resist the new trend. It was not usually developed countries, which could afford the high costs of litigation, but the developing countries that were the victims of any move in the direction of restrictive practice. The question was, therefore, what should the developing countries do? One thing they certainly should not do was to make a general practice of restriction, since that would clearly be disastrous. Rather, they should continue to practice traditional State immunity among

themselves, without any restriction, on a reciprocal basis. It would be pointless for them to try to negotiate with the developed countries, since there was no likelihood of the latter amending their legislation just to accommodate the interests of the developing countries. For the time being, therefore, the developing countries would have to follow the principle of reciprocity, but on the clear understanding that it was no more than a fiction: genuine reciprocity was based on a wide range of mutual interests, and the objectives and priorities of the developed countries and the developing countries were diametrically opposed.

27. There was another respect in which the developing countries differed from the developed, in a very practical sense. The fact that multinational corporations served, in effect, as quasi-agents of the developed countries meant that States could be arraigned before the courts of other countries, and that the whole matter of their immunity could be regulated by the law of those countries. The developing countries should therefore co-operate with one another to devise ways and means of meeting that particular challenge.

28. Article 12, on commercial contracts, was in his view one of the most crucial in the draft. Despite the objections to it, he believed, in the light of members' comments, that a generally acceptable text could still be found. The basic objection, of course, was to the reference to private international law; but there was also another question, namely whether a State could be arraigned before the court of a foreign State when it had an agency that was a distinct legal entity in that foreign State. That was a point on which the Commission could, and should, make progress so as to narrow its differences on article 12. He presumed that if any such agency defaulted on payment of a judgment debt, the State to which the agency was answerable could negotiate with the forum State, so that there would be no need for it to appear before a foreign court.

29. He considered that the Special Rapporteur's discussion of differences in ideology (A/CN.4/376 and Add.1 and 2, para. 20) was misleading, especially the statement that the theory that a sovereign State could not have two different personalities was not only prevalent among socialist States, but also adhered to in some other States. In his view, those differences, though genuine, should be regarded as conceptual rather than ideological. With that in mind, he was particularly concerned about the fact that, under the United States *Foreign Sovereign Immunities Act of 1976*, when an agency of a foreign State had entered into a contract with a United States citizen who subsequently suffered injury, the foreign State could be arraigned before the United States courts. The implications for all developing countries, particularly as to the costs involved, were enormous.

30. He was unable to agree with the statement by the Special Rapporteur that recent case-law in the United Kingdom went further than United States practice (*ibid.*, para. 41), since the House of Lords decision in the "*I Congreso del Partido*" case (1981) involved ships plying waters that concerned only the United Kingdom and hence would not have a very wide application. On the

other hand, under the United States Act of 1976, all developing countries, and indeed the developed countries as well, were exposed to an extensive range of restrictive provisions. All nations had a right to legislate, of course, but some had more right than others, in that they could back up their right with armed force and diplomatic and financial power.

31. No one nation or person had a prescriptive right in the concept of how States should be organized or administered or what their agencies should do. Thus there was a need for developing and developed countries alike to pause, take stock and decide whether they were moving in the right direction. That need was increased by the lack of judicial practice upholding absolute immunity, as the Special Rapporteur recognized (*ibid.*, para. 45). So long as a draft convention provided that a State could be arraigned before the courts of another country when it already had an agency in that country with the legal capacity to appear in court, it would be difficult to secure a significant number of ratifications. He was in favour of State immunity, but he also considered that a realistic set of exceptions was necessary: such exceptions must, however, be fair, and countries should not be forced into a corner by legislative provisions.

32. His immediate concern where draft article 16 was concerned related to copyright. Many of the poorer countries were experiencing a cultural explosion, and those various forms of artistic expression required protection. Consequently, while he was in favour of a liberal measure of State immunity, he believed that an exception was advisable in that area. There was no reason why a State should be allowed to do what an individual could not do.

33. If he had understood him correctly, Mr. Jagota had suggested that, under the terms of article 16, the nationalization or expropriation legislation of a defendant State would be subject to examination by the forum State. His own impression, however, was that under expropriation legislation, a State could acquire rights covered by copyright or patent which would then extend to any infringements committed abroad, and that it was partly with that situation in mind that article 16 had been drafted. It would be quite improper for any State to question the validity of legislation that was in force in a foreign State. Developing countries had been reluctant to become parties to earlier copyright conventions mainly because of the restrictions placed on educational material for primary, secondary and other institutions and on technical research material.

34. He agreed in principle with the provisions of draft article 17. Lastly, with regard to draft article 18, while he was in favour of State immunity in the broader sense, he agreed that if a State had a shareholding or other direct interest in a foreign company, it could hardly resist the local jurisdiction. Assuming that its rights in the foreign company were threatened, it would presumably seek redress before the forum of the *locus* of the company and, that being so, must inevitably be bound by its obligations before that forum. He therefore considered that article 18 had a place in the draft and agreed with the Special Rapporteur that a separate article was justified.

35. Mr. RAZAFINDRALAMBO observed that, in examining in his sixth report (A/CN.4/376 and Add.1 and 2) the debate in the Sixth Committee of the General Assembly, the Special Rapporteur had noted the continuing ideological differences with regard to the personality, capacity and functions of the State. At the same time, he had pointed out that the Commission had tried to avoid taking sides in the confrontation of such unavoidable differences and had stressed that the solutions he proposed did not rely on any distinctions between socialist and non-socialist law, civil and common law, or other classifications of legal systems. He had also pointed out that the Commission had been able to reach the conclusion that State immunity was a general principle and that its limitations were exceptions to the general principle (*ibid.*, paras. 20-21).

36. The Special Rapporteur could have stopped there, but after studying the legal evolution of the question, he had expressed the view that there was a marked tendency to increase the restriction of immunity. That meant reopening the controversy on the historical origin of the rule of immunity and the dispute between the supporters of absolute immunity and those who favoured restricted immunity—a new quarrel between ancients and moderns, in which the countries of the Old World, oddly enough, played the part of the moderns, while the young countries supported the thesis of the ancients.

37. The Special Rapporteur had recognized that “in the same way that it cannot be said that a particular legal system has adopted a restrictive practice, nor can the opposite be inferred simply from the absence of practice to the contrary” (*ibid.*, para. 28). He noted, however, that the Special Rapporteur had not drawn from that statement the conclusions which appeared to be necessary. Indeed, the Special Rapporteur considered that the marked increase in restrictive practice which had taken place since the submission of his fifth report was partly due to the absence of judicial practice confirming absolute immunity during the period which had elapsed (*ibid.*, paras. 38-47). It seemed, however, that the pertinent observations put forward by Mr. Ni (1835th meeting) convincingly showed the real significance of that absence of practice. Paraphrasing the assertions of the Special Rapporteur quoted above and simply changing the adjective “absolute” to “restricted,” it would be possible to affirm that “care should be taken lest lack of practice in a given State be misconstrued as existence of practice favouring restricted immunity, when in actual fact there has been no decision upholding any State immunity anywhere”. Formulated thus, that assertion made it possible to reach a conclusion diametrically opposite to that of the Special Rapporteur.

38. Much had been said during the discussion about the interests of developing countries. In fact, the whole problem of the jurisdictional immunities of States and their property revolved around economic and financial interests. If there was no judicial practice anywhere in the third world supporting State immunity of any kind, it was because all disputes relating to economic, commercial or financial intervention by a foreign State or a foreign company in a developing country were entirely

outside the competence of that country's courts. In modern international economic and financial relations there were two kinds of partners: on the one hand, exporters and suppliers of goods, investments, credit and technology—in practice, the industrialized countries—and on the other, those receiving or importing such goods and services, all of which were countries of the third world. Those countries were always in the position of applicants, because they were economically weak. To promote their economic development they needed their partners and submitted to the conditions imposed upon them, among the first of which were jurisdiction or arbitration clauses. They were always required to accept, willy-nilly, an explicit clause on the settlement of disputes by a third party or sometimes events by the courts of the exporting country. That situation resulted in waiver of jurisdictional immunity, which explained the absence of judicial practice relating to such immunity in the countries of the third world.

39. There was also, as Mr. Reuter has rightly pointed out (*ibid.*), a very real psychological cause which might be highlighted for a proper understanding of the problem: that was the distrust of foreign courts in general and of the courts of young countries in particular. It must be recognized that, rightly or wrongly, the judges of those courts did not inspire much confidence in European investors, who were reluctant to entrust them with disputes involving a high financial stake or the interests of the foreign company, still less the interests of a foreign public body. It was true that that distrust was not always felt in one direction only and that a State of the third world was sometimes unwilling to appear before the court of a developed country.

40. In any case, it seemed pointless to base the Commission's work on the practice of States, either because it was fragmentary—often consisting only of the practice of a few large States—or because it was non-existent. It would be wiser to conclude, as the Special Rapporteur had done, that “State immunity as a principle is to be upheld, but several specified areas should be investigated to determine the precise extent of immunity, its applicability or the conditions or limitations qualifying its application” (A/CN.4/376 and Add.1 and 2, para. 29).

41. In connection with draft article 16, the question arose as to whether a State could register a patent or other intellectual property right and whether it could be charged with failing to respect a right of that kind belonging to another person. In the light of the very instructive explanations given during the discussion, especially by Mr. Reuter (1835th meeting), an affirmative answer to that question was no longer in doubt. It remained to be decided whether the article itself was viable and whether it was of any value to States, or whether, on the contrary, it was unnecessary or even harmful.

42. To answer those questions it would be necessary to examine the two paragraphs successively, since they dealt with two quite different situations. Paragraph 1

dealt with the case in which a State itself registered a patent or other intellectual or industrial property right, or used a trade name or business name, and in which a proceeding was initiated concerning the use of those rights. If the State had been willing to take action to secure the protection of the State of registration, it was not clear at first sight why it should not accept the jurisdiction of that State. The Special Rapporteur had explained that point very well in his report (A/CN.4/376 and Add.1 and 2, para. 78). As Mr. Balanda had emphasized (1835th meeting), since the right to use a patent, for example, was exercised within the territory of the State of registration of the patent, any dispute about it should be within the competence of the courts of that State. The State holding the right could, moreover, be the plaintiff if it wished to enforce its right against another person and, by so doing, it appeared implicitly to waive its immunity. That did not present any insurmountable difficulty; the difficulty arose when the State was a defendant. It was the possibility of summoning a State to appear in court which raised the problem of the retention of article 16, paragraph 1. The solution proposed by Mr. Jagota might be attractive, but only in theory. For he feared that it might run counter to the international provisions in force regarding intellectual and industrial property. Must the Commission rely on internal law in that respect? That would only multiply disputes. He would be inclined to accept the provision on exceptions to immunity relating to patents, on condition that the scope of the registration was clearly defined.

43. Paragraph 2 of article 16 raised even more doubts. It dealt with the case in which a third person—private or public—as the holder of a patent or other similar right, took legal proceedings against a State in another State for infringement of that right. The State charged with infringement could not claim immunity from jurisdiction. In his opinion, that was going too far in making exceptions to immunity. There were, of course, international conventions which protected intellectual property, such as the 1971 Universal Copyright Convention.<sup>10</sup> But few countries of the third world had ratified those instruments, for understandable reasons. The point of grave concern was that, under a provision such as that in paragraph 2, any State could be summoned to appear in the court of another State because some third party accused it of infringing a patent or other intellectual or industrial property right held by that third party. Such cases might be multiplied by reason of nationalization. If the charge was unfounded, the State unjustly accused, if it could not invoke immunity from jurisdiction, would have been brought before a foreign court with all the consequences such proceedings would have for it, moral and especially financial. The objections to those provisions raised by Chief Akinjide and Mr. Ushakov (1834th meeting) seemed entirely justified and he was in favour of deleting paragraph 2.

44. As to article 17, the question was whether it should

be included in the draft. It was impossible seriously to challenge the justification for the principle—so well expounded by the Special Rapporteur (A/CN.4/376 and Add.1 and 2, para. 86)—that a State had the power to tax any natural or juridical person, private or public, by virtue of the territorial connection. But under the terms of article 17, paragraph 2, the whole matter of seizure of diplomatic or consular premises or other internationally protected State property would escape the exception to State immunity; and paragraph 1, subparagraphs (c) and (d), referred to taxation of commercial activities, which in his opinion could be covered by the exception to immunity provided for in article 12, on condition that the notion of a commercial contract as defined in article 2, paragraph 1 (g), was very broadly interpreted; hence it was difficult to see what remained of article 17. Many countries did not collect the value added tax on goods destined for export and it generally benefited foreigners. Customs duties were generally not payable by public-law corporate bodies, either under exemption or by virtue of temporary admission. As to stamp-duty and registration fees, they were not payable by foreign States, at least in countries such as Madagascar, where the law on registration and stamp-duty was similar to that of France. Hence it was not surprising that the Special Rapporteur himself had spoken of the “marginal utility” of an express provision on the subject (*ibid.*, para. 88). It should be noted, however, that in matters of taxation, a proceeding could be instituted before a national court either following unsuccessful recourse to the competent authorities, or following a complaint by the Inland Revenue or Customs department. As had been pointed out during the discussion, however, a dispute of that kind might be settled at the foreign office level. Hence article 17 did not appear to be really necessary.

45. Article 18, on the other hand, appeared to have a place in the draft. In his opinion, that provision had the same legal foundation as article 16. Both articles dealt with incorporeal property, possession of which implied the will of the State to submit to the jurisdiction of the State with which the property in question was legally connected. Article 18 concerned shares in a company which might be of a commercial nature, with the reservation that it must satisfy the conditions laid down in paragraph 1, subparagraphs (a) and (b). As the Special Rapporteur had rightly pointed out, a court of the forum State was the only *forum conveniens* (*ibid.*, para. 109).

46. He would like some clarification on points of detail. First of all, he did not see the need to make a distinction between a partnership and a body corporate where legal proceedings were concerned. Secondly, the notion of control might raise problems, since it might be simply a matter of legal control, whereas economic or financial control was often more real in practice.

47. He found paragraph 2 of article 18 completely justified, since the required “agreement in writing” appeared to refer to arbitration clauses or jurisdiction clauses. He would propose some drafting changes to the Drafting Committee in due course.

*The meeting rose at 1 p.m.*

<sup>10</sup> United Nations, *Treaty Series*, vol. 943, p. 178.

## 1837th MEETING

Friday, 8 June 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

*Present:* Mr. Balanda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**Jurisdictional immunities of States and their property**  
(*continued*) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371, <sup>2</sup> A/CN.4/376 and Add.1 and 2, <sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR <sup>4</sup>  
(*continued*)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) *and*

ARTICLE 18 (Shareholdings and membership of bodies corporate) <sup>5</sup> (*continued*)

1. Mr. McCaffrey said that he wished to emphasize the point already made by Sir Ian Sinclair (1834th meeting), namely that there was no historical basis for the proposition that international law contained a rule specifying the absolute immunity of one State from the juris-

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (a) and commentary thereto: *ibid.*, p. 100; para. 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (c) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (d) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (e) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

*Part III* of the draft: (h) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1833rd meeting, para. 1.

diction of another. He would cite but one authority in support of that argument, the decision in *The Schooner "Exchange" v. McFaddon and others*<sup>6</sup> in 1812, in which Chief Justice Marshall of the United States Supreme Court had expressed the opinion that any exemption from the territorial jurisdiction of a State must derive from the consent of the sovereign of the territory, which could be express or implied. Such implied permission for one State to enter the territory of or engage in intercourse with another was, according to Chief Justice Marshall, an "implied licence", in other words permission that was revocable on proper notice by the territorial State. Hence the notion that there had always been a rule of absolute jurisdictional immunity had no basis in fact. It was also untenable in theory, for the argument that absolute immunity was the necessary corollary of the sovereign equality of States could not withstand close scrutiny: once States A and B were equal, how could State A act with impunity within State B except with the consent of State B? Chief Justice Marshall had further stated in the case in question that any exception to the full and complete power of a nation within its own territory must be traced to the consent of the nation itself and could flow from no other legitimate source. Those words were as true in 1984 as they had been in 1812 and he was therefore unable to agree with Mr. Jagota (1836th meeting) that State immunity was an exception to territorial sovereignty.

2. The judgment in *The Schooner "Exchange"* also demonstrated that, under the doctrine of the sovereign equality of States, one State would not be absolutely immune from the jurisdictional power of another State, at least so far as acts conducted or effects produced within the territory of that other State were concerned. Rather, any jurisdictional immunity must necessarily be based on the consent of the forum State, and that consent would in turn necessarily be limited in terms of the purposes for which it was given. The inescapable conclusion seemed to be that the jurisdictional immunity of States should be viewed in functional terms, which was why the expressions "absolute theory" and "restrictive theory" were not very helpful in understanding why States were granted immunity from the jurisdiction of other States in some circumstances, but not in others. One basic difficulty with the expression "absolute immunity" was that little, if anything, was absolute in the law. One only had to consider the universal practice of withholding immunity on the basis of reciprocity in order to understand that "absolute" immunity was never truly absolute.

3. It had been suggested that the functional theory of immunity was recognized only in Europe and North America. But, as was clear from the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2), States such as Singapore, Pakistan, Australia and Malaysia had followed a similar line. Moreover, the Inter-American Juridical Committee, a body composed chiefly of legal experts from South America, had in 1983 adopted a draft convention<sup>7</sup> which recognized that State

<sup>6</sup> See 1835th meeting, footnote 7.

<sup>7</sup> See OEA/Ser.G-GP/doc. 1352/83, of 30 March 1983. See also *International Legal Materials* (Washington, D.C.), vol. XXII, No. 2 (March 1983), p. 292.

immunity did not exist in a number of cases, while the committee of the International Law Association that had prepared the Montreal Draft Convention on State Immunity in 1982<sup>8</sup> had been composed of experts not only from Western Europe and North America, but also from Egypt, Japan, Pakistan, the Philippines, Poland, the USSR, Yugoslavia and Zambia.<sup>9</sup> It was difficult to support the proposition that only the Western industrialized States analysed the jurisdictional immunity of States in functional terms when such an approach was in fact followed by a broad range of countries, and all the new legislation adopted some form of functional approach.

4. He wished in that connection to lay to rest the fears expressed by Mr. Francis (1836th meeting) regarding the United States *Foreign Sovereign Immunities Act of 1976*. In order for a United States national to be able to bring an action in the United States courts in respect of a tort, the tort must, under section 1605 (a) (5) of the Act, have occurred in the United States itself. Similarly, in the case of commercial activities, under section 1605 (a) (2) of the Act, there had to be a direct connection with the United States.

5. With regard to the question of reciprocity, he noted that in his report (A/CN.4/376 and Add.1 and 2, paras. 39 *et seq.*), the Special Rapporteur referred to the "sharp increase in restrictive practice" and stated that reciprocity would inevitably lead to an expansion of the functional approach to jurisdictional immunity. Since a growing number of States allowed, or even directed, their courts to exercise jurisdiction over foreign States in certain categories of cases, it seemed to follow automatically that the States which based control of immunity on reciprocity would withhold immunity in a correspondingly growing number of cases. In other words, since States such as Hungary, India, Poland and the USSR granted immunity from the jurisdiction of their courts on the basis of reciprocity, it seemed that the growing interdependence of the world, coupled with the increasing prevalence of functional practice, would lead inevitably to an ever larger number of cases in which such States would withhold immunity.

6. Against that general background, he had no objections in principle to draft articles 16 to 18, the content of which was covered by the trading and commercial activities rubric of the United States *Foreign Sovereign Immunities Act*. As the Special Rapporteur pointed out in his report (*ibid.*, paras. 56-57), article 16 followed on logically from articles 12 and 15. With regard to article 12, the definition of "commercial contract", as laid down in paragraph 1 (g) (iii) of article 2, could be interpreted to cover the subject-matter of article 16, but the latter was closer to article 15 inasmuch as patents, trade marks and other intellectual property were in effect property rights conferred by a State upon the inventor or producer. The fact that a State conferred such a right was an indication that it followed a strong policy of encouraging innovation and investment of labour and cap-

ital; that policy would be thwarted if it could be evaded by the simple expedient of, for example, causing an item patented by company A in State X to be manufactured by another company owned by State Y and sold in State X in violation of the patent owned by company A. As Chief Justice Marshall had held in *The Schooner "Exchange"*, the implied licence under which the foreign State entered the territory or commerce of the forum State could never be construed as granting such an exemption from jurisdiction.

7. As for the concern voiced by Mr. Jagota (1836th meeting), the reason why there did not seem to be any problem regarding article 16 could be illustrated by two hypothetical situations. Assuming, first, that there were two States, X and Y, which were not parties to any multilateral or bilateral agreement on patents, and that company A, incorporated under the laws of State X, patented a product in State X; assuming further that company B, incorporated under the laws of State Y, patented the same or a similar product in State Y and that State Y then nationalized company B and its patent and sought to sell the patented product in State X; it was clear that company B could not do so, nor was it sensible to allow State Y to be immune from challenge by company A in the courts of State X. The Supreme Court of Austria, in an extremely well-reasoned opinion, had agreed with that view in *Dralle v. Republic of Czechoslovakia* (1950), when it had held that what could not be done by a private company could not be done by a foreign State either (A/CN.4/376 and Add.1 and 2, para. 65).

8. Assuming, secondly, that company A, incorporated under the laws of State X, has registered a patent in State X and also in State Y, to which company A exported its product; assuming further that State X nationalized company A and then applied to the authorities in State Y for the patent in State Y to be reissued or registered in the name of State X; then if State Y's patent office refused to reissue the patent and State X wished to challenge that refusal, it could appeal against the action of State Y's patent office. State X would then be a claimant and would waive immunity, as provided for under draft article 9. If State Y's patent office did reissue the patent, company A could presumably appeal. In any such appeal, or indeed in an original action brought by company A for patent infringement, the question of the validity of State X's nationalization might be raised. That was the point of concern to Mr. Jagota, but his own interpretation of article 16 was that it did not cover the question of whether one State could examine the validity of nationalization effected by another State. The matter had been considered by the Austrian Supreme Court in the *Dralle* case and had been dealt with in some States as an issue of sovereign immunity or as an "act of State", but it was important not to confuse that question, which could arise in a wide variety of contexts, with the entirely separate issue covered by article 16, which did not seem to present any problem regarding examination of the validity of foreign nationalization.

9. Again, in *The Schooner "Exchange"*, Chief Justice Marshall had also stated that: "A prince, by acquiring private property in a foreign country, may possibly be

<sup>8</sup> See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 5.

<sup>9</sup> *Ibid.*, p. 325.

considered as ... assuming the character of a private individual." That was not to suggest that there was no distinction between the immunity of the sovereign, on the one hand, and of the State, on the other—a distinction which could in fact be supported on the basis of the immunity *ratione personae* of foreign sovereigns. But *The Schooner "Exchange"* case had provided an early indication that even a sovereign was not immune from the jurisdiction of other States if he, or *a fortiori* a State, acquired private property in a foreign country.

10. He would like to reassure Chief Akinjide that article 16 would in no way affect the ability of countries to decide on the extent to which they wished to grant the rights provided for under the article. Indeed, it would enable States to do exactly what Chief Akinjide had said (1834th meeting) they should be allowed to do, namely to regulate the matter under bilateral agreements and municipal legislation. Thus, if a State chose not to become a party to a copyright convention, nothing in article 16 would prevent it from reproducing books copyrighted in other States and selling or distributing them within its borders. On the other hand, it would not be allowed to reproduce a book copyrighted in another State and sell it in that other State, unless it subjected itself to the jurisdiction of the courts of that other State. Consequently, he saw nothing in article 16 that was inimical to the interests of the developing countries, which were, in any event, also beneficiaries under the article.

11. The Special Rapporteur had pointed out in the report (A/CN.4/376 and Add.1 and 2, para. 51) that article 16 covered three categories of intellectual and industrial property; the wording used in the article could perhaps be simplified by naming those three categories and defining them. Both paragraphs of the article were essential. Paragraph 1 related to the determination of the right in question in proceedings which might be brought by the State holding the right or by another party. In either case, the foreign State's interest might well be affected. Paragraph 2 concerned a situation in which the foreign State was alleged to have infringed the right in question in the territory of the State of the forum, which was the State granting the right in question. In that case, the competence of the State granting the property right to make a determination with respect to that right could not be doubted. Lastly, care should be taken to draft the article in broad enough terms to cover new technology such as computer firmware and software.

12. With regard to article 17, it was important to make it clear, first, that the draft articles did not affect existing immunities for diplomatic and similar premises, and, secondly, that States would not normally enjoy jurisdictional immunity in respect of fiscal liabilities and customs duties arising out of trading and commercial activities. The first point was covered by paragraph 2 and the second by paragraph 1. He none the less agreed with Mr. Ogiso (1834th meeting) that the wording could be simplified without sacrificing clarity.

13. Article 18 seemed simply to state the proposition that, when a State became a member of a commercial organization that also had private individuals or entities as members, the price of admission was in effect agreement

not to claim immunity in any proceedings concerning the determination of its rights and obligations as a member of the organization. There was, of course, good reason for such a provision, since the alternative would be the enactment of legislation stipulating that States could not participate in commercial organizations. In other words, article 18 was merely saying that, when it came to investing in, or participating in the control of, a commercial organization in another country, a State could not have its cake and eat it. It could hardly be otherwise, for a rule of immunity would not only adversely affect the organizations themselves, but would also frustrate the implementation and enforcement of the statutory schemes that governed the way in which such companies operated. Article 18, therefore, was a logical and necessary element of the draft.

14. Mr. PIRZADA, referring to certain judicial decisions in which Pakistan had been involved, said that although a plea of sovereign immunity had ultimately prevailed in the House of Lords in the well-known case *Nizam of Hyderabad and State of Hyderabad v. Jung and others* (1956),<sup>10</sup> a rider had been added to the effect that the bank need not release the funds until the parties had established their claims. As a result, millions of pounds sterling had been frozen for more than 30 years. Fortunately, India and Pakistan had arrived at an amicable agreement, but the sums in question had yet to be recovered from the bank. It was in the light of that costly experience, and on the grounds of reciprocity, that the *State Immunity Ordinance*, which was patterned on United Kingdom legislation, had been promulgated in Pakistan in 1981 (see A/CN.4/376 and Add.1 and 2, para. 71).

15. In *The Secretary of State of the United States of America v. Messrs. Gammon-Layton* (1971),<sup>11</sup> the High Court of Karachi had rejected a plea of sovereign immunity and allowed the arbitrators' award. In another arbitration arising out of a claim against the Government of Sri Lanka for alleged breach of contract, a difference of opinion had arisen between the arbitrators and the matter had been referred to the umpire, who had rejected the submission by the Government of Sri Lanka to the effect that the transaction was not of a commercial nature because the rice that was the subject-matter of the contract was being imported to meet an acute shortage throughout the country. The umpire had awarded a token sum which the contractor had ultimately accepted. The High Court, however, had left open the question of whether, in the circumstances of the case, a plea of sovereign immunity was available. In *A.M. Qureshi v. Union of Soviet Socialist Republics and another* (1981),<sup>12</sup> the Supreme Court of Pakistan had held that sovereign immunity did not extend to commercial transactions and had referred the case to the High Court. In the event, the Soviet Union had voluntarily paid all the plaintiff's costs. In all three cases, he had appeared as counsel.

<sup>10</sup> United Kingdom, *The Law Reports, Chancery Division, 1957*, p. 185.

<sup>11</sup> *All Pakistan Legal Decisions* (Lahore), vol. XXIII (1971), p. 314.

<sup>12</sup> *Ibid.*, vol. XXXIII (1981), p. 377.

16. He noted that the Special Rapporteur had referred in his sixth report, in connection with the "sharp increase in restrictive practice" (*ibid.*, paras. 39-47), to *Birch Shipping Corporation v. Embassy of the United Republic of Tanzania* (1980), the "I Congreso del Partido" case (1981) and the *National Iranian Oil Company* case (1983), in which the Federal Constitutional Court of the Federal Republic of Germany had allowed the attachment of assets of a foreign sovereign State, as well as to the cases in which Italian courts had upheld the attachment of the bank accounts of embassies for the payment of social security and other emoluments under a contract of employment. The *State Immunity Ordinance* of Pakistan, in section 3, recognized immunity of the State from jurisdiction but went on to provide for certain exceptions, three of which were covered to a certain extent by draft articles 16, 17 and 18. Under section 13 of the Ordinance, the State was given great latitude even with regard to commercial activities, inasmuch as they were exempt from a number of procedures. Section 14 provided that no penalties could be imposed upon the State nor any attachment, injunction or specific performance ordered. Section 15 provided that a separate entity would also be immune from the proceedings in the courts if it was acting in the exercise of sovereign authority, and section 16, the most important provision, laid down that the federal Government could extend immunity in certain instances.

17. It was significant that, in their report on their meeting in New York in November 1983, the legal advisers to the Asian-African Legal Consultative Committee had expressed the view that, in the present state of development of the law, it would be futile to contemplate application of the doctrine of sovereign immunity in its traditional form, but that, even tested by the restrictive doctrine, it would appear that certain provisions of the United States *Foreign Sovereign Immunities Act of 1976*, and particularly their judicial interpretation, went far beyond what the international community could legitimately be expected to accept. They had further observed that a restrictive doctrine of sovereign immunity might well be justified in the modern context, particularly having regard to the manifold activities of States in the commercial trading sector, and that it would not be reasonable to expect immunity to be allowed in regard to activities of a purely commercial nature in the true sense. Nevertheless, they had hoped that even the restrictive doctrine would have some limitation, since no State had the right or competence, under the guise of applying a restrictive doctrine, to encroach upon the jurisdiction of other States.

18. The report contained a number of suggestions, including one on arbitration and another on the possibility of member countries adopting legislation to provide for reciprocal restriction of immunity in regard to foreign States whose legislation provided for such restriction. The 1961 Vienna Convention on Diplomatic Relations contemplated such a solution. The legislation in question would provide that a foreign Government could not be sued without the consent of the executing Government. Another matter mentioned in the report had been the colossal costs of proceedings pertaining to pleas of sovereign immunity. A good illustration in that regard was

provided by the decision of the House of Lords in *Alcom Ltd. v. Republic of Colombia* (1984)<sup>13</sup> that the parties should bear their own costs, which exceeded the amount of the claim itself. The Special Rapporteur's constructive suggestions in that regard should be given full consideration. Mr. Ni (1835th meeting) had also rightly pointed out that if commercial activities were carried on by an agency as an independent entity, the foreign State concerned should not be dragged into proceedings as a co-defendant.

19. As to draft article 16, Chief Akinjide's interesting comments (1834th meeting) on the wide disparity between the developed countries and the developing countries with regard to intellectual property and the prejudicial effects of the proposed provisions on the developing countries must be taken into account. Moreover, article 16 even went beyond the terms of section 7 of the United Kingdom *State Immunity Act 1978* (A/CN.4/376 and Add.1 and 2, para. 70) and seemed to be similar to article 8 of the 1972 European Convention on State Immunity (*ibid.*, para. 73). The reference to rights belonging to a third person and to a right "otherwise protected in another State" would obviously create serious complications. Mr. Jagota's criticism of the article (1836th meeting) was also highly pertinent. The courts of another State should not have jurisdiction to examine the validity of the nationalization, acquisition, requisition or other expropriation legislation of the State concerned. Similarly, the Commission should benefit from the experience and expertise of UNCTAD and other relevant bodies.

20. Draft article 17 likewise called for reconsideration. Paragraph 1 (a) appeared to be based on section 11 of the United Kingdom Act, which was applicable only to commercial activity. Accordingly, an express reference to commercial activity should be introduced into subparagraph (a), as was already done in subparagraphs (c) and (d). Paragraph 1 (b) could be dispensed with, as could paragraph 2, for the reference to certain specific measures of execution could lead to difficulties of interpretation; it might be wrongly inferred that other measures or remedies not specified therein were available for execution against diplomatic or consular premises.

21. Draft article 18 was acceptable in substance. The basis for the article would be apparent from the cases from Indian judicial practice prior to independence, when the subcontinent had had a number of "native States" ruled by maharajahs and nawabs. Under the provisions of the statutory law at that time, those States and their rulers were entitled to sovereign immunity. In the *Gaekwar of Baroda State Railways* case,<sup>14</sup> the Privy Council had upheld the plea of immunity, since the railway had been owned by the Maharajah of Baroda. On the other hand, in the winding up of a limited company in which the majority of the shares had been owned by the ruler of the State, immunity had been denied by the High Court because the company had a personality dis-

<sup>13</sup> See 1833rd meeting, footnote 5.

<sup>14</sup> *Gaekwar of Baroda State Railways v. Hafiz Habib-ul-Haq and others* (1938) (*Annual Digest and Reports of Public International Law Cases, 1938-1940* (London), vol. 9 (1942), case No. 78, p. 233).

inct from that of its members. Article 18 applied *prima facie* to bodies established for commercial activities. In order to remove all doubts, it should be pointed out that the article would not apply to cultural bodies or to bodies which, under the company law of India or Pakistan, for example, were called “associations not for profit”. That would perhaps allay any apprehensions concerning bodies like the Asian-African Legal Consultative Committee. It was plain that articles 16 to 18 required revision in the light of the discussion.

22. Mr. LACLETA MUÑOZ, referring to the section of the report (A/CN.4/376 and Add.1 and 2, paras. 2-18) on the status of the draft articles already submitted, said that he was among those who had expressed reservations regarding article 6, paragraph 2, and consequently the interrelated article, namely article 7, texts which had been provisionally adopted by the Commission.

23. The question of the differences in ideology regarding the personality, capacity and functions of the State was crucial and the solution proposed by the Special Rapporteur (*ibid.*, para. 22), which was possibly the only one, deserved consideration. On the one hand, there were those who believed in the single legal personality, or rather capacity, of the State, vested in international law with all the attributes that were those of a sovereign and which it could renounce only of its free will. On the other hand, there were those, including himself, who believed in the dual legal capacity of the State. In his opinion, when a State acted as a subject of law in an internal legal system—the one in force within its own territory or within the territory of other States—it was not protected by jurisdictional immunity, at least not in every instance.

24. Indeed, 50 years had passed since the problem of such duality had been resolved. States that had embarked on activities which, in other systems, were carried on by private entities that were subjects of private law had done no more than assign those activities—at least in their external relations—to other entities which were controlled, owned or administered by them, but had separate personality and were therefore subject to the jurisdiction of the courts of another State. From such a standpoint it was possible to affirm the absolute immunity of the State, because the State as such was no longer engaging in activities that could be classed as *acta jure imperii*, in other words acts of sovereign authority, since the *acta jure gestionis* were being carried out by other entities. Such an approach, however, was not followed by all States and rules acceptable to all had to be adopted. Admittedly, the task was not an easy one. In that regard, it was essential to remember that the distinction between *acta jure imperii* and *acta jure gestionis* lay essentially in the need to facilitate relations between foreign States and private persons who were the nationals of other States.

25. The questions discussed in the report in connection with differences in practice and procedure (*ibid.*, paras. 23-26) were different, but no less important. He could agree with the Special Rapporteur if the latter's view was that the problem of jurisdictional immunities arose only when the courts were competent and had jurisdiction under the rules governing those matters. Like the Special Rapporteur, however, he wondered whether the exi-

stence of jurisdictional immunity in an individual case could be determined only by the competent court. That was doubtful, for if the determination of jurisdictional immunity fell only to a court that was competent, complete immunity would not be possible and the foreign State would always be subject to the jurisdiction of that competent court, at least so far as the decision on immunity from jurisdiction was concerned.

26. The Special Rapporteur's reflections on the growing acceptance of the necessity for international control of State immunity (*ibid.*, paras. 27-28) reopened the question of differences in ideology but were of great interest and illustrated his commendable efforts to make every use of the inductive method, a course which sometimes posed some difficulties. For his own part, he endorsed the statement that care should be taken lest lack of practice in a given State be misconstrued as favouring absolute immunity when, in actual fact, there had been no decision upholding any State immunity anywhere (*ibid.*, para. 28). Spain afforded an illustration of that point, since it revealed no practice in the matter. There was no legislative provision, no decision of the Supreme Court—merely the decisions of some courts of first instance. Even those decisions were disconcerting, because in some instances they reflected the distinction between *acta jure imperii* and *acta jure gestionis*, but not in others. He would hesitate to affirm that decisions by Spanish courts granting a foreign State immunity from jurisdiction without drawing that distinction actually went so far as to confirm absolute immunity. More than likely, a judge in a particular case had considered whether the circumstances warranted the granting of immunity and, after deciding that they did, had ruled on the issue as if immunity were unrestricted. In fact, that was not so. Decisions of that kind could not be regarded as being any different from rulings in which a judge had decided not to recognize immunity on the grounds of the distinction between *acta jure imperii* and *acta jure gestionis*.

27. The application of the principle of reciprocity, discussed in the report (*ibid.*, para. 29), was not without interest, for reciprocity covered the notions of equity, justice, equality and also retaliation and reprisals. It was nevertheless a necessary evil that could solve some of the problems involved. The trend towards further limitations on immunity of States was warranted and could be explained by the increasing realization that a State's immunity when it engaged in trading activities must not conflict with protection of the interests of other entities or private persons, and should not violate human rights.

28. Draft article 16 was acceptable. Chief Akinjide's comments (1834th meeting) regarding the situation of the developing countries were not properly relevant, since they were concerned more with legislative policy and the system of protecting intellectual property. No rule of public international law compelled States to protect all, or even some of the aspects of intellectual property. States were perfectly free not to become parties to the international conventions on the matter and to refrain from adopting internal legislation. Article 16 dealt not with that question but with the situation of a State when it submitted itself to the system for the protection of in-

lectual property enforced in the forum State in order to defend its intellectual property rights, and the situation of a State when it infringed or was accused of infringing the rights of others in the territory of the forum State.

29. The two situations were covered in paragraphs 1 and 2, respectively, of article 16 and were the two sides of the same coin. Invoking reasons of justice or equity in order to lay down the principle of immunity in paragraph 2 would in effect be the same as saying that a State could, in the name of its sovereignty, meddle in the territorial sovereignty of another State by infringing the rights of third parties, who would then be deprived of any remedy. Mr. Jagota considered (1836th meeting) that failure to enunciate State immunity in paragraph 2 meant that the courts of the forum State could strip the acts and decisions of another State of their legal effects, something which would be incompatible with the sovereignty of that other State. Personally, he did not fully share that view, since judges in the forum State must then, in the name of the very same principle of sovereignty, apply the rules in force in the territory of that State for the protection of intellectual property rights. Perhaps it would be enough for them to recognize the extraterritorial effects of the decisions and acts of other States, for example by invoking reasons of public policy, something which would not be incompatible with respect for the sovereignty of States. Once again, the difficulty lay in the need to go into detail, but it was also extremely difficult to set forth principles that took account of each and every possible case.

30. Furthermore, if the interests of the developing countries were to be borne in mind, particularly with regard to the acquisition of technology and technical know-how, it was necessary to draw on other solutions that had already been proposed, more especially the adoption of systems for protecting intellectual property that included certain requirements established in the national interests of those countries. That could not be achieved merely by protection, through State immunity, of types of conduct that could well be wrongful under the law of the forum State.

31. The section of the report on draft article 17 (A/CN.4/376 and Add.1 and 2, paras. 81-103) was rather obscure, at least in the Spanish version, but the rule appeared to be acceptable inasmuch as it covered cases in which the State did not enjoy tax exemptions and did not benefit from immunity from the jurisdiction of the courts of the other State in any proceeding relating to fiscal liabilities. The wording of the article could none the less be simplified, since it gave the impression that the State was subject to the jurisdiction of the courts of another State only in proceedings relating to liabilities under the four categories of taxes and duties enumerated. Paragraph 2 should be brought into line with article 4 of the draft. If it was retained, attention would have to be paid to the wording, since State immunity in connection with seizure did not seem to be a satisfactory notion. It would be better to speak of the inviolability, rather than the immunity, of the State.

32. Draft article 18, on shareholdings and membership

of bodies corporate, was absolutely essential. Membership of a State in a body corporate must not create a situation of inequality through application of the principle of immunity, something that would be disastrous for the other members. The article elicited comment only in connection with the condition whereby the body corporate in which the State participated must be "controlled from ... that State". That notion was merely territorial and had nothing to do with the theory of control, which was concerned with the nationality of those who effectively exercised control over the body corporate. The wording should be improved accordingly.

33. Mr. MAHIU said that, although the Special Rapporteur had, in his sixth report (A/CN.4/376 and Add.1 and 2, para. 20), pointed to the irrelevance of continuing differences in ideology and had urged the Commission not to become bogged down in dispute, the discussion showed that the same basic issues continued to arise. For example, the three articles under consideration necessarily called into question yet again the fundamental principle of State immunity, which was viewed in various ways depending on the place assigned to the State in international relations. The problem would be easy to resolve if a distinction could be made in every instance between sovereign activities, which benefited from immunity, and activities which did not so benefit. But sometimes the distinction was particularly difficult to make. Indeed, the Commission could well engage in endless discussion on that point. If it was true, as Mr. McCaffrey had pointed out, that absolute jurisdictional immunity was not possible, then absolute territorial sovereignty was not possible. In short, the sovereignty of the forum State and the immunity of the foreign State—such immunity simply being an extension of the foreign State's own sovereignty—were the two sides of the same coin. Again, it was not quite true, as Mr. McCaffrey had affirmed, that absolute immunity from jurisdiction would lead to impunity for one State in another State. Under international law, other sanctions were available to a State that regarded another State's activities as reprehensible: it could declare an agent of the other State *persona non grata* or decide to sever diplomatic relations.

34. It was apparent from the report that the legislative practice, and still more the judicial practice, of States had not laid down the principle of absolute immunity. However, the virtual absence of judicial practice could be explained quite simply by the fact that the problem had never arisen in some States. Indeed, in some States the courts had never had occasion to adjudicate because it had not been deemed advisable to bring before them cases that would have jeopardized the principle of immunity. Hence it was possible to infer that some States had a very broad and perhaps absolute view of immunity.

35. One might well ask, as the Special Rapporteur did (*ibid.*, paras. 88-89), whether draft article 17, concerning exemption from fiscal liabilities and customs duties, was really warranted. Regional conventions glossed over that problem. The argument had been advanced that the Commission would thus be contributing to the progressive development of international law, but he was hesitant in that regard because some practice did exist in the

matter and seemed not to have raised any special problems.

36. Despite lengthy discussion, most members appeared to be in favour of the protection afforded in draft article 16. Its scope should therefore be clarified, together with the effects on States brought before the courts. In connection with paragraph 1, Mr. Jagota (1836th meeting) had wondered whether a State depositing or applying for a patent or trade mark in another State thereby consented to the latter's jurisdiction or whether it should then request protection for the patent or trade mark. From the standpoint of jurisdiction, the effects would not be the same in each case. Deposit or application by one State in another State implied acceptance by the former of the latter's legislation, legislation which normally provided for protection which was assured by the courts of the forum State. The Special Rapporteur would have to take account of that matter, particularly in the light of the fact that the issue involved a State and not a person.

37. The enumeration of intellectual property rights in paragraph 1 (a) of article 16 could be condensed. Why, for example, mention a plant breeders' right and not the right to a breed of animal or even the human species for the purposes of genetic engineering? Moreover, it was doubtful whether the same effects could be attached to a patent which had been "registered", "deposited" or "applied for". The consequences of a mere application should not be the same as for registration or deposit.

38. Paragraph 2 of article 16 should be brought into line with paragraph 2 of article 15 of the draft, in connection with which he had expressed reservations.<sup>15</sup> Indeed, paragraph 2 of article 16 confirmed his fears: a State might well be brought before the courts of another State in connection with patent proceedings against a third party. It was essential to limit the cases in which a State could be summoned to appear. Mr. Jagota's concern regarding the assessment of nationalization measures was perfectly justified. In view of the phenomenon of "creeping jurisdiction", a State sued in connection with nothing more than copyright might find itself being taken too far. Moreover, in regard to intellectual property, case-law varied not only from one country to another, but even inside one and the same country. Consequently, under paragraph 2 of article 16 in its present formulation, some States could be dragged into proceedings well beyond any expectation.

39. Draft article 17 called for comment merely in connection with its wording. An enumeration of taxes and duties should be avoided so as to obviate giving the impression that taxes and duties which were not listed were in fact exempt from jurisdiction. At the same time, no mention should be made of value added tax or *ad valorem* stamp-duty, which did not exist in all countries. An interesting solution had been proposed by Mr. Jagota, namely to approach the problem from the standpoint of the activities of the State rather than the standpoint of taxes, and to identify the activities for which a State would be exempt from the jurisdiction of the courts of another State.

40. The principle underlying draft article 18 was jus-

tified. As he had observed in connection with other articles, it was natural for a State engaging in commercial activities in another State to be subject to the jurisdiction of the courts of that other State. Nevertheless, it would be advisable to clarify the scope of the article, particularly the requirement that the body corporate should have members other than States. The point had already been raised in the course of the discussion that members other than States might include international organizations. It was also possible to have a company in which the sole shareholder was the State, or companies consisting of States and organizations, like some banks that took part in regional or world-wide commercial operations.

41. Paragraph 1 (b) of article 18 set forth the criteria for identifying a company, namely the law governing incorporation, the matter of control, and the principal place of business. The first of those criteria was sound, but the other two should be re-examined in order to avoid difficulties of interpretation.

42. Lastly, the question arose whether the Commission could define a company within the meaning of article 18, something that in turn posed the problem of the definitions contained in article 2 of the draft. Article 18 spoke of bodies corporate or partnerships, but they were characterized differently from one legal system to another. Some bodies could not be clearly marked as bodies under public law, bodies under private law or bodies engaging in acts of sovereignty or in commercial acts. Hence the problem was not simply one of drafting.

43. Sir Ian SINCLAIR said that, unfortunately, he had forgotten to comment in his earlier statement (1834th meeting) on the passage in the Special Rapporteur's report relating to the recent "*I Congreso del Partido*" case (1981), in which jurisdiction had been upheld upon the physical presence of a sister ship (A/CN.4/376 and Add.1 and 2, para. 41). The passage in question might give the impression that, in the case in point, the United Kingdom courts were exercising excessive jurisdiction. The real position was, in fact, that the so-called "sister-ship jurisdiction" stemmed from the United Kingdom *Administration of Justice Act, 1956*<sup>16</sup> which was itself based on the International Convention relating to the Arrest of Seagoing Ships<sup>17</sup>—a Convention which had been drawn up at the Ninth Diplomatic Conference on Maritime Law held at Brussels in 1952 and to which more than 30 States, including the United Kingdom, were parties.

44. The sister-ship jurisdiction referred to in the report was therefore nothing new. It had been the subject of lengthy discussions between experts on maritime law at the Brussels Conference. It existed mainly in order to ensure that certain types of maritime claims or maritime liens against a ship could be pursued against a sister ship. That was very necessary in shipping, since vessels tended to move from place to place very rapidly.

*The meeting rose at 1.05 p.m.*

<sup>15</sup> *Yearbook ... 1983*, vol. I, p. 300, 1806th meeting, para. 80.

<sup>16</sup> United Kingdom, *The Public General Acts, 1956*, p. 245, chap. 46.

<sup>17</sup> United Nations, *Treaty Series*, vol. 439, p. 193.

## 1838th MEETING

Tuesday, 12 June 1984, at 3 p.m.

Chairman: Mr. Alexander YANKOV

*Present:* Mr. Balanda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property (continued)** (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>  
(continued)

ARTICLE 16 (Patents, trade marks and other intellectual properties)

ARTICLE 17 (Fiscal liabilities and customs duties) *and*

ARTICLE 18 (Shareholdings and membership of bodies corporate)<sup>5</sup> (concluded)

1. Mr. USHAKOV said he wished to point out that article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics could not be interpreted, as the Special Rapporteur had done in his sixth report

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (a) and commentary thereto: *ibid.*, p. 100; para. 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (c) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (d) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (e) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

*Part III* of the draft: (h) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1833rd meeting, para. 1.

(A/CN.4/376 and Add.1 and 2, para. 72), to mean that jurisdictional immunity was granted to foreign States subject to reciprocity. The article first laid down the rule of absolute immunity, under which a suit could be brought against a foreign State only with its express consent, and then went on to specify that where a foreign State did not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the article, was accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR on another authorized organ might impose retaliatory measures in respect of that State, its representatives or its property. Accordingly, such measures could be taken against a foreign State which had infringed the law of the USSR, but they were not based on any reciprocity. Further to an infringement of that kind, any State could take retaliatory measures on the grounds of responsibility. Soviet legislation should be construed in that sense, as should, in all likelihood, the legislation of some other States.

2. Mr. DÍAZ GONZÁLEZ said it was deplorable that, in the Spanish version, the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2) was very difficult to read. It was not the first time that, as a member working in Spanish, he was compelled to protest that the Commission's documents, which were for the most part drafted in English or French, were incorrectly translated into Spanish, even though they were extremely well written in the original language. Legal terminology was as precise in Spanish as it was in other languages and it was regrettable that the Commission's Spanish-speaking members should be obliged to use documents containing expressions that were not accurate having regard to their legal training and background.

3. Generally speaking, draft articles 16 to 18 were acceptable. The Special Rapporteur had endeavoured to reconcile the trends which had emerged not only in the Commission, but also in the international legal world. It did not seem advisable to revert now to matters of principle such as the absolute character of jurisdictional immunity or of sovereignty. Perhaps the three articles would have to be recast and condensed. For example, the detailed enumeration in article 17, if retained, might well cause more difficulties than it would solve. Moreover, the Commission should not try indefinitely to determine, for instance, which taxes or patents were exempt from jurisdiction; it should simply use terms broadly defined in the relevant international conventions and in the fiscal legislation of States. In any event, the three articles in question would doubtless be referred to the Drafting Committee, which would consider both the substance and the form. He reserved the right to make further comments on them when they came back from the Drafting Committee.

4. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion on draft articles 16 to 18, said that the debate had proved helpful. In particular, he wished to thank Mr. Ushakov for his explanation regarding the interpretation of Soviet legislation. Clearly, under Soviet law immunity was not based on reciprocity, although the executive could, where appropriate, take retaliatory

measures that might have the effect of restricting the scope of immunity. Thus the position under Soviet law was not quite the same as in Indian practice and was the opposite of Italian practice, in which immunity was granted to a foreign State only in so far as it was established that the Italian State enjoyed immunity under that foreign State's law. He was grateful to Sir Ian Sinclair (1837th meeting) for clarifying the position with regard to "sister-ship jurisdiction", thereby dispelling any misunderstanding regarding the passage of his sixth report on that subject (A/CN.4/376 and Add.1 and 2, para. 41).

5. Similarly, Mr. Pirzada (1837th meeting) had helpfully drawn the Commission's attention to the role of the executive in the recognition of State immunity, as illustrated by the legislation in Pakistan. Of course, State practice on the matter of the immunity of foreign States consisted primarily of judicial practice, but he agreed that due regard should be paid to legislative practice and also to the practice of the executive, although the latter was admittedly more difficult to investigate and analyse than was judicial practice.

6. During the discussion of the topic at the Commission's thirty-fourth session, it had been noted that the judicial practice related to only a handful of States, mostly from western Europe. That important point had been made by, among others, Mr. Malek<sup>6</sup> and Mr. Thiam.<sup>7</sup> In his reply,<sup>8</sup> he had said in particular that the first leading case on the subject, *The Schooner "Exchange" v. McFaddon and others* (1812), had been tried not in a European State, but in the United States of America, which at the time had been a comparatively new State and certainly a developing country. It was true that most of the cases pertaining to State immunity were from Europe and the United States, as well as Egypt, but one should remember that, throughout the nineteenth century, China, Japan and most Asian countries had still been subject to the so-called "capitulations" régime of extraterritorial jurisdiction, under which all foreigners, and not just foreign States or State entities, had been excluded from the jurisdiction of the territorial State. Hence it was understandable that no cases could be cited from the Asian region in the nineteenth century.

7. Again, the doctrine of State immunity, as interpreted by United States judges, and especially Chief Justice Marshall, was not a doctrine of absolute immunity at all. As to the practice in other States, the distinction between the public acts and the private acts of the State, in other words the concept of the dual personality of the State, had emerged clearly in Italy as early as 1886.<sup>9</sup> In Belgium, in a case dating back to 1857,<sup>10</sup> immunity had been withheld on the grounds that the cause of action had arisen from a commercial contract. In the more recent United Kingdom and United States practice with

regard to so-called "unqualified immunity", it was significant that immunity was subject to many qualifications which represented significant limitations.

8. With regard to the approach adopted towards the exceptions to immunity, Mr. Jagota (1836th meeting) had wondered whether articles 16 to 18 did not reflect the position that State immunity represented an exception to the basic rule of territorial jurisdiction. In fact, it had not been his intention to depart in any way from the view that the fundamental principle was that of immunity, based on the sovereign equality of States. As Mr. Thiam had said at the thirty-fourth session, one State could not exercise *imperium* over another.<sup>11</sup>

9. The rules of international law on State immunity and waiver thereof were based essentially on a series of presumptions of consent. Thus a State which consented to receive an ambassador thereby agreed to extend the appropriate immunities to that ambassador and to the State he represented. As Chief Justice Marshall had pointed out, if a State invited the troops of a foreign State to pass through its territory, it could be assumed to have waived jurisdiction over the troops in question. However, when a State agreed to another State conducting commercial activities on its soil, its consent could be made conditional on non-immunity for the other State or State entity concerned. With reference to exceptions to immunity, Mr. Jagota had rightly drawn attention to the need to establish a sufficient territorial connection, something which had been apparent in connection with the provisions of article 12, on commercial contracts. Paragraph 1 of article 12 specifically referred to "the applicable rules of private international law", rules which implied a strong territorial connection. That important point could perhaps be brought out in redrafting article 12. The same was true of article 13, on contracts of employment, and article 14, on personal injuries and damage to property. In the case of article 15, the principle of immunity was bound up with the fundamental norm of territorial sovereignty.

10. In connection with draft article 16, the Drafting Committee would consider the suggestion to dispense in paragraph 1 (a) with the enumeration "a patent, industrial design, trade mark ..." and would carefully check the French and Spanish versions of the article. However, despite the suggestion that paragraph 1 could be deleted on the grounds that it was already covered by articles 9 and 15, he none the less considered that the paragraph was a useful one, more particularly because of the specialized nature of the subject of patents, copyright, and so on.

11. Attention had been drawn to the desirability of taking into account the work of UNCTAD regarding the problem of patents and the developing countries. He had therefore consulted UNCTAD studies on the role of the patent system in the transfer of technology to developing countries and had learnt that it was not perhaps advisable for many of the developing countries to introduce patent legislation at the present time, since such legislation would not be of assistance to them in their development

<sup>6</sup> *Yearbook ... 1982*, vol. I, p. 64, 1709th meeting, para. 3.

<sup>7</sup> *Ibid.*, p. 69, 1710th meeting, para. 5.

<sup>8</sup> *Ibid.*, p. 87, 1713th meeting, para. 5.

<sup>9</sup> See 1834th meeting, footnote 1.

<sup>10</sup> *État du Pérou v. Kreglinger (La Belgique judiciaire)* (Brussels), vol. XVII, p. 33).

<sup>11</sup> *Yearbook ... 1982*, vol. I, p. 69, 1710th meeting, para. 2.

efforts. That might be true for some, but by no means all developing countries. His own country, Thailand, was at present exporting watches and television sets to countries in western Europe and was only able to do so because it had adopted a patent system.

12. In connection with paragraph 2, he accepted the suggestion to delete the words "or attributable to" in subparagraph (a). His conclusion was that, subject to appropriate redrafting, article 16 as a whole had a place in the draft.

13. Draft article 17 seemed equally useful, although the question arose as to the form in which it should be included in the draft. First, the Drafting Committee would consider the suggestion to remove the detailed enumeration of taxes. Secondly, paragraph 2 in its present form might be dispensed with and its substance transferred to a general provision that would find a place either at the end of article 15 or in part IV of the draft.

14. No objection of principle had been put forward with regard to draft article 18, but the discussion had revealed the need to clarify the article, which was of limited application and related purely to matters of company law. A query had been raised about the meaning of "an unincorporated body", as opposed to "a body corporate". The intention was of course to cover, by means of a comprehensive formula, bodies with or without legal personality (*dotées ou non de la personnalité juridique*).

15. In conclusion, he proposed that draft articles 16 to 18 should be referred to the Drafting Committee. He would himself submit revised drafts in the light of the discussion.

16. Mr. JAGOTA said he hoped that the Drafting Committee would take due account of the points he had mentioned in his statement at the 1836th meeting, particularly with regard to the position of developing countries in the matter of patents and intellectual property. Article 16, viewed from the standpoint of UNCTAD, might well have no relevance for a developing country, for if a developing country had no patent law, as recommended by UNCTAD, there would be nothing for the country's courts to protect. The converse, however, was true for a developing country that experienced a trade problem with another country in which trade was controlled or regulated by the State and which had a patent law and allowed no immunity to foreign States in respect of patents. The Drafting Committee should look into that aspect of the matter. Again, it should consider whether it was appropriate to accept the presumption that a foreign State which applied for registration in order to protect its products or patents was thereby deemed to have waived its immunity altogether. In his view, such registration could not be considered as sufficient to imply waiver; a more express act should be required for that purpose. A system which regarded mere registration of a patent as justifying the setting aside of immunity for all consequent proceedings would constitute a serious barrier to the advancement of the developing countries. Of course, it was always possible to conclude an intergovernmental agreement between a developed and a developing country whereby access to the

developed country's market was made subject to a waiver of immunity in respect of proceedings for the commercial activities in question.

17. Lastly, he wished to reiterate the importance of drawing a careful distinction between international trade proceedings and the matter of patents. The exercise of jurisdiction by foreign courts in commercial activities conducted by a State or by State entities was acceptable. In relation to patents, however, matters of public law must not be called into question before a foreign court. In particular, a foreign court could not be allowed to sit in judgment on the validity of acts of State regarding nationalization.

18. Sir Ian SINCLAIR pointed out that article 16 dealt only with a right or rights protected in another State. Some right capable of being protected in another State had to exist. If a State had no patent law, there would be no right that required protection. The whole object of article 16 was to ensure that State immunity would not interfere with the determination of any issue relating to protection of the right.

19. Mr. Jagota's point regarding nationalization measures would not necessarily arise in the context of article 16 alone. It could also apply to any matter connected with the extraterritorial recognition of nationalization legislation. The case-law on that subject varied considerably from one country to another. The problem was a very general one and could emerge under any of the articles of the draft.

20. The Drafting Committee should also consider the possible need to broaden the terms of paragraph 1 (a) of article 18 by replacing the formula "other than States" by "other than States or international organizations". Some bodies consisted solely of States and international organizations and perhaps the intention was not to bring them within the framework of article 18.

21. Mr. SUCHARITKUL (Special Rapporteur) said that the point mentioned by Sir Ian Sinclair in connection with article 18 would be dealt with by the Drafting Committee. With regard to Mr. Jagota's point concerning the effects of registration, his own view was that a foreign State which applied for the registration of a patent or other intellectual property thereby showed a clear intention of seeking the protection of the laws and courts of the State of registration. It would therefore have to accept that the whole procedure should take its course.

22. As to the question of the "act of State" doctrine in the United States, the most recent case-law in that country clearly indicated that, when a party pleaded immunity from jurisdiction and the plea was rejected, the defence of "act of State" could not be raised again for the same set of facts. The same rule applied to a foreign State which brought suit itself, thereby submitting to the jurisdiction; it could not subsequently invoke the defence of "act of State".<sup>12</sup> Any different rule would mean allowing the foreign State concerned to bring in immunity through the back door—i.e. by pleading "act of State"

<sup>12</sup> See *Alfred Dunhill of London, Inc. v. Republic of Cuba et al.* (1976) (*United States Reports*, vol. 425 (1978), p. 682).

—after having submitted to the jurisdiction or having had its plea of immunity rejected. Another difference between the plea of immunity and the defence of “act of State” was that that defence could not be waived. Also, if the defence of act of State was upheld, there was a total lack of jurisdiction and the court could not sit in judgment at all. The problem was totally different from that of immunity from jurisdiction.

23. Mr. McCaffrey said that the act of State doctrine was in effect a doctrine of judicial abstention whereby the judiciary might deem it appropriate not to enter into the kind of inquiry involved. Accordingly, Mr. Jagota’s concern might be allayed by some kind of general saving clause specifying that nothing in the articles related to the question of whether one State could sit in judgment on the propriety of nationalization by another State.

24. The Chairman said he took it that the Commission agreed to refer draft articles 16, 17 and 18 to the Drafting Committee.

*It was so agreed.*<sup>13</sup>

#### ARTICLES 19 AND 20

25. The Chairman invited the Special Rapporteur to introduce draft articles 19 and 20, which read:

##### *Article 19. Ships employed in commercial service*

#### ALTERNATIVE A

1. This article applies to:
  - (a) admiralty proceedings; and
  - (b) proceedings on any claim which could be made the subject of admiralty proceedings.
2. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:
  - (a) an action *in rem* against a ship belonging to that State; or
  - (b) an action *in personam* for enforcing a claim in connection with such a ship if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes.
3. When an action *in rem* is brought against a ship belonging to a State for enforcing a claim in connection with another ship belonging to that State, paragraph 2 (a) above does not apply in regard to the first-mentioned ship unless, at the time when the cause of action arose, both ships were in use for commercial purposes.
4. Unless otherwise agreed, a State cannot invoke immunity from the jurisdiction of a court of another State in:
  - (a) an action *in rem* against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or
  - (b) an action *in personam* for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.
5. In the foregoing provisions, references to a ship or cargo belonging to a State include a ship or cargo in its possession or control or in which it claims an interest; and, subject to paragraph 4 above, paragraph 2 above applies to property other than a ship as it applies to a ship.

<sup>13</sup> For consideration of draft article 16 as proposed by the Drafting Committee, see 1868th meeting, paras. 38 *et seq.*, and 1869th meeting, paras. 1-4; for consideration of draft articles 17 and 18, see 1869th meeting, paras. 5-35.

#### ALTERNATIVE B

1. If a State owns, possesses or otherwise employs or operates a vessel in commercial service and differences arising out of the commercial operations of the ship fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in admiralty proceedings *in rem* or *in personam* against that ship, cargo and owner or operator if, at the time when the cause of action arose, the ship and/or another ship and cargo belonging to that State were in use or intended for use for commercial purposes, and accordingly, unless otherwise agreed, it cannot invoke immunity from jurisdiction in those proceedings.

2. Paragraph 1 applies only to:
  - (a) admiralty proceedings; and
  - (b) proceedings on any claim which could be made the subject of admiralty proceedings.

##### *Article 20. Arbitration*

1. If a State agrees in writing with a foreign natural or juridical person to submit to arbitration a dispute which has arisen, or may arise, out of a civil or commercial matter, that State is considered to have consented to the exercise of jurisdiction by a court of another State on the territory or according to the law of which the arbitration has taken or will take place, and accordingly it cannot invoke immunity from jurisdiction in any proceedings before that court in relation to:

- (a) the validity or interpretation of the arbitration agreement;
- (b) the arbitration procedure;
- (c) the setting aside of the awards.

2. Paragraph 1 has effect subject to any contrary provision in the arbitration agreement, and shall not apply to an arbitration agreement between States.

26. Mr. Sucharitkul (Special Rapporteur) said that draft articles 19 and 20 established two further exceptions to jurisdictional immunity. The first, provided for under draft article 19, concerned ships employed in commercial service. It was a matter that was more familiar to common-law jurists than to civil-law jurists because the procedures involved were British admiralty procedures and also because special status was attached to ships. So far as the procedures were concerned, maritime law had developed largely in the context of the systems used by the larger maritime powers, in which connection British admiralty practice had been predominant. Ships were, in a sense, floating territory, which meant that there could be an overlapping of jurisdictions, for example when the ship of one State entered the harbour of another State. Another special feature of ships, however, was their nationality, or rather their flag, which entitled them to the protection of the flag-State and its law. It was because of those two factors—procedure and the special status of ships—that he had looked first at the practice of the United Kingdom and the United States of America, before examining that of other jurisdictions (A/CN.4/376 and Add.1 and 2, paras. 145-163).

27. The British cases dated back to *The “Swift”* (1813) and the dictum of Lord Stowell in that case was cited in the report (*ibid.*, para. 184). Probably the first case to involve a public ship of war, however, was *The “Prins Frederik”* (1820) (*ibid.*, para. 146), although the dispute had ultimately been settled by arbitration. The next important case in the United Kingdom had been *The “Charkieh”* (1873) (*ibid.*, para. 147), involving a ship which had been engaged in trading ventures and had not

been accorded immunity. A lesser ground for rejecting immunity had been that the ship had been owned by the Khedive of Egypt in his private capacity and had been chartered to a British subject at the time of the commencement of proceedings. Sir Robert Phillimore's dictum in that case was well known (*ibid.*) and had laid down the rule of restrictive immunity which he had confirmed in *The "Cybele"* (1877) and in the "*Constitution*" (1879), in which he had drawn a distinction between an American vessel of war, which had been held to be entitled to immunity, and a public ship employed for commercial purposes, which had not been accorded immunity (*ibid.*, para. 148). Sir Robert Phillimore had gone a step further in *The "Parlement belge"* case (1879), concerning a ship used only partly for commercial purposes, although the decision had been overruled by the Court of Appeal on the grounds that the ship had "been mainly used for the purpose of carrying the mails" (*ibid.*, para. 149). Moreover, under the bilateral treaty then in force between Belgium and the United Kingdom, packet-boats, regardless of subsidiary employment, had to be treated as men-of-war for the purposes of jurisdictional immunities. In that connection, he drew attention to the pronouncement by Lord Justice Brett (*ibid.*). The rule as applied in the United Kingdom had none the less tilted in favour of the doctrine of unqualified immunity with the decision in *The "Porto Alexandre"* case (1920), in which the decision in *The "Parlement belge"* had been followed, perhaps incorrectly.

28. The decision in *The "Cristina"* (1938) had marked the beginning of a period of uncertainty and a number of judicial observations had thrown further doubt on the decision in *The "Porto Alexandre"* (*ibid.*, para. 153). Nevertheless, the matter had finally been settled with the House of Lords decision in 1981 in *The "I Congreso del Partido"* case, an extract from which was cited in the report (*ibid.*, para. 155). As stated (*ibid.*, para. 156), the House of Lords had applied the common-law principles as they had existed prior to the entry into force of the *State Immunity Act 1978* and the ratification by the United Kingdom of the 1926 Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and its 1934 Additional Protocol. *The "Philippine Admiral"* case and *Trendtex Trading Corporation Ltd. v. The Central Bank of Nigeria* in 1977 had put an end once and for all to any lingering doubts about the judicial practice of the United Kingdom (*ibid.*).

29. As to judicial practice in the United States, a leading case had been that of *Berizzi Brothers Co. v. S.S. "Pesaro"* (1926). Judge Julian Mack, at first instance (1921), had favoured restricted immunity, but the Supreme Court had disclaimed jurisdiction on the grounds that the vessel in question, though described as a general ship engaged in the common carriage of merchandise for hire, had been owned and in the actual possession of the Italian Government. A dictum by Mr. Justice Van Devanter in that case was cited in the report (*ibid.*, para. 158). Yet after a fairly short time, the executive branch of the Government had intervened, as was apparent from the decision in *Republic of Mexico et al. v. Hoffman* (1945), in which Chief Justice Stone had

stated: "It is ... not for the courts to deny an immunity which our Government has seen fit to allow". United States judges had been predisposed to regard the interpretation of a foreign State's use of its vessels as a matter of diplomatic rather than judicial determination, and judicial primacy in the matter had thus been superseded.

30. The Tate Letter of 1952 (*ibid.*, para. 161) had brought a return to a restrictive doctrine based on the distinction between *acta jure imperii* and *acta jure gestionis*, culminating in the adoption of the *Foreign Sovereign Immunities Act of 1976*. Thus any significant trace of absolute State immunity as reflected in *The "Pesaro"* and *The "Porto Alexandre"* cases had, in effect, been eliminated.

31. The practice of other countries examined in his sixth report (*ibid.*, paras 164-177) revealed some initial fluctuations but ultimately an abandonment of any adherence to the doctrine of absolute or unqualified immunity and a growing trend, with the adoption of the 1926 Brussels Convention, to favour a more restrictive doctrine of immunity in regard to government-owned and operated vessels employed in commercial and non-governmental services. For example, in Belgium, the requisitioning of a vessel by a foreign State had once been regarded as an *actum imperii* over which Belgian courts had no jurisdiction. But with the entry into force of the 1926 Brussels Convention and its Protocol, the Court of Appeal of Brussels had permitted the arrest of a vessel in *Sáez Murua v. Pinillos et García* (1938) (*ibid.*, para. 172).

32. The trends in State practice, though tentative, were clear. In *The "Visurgis"* and the "*Siena*" case (1938), a German court had observed that continental, British and American practice could be summarized in the following terms: "A vessel chartered by a State but not commanded by a captain in the service of the State does not enjoy immunity if proceedings *in rem* are brought against it; still less can the owner of the vessel claim such immunity in an action for damages" (*ibid.*, para. 179). The rules of State immunity as applied to vessels owned or operated by States had been clearly expounded by Lord Wilberforce in *The "I Congreso del Partido"* (*ibid.*, para. 183). Chief Justice Marshall had also observed in *Bank of the United States v. Planters' Bank of Georgia* (1824) that it was "a sound principle that, when a Government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen" (*ibid.*, para. 185).

33. With regard to governmental practice, an examination of national legislation revealed a trend in favour of a distinction between vessels of war and vessels used for government purposes, on the one hand, and vessels employed in non-governmental and commercial services, on the other. In that connection, he had cited Norwegian legislation of 17 March 1939 (*ibid.*, para. 191), the United States *Public Vessels Act of 1925* and *Foreign Sovereign Immunities Act of 1976* (*ibid.*, para. 193), and the United Kingdom *State Immunity Act 1978* (*ibid.*, para. 194).

34. He had also examined international and regional conventions, particularly the 1926 Brussels Convention

and its 1934 Additional Protocol (*ibid.*, paras. 199-207). The Convention should not be dismissed as an instrument of purely regional character, since it had many States parties from a number of continents and with differing economic and social systems. He had likewise referred to the codification conventions prepared by the 1958 Conference on the Law of the Sea (*ibid.*, paras. 208-210), to article 236 of the 1982 United Nations Convention on the Law of the Sea (*ibid.*, paras. 211-212), regarding protection of the marine environment, to the 1940 Treaty on International Commercial Navigation Law (*ibid.*, para. 213) and to the 1969 International Convention on Civil Liability for Oil Pollution Damage (*ibid.*, para. 214). In the context of treaty practice, he had pointed out (*ibid.*, para. 215) that the use of a "waiver clause" reaffirmed the trend towards the exercise of jurisdiction by competent courts in proceedings against vessels, cargoes and owners, provided the cause of action arose out of commercial shipping forming part of the business activities of the State. A typical example was article XVIII of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany (*ibid.*).

35. Lastly, his examination of the opinions of writers (*ibid.*, paras. 216-230) revealed that those in favour of absolute immunity and those in favour of restricted immunity were initially more or less equally divided. Nevertheless, there was undoubtedly a clear trend towards restricted immunity, one that had inevitably gathered momentum. It was on the basis of those considerations that he had prepared the alternative versions of draft article 19.

36. Draft article 20 related to arbitration, which in one sense was difficult to dissociate from judicial settlement. Arbitration could take many forms and the main types were discussed in the report (*ibid.*, paras. 237-245). State practice in the matter was not very revealing, since an agreement to submit to arbitration could operate to delay the exercise of the original jurisdiction by a court. In that connection, it would be noted that in the arbitration case *Maritime International Nominees Establishment v. Republic of Guinea* (1982), it had been held that the agreement to submit to arbitration did not create new jurisdiction where none existed (*ibid.*, para. 248).

37. With regard to governmental practice, section 9 of the United Kingdom *State Immunity Act 1978* provided that, where a State had agreed in writing to submit a dispute to arbitration, the State was not immune as respects proceedings in the courts of the United Kingdom which related to the arbitration, although a proviso was included to the effect that that provision was subject to any contrary provision in the arbitration agreement and did not apply to any arbitration agreement between States. A similar provision was to be found in Pakistan's *State Immunity Ordinance, 1981* and Singapore's *State Immunity Act, 1979*. He had also referred to the 1972 European Convention on State Immunity, the Geneva Protocol on Arbitration Clauses, of 24 September 1923, and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*ibid.*, paras. 251-253). Consequently, it was clear that, if there was an agreement to

submit to arbitration and if there was also a link between the procedure for arbitration and the internal legal system, it was difficult not to infer implied consent to the exercise of jurisdiction. It was on that basis that he had formulated draft article 20 for consideration by the Commission.

*The meeting rose at 6 p.m.*

## 1839th MEETING

*Wednesday, 13 June 1984, at 11.10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

### Organization of work of the session (*concluded*)\* (ILC (XXXVI)/Conf. Room Doc.2)

[Agenda item 1]

1. The CHAIRMAN said that the Enlarged Bureau had held a meeting that morning to consider the timetable for the remainder of the session. It recommended:

- (a) That the Commission should continue its consideration of the following two topics:
- Jurisdictional immunities of States and their property (agenda item 3), until 15 June;
  - Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (agenda item 4), from 18 to 22 June;
- (b) That the Commission should then consider the following topics:
- International liability for injurious consequences arising out of acts not prohibited by international law (agenda item 7), from 25 to 29 June;
  - The law of the non-navigational uses of international watercourses (agenda item 6), from 2 to 9 July;
  - State responsibility (agenda item 2), from 10 to 20 July;
- (c) That the Commission should consider its draft report and related matters from 23 to 27 July.

2. The Enlarged Bureau planned to hold a further meeting before the end of the session in order to review the progress of work. If there were no objections, he would take it that the Commission agreed to those recommendations.

*It was so agreed.*

\* Resumed from the 1815th meeting.

**Jurisdictional immunities of States and their property**  
(continued) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>  
(continued)

ARTICLE 19 (Ships employed in commercial service) and  
ARTICLE 20 (Arbitration)<sup>5</sup> (continued)

3. Mr. USHAKOV said that the Special Rapporteur was to be commended for the extremely thorough study which had led to the formulation of draft article 19. Personally, he had come to an entirely different conclusion which was not at all surprising, for as indicated in the report (A/CN.4/376 and Add.1 and 2, para. 217), he (Mr. Ushakov) was in favour of so-called "absolute" immunity. In point of fact, he favoured State immunity pure and simple; the word "absolute" was simply added as a modifier by those who were opposed to immunity as such. The Special Rapporteur himself proved to be an advocate of restricted immunity, since article 19 set forth the principle that State immunity should not apply to commercial activities conducted by a State through trading vessels belonging to or used by it. Indeed, under paragraph 2 of alternative A of article 19, that exception would appear to apply even to a State's warships.

4. What was in fact meant by "commercial activities" when they were carried out by a merchant vessel belonging to a State? The question remained unresolved. It was obvious, as he himself had noted in the memorandum

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

*Part I* of the draft: (a) art. 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (b) art. 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—para. 1 (a) and commentary thereto: *ibid.*, p. 100; para. 1 (g) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (c) art. 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; para. 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), p. 21; (d) arts. 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

*Part II* of the draft: (e) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (f) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (g) art. 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22-25.

*Part III* of the draft: (h) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1838th meeting, para. 25.

which he had presented at the previous session (A/CN.4/371), that a State formed a single indivisible whole and could not engage in acts of governmental authority in some cases and conduct itself as a mere private person in others; in other words, it could not perform *acta jure imperii* and *acta jure gestionis* as the occasion arose. In any event, such a distinction did not apply in court, for the immunity of a senior public official or a member of parliament had to be waived before he could be tried. In the case of State ships employed in commercial service, it was the fact that they belonged to a State that was decisive, and the use to which they were put was irrelevant. A State could use a merchant vessel that belonged to it for purposes other than profit, to help its population or its economic development, by importing wheat for example.

5. Assuming that a distinction could be drawn between acts *jure imperii* and acts *jure gestionis*, could a State be brought before the courts of another State as though it were acting as a private person? The answer was that it definitely could not. It was always the State as such that would be summoned and tried. The exercise of the jurisdiction of a court of one State over another State always amounted to the exercise of the governmental authority, the judicial authority, of the first State over the second. That would be the case, for example, if activities conducted by States through their merchant vessels were the subject-matter of a court action.

6. Yet even the advocates of the theory of functional immunity, which was in his view a mistaken theory, had always tended to recognize that military vessels and other State vessels in public service—even though a distinction between public and non-public service was impossible to make—were exempt from the jurisdiction of another State. A State which possessed or used such vessels was still responsible for any damage they might cause in the ports and territorial waters of a foreign State, whose laws and regulations it was bound to respect. It could easily assume its responsibility in that regard without submitting to the jurisdiction of a court of that foreign State.

7. Many countries, including the Soviet Union, which had always recognized and continued to recognize the absolute immunity of ships belonging to or used by another State, had settled disputes arising out of damage caused by such ships out of court. Jurisdictional immunity did not mean that a State could do what it liked without having to pay compensation. It simply meant that, under the firmly established principle of the sovereign equality of States, a State could not be subjected to the judicial authority of another State. Obviously, in commercial agreements or contracts a State could, either expressly or implicitly, submit voluntarily to the jurisdiction of a foreign State. But it was always the consent of the State that was decisive, even in internal law.

8. The report showed that, in the matter of the application of the theory of functional or restricted immunity, judicial practice was quite scanty and not at all uniform, even within the same State, and that governmental practice, which was incidentally quite recent, was limited to only a small group of States. Article 19 was pointless, if not dangerous, because it ran counter to the funda-

mental principles of modern international law and, in particular, the principles of the sovereignty and sovereign equality of States.

9. He would comment on draft article 20 at a later stage, if there was enough time at the present session.

10. Mr. McCaffrey, referring to alternative A of draft article 19, said that the layout of paragraph 2 made it appear as though the last clause, reading "if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes", applied to subparagraph (b) alone, rather than to the paragraph as a whole.

11. With regard to the remarks made by Mr. Ushakov, he pointed out that, if all trading activities were conducted solely by the State or by State entities, there would be complete equality. Under some systems, however, trading was carried out mainly through private entities. A situation of inequality might well arise when a private entity traded with a State and also when it was impossible for the private entity to obtain direct redress through measures initiated by it against the State entity. The private entity would have to rely on its own Government to assert its claim through diplomatic channels, something that would be of small comfort to the private entity, which would lose all control over its attempts to obtain redress. Consequently, many States would insist on allowing direct recourse by private entities against all their trading partners, whether private or governmental. Those were the hard facts of the matter and to insist on full immunity in all circumstances was simply to ignore reality.

12. Chief Akinjide said that, in his view, Mr. Ushakov had somewhat over-simplified the issue. To illustrate his point he could cite a case in which he had been involved on behalf of his Government. It had concerned a ship, built in the Federal Republic of Germany, which had belonged to the Nigerian Government and, after delivery, had had to return for repairs. On reaching the English Channel, the ship, manned by members of the Nigerian navy, had developed serious engine trouble. The alarm had been raised and rescue ships had arrived. The salvors, however, had refused to rescue the ship until the Lloyd's salvage form had been signed. As the ship had been in dire straits, that had been done and the ship had then been towed to a French port. The problems had been insurmountable, with contracts involving a private German company, a private French salvage company, Lloyd's of London—a private association—the Nigerian armed forces and a State-owned ship. He very much doubted whether Mr. Ushakov's principle could have been invoked against all those parties. He also doubted whether Mr. Ushakov's theory could prevail until such time as all States followed the same system.

13. Mr. Sucharitkul (Special Rapporteur) said that Mr. McCaffrey's comment regarding paragraph 2 (b) was quite correct. The words "if, at the time when the cause of action arose, the ship was in use or intended for use for commercial purposes" appeared wrongly as the last clause of subparagraph (b), a transcription mistake

that should be rectified. The clause in question should start on a separate line, so as to apply not only to actions *in personam* but also to actions *in rem*.

14. It was thus clear that the provisions of article 19 were not applicable to warships. Should there be any doubt in that regard, it would be necessary to insert a separate provision that specifically excluded warships.

15. Sir Ian Sinclair said he agreed with Mr. McCaffrey and felt that Mr. Ushakov had failed to take into account much of the abundant material supplied by the Special Rapporteur in support of draft article 19. That material showed the development of State practice and also discussed a whole series of international conventions which had a direct or indirect bearing on the point under discussion. One of them was the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, which was the outcome of a maritime conference held in Brussels in 1926 in the context of difficulties that arose with regard to State-owned vessels engaged in commercial service when a plea of immunity was entered (A/CN.4/376 and Add.1 and 2, paras. 199-207).

16. The problem at issue could be summarized in the following manner. Shipping was something different from the other matters dealt with by the Commission with regard to the exceptions to immunity. As a matter of legal fiction, a ship was a piece of floating territory. The difficulty was that it moved rapidly from place to place. Various events could take place in connection with a ship: it could be involved in a collision or an incident could occur on the high seas, as in the case referred to by Chief Akinjide. Salvors might then come on the scene and, in circumstances similar to those described by Chief Akinjide, he would himself have given the same advice. If the only alternative to loss of the ship by sinking was to sign a salvage form, then one would have to sign the form. Yet in all fairness, one should appreciate the problem facing the salvors. If they salvaged a ship and the ship disappeared after a few days in port for repairs, they would be left without recourse. Clearly they had to have some kind of arrangement whereby their claim for salvage could be met.

17. Another specific aspect of shipping was that *in rem* jurisdiction amounted in part to the arrest of a vessel, but that did not mean the vessel was physically held up for an indefinite period of time. In practically all the cases which had come to his knowledge, the normal practice was for a bail bond to be posted immediately after the arrest of a vessel, so that the ship could be released and continue its voyage. Ships were constantly on the move, and hence there had to be some means whereby properly justified maritime claims could be asserted on behalf of private persons who had suffered damage as a result of incidents occurring during the voyage.

18. An examination of the Special Rapporteur's commentary, of the 1926 Brussels Convention and of various other international conventions, such as the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea (*ibid.*, paras. 208-212), showed plainly that immunity continued to subsist in regard to State-owned vessels employed in non-

commercial government service. A problem arose when State-owned vessels were used in commercial service; that was another aspect of commercial activity which the Commission had discussed in connection with an earlier article. Since the arrest of a vessel was involved, the case was on the borderline between exceptions to State immunity in the adjudicative field and the concept of immunity from attachment. Accordingly, any provision on the matter had to take both aspects into consideration and also make clear the fact that it related exclusively to commercial service and did not apply to naval ships or to State-owned ships used for non-commercial service.

19. In his review of legal writings (*ibid.*, paras. 216-228), the Special Rapporteur had mentioned a number of writers who upheld the doctrine of absolute immunity, but he would also doubtless agree that the list of authors who endorsed the restrictive concept of immunity could have been much longer.

20. Lastly, the Special Rapporteur had commented on sister-ship jurisdiction in connection with the House of Lords decision in *The "I Congreso del Partido"* case in 1981 (*ibid.*, para. 41) and had stated that "the basis for the assumption and exercise of sister-ship jurisdiction is not completely free from controversy" (*ibid.*, para. 155). Sister-ship jurisdiction as applied in the English courts derived directly from the International Convention relating to the Arrest of Seagoing Ships, signed at Brussels in 1952.<sup>6</sup> To date, there were 31 States parties to the Convention, by no means all of them European countries, for they included Fiji, Guyana, Mauritius, the Syrian Arab Republic and Togo. The purpose of sister-ship jurisdiction was to deal with the problem of the impossibility of arresting the specific vessel in commercial service which had caused the incident giving rise to a maritime claim. In cases of that type, it had been agreed at the 1952 Brussels Conference that, subject to certain conditions, the claimant could arrest a sister ship of the vessel whose service had given rise to the claim.

21. It was important to remember that, in United Kingdom judicial practice, sister-ship jurisdiction was subject to very strict conditions. For example, *The "Sennar"* (No. 2) case, a very recent one reported so far only in the *Financial Times* of 8 June 1984, had not involved a problem of State immunity, but sister-ship jurisdiction had been invoked, first in the courts of the Netherlands and subsequently in the English courts. The purpose had been to avoid a jurisdictional clause included in the contract in the interests of the Sudanese party to the transaction. The contract had related to the export of groundnuts shipped from Sudan to the Netherlands, with a stipulation that it was governed by Sudanese law and that the courts of Khartoum or Port Sudan had exclusive jurisdiction over any dispute arising out of the contract. The Court of Appeal in London had refused to allow sister-ship jurisdiction for the benefit of the claimants and had taken the same view as the Netherlands court earlier, namely that the case fell within Sudanese jurisdiction.

*The meeting rose at 12.40 p.m.*

<sup>6</sup> See 1837th meeting, footnote 17.

## 1840th MEETING

*Thursday, 14 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclela Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**Jurisdictional immunities of States and their property** (*continued*) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>  
(*continued*)

ARTICLE 19 (Ships employed in commercial service) and  
ARTICLE 20 (Arbitration)<sup>5</sup> (*continued*)

1. Mr. QUENTIN-BAXTER said that he had been unable to participate actively in the discussion of draft articles 16 to 18, which contained provisions that were perhaps necessary and interesting but were of somewhat limited application. Draft article 19, however, dealt with the very important matter of ships, a special case that had to be considered in its own right. Yet some of the ele-

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem.*

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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<sup>5</sup> For the texts, see 1838th meeting, para. 25.

ments included in alternatives A and B might well go beyond what was immediately necessary for the purposes of the article.

2. He was struck by the fact that the form of article 19 differed greatly from that of the other articles on exceptions to immunity. For example, both article 15, paragraph 1, and article 16, paragraph 1, began with the words: "The immunity of a State cannot be invoked...", while article 17, paragraph 1, stated: "Unless otherwise agreed, a State cannot invoke immunity...". If article 19 were cast in the same form, the question involved would still be sizeable but it would be more manageable.

3. As the Special Rapporteur had pointed out in his sixth report, shipping was a subject on which treaty law afforded ample guidance (A/CN.4/376 and Add.1 and 2, paras. 198-214). The International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, adopted at Brussels in 1926, specified in article 1:

Seagoing vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on government vessels, and the States owning or operating such vessels, or owning such cargoes, are subject in respect of claims relating to the operation of such vessels or the carriage of such cargoes, to the same rules of liability and to the same obligations as those applicable to private vessels, cargoes and equipments.

4. Admittedly, the 1926 Brussels Convention was binding on only a minority of States—including, however, such maritime nations as the United Kingdom—but it provided a clear indication of a trend in the law. An even clearer indication, and one of a more general character, was to be found in the 1958 Geneva Conventions on the law of the sea, which had stemmed from the work of the Commission and constituted one of its most remarkable achievements. Both the Convention on the High Seas and the Convention on the Territorial Sea and the Contiguous Zone drew a very clear distinction between warships and government ships operated for non-commercial purposes on the one hand, and ships operated for commercial purposes, on the other. That distinction had stood the test of time, for it had been carried into the 1982 United Nations Convention on the Law of the Sea, together with most of the provisions of the 1958 conventions on the high seas and the territorial sea.

5. Despite the different views held on the subject of State immunity, in that respect the law with regard to ships was quite plain. Accordingly, if article 19 was simply formulated to read: "A State cannot invoke immunity from the jurisdiction of a court of another State in proceedings relating to ships engaged in commercial service", it would be enough to deal with an important but not very controversial issue. Unfortunately, the Special Rapporteur had included a vast amount of material in his report and both the commentary to and the texts of alternatives A and B dealt not only with immunity itself, but also with the problem of when immunity could be claimed. The attempt to deal with the very difficult question of the circumstances in which a Government's interest in a ship was sufficient to attract immunity involved an enormous range of problems. Indeed, the differences on the subject were so wide that it would be difficult to

devise a common rule even for the United States and United Kingdom systems.

6. In his report, the Special Rapporteur treated the nationality of ships as an issue different from that of ownership. In the 1958 Geneva Conventions on the law of the sea, however, attention had been focused on a ship's nationality, which was that of its flag. Under the law of the sea, nationality and ownership went together for the purpose of identifying a government ship employed for non-commercial purposes. On the other hand, in court proceedings many other factors were involved. In that regard, the report contained the inevitable reference to a ship being "sometimes considered as a piece of floating territory of the flag-State" (*ibid.*, para. 120). Yet that conception was known to be full of problems and it had been the subject of strong judicial criticism. In *The "Lotus"* case<sup>6</sup> before the PCIJ, Judge Lord Finlay had condemned the formula as exaggerated use of metaphor in relation to ships. In *The "Cristina"* (1938),<sup>7</sup> Lord Atkin had similarly disapproved of Oppenheim's words regarding the character of ships. The Special Rapporteur had concluded that the distinctions in question, important as they were for certain other purposes, did not greatly affect the character of ships in the context of the topic under consideration. Therefore the Special Rapporteur had added that:

... ships, though *prima facie* governed by rules different from those to which common law submits other movables, are in the final analysis subject to such rules, and the courts "will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control" (*ibid.*, para. 123),

quoting an extract from the decision by Lord Atkin in *The "Cristina"*,<sup>8</sup> which had not been altogether satisfactory in terms of results.

7. For his own part, he preferred the view expressed by Justice Frankfurter of the Supreme Court of the United States in *Republic of Mexico et al. v. Hoffman* (1945):

... "possession" is too tenuous a distinction on the basis of which to differentiate between foreign government-owned vessels engaged merely in trade that are immune from suit and those that are not. Possession, actual or constructive, is a legal concept full of pitfalls.<sup>9</sup>

Those conclusions were supported by the judicial practice followed in the United Kingdom and in a number of Commonwealth countries since 1945. Many cases could be cited which demonstrated the impracticality of basing the distinction between two types of ships on possession or control.

8. One of the most significant steps forward would be to break through the jungle of concepts and adopt the very simple concept of a ship engaged in trade or of a ship employed for commercial purposes. A formula of that kind would not involve any of the difficulties of the old distinction between *acta jure imperii* and *acta jure*

<sup>6</sup> Judgment No. 9 of 7 September 1927, *P.C.I.J., Series A, No. 10*.

<sup>7</sup> United Kingdom, *The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1938*, p. 485.

<sup>8</sup> *Ibid.*, p. 490.

<sup>9</sup> *United States Reports*, vol. 324 (1946), pp. 39-40.

*gestionis*, which had given rise to different rules in different countries and had led to different results on the same sets of facts. Again, the Special Rapporteur had perhaps paid undue attention to common-law precedents over the past 100 years. Personally, he would hesitate to saddle the jurists of the world with those precedents.

9. It might be necessary at a later stage to deal with the circumstances in which a Government could be held to have a sufficient connection with a ship in order to claim immunity. The immediate point, however, was to state the exception to State immunity so far as ships were concerned. A provision confined exclusively to such a statement would give rise to none of the extremely difficult issues to which he had referred. Article 19 would thus simply provide that a claim of immunity could not be made with respect to ships operated for commercial purposes.

10. Lastly, in framing article 19 it was desirable to avoid the use of terms such as “action *in rem*” and “action *in personam*”, which might not be readily understandable to lawyers from every legal system. The draft articles had to be brief and had to provide guidance to the whole world on certain important questions. To that end, terms peculiar to one particular system of law should be avoided.

11. Mr. NI observed that most of the material discussed in the section of the report on draft article 19 (A/CN.4/376 and Add.1 and 2, paras. 119-230) derived from the practice followed under the common-law system, and that the terms employed and the conclusions reached drew largely on that system. It was explained that, since there was little judicial practice in support of the doctrine of “absolute” immunity, the Special Rapporteur had taken as his starting-point the so-called Anglo-American practice (*ibid.*, para. 144). The absence or scantiness of judicial decisions, however, should not be interpreted as lack of support for the rule of unrestricted immunity, for other expressions of opinion and attitudes existed and were no less authoritative than were judicial decisions.

12. The Special Rapporteur had given a highly interesting account of two divergent theories to explain the immunity of government trading ships, one based on State ownership, and the other on State possession. Then a third theory was advanced (*ibid.*, para. 221), according to which complete immunity was founded on the principle of the sovereign equality of States. It was apparent that the first two theories merely stated the different criteria for immunity already asserted in respect of public trading ships; only the third provided the ground—namely the sovereign equality of States—for granting immunity to so-called State trading ships.

13. Six arguments were forcefully made in support of the non-immunity of public trading ships (*ibid.*, paras. 223-228) and they merited careful examination. The first suggested that immunity on a broad basis was outmoded. The second explained the reasons for assimilating the legal position of public trading ships to that of private ships. The third and sixth emphasized the lack of equity in placing the individual and the State on a different

footing. The fourth concerned the dignity, equality and independence of States owning or operating the vessels. The fifth argument was based on the interests of safe navigation and was a valid one, although perhaps somewhat over-emphasized. For countries, including his own, which carried on foreign trade or transport through State enterprises having an independent legal personality of their own, the absence of immunity for ships owned or operated by them was unlikely to present any difficulty.

14. Nevertheless, alternative A for draft article 19 seemed much too lengthy and cumbersome. Paragraph 1, relating to the scope of application, did not appear to be necessary, since not all States had a separate admiralty or maritime jurisdiction, nor did all procedural systems draw a distinction between actions *in rem* and actions *in personam*. Paragraph 2 dealt with the non-immunity of ships used or intended for use for commercial purposes, while paragraph 3 set forth the conditions for the exercise of “sister-ship jurisdiction”, a broadening of the scope of application of the article that would probably give rise to difficulties in connection with arrest or execution in maritime proceedings. It was doubtful whether the concept of such jurisdiction would be generally acceptable. Again, paragraph 5 included a number of notions, such as “control” as distinguished from “possession” or “interest” in the ship or cargo, that were not very clear and would need further clarification and study.

15. Alternative B was very much shorter, but certain terms called for elucidation. What was the exact meaning of “commercial service” and what was encompassed by the expression “commercial operations”? Furthermore, paragraph 2 of alternative B was probably unnecessary, for the reasons he had already given in connection with paragraph 1 of alternative A.

16. The object of draft article 20 was to deny immunity in the case of an agreement to submit to arbitration, but the article none the less gave rise to a difficult problem. The parties to a dispute sometimes preferred arbitration to judicial proceedings because it saved time and costs, apart from enabling the parties to choose freely the panel of arbitrators, the arbitration procedure and the law to be applied. In that connection, it was interesting to cite the Convention on the Settlement of Investment Disputes between States and Nationals of other States, signed at Washington in 1965,<sup>10</sup> which was adhered to by a majority of States. Article 26 specified that:

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy...

Naturally, the provisions of the Washington Convention did not prevail over the national laws of States not parties to the Convention, but article 26 at least indicated the effect of an agreement to arbitrate *vis-à-vis* litigation in national courts.

17. There were some States in which the judiciary exercised a measure of control or supervision over arbitration and in which a matter might be submitted to a court

<sup>10</sup> United Nations, *Treaty Series*, vol. 575, p. 159.

for a decision on a particular point of law. Nevertheless, arbitration and adjudication by courts were two distinct procedures and, in most States, an agreement to arbitrate normally precluded the bringing of suit to a court on the same grounds, except for the purpose of invalidating the agreement. An agreement to arbitrate could on no account be taken as a presumption of waiver of immunity; otherwise, the parties would be deterred from entering into such an agreement.

18. There was little national legislation on the subject and judicial practice in support of article 20 was scanty, although the Special Rapporteur mentioned the interesting case *Maritime International Nominees Establishment v. Republic of Guinea* (*ibid.*, para. 248). The 1923 Geneva Protocol on Arbitration Clauses and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, mentioned by the Special Rapporteur (*ibid.*, paras. 252-253), seemed to confirm the validity of an agreement to submit to arbitration as being relevant to the exercise of jurisdiction by the court in that particular case. Under article II of the 1958 Convention, where an arbitration agreement existed, the court seized of a case had, at the request of any one party, to order the case to be submitted to arbitration, unless such agreement was considered void or not enforceable. Thus the agreement to submit to arbitration could only be interpreted as an impediment to the exercise of jurisdiction by the court, unless the agreement was invalid. In the circumstances, it would be extremely difficult to accept the situation as an "irresistible implication" or an "almost irrebuttable presumption" (*ibid.*, para. 255) that the State in question had waived its immunity from jurisdiction. Article 20 should not therefore find a place in the draft.

19. The Commission was reaching the end of its discussion of the articles relating to exceptions to immunity, and hence some concluding comments were in order. Immunity, founded on the sovereign equality of States, was the rule and he was fully aware of the significance of the sovereignty of the territorial State. Indeed, in a country like China, which had once been subjected to such régimes as consular jurisdiction or capitulations, territorial sovereignty and political independence were treasured above all else. When representatives of one State entered the territory of another, they must naturally abide by the laws and regulations of the host State. It was, however, equally true that, by virtue of the principle of the sovereign equality of States, one State could not sit in judgment over another State without its consent. That was especially true in States where immunity had to be claimed before the courts. An appearance before a court in another State, even if only to contest jurisdiction, was in itself tantamount to submission to the authority of the court of the other State. It was for that reason that certain States claimed immunity on the strength of the legal maxim *par in parem imperium non habet*, which was totally different from a claim of extraterritoriality or unaccountability to the local law.

20. Since immunities could be waived either expressly or by implication, disputes often arose with regard to implied waiver. In that regard, a number of presumptions had been suggested as implying consent. Presump-

tions, however, should not be far-fetched or arbitrary. For example, in theory article 16 afforded protection to both the developing and the developed countries. In practice, however, more protection was provided for developed States. The test of fairness could not be applied in a vacuum and the actual circumstances had to be taken into account. In the preparation of draft articles on a subject in which the interests of States did not always work in harmony, consideration should be given to mutual understanding and mutual accommodation. In view of the crucial character of part III of the draft, he urged members of the Commission to work patiently together in order to produce a draft that would be acceptable to all States, regardless of their legal system, from all regions of the world.

21. Mr. OGISO, noting that little judicial practice could be cited from countries other than the United Kingdom and the United States of America, said that to the best of his knowledge the only Japanese case involving a government ship had occurred in 1954, when a Captain Kurikov, the commander of a Russian patrol boat which had entered Japanese territorial waters, had been prosecuted by a Japanese court for aiding and abetting illegal entry into Japan and had received a suspended sentence. The court had held that the status of warships was clearly established in international law, but not the status of other government ships, and hence that it was able to exercise jurisdiction. No other cases involving government ships had arisen since 1954 and Japan had subsequently become a party to the 1958 Geneva Conventions on the territorial sea and the contiguous zone and on the high seas, thereby accepting the provision regarding the status of public ships other than warships, which the Special Rapporteur discussed in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 208-209). In the circumstances, he did not think that the Japanese Government would have any fundamental objection to the basic proposition that the State could not claim immunity from jurisdiction in the case of a government-owned ship operated for commercial purposes.

22. He had been heartened by Mr. Quentin-Baxter's objections to some of the terms used in draft article 19, which was based largely on United Kingdom legislation. Concepts such as actions *in rem* and actions *in personam* were unknown in Japanese law, under which any action involving the operation of a ship was brought against the owner or operator of the ship. Such concepts would inevitably raise the question of the extent to which the provisions of the article could be brought into line with or incorporated into the Japanese legal system. He experienced similar difficulty with the term "admiralty proceedings", which had no equivalent in the Japanese legal system. All claims concerning the operation of a ship or damage caused by a ship were brought in the civil courts in accordance with the same procedure as that applicable to all other civil cases. Moreover, so far as he knew, those terms were not used in the 1926 Brussels Convention. In an international convention, it was necessary to use neutral wording and seek to express the basic principle clearly, without entering into too much detail or leaning unduly towards any one particular legal system.

23. The common-law system had made a great contribution to the development of international law and, so far as ships were concerned, much benefit was to be derived from the judicial decisions of the United Kingdom and the United States; but an international convention had to be drafted in such a way that the principles could be applied under the relevant national legislation without difficulty and without giving rise to any unnecessary discrepancies with other national legal systems. He had not discussed the matter with the Japanese judiciary, but he suspected that their initial reaction might be to ask why they should accept a copy of foreign legislation which, historically, was entirely different from their own. Given the basic agreement on the purpose of the article, such a negative response from competent national authorities would be rather disappointing.

24. Furthermore, the phrase "intended for use" appeared in both of the alternative versions of draft article 19 but was not found in the 1926 Brussels Convention; it would introduce a subjective element and tend to cloud the issue of jurisdiction unnecessarily. United Kingdom legislation had its own background and, in the absence of that background, the expression in question could cause problems and ambiguity. Consequently, unless there was a definite reason for retaining it, it should be deleted.

25. He would also be grateful to have the Special Rapporteur's view on whether the word "use" or "operation" was preferable. He believed that the word employed in the 1958 Convention on the High Seas and also in the 1926 Brussels Convention was "operated". Again, United Kingdom legislation might have some special background which justified the word "use", but he would prefer "operated".

26. In his comments on the formulation of draft article 19, the Special Rapporteur employed the word "exclusively" (*ibid.*, para. 231 (b)). That comment could therefore be interpreted to mean that, if a ship caused damage when in use for commercial service, an exception to immunity would apply; on the other hand, if that same ship was used for governmental service, either before or after commercial service, an exception to immunity might not apply. Personally, he considered that the notion of exclusiveness in regard to non-governmental and commercial service should be related to the point in time at which the cause of action arose, so as to make quite clear the circumstances under which an exception to immunity might apply. If that was not done, the exception to immunity might become far narrower than the Special Rapporteur had explained.

27. On the basis of his comments, he wished to suggest the following wording for article 19, with a view to assisting the Special Rapporteur:

"Unless otherwise agreed, a State cannot invoke immunity from jurisdiction in respect of claims relating to the operation of vessels owned or operated by that State for commercial purposes at the time when the cause of such claims arose."

He had avoided any detailed reference to ownership and possession in the belief that the adoption of termin-

ology along the lines of that used in the 1926 Brussels Convention would help to simplify the draft.

28. Sir Ian SINCLAIR said that State-owned or controlled ships, whether employed in commercial or in non-commercial service, had special characteristics: they had the quality of mobility; they were a type of floating property; by their very nature, they frequently came within the territorial sea or waters of other States; they visited foreign ports; and they provided a major point of contact with the territorial State for the State that owned, controlled or operated them. Therefore it was not surprising that much of the development of the law on sovereign immunity had turned on the question whether and to what extent immunity could be invoked to bar claims arising out of the operation of seagoing vessels owned, controlled or operated by a foreign State.

29. The extensive jurisprudence of the United Kingdom in that connection was reviewed by the Special Rapporteur in his report (A/CN.4/376 and Add.1 and 2, paras. 145-156) and the line of development from *The "Prins Frederik"* case (1820) through *The "Charkieh"* (1873) to *The "Parlement belge"* (1880) was well known. The Court of Appeal had granted immunity in *The "Parlement belge"* case on the ground that the ship was essentially a mail-boat and hence a public vessel employed mainly in non-commercial service. Although *The "Parlement belge"* case had been misinterpreted in later cases in United Kingdom courts, and notably in *The "Porto Alexandre"* case (1920), the Special Rapporteur was clearly right to conclude (*ibid.*, para. 150) that the principle laid down in *The "Parlement belge"* did not appear to be incompatible with the restrictive approach to immunity: that, indeed, had been the view taken by the House of Lords in 1981 in *The "I Congreso del Partido"* case.

30. Thus United Kingdom case-law had finally come down decisively in favour of the view that there was no principle of international law that required immunity to be granted to a State-owned ship employed in commercial service. Section 10 of the *State Immunity Act 1978* incorporated that qualification of the general principle of immunity, albeit in a somewhat idiosyncratic way, since it had been tailored to deal with the special peculiarities of admiralty proceedings in the United Kingdom. Clearly, however, neither he nor any other United Kingdom lawyer would wish to saddle the rest of the world with all the complexities that arose from the concept of admiralty proceedings and actions *in rem* and *in personam* that had developed over the years.

31. Thus there seemed to be a broad consensus of informed opinion in support of that particular view of the matter. He had been studying the publication entitled *Materials on Jurisdictional Immunities of States and their Property*<sup>11</sup> in order to try to form an assessment of the situation. From the replies to the Secretariat's ques-

<sup>11</sup> United Nations publication, Sales No. E/F.81.V.10.

tionnaire furnished by States, he had deduced that a very large number of States had accepted the broad proposition that State-owned vessels engaged in commercial service did not enjoy immunity from the jurisdiction of local courts.

32. In his report (*ibid.*, paras. 217-228), the Special Rapporteur had examined the opinions of jurists on whether immunity should be accorded to State-owned trading vessels. The Special Rapporteur could no doubt cite many other authorities in favour of a restrictive view of immunity with regard to the operation of such vessels; but, for his own part, he wished to draw attention to the report by Ian Brownlie to the Institute of International Law in 1983 entitled *Les aspects récents de l'immunité de juridiction des Etats*, in which Mr. Brownlie had surveyed the whole field of jurisdictional immunities and had endeavoured to pin-point what were termed critical elements. First, if the implementation of State policies necessarily involved the making of transactions within the context of a system of local law, including reference to commercial arbitration, the State took the risk of accountability within that system of local law. Secondly, such accountability was compatible with the principle of consent, since the foreign State could always choose to avoid such transactions: it became a "visitor" to the jurisdiction at its own choice and could always stipulate for treaty performance of servicing operations. Thirdly, such accountability within the system of local law was justified by certain general principles of law and, in particular, by the principles of good faith, reliance and unjust enrichment. Fourthly, given the private-law character of the transactions, municipal courts provided the appropriate forum.

33. Mr. Brownlie had also given examples of how those elements should operate in specific situations. For instance, if the owners of a ship chartered it to a foreign State to transport wheat purchased under a commodity agreement with another State, with the charter agreement containing an arbitration clause, and if the ship was damaged in discharging cargo and the owners sought to compel arbitration in the pertinent municipal courts, the charter and its arbitration clause were transactions based in private law and in ordinary commercial forms. They were incidental to the implementation of an international agreement, but the means chosen involved ordinary private transactions. The State charterer would presumably have chosen the most effective and convenient method of achieving the particular purpose, a method that involved the risk of arbitration. Such risks were themselves an emanation of the *puissance publique* and, on the basis of the principles of good faith and reliance, could not be avoided if they matured.

34. As to draft article 19, Mr. Quentin-Baxter's comments had already covered much of what he had wished to say. Obviously, it would not be appropriate to endeavour to translate the complexities of United Kingdom procedural law into an international convention. An attempt should therefore be made to seek a more general form of wording that would have

meaning for everyone and would achieve the desired aim. He did not altogether agree with Mr. Ogiso regarding the phrase "intended for use", since there had been instances, as in *The "I Congreso del Partido"*, when a claim had been brought against a vessel that had been intended for use for commercial service but had not actually been used for such service at the time in question.

35. On the other hand, he agreed that it was unnecessary to make special provision for sister-ship jurisdiction, even though certain States operated such jurisdiction, or to include a reference in the article to admiralty proceedings or *in rem* or *in personam* jurisdiction. Yet the article should cover not only claims against State-owned ships for trading purposes, but also claims against cargo, something which Mr. Ogiso's proposed text would not do. With that in mind, he had drafted the following text for possible consideration by the Drafting Committee:

"1. The immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to:

"(a) The determination of a claim against or in connection with a seagoing vessel in commercial service owned, possessed or operated by the State; or

"(b) The determination of a claim against or in connection with a cargo owned by the State if, at the time when the cause of action arose, the vessel or, as the case may be, the cargo of the vessel carrying it, was in use or intended for use for commercial purposes.

"2. Paragraph 1 shall not apply to any warships, naval, auxiliary or other ships owned or operated by a State and used for the time being only in government non-commercial service."

36. Mr. USHAKOV said it would be interesting to know how State-owned trading ships employed in commercial service were defined in the laws and regulations in force in the United Kingdom. In addition, he would like to know why an action *in rem* against a trading ship owned by a State would be brought against that State in its capacity as the owner in cases where the vessel in question was not being used by the State but was in the possession of, or being used by, a legal person—whether foreign or not—that was neither a State nor a State organ and did not enjoy immunity.

37. Mr. OGISO said he would have no objection to article 19 covering claims against cargo. He would none the less appreciate it if the Special Rapporteur could clarify, first, the extent to which article 12 would cover the question of cargo and, secondly, whether cargo which represented some form of economic assistance, for instance provision of rice through governmental aid programmes under the Kennedy Round, would come under the heading of commercial activities.

*The meeting rose at 1.05 p.m.*

## 1841st MEETING

Friday, 15 June 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

### Jurisdictional immunities of States and their property (continued) (A/CN.4/363 and Add.1,<sup>1</sup> A/CN.4/371,<sup>2</sup> A/CN.4/376 and Add.1 and 2,<sup>3</sup> A/CN.4/L.369, sect. C, ILC (XXXVI)/Conf. Room Doc.1 and Add.1)

[Agenda item 3]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPporteur<sup>4</sup> (concluded)

#### ARTICLE 19 (Ships employed in commercial service) and ARTICLE 20 (Arbitration)<sup>5</sup> (concluded)

1. Mr. REUTER said that he first wished to make two points regarding the discussion on draft articles 16, 17, 18 and 19. To begin with, some members of the Commission appeared to feel that the Commission was engaged in a difficult task. Yet the Commission was not only able

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> *Idem*.

<sup>3</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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*Part III* of the draft: (h) art. 11, *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised text: *ibid.*, p. 99, footnote 237; (i) art. 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (j) arts. 13 and 14: *ibid.*, pp. 18-19, footnotes 54 and 55; revised texts: *ibid.*, p. 20, footnotes 58 and 59; (k) art. 15 and commentary thereto adopted provisionally by the Commission: *ibid.*, p. 22.

<sup>5</sup> For the texts, see 1838th meeting, para. 25.

to overcome any difficulties, but duty-bound to deal with the questions that were involved, partly because of the way in which the Special Rapporteur had raised the problem as a whole. Several members considered that jurisdictional immunity of the State should be established as the rule, while others held a somewhat different position. If account was to be taken of all viewpoints, the Commission would not be able to enunciate the principle of State immunity unless it looked into all the areas where exceptions might or did exist.

2. Secondly, logical well-founded arguments had been advanced that the State enjoyed general absolute immunity precisely because it was a State. In its international economic relations, it could use other legal entities which did not enjoy immunity. Accordingly, any problems facing the Commission were quite simply artificial. On principle, he could not agree, because the application of the rule of international law that was being formulated would thus be subordinated to unilateral, sovereign decisions that were taken by a State and related to its internal organization. Hence it would no longer be a rule, for it would not be binding on the State. But Mr. Ni had argued for another position (1835th meeting); first, that the State enjoyed immunity because it was a State, in other words an absolute entity, and secondly, that other subsidiary organs of the State existed which must also enjoy immunity. He himself could agree with that view, because he was inclined to believe in functional immunity, whether in the case of a State or of its organs.

3. The various attitudes towards draft article 19 were a matter of concern because, in terms of basic principles, such as whether a piece of floating territory was more important than a piece of land territory or whether the personality of the State was more important than territoriality, they were all equally defensible. Yet they would hold up the progress of the Commission's work. He therefore wished to revert to a point that had been touched upon only lightly, namely the requirements of shipping and maritime trade. When two States came into conflict and each one claimed jurisdiction, a settlement had to be reached and account had to be taken of those requirements. The fact was that, at the present time, maritime trade enjoyed great freedom. It might not be absolute and it might involve exceptions. It might not last for ever, but it did exist. Shipping accounted for at least three quarters of world trade. Such freedom was, admittedly, beneficial to the States able to take advantage of it, whereas others were unable to do so because of underdevelopment. The socialist countries now made ample use of it because they had large fleets and were shrewd traders, and many developing countries were becoming increasingly involved in such trade. If the international freight market did not exist, maritime trade would be carried on bilaterally, and obviously the problem of immunity would not arise. If all trade took place within a well-defined bilateral framework, immunity would not be needed because trade would be conducted on perfectly equal terms. Some countries might well see that as the solution if they found such a course to be in their interests.

4. The Commission must, none the less, base its deci-

sion on an overall view of the situation. As he saw it, the smooth functioning of international shipping and maritime trade depended on the maintenance of some measure of physical safety and legal security. That might afford a foundation for an exception to immunity—for the non-immunity of State-controlled ships—since immunity from jurisdiction could not be dissociated from immunity from execution. It might also be possible to confine State jurisdiction to two types of matters: all matters relating to the safety of shipping and all matters relating to maritime trade as a whole.

5. A new development had emerged so far as the safety of shipping was concerned: trading vessels had become extremely dangerous on account of the pollution they could cause and some of the cargoes they carried. In that connection, he referred to two disasters at sea which had involved vessels belonging indirectly to the Government of France but providing a public service. The disasters had given rise to proceedings, in one case in the United States of America. It would have been inconceivable for the Government of France to have claimed immunity from jurisdiction on the grounds that the vessels in question were State-owned. He was unable to agree with Mr. Ushakov (1839th meeting) that the problems caused by such cases could be settled simply by diplomatic negotiations. Experience showed that, although negotiations of that kind could be successful, they could also fail. In any event, they would not help to guarantee freedom of maritime trade. In that regard, moreover, the Norwegian legislation of 17 March 1939 referred to by the Special Rapporteur (A/CN.4/376 and Add.1 and 2, para. 191) provided some valuable guidelines. In the interests of safety, it was quite usual to give equal treatment to all ships within a State's territory, except for warships of course.

6. With regard to maritime trade, it should be possible to agree that State trading vessels did not benefit from immunity because they had chosen to engage in commercial activities. In what instances then would State vessels enjoy immunity? A State might, for example, have a liquid debt payable to a foreign entity and might, for valid reasons, not be able or not want to pay it. For the recovery of debts that had nothing to do with shipping or maritime trade, jurists had invented an operation whereby a ship of the State's fleet could be seized as surety while in a foreign port. Such cases had actually occurred, at least in the form of attempted seizure, and one had involved France. The Government of France had been opposed to that type of operation and he himself was absolutely against it. An operation of that kind would be prejudicial to the safety of maritime trade. Yet a State which possessed a fleet must be able to guarantee its fleet's safety. That was an avenue the Commission might explore in trying to find an acceptable formula.

7. Mr. BALANDA, drawing the Special Rapporteur's attention to what appeared to be two errors in the report (A/CN.4/376 and Add.1 and 2), said he assumed that the words "the unusual requisite of nationality" in paragraph 120 should be replaced by "the usual requisite of nationality". He also pointed out that the term "per-

sonalized responsibility" used in paragraph 157 did not exist in, for example, his own country's legal system.

8. The characteristics of ships described by the Special Rapporteur as justifying their special status were relevant and generally accepted: a ship had a nationality; it was regarded as an extension of national territory, with all the ensuing consequences; and it was a particular type of movable property in that it could be mortgaged, whereas mortgages usually applied to immovable property. The Special Rapporteur's historical analysis of judicial practice, in which absolute immunity for State ships employed in commercial service had given way to restricted immunity, was also very interesting, but unfortunately it covered only a particular group of States. It did not, moreover, always faithfully reflect the position of the State as such, as was shown more particularly in the analysis of *The "Pesaro"* case (1926), in which the State Department of the United States of America had adopted a different position from that taken by the courts (*ibid.*, paras. 157-159). The analysis also mentioned opinions such as Chief Justice Marshall's in *The Schooner "Exchange"* case (1812) (*ibid.*, para. 136) and Chief Justice Stone's in *Republic of Mexico et al. v. Hoffman* (1945) (*ibid.*, para. 160). The study was thus somewhat unbalanced, because in the early days only a small number of States had been well versed in shipping affairs.

9. Hence, as the Special Rapporteur himself pointed out, it could not be stated with any certainty that the principle of absolute immunity or lack of immunity existed in international law. Similarly, a position for or against jurisdictional immunity could not be inferred from the absence of judicial practice in other States or from the small number of legal decisions that had been handed down. The Commission must therefore proceed cautiously. He agreed with the statement made by the Special Rapporteur concerning the "marked absence of a consistent practice of States in support of immunities in respect of State-owned or State-operated vessels, regardless of the nature of their service or employment" (*ibid.*, para. 178); it could not be concluded on the basis of that finding that the principle of absolute jurisdictional immunity did exist.

10. Referring to the development of Anglo-American case-law, particularly since *The "I Congreso del Partido"* case (1981), he noted that, in cases where a State engaged in commercial activities, even to provide a public service, it was regarded as a private individual and therefore did not enjoy immunity. In that connection, Mr. Ni had made a point (1840th meeting) concerning commercial activities by developing countries. It should be emphasized that, in those countries, the State's role was entirely different from what it was in the developed countries: it was the driving force behind all activities and the entire life of the nation depended on it. It did not merely supply public services, for it was the great provider, responsible for promoting the political, economic and social development of the population. The State thus had to engage in commercial activities. Unlike private individuals, who conducted such activities for profit, the State engaged in them to provide public

services. The situation described by the Special Rapporteur as being that of the developed countries in the past (A/CN.4/376 and Add.1 and 2, para. 143) was now that of the developing countries. In that connection, the observations made by Mr. Justice Van Devanter, quoted in the report (*ibid.*, para. 158), spoke for themselves. The criterion of *publicis usibus destinata* that had emerged in *The "Pesaro"* case (1926) must therefore be taken into account.

11. Even in the practice of the developed countries, the reason for restricting immunity lay in the fear of the power of the State over the individual, who must be protected. Immunity from jurisdiction did not, of course, mean absence of responsibility, as Mr. Ushakov had pointed out (1839th meeting). The State could be held responsible for an act even though it enjoyed immunity from jurisdiction, and it could pay compensation when its responsibility was established. But a rule could not be established on the basis of an entirely exceptional situation. Again, arbitration might provide a solution even if the principle of jurisdictional immunity was applied to State trading vessels.

12. It would be entirely in keeping with the logic underlying article 12—in connection with which the Special Rapporteur had taken note of the virtually unanimous view of the members of the Commission that account had to be taken not only of the nature, but also the purpose of commercial activities—to reflect the particular situation of the developing countries. At the same time, it was possible to take, *a contrario*, the following view expressed by the Special Rapporteur in his report:

While there is no general agreement either in the practice of States or in international opinion as to the basis for vessels operated by States for commercial non-governmental purposes, there appears to have emerged a clear and unmistakable trend in support of the absence of immunity for vessels employed by States exclusively in commercial non-governmental service... (A/CN.4/376 and Add.1 and 2, para. 229).

There should be no difficulty in establishing an exception to jurisdictional immunity in the case of State ships engaging exclusively in non-governmental commercial activities, but immunity should none the less be accorded if the activities involved a public service, as was the case when developing countries engaged in commercial activities.

13. What argument was to be derived from the fact that a number of developing countries, including Zaire, had acceded to the 1926 Brussels Convention and its 1934 Additional Protocol, which equated commercial activities by States with those carried out by private individuals? It would be rash to conclude that, by rejecting the principle of jurisdictional immunity, those countries had necessarily adopted the restrictive tendency. For example, when Zaire had to market its natural resources in order to secure the advancement of the nation, it could not elude the constraints of the international economic situation. If it engaged in such activities of its own free will, it had to abide by the rules of the game. If it refused what was accepted by others, namely restricted jurisdictional immunity, it would be committing suicide. It faced a kind of state of necessity, one that the developing

countries had to yield to in order to survive. His own conclusions would therefore have been more nuanced than those reached by the Special Rapporteur in his report (*ibid.*, paras. 224-225).

14. The Special Rapporteur was right to say that immunity had to be invoked expressly, but it would be necessary to go even further, for behind the question of jurisdictional immunity stood that of the competence of courts. Under the legal system in Zaire, such competence was a matter of public policy, so that the judge in a case automatically had to raise the question of immunity without waiting for the State itself to be able to prove that it enjoyed immunity. Establishing the existence or absence of State immunity meant that the State was already being subjected to the jurisdiction of another State and that the principle *par in parem imperium non habet* was being ignored.

15. Like other members, he was of the opinion that the wording of draft article 19 had to be generally acceptable if the instrument now being prepared was to be effective in any way. It was important to use terminology found in most legal systems. For example, terms such as "action *in rem*" and "action *in personam*" should be deleted, particularly since an action *in rem* against a vessel did not exist in some legal systems, at least not in the system in force in Zaire. It would be quite astonishing to serve a summons on a ship, which was an inanimate object. Moreover, those terms were not very clear and the Special Rapporteur himself had shown (*ibid.*, para. 183) how an action *in rem* could lead to an action *in personam*. An action *in rem* also involved the problem of immunity from execution, which the Commission had not yet considered. The term "admiralty" should also be eliminated. In Zaire, competence, even in commercial matters, lay with the civil courts and tribunals. Again, he would be very reluctant to see the Commission establish the concept of "sister-ship jurisdiction", which was extremely dangerous and raised practical problems in international trade relations. Although the words "Unless otherwise agreed" in paragraphs 2 and 4 of alternative A of article 19 made for some flexibility, they did not pave the way for the application of the principle of reciprocity.

16. He would have great difficulty in endorsing article 19 in its present form. It contained too many elements and should be cut down to the bare essentials. If the Commission decided to retain the article, it should take account of the need for flexibility in applying it to the special situation of the developing countries.

17. Chief AKINJIDE said that four main factors had brought about a change in the situation with regard to the topic under consideration. In the first place, what was often referred to as international law in the matter had until recently actually been European law, in other words the law used by tsarist Russia and the European States which had once dominated most of the world to serve their own economic and imperialist aims. Care should be taken, therefore, not to import what was really European law into a modern concept. Secondly, as was clear from the various cases and the literature cited in the Special Rapporteur's report (A/CN.4/376

and Add.1 and 2), the only certain thing about the whole matter was its uncertainty. Nothing had ever been firmly settled even in the developed countries, and there was no way of knowing what attitude the courts of those countries might take in 20 years' time. Thirdly, after the Second World War, many countries had turned to the socialist system, a fact that could on no account be ignored. Fourthly, many developing countries had a mixed economy, many sectors of which were owned or controlled by the State. In his own country, for instance, there could be no question of shipping, railways and air transport being privately owned. It was felt that private individuals would have difficulty in competing with multinational corporations and obtaining the necessary capital, and also that it would be immoral to place in private hands the huge profits that were to be made in those sectors. Many other developing countries undoubtedly took the same view.

18. Given such a fundamental change of circumstances, it was simply not possible to adopt United States and European practice hook, line and sinker. As he saw it, the basic issue was how to marry all the competing interests within the context of the Commission's statute, and first and foremost article 1 (1), which provided for the promotion of the progressive development of international law. Under the terms of its statute, the Commission was also enjoined to take account of all the interests involved, since article 8 stipulated that representation of the principal legal systems of the world should be assured. Clearly the product of its work could not reflect but one legal system, a point which, he felt bound to note, was not apparent from the report.

19. Furthermore, if draft article 19 was adopted, there would be nothing to prevent a socialist or a developing country, for instance, from using one of its warships to carry wheat or crude oil and then claiming absolute immunity. Indeed, the Special Rapporteur seemed to support that contention, since he referred to the French case *Etienne v. Gouvernement des Pays-Bas* (1947), in which jurisdiction had been declined on the ground that the ship concerned had been employed by the Netherlands for political purposes (*ibid.*, para. 167). Also, as he later explained (*ibid.*, paras. 195-196), despite the clear terms of the *State Immunity Act 1978*, the United Kingdom had had to provide for a special exception in the case of the Soviet Union. It was thus apparent that judicial decisions and State practice did recognize the differences in economic systems.

20. The decisions taken by some countries were political, not judicial, as was evident from the Special Rapporteur's reference to the intervention of the United States State Department in connection with a question of immunity (*ibid.*, paras. 159-161). In the words of Chief Justice Stone in *Republic of Mexico et al. v. Hoffman* (1945), "it is therefore not for the courts to deny an immunity which our Government has seen fit to allow, or to allow an immunity on new grounds which the Government has not seen fit to recognize".

The "*I Congreso del Partido*" case (1981) (*ibid.*, para. 155) and the *Trendtex* (1977)<sup>6</sup> and *Texas Trading* (1981)<sup>7</sup> cases reflected the attitude not of the socialist or developing countries, but of the United Kingdom and the United States and that attitude, as had rightly been observed, should not be inflicted on countries having other legal systems. Obviously, draft article 19 did not meet the criteria he had outlined.

21. Mr. LACLETA MUÑOZ said that, unlike the section of the Special Rapporteur's report (A/CN.4/376 and Add.1 and 2) relating to articles 16 to 18, which had been difficult to understand primarily because of the translation into Spanish, the section on article 19 was readily grasped, despite some problems with the use of terms. The Special Rapporteur had placed too much emphasis on the practice of the common-law countries, as could be seen from article 19, but the article required re-drafting chiefly because it did not meet the Commission's needs. In that connection, he agreed with the comments made by Mr. Quentin-Baxter (1840th meeting).

22. With regard to the judicial practice of States, the Special Rapporteur had drawn attention to the oft-cited dictum of Sir Robert Phillimore, which contained an assertion of fundamental importance in the matter (A/CN.4/376 and Add.1 and 2, para. 147), and had gone on to trace the development of that practice. But the Commission should focus mainly on the Special Rapporteur's discussion of the 1926 Brussels Convention and its 1934 Additional Protocol, instruments that reflected a trend common to a large number of countries (*ibid.*, paras. 199-207). That trend had been confirmed in two of the conventions elaborated at the 1958 United Nations Conference on the Law of the Sea and also in the 1982 United Nations Convention on the Law of the Sea. It was not clear why the Special Rapporteur had mentioned only article 236 of the latter Convention (*ibid.*, para. 211), for many other relevant articles had also been adopted by consensus. They were based on provisions of the 1958 conventions and provided for State immunity only in the case of warships and State vessels employed in non-commercial governmental service. Hence they were the mark of a significant tendency within the international community.

23. He endorsed the Special Rapporteur's conclusions (*ibid.*, paras. 229-230), but did not think that either of the alternatives for draft article 19 was acceptable because each was based almost exclusively on the judicial practice of the common-law countries. As it now stood, paragraph 1 of alternative A could not be applied in Spanish law, in spite of the efforts at transposition made by the translators. There was no equivalent of the concept of "admiralty proceedings" in Spanish law. Maritime courts, however, were competent to deal with matters relating to navigation and shipping accidents, which were not fully covered by article 19. Moreover, the distinction between actions *in rem* and actions *in personam*, as well as any reference to "sister ships", should be avoided. Those elements had no place in the article be-

<sup>6</sup> See 1834th meeting, footnote 8.

<sup>7</sup> *Ibid.*, footnote 9.

cause, in the final analysis, they were governed by the internal law of the forum State. The Special Rapporteur should take account of all the comments in the Commission and redraft article 19 completely.

24. Two key ideas had emerged during the discussion. First, account would have to be taken of the particular situation of the developing countries, to which some members had drawn attention. To that end, the Commission might adopt the criterion of the purpose of the activity, as it had done in the case of article 12. Secondly, a distinction must be drawn between socialist and mixed-economy systems, although the difference between them might not be as great as it seemed. For example, in Spain, a market-economy country, there were some trading vessels which, despite appearances, did belong to the State: the vessels belonging to a particular national enterprise set up as a limited company under ordinary law belonged in fact to the Spanish State because the company was a subsidiary of the State-owned National Institute of Industry. Thus the socialist countries were not the only ones in which companies belonging exclusively to the State could own trading vessels.

25. Mr. McCAFFREY said that the basic principle embodied in article 19 was necessary on practical grounds and justified both by existing treaty law and by customary international law. He agreed, however, with a number of previous speakers (1840th meeting), especially Mr. Quentin-Baxter, Sir Ian Sinclair and Mr. Ogiso, that the provisions of the article should be redrafted so as to be made more generally applicable.

26. He had already mentioned in his previous statement (1839th meeting) the practical necessity of stating the principle contained in article 19 and had then referred to the inequality, as between private traders and State trading entities, that would result from granting jurisdictional immunity to the trading partner that happened to be owned or controlled by a State. In that connection, he recalled the reasoning of Judge Mack in *The "Pesaro"* case decided by the lower court in 1921 (A/CN.4/376 and Add.1 and 2, para. 157). Admittedly, the lower court decision had been reversed by the United States Supreme Court in 1926, but it was nevertheless true that Judge Mack's decision was better reasoned. It certainly represented more accurately current United States practice and, indeed, the practice of the State Department itself, as indicated by the letter addressed by the Department to Judge Mack denying jurisdictional immunity to "government-owned merchant vessels ... employed in commerce" and adding significantly: "The Department has not claimed immunity for American vessels of this character" (*ibid.*, para. 159). Judge Mack had concluded—very much as Sir Robert Phillimore had done in *The "Charkieh"* case (1873) (*ibid.*, para. 147)—that, since Governments were increasingly engaged in State trading and in various commercial ventures, immunity for States and State property involved in such ventures was not only unnecessary, but also undesirable, because it would deprive the private parties dealing with States of their judicial remedies. It would thus give States an unfair competitive advantage over private commercial enterprises.

27. He appreciated Mr. Balanda's point that developing countries often did not trade for profit. Nevertheless, when a State dealt with private individuals, it should do so with due regard for what Mr. Balanda himself had called "the rules of the game". As also pointed out by Mr. Balanda, jurisdictional immunity did not mean absence of liability or responsibility. Yet in practice, as far as the individual was concerned, immunity did unfortunately mean absence of responsibility.

28. Other members, notably Sir Ian Sinclair and Mr. Quentin-Baxter, as well as the Special Rapporteur in his report (*ibid.*, paras. 191-192 and 198-215), had amply demonstrated the firm basis in treaty law for the principle embodied in article 19. While the 1926 Brussels Convention constituted perhaps the most outstanding illustration of the broad acceptance of that principle, equally relevant were the important United Nations conventions on the law of the sea, namely the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, the 1958 Geneva Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. In the case of the latter, it was significant that the relevant provisions had been adopted by consensus by the Third United Nations Conference on the Law of the Sea. The provisions of those Conventions, referred to by the Special Rapporteur (*ibid.*, paras. 208-211), confirmed the acceptance by a broadly representative group of States of the basic principle of the non-immunity of State trading vessels.

29. Incidentally, it should be stressed that, although the United States had not ratified the 1926 Brussels Convention, it had enacted legislation to the same effect, namely the *Public Vessels Act* of 1925 and also section 1605 (b) of the *Foreign Sovereign Immunities Act of 1976* (*ibid.*, para. 193). With regard to United States practice in the matter, he wished to draw attention to a passage in the *Restatement of the Foreign Relations Law*, which read:

*Maritime liens.* The special provision for maritime liens in subsection (4) (section 1605 (b) of the Act) reflects the desire of Congress not to curtail bases for jurisdiction of claims against foreign States existing prior to adoption of the Act.

Admiralty law has long been regarded as a kind of international law, in the sense that many of the disputes that it was designed to resolve arise on the high seas and not within the legislative jurisdiction of any State. Jurisdiction to adjudicate claims in admiralty (whether or not arising on the high seas) has been linked, therefore, not to activity within the State of the forum, but to the presence there of a vessel or cargo. Because the presence of a vessel or cargo might well be temporary, the law has long known "maritime liens", which constitute both the basis for jurisdiction over the claim and a security device for payment of a judgment that may be obtained. The *lien* results from a libel on the vessel or cargo, which must either remain in the port where the lien is asserted or be replaced by a bond.<sup>8</sup>

The purpose of the provisions of the *Foreign Sovereign Immunities Act* was to avoid arrests of State-owned vessels and they were based on pre-existing legislation relating to vessels owned by the United States. It should be noted that section 1605 (b) of the *Foreign Sovereign Im-*

<sup>8</sup> American Law Institute, *Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 2* (27 March 1981) (Philadelphia, Pa.), p. 197, Part IV: Jurisdiction and Judgments, chap. 2, sect. 455.

*munities Act* did not provide a remedy *in rem*, in other words against a ship, but a remedy *in personam* against the foreign State.

30. As to the terminology used in article 19, he agreed with other speakers about replacing such terms as *in personam*, *in rem* and “admiralty”, which had been taken from Anglo-American legal terminology, by more general expressions better suited to an international instrument. Actually, it was worth noting that the distinction between claims *in rem* and claims *in personam* had largely disappeared both in the United Kingdom and in the United States, where the Supreme Court had held in 1977, in *Shaffer et al. v. Heitner*,<sup>9</sup> that there really was no difference for jurisdictional purposes between the two types of claim, since by proceeding against property, a claimant was really affecting the owner’s rights in that property.

31. Lastly, he expressed his regret that pressure of time should have obliged him to postpone to a later stage his comments on draft article 20 and on the Special Rapporteur’s valuable comments thereon.

32. After a brief procedural discussion in which Mr. MALEK, Mr. JAGOTA, Sir Ian SINCLAIR, Mr. THIAM and Mr. FRANCIS took part, the CHAIRMAN said that, since there was no time for further discussion of draft article 19, he would invite the Special Rapporteur to reply to the statements made so far. The debate on the article would probably be resumed at the following session.

33. Mr. SUCHARITKUL (Special Rapporteur) said his intention was not to sum up, but simply to give his impression of the enlightening comments that had been made so far.

34. He wished to apologize for having allowed himself to be unduly influenced by English legal terminology. He had drafted the articles in English, and had therefore been inevitably led to use concepts drawn from English law. He was grateful to, among others, Mr. Quentin-Baxter (1840th meeting), Sir Ian Sinclair (*ibid.*), Mr. McCaffrey and Mr. Lacleta Muñoz for drawing attention to that point. All the expressions which had been criticized, such as “action *in rem*”, “action *in personam*” and “admiralty proceedings” would be removed and replaced by more universally known expressions.

35. Mr. Ushakov’s opinion (1839th meeting), shared by a number of writers and Governments, was that, when a State-owned ship was operated by an independent entity, an action could be brought by a private claimant against that entity but not directly against the State. A new paragraph would therefore be inserted in the article to provide that proceedings in relation to the commercial operation of a State-owned ship by an independent entity could be permitted against that entity itself, thereby saving embarrassment to the State owning the vessel. At the same time, no inconvenience would result for any claimants with regard to the enforcement of a maritime lien or to any suit arising from a collision, salvage or carriage of goods by sea.

36. As to the position of the developing countries, the great complexity of the shipping problem should not be overlooked. From his experience in the Department of Economic Affairs in his own country, he was able to say that it was very difficult to intrude into the world of shipping, which was dominated not by Governments, but by private organizations. For example, the Japan-Thailand Liner Conference was dominated not by the Japanese or by their shipping firms, but by Scottish and Scandinavian shipping companies. That kind of phenomenon was the living reality of the shipping world.

37. The question of State-owned vessels used for commercial purposes was perhaps less straightforward than the 1926 Brussels Convention might suggest. The points made during the discussion, particularly by Mr. Ogiso (1840th meeting), Mr. Balanda and Chief Akinjide, had to be taken into consideration: non-commercial operations would have to be excluded from the rule laid down in article 19. He had in mind Government-to-Government transactions for the carriage by sea of relief supplies or a triangular operation such as the shipping to Africa of rice bought in Thailand by Japan. The rice in such a transaction, not being a commercial cargo, should be immune from attachment or seizure, since it was intended for use for a governmental purpose.

38. For all those reasons, he withdrew alternative A of article 19 and would revise alternative B in the manner suggested by Mr. Ogiso and by Sir Ian Sinclair. In addition to replacing specifically English legal terms, he also intended to omit the reference “and/or another ship”, in other words the so-called “sister-ship jurisdiction”.

39. With such changes, paragraph 1 of the new text of article 19 would be formulated along the following lines:

“1. If a State owns, possesses or otherwise employs or operates a vessel in commercial service and differences arising out of the commercial operations of the ship fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in proceedings relating to the operation of that ship or to the cargo and owner or operator if, at the time when the cause of action arose, the ship and cargo belonging to that State were in use or intended for use exclusively for commercial purposes, and accordingly, unless otherwise agreed, it cannot invoke immunity from jurisdiction in those proceedings.”

Paragraph 2 would be appropriately recast, and paragraph 3 might read:

“3. Proceedings relating to the commercial operation of State-owned vessels by an independent entity may be permitted if instituted against the independent entity operating the vessel.”

A reformulation of that kind should meet the concern expressed in the Commission. He would submit the revised text of article 19 for discussion at the present session, if time allowed, or else at the following session.

*The meeting rose at 1.05 p.m.*

<sup>9</sup> United States Reports, vol. 433 (1979), p. 186.

## 1842nd MEETING

Monday, 18 June 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)\* (A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)**

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup>  
(continued)

ARTICLE 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 31 (Indication of status of the diplomatic bag)

ARTICLE 32 (Content of the diplomatic bag)

ARTICLE 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 34 (Status of the diplomatic bag dispatched by postal services or other means) *and*

ARTICLE 35 (General facilities accorded to the diplomatic bag)<sup>5</sup> (continued)

1. Mr. RAZAFINDRALAMBO said that the draft articles under consideration were of particular importance to countries which could not afford the services of a professional diplomatic courier and were obliged, in the words of article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, to "employ all appropriate means" of communication to maintain liaison

\* Resumed from the 1832nd meeting.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1830th meeting, para. 1.

with their diplomatic and consular missions. In the case of the diplomatic bag, airlines were probably the means mainly used. But that means of transport was far from presenting the same guarantees of protection and security as conveyance by diplomatic courier, and the Special Rapporteur had been right in saying that "the increasing significance of the status of the diplomatic bag has also to be considered from the point of view of the widespread practice of using diplomatic bags not accompanied by diplomatic couriers" (A/CN.4/374 and Add.1-4, para. 246). The importance of that status was also clear from the title of the topic, which referred to the status of both the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Thus the second aspect of the topic needed to be examined just as carefully as the first.

2. The practice, confirmed by the four codification conventions, of entrusting the bag to the captain of a commercial aircraft, was far from satisfactory according to the experience of certain sending States. First of all, it meant that the bag was entrusted *intuitu personae* to a particular airline pilot, because that pilot must carry official documents. But some diplomatic bags sent to distant missions had to cross several continents, pass through a number of airports and change airlines. In those circumstances it was not possible to entrust the bag to the captain of an aircraft covering only the first part of the journey. Even if there was no change of aircraft there might be a change of crew: between Paris and Antananarivo, for example, the crew was changed three times. Thus it was open to question whether the captain of an aircraft would hand over the diplomatic bag to his replacement. At each such transfer, the responsibilities became less clear; the bag might be treated as an ordinary package and relegated to some corner of the aircraft.

3. Sending States which could not have recourse to pilots *intuitu personae* had to resort to means which did not appear to fall into any of the categories mentioned by the Special Rapporteur (*ibid.*, para. 217), but rather to come under draft article 34. They did not entrust the diplomatic bag to airline pilots, but sent it as air freight with an air transport company. That was common practice in most third world countries, whose experience was anything but encouraging. There were many examples of diplomatic bags entrusted to air transport companies which had been found cut open and emptied of their contents at an airport. One air transport company to which the diplomatic bag of the Malagasy Embassy in Paris had been entrusted had claimed to have lost it on the road to Orly Airport. For mainly financial reasons, however, some countries were obliged to resort to such means, at least for sending non-confidential official documents. As Chief Akinjide had stressed (1825th meeting), the African countries were obliged, even for South-South relations, to pass through the main European capitals. Some European countries, either by reason of their geographical position or as a result of their historical role in colonial times, had become almost obligatory transit points. It should be added that that state of affairs did not present only disadvantages for the African countries, considering the policy of cultural and economic interest which the European countries con-

tinued to pursue, particularly with their former colonies. In any case, for the countries of the third world, the provisions relating to the status of the unaccompanied diplomatic bag were of particular importance.

4. In draft article 30, the Special Rapporteur dealt not only with the status of the captain of a commercial aircraft or the master of a merchant ship, but also with that of an authorized member of the crew, which was an innovation in relation to the codification conventions. But the status of an authorized member of the crew did not derive from any significant State practice, and it seemed hardly worth considering, since only two situations could arise. In the first case, the captain might not be able to take charge of the diplomatic bag on departure and the sending State would have to employ a different means of communication. In the second case, the captain accepted responsibility for the diplomatic bag and there would seem to be no reason why he should subsequently hand it over to a mere member of the crew, unless there was a change of crew; but even in that case, it was to his replacement that he should entrust the bag. Consequently, the possibility of entrusting the bag to a member of the crew of an aircraft or ship should be eliminated.

5. Paragraph 4 of draft article 30 dealt with the delivery of the bag by the captain to members of the diplomatic mission of the sending State, but did not mention the case of delivery of the bag to the captain by the mission for transport to the sending State. Paragraph 4 should be amended to make good that omission. In addition, the obligations of the receiving State should be specified.

6. The indication of the status of the diplomatic bag provided for in draft article 31 was necessary, though it was not sufficient to prevent the commission of offences against the diplomatic bag not accompanied by diplomatic courier. The precautions taken to identify the bag were intended mainly to prevent confusion with an ordinary package and to ensure respect for the privileges and immunities attaching to it. In fact, the identifying marks only facilitated the task of those whose business it was to violate the secrecy of the official correspondence of the sending State.

7. The wording of draft article 31 was modelled on that of the corresponding provisions of the four codification conventions and called for comment only in so far as the Special Rapporteur had departed from those texts. Whereas article 27 of the 1961 Vienna Convention required only that the packages constituting the diplomatic bag “must bear visible external marks of their character”, draft article 31, paragraph 2, required that the packages constituting the diplomatic bag, if unaccompanied by diplomatic courier, “shall also bear a visible indication of their destination and consignee, as well as of any intermediary points on the route or transfer points”. While it seemed obvious that the destination and consignee must be indicated, it was more difficult to see the practical need to indicate “any intermediary points on the route or transfer points”. Some airlines in fact took different routes according to the day and the flight number, and those routes were not always known in advance. It followed that the indication of intermediary points and transfer points was not essential. As to para-

graph 3, he wondered why it was made obligatory to determine the maximum size or weight of the diplomatic bag; it would suffice if that were made optional.

8. Draft article 32, which dealt with the content of the diplomatic bag, was very important, because it was designed to prevent abuses and protect the interests of the receiving State or of a transit State in so far as the bag was not automatically transferred. The Special Rapporteur had rightly not followed the examples of the codification conventions by including provisions on verification of the contents of the bag. Such verification was, indeed, linked with the principle of the inviolability of the diplomatic bag—a fundamental principle which was stated in draft article 36 and intended to ensure the secrecy of official correspondence. In view of technological progress, however, that principle was in danger of becoming a dead letter, at least in regard to unaccompanied bags. It therefore seemed doubtful whether there was any practical need to impose on sending States specific measures for the prevention of abuses and the punishment of offences against the provisions of article 32, paragraph 1. Moreover, transit and receiving States were not obliged to take similar measures to prevent unaccompanied bags from being opened, emptied of their contents or lost while passing through their territory. In addition, if abuses calculated to injure the interests of the sending State were committed, the laws in force in that State would probably already be producing a deterrent effect by providing for appropriate civil, penal or administrative sanctions against offenders. Draft article 32 should therefore include a provision on the responsibility of transit and receiving States in the event of loss or breaking open of the diplomatic bag in their territory. In any case, the last clause of article 32, paragraph 2, concerning prosecution and punishment, did not seem necessary.

9. Draft article 33, on the status of the diplomatic bag entrusted to the captain of an aircraft, the master of a ship or an authorized member of the crew, seemed unnecessary because it only referred back to the status of the diplomatic bag in general. It might have been better to draft the title of part III in more precise terms such as “General status of the diplomatic bag” or “Status of the diplomatic bag whether or not accompanied”. Another solution would be to include an article 30 *bis* entitled “Scope of the present articles”, providing that “the present articles apply to the diplomatic bag whether or not accompanied by diplomatic courier”.

10. Draft article 34, on the status of the diplomatic bag dispatched by postal services or other means, was undoubtedly of practical importance. It covered the case of bags sent by air, without being entrusted to the captain of an aircraft, or dispatched by post. Dispatch by the postal service had the disadvantage of being subject to the operation of that service without, it appeared, any preferential treatment. Admittedly, the postal authorities of the receiving State or transit State were required, at the end of paragraph 2, to “facilitate the safe and expeditious transmission of the diplomatic bag”, but that was a wish rather than an obligation; such a provision could have no real influence on the conduct or respon-

sibility of the States concerned. Those States were dependent on the quality of their postal services and, in the event of a postal strike, could not guarantee the forwarding of the diplomatic bag or even ensure that it did not remain undelivered. The same applied to dispatch by ordinary surface, air or maritime transport, except that the risks were even greater. There again, the obligations of the transit State or receiving State laid down in article 40 should be more general and not cover only the cases of *force majeure* and fortuitous event. It seemed unacceptable that an unaccompanied diplomatic bag sent by post or other means could disappear without the responsibility of the transit or receiving State being specifically engaged.

11. Lastly, with regard to draft article 35, on the general facilities accorded to the diplomatic bag, he suggested following the relevant provisions of the Vienna Conventions on diplomatic and consular relations and adding to the French text, after the words *toutes les facilités voulues*, the words *pour le transport et la remise rapide et en toute sécurité de la valise diplomatique*.

12. Mr. FRANCIS said he agreed with much of what had been said by the previous speaker. The first of the draft articles under discussion, article 30, made provision for the diplomatic bag being conveyed by the captain of a commercial aircraft, the master of a merchant ship or an "authorized member of the crew". There had been some discussion as to whether a member of the crew should be specifically mentioned. It was true that article 27 of the 1961 Vienna Convention on Diplomatic Relations mentioned only "the captain of a commercial aircraft", but there had been developments since 1961 which warranted making the provision considerably broader. The Special Rapporteur had mentioned in his report at least one case of a diplomatic courier and a diplomatic bag being carried by lorry (A/CN.4/374 and Add.1-4, para. 234).

13. From a practical point of view, it would be unwise to limit the custody of the diplomatic bag to the captain of a commercial aircraft or the master of a merchant ship. From his own experience, he could say that the captain of a small aircraft would himself take charge of the diplomatic bag; but on a larger aircraft, delegation to a crew member would be possible. Furthermore, in some countries, including his own, it was quite a common practice to entrust the bag to an agent of the airline concerned, who passed it on to the captain or authorized crew member. Thus it was necessary to make the provisions of article 30 broad and flexible enough to cover all those possibilities. He accordingly supported the formula in paragraph 1 of article 30, reading: "The captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew under his command...".

14. As to paragraph 4, he agreed with Mr. Razafindralambo on the need to fill a gap in the text, which referred only to direct delivery of the diplomatic bag to "members of the diplomatic mission of the sending State". In draft article 3 (Use of terms), paragraph 1 (2) defined a "diplomatic bag" as including not only "a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961", but also "a consular bag within the meaning of the Vienna Convention on

Consular Relations of 24 April 1963". The term "mission" was defined in paragraph 1 (6) as including diplomatic missions, special missions and permanent missions; it did not include a consular post, which was defined separately in paragraph 1 (7). Thus the effect of the present text of draft article 30, paragraph 4, would be to exclude members of consular posts from benefiting from the facilities for free and direct delivery of the consular bag. In order to avoid that probably unintended result, he suggested the insertion of the words "or consular post" after the words "delivery of the diplomatic bag to members of the diplomatic mission".

15. In examining the group of articles under consideration, it should be borne in mind that, as pointed out by a number of speakers, most developing countries did not have professional diplomatic couriers. They were therefore obliged to rely on other means of transport for the dispatch of diplomatic bags.

16. He had some drafting suggestions to make regarding part III of the draft articles. In the first place, the title "Status of the diplomatic bag" did not adequately cover the contents of that part, and he suggested that it should be expanded to read: "Content, characteristics and status of the diplomatic bag". As to the order of the draft articles, he suggested that the article on the content of the diplomatic bag should be placed first; the next article would deal with the characteristics of the bag; and next would follow article 36, on the inviolability of the diplomatic bag. In view of the fundamental character of that provision, it should precede the remaining articles in part III.

17. In draft article 32, the language of paragraph 1 needed to be strengthened. Since the purpose was to prevent abuses, it would be preferable not to use the formula "may contain"; he suggested that the paragraph should begin with a specific statement to the effect that the contents of the diplomatic bag must be intended exclusively for official use. The provision could then go on to say that the diplomatic bag "may contain official correspondence...". As to paragraph 2, he agreed with those members who had suggested the deletion of the last clause "and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag".

18. Lastly, in draft article 34, paragraph 1, he suggested that the words "shall comply" should be replaced by the more appropriate words "shall conform".

19. Mr. NI said that, generally speaking, he approved of draft article 30, though some parts of it were rather cumbersome. As had already been pointed out in the Commission and in the Sixth Committee of the General Assembly, it was necessary to fill certain gaps in the four codification conventions by introducing provisions in that draft article, but those provisions should not be too long. In paragraph 1, the Special Rapporteur had tried to describe clearly the incoming and outgoing movements of the diplomatic bag. But the paragraph was too long, and it was much less clear than the first sentence of paragraph 1 of the corresponding articles of the four codification conventions, which were not open to any misun-

derstanding. Paragraph 1 of draft article 30 provided that, besides the captain of an aircraft or master of a ship, “an authorized member of the crew under his command may be employed for the custody, transportation and delivery of the diplomatic bag”—a provision which appeared unnecessary. Although no such provision was included in the codification conventions, the possibility of entrusting the bag to an authorized member of the crew was not, in fact, excluded. In practice that was always done and the receipt was signed on behalf of the captain. Draft article 30 would raise the question whether the member of the crew was under the captain’s command and whether he was authorized. Furthermore, the term “employed” in paragraph 1 was not as satisfactory as the term “entrusted”, which appeared in the four codification conventions and in paragraph 2 of draft article 30.

20. Paragraphs 2 and 3 could be combined, which would not only simplify the drafting, but would be in conformity with the four codification conventions. The fact that the captain or master was not considered to be a diplomatic courier had been made clear in debate during the formulation of the codification conventions. The delivery of the diplomatic bag was not his only task. If he committed an unlawful act during the performance of other duties, he was subject to arrest or detention. It would be inconceivable for him to enjoy privileges and immunities simply because he had been entrusted with a diplomatic bag. It was in his capacity as captain or master that he was entitled to due respect and appropriate assistance, not because he was carrying a diplomatic bag.

21. According to paragraph 4 of draft article 30, the authorities of the receiving State must accord facilities to the person who came to take possession of the bag, so that he could have access to the aircraft or ship. Those facilities did not appear to extend to the captain or master, but the safe handing over of the inviolable diplomatic bag in itself facilitated the completion of his task. In their corresponding articles, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States provided that “by arrangement with the appropriate ... authorities” of the receiving State, the person sent should be able to take possession of the bag directly and freely from the captain. The 1961 Vienna Convention on Diplomatic Relations did not contain even that short phrase, but its omission had never caused any difficulties. Nevertheless, to affirm the obligation of the receiving State to provide assistance, paragraph 4 could be retained, but in simplified form. The person to be given access to the aircraft or ship could be a staff member of the embassy, consulate or mission of the sending State. That particular was not specified in paragraph 4.

22. The status of the diplomatic bag, which was an important instrument for free communication by States for official purposes, was the core of the whole set of draft articles. The increasing importance of the status of the diplomatic bag was also shown by the very widespread practice of sending bags unaccompanied by a

diplomatic courier. Consequently, it was necessary to formulate new rules maintaining a balance between the rights and duties of the sending State and those of the receiving State, so as to protect the interest of the sending State in having the bag freely and quickly delivered, to ensure that the sending State would respect the laws and regulations of the receiving State, and effectively to prevent abuse of the privileges accorded.

23. As to paragraph 1 of draft article 31, he saw no reason to formulate a different provision, since the four codification conventions all contained similar provisions, which had proved to be in conformity with State practice. Paragraph 2 referred to “any intermediary points on the route or transfer points”, which it was not necessary to indicate in all cases. He therefore suggested that the words “as necessary” be added after the words “as well as of”. Paragraph 3 raised not only the question of the external markings on a diplomatic bag, but also that of its contents and of the limitations on abuse of rights. Hence that paragraph appeared to fall within the scope of draft article 32.

24. With regard to draft article 32, on the content of the diplomatic bag, he emphasized that in principle the bag was inviolable and that the Special Rapporteur’s proposed article 36 confirmed the inviolability of the bag and its exemption from examination. The four codification conventions provided only for the inviolability of official correspondence. But if the diplomatic bag contained official correspondence as well as articles for official use, it might consist of numerous packages of each category, with no limit to their size or weight. As the packages would be indistinguishable one from another, it might be asked who would determine which contained articles other than those referred to in article 32, paragraph 1. Though mutual trust and co-operation should exist at the international level, cases of abuse did occur and they were even on the increase. At the present time, none of the multilateral conventions on diplomatic law provided a viable solution to the problem of the verification of the contents of the diplomatic bag. Going further than the 1963 and 1969 Conventions, draft article 32, paragraph 1, restricted the content of the diplomatic bag by adding the word “exclusively” before the words “for official use”, which was certainly a positive step, although it did not solve the problem.

25. Paragraph 2 of draft article 32 raised the same difficulties as paragraph 2 of article 20; it provided that the sending State must take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1, and must prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag. Such a provision would require Governments to enact new laws in order to fulfil their obligations. Generally speaking, under internal criminal law a State could prosecute and punish nationals who committed offences outside its territory. Such prosecution and punishment were, however, subject to certain limitations, which sometimes consisted merely of a list of punishable offences and sometimes depended on the length of the sentence. If, however, persons other than diplomatic couriers had used the diplo-

matic bag for the transport of unauthorized articles, and if criminal acts had been committed before the bag had left the territory of the sending State, the question arose whether articles other than those allowed could be used as evidence to prosecute and punish, without resorting to legislation.

26. Paragraph 3 of draft article 31 dealt with the size and weight of the bag, and raised the question not only of its external markings, but also of its contents and of the abuse of rights. It was obvious that large containers and crates should not be dispatched as diplomatic bags. It was not only a question of size and weight, however, but also of contents and of abuses; further consultations should be held between all States in order to find an acceptable method. Some bilateral conventions already provided for the opening of the bag in the presence of an authorized representative of the sending State, to ensure that it did not contain anything other than official correspondence and articles intended for official use. That practice should be widespread before generally accepted rules were formulated. For the time being, therefore, sending and receiving States should formulate provisions based on mutually accepted principles and come to an agreement, as had been done on the size and weight of the diplomatic bag.

27. At first sight, it appeared that draft article 33 could be combined with draft article 30. But the latter article dealt with the captain or master and his status, the official documents which should be in his possession and the facilities to be accorded to him, whereas draft article 33 focused on the diplomatic bag entrusted to the captain or master, with specific provisions on the legal status of the bag, its external markings, its contents and the privileges and immunities to be accorded to it by the receiving and transit States. As the two articles differed in content and focus, they should not be artificially merged. The status of a captain or master entrusted with the delivery of the bag was not the same as that of a diplomatic courier, so it was natural for him to be the subject of a separate article. Nor was the status of a diplomatic bag entrusted to a captain or master the same as that of a diplomatic bag not accompanied by diplomatic courier, such as bags sent by post. For the diplomatic bag entrusted to a captain or master was not really accompanied by a designated person.

28. Referring to draft article 34, he pointed out that the four codification conventions did not contain explicit provisions on the dispatch of the diplomatic bag by postal services or other means, but provided that "all appropriate means" of communication might be employed—a formula which obviously included postal services and other means of transport and communication. Paragraph 1 of draft article 34 provided that "the diplomatic bag dispatched by postal services or other means, whether by land, air or sea, shall comply with all the requirements set out in article 31", but did not mention that article 32, on the content of the diplomatic bag, must also be respected. Did that mean that the diplomatic bag referred to in article 34 was not subject to the provisions of article 32?

29. Draft article 35, on general facilities accorded to

the diplomatic bag, was symmetrical with draft article 15 on general facilities, but it was drafted in stronger terms. Perhaps that was intended to show that the diplomatic bag not in the direct and permanent custody of a courier had more protection and preferential treatment, which was quite understandable.

30. Sir Ian SINCLAIR said that the articles under discussion constituted a mixed bag. Article 30 was the last of the set of draft articles dealing with the status of the diplomatic courier or other person entrusted with the transport and delivery of the diplomatic bag; articles 31 to 35 were the first five of the very important series of articles dealing with the bag itself. Article 30 dealt with the need to afford a sensible, but not excessive degree of protection to the carrier of the bag; the succeeding articles met the need to regulate the status of the bag itself.

31. Draft article 30 dealt with the comparatively recent, but growing practice of entrusting the diplomatic bag to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew. The article was thus a necessary and useful provision, which served to regulate an increasingly used means of transport and delivery of the diplomatic bag. The importance and significance of that method of conveying the diplomatic bag varied, of course, from one sending State to another. States which employed a professional courier service might use it rarely, but they would do so from time to time. For other States, it could well be the regular method of transport and delivery of the diplomatic bag, except where an *ad hoc* courier was appointed. A vivid picture had been painted by Mr. Razafindralambo of some of the difficulties encountered by developing countries which used that method as normal routine.

32. In any case, whatever the practice of particular sending States, there was no doubt about the need for a provision covering the case of a captain, master or crew member who was entrusted with the transport and delivery of the diplomatic bag. He therefore had no difficulty in accepting article 30 in principle; in substance it was similar to article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations and the corresponding provisions of the other major codification conventions.

33. As to the drafting, however, he agreed with Mr. Ni and suggested that the Drafting Committee should endeavour to shorten and simplify the wording of article 30, paragraph 1, in the light of the definitions in article 3 as provisionally adopted, and of the economy of the draft as a whole. In particular, he suggested the deletion of the last part of paragraph 1: "or for the custody, transportation and delivery of the bag of the diplomatic mission, consular post, special mission, permanent mission or delegation of the sending State in the territory of the receiving State addressed to the sending State" and the insertion in its place of the words: "or, as the case may be, in the territory of the sending State".

34. There had been some discussion about the possible deletion of the reference to "an authorized member of the crew". He himself was uncertain on that point, but if those words were retained he would have no objection to

the innovation they constituted. If, however, the majority wished to delete those words, he would suggest that a passage be introduced into the commentary to explain that delivery of the diplomatic bag to the captain of a commercial aircraft or the master of a merchant ship would not necessarily exclude the possibility of the bag being physically entrusted to an authorized member of the crew thereafter.

35. He had a point of substance to raise with regard to paragraph 4 of draft article 30. As worded, that paragraph seemed to imply that the receiving State had discretion to allow or not to allow access to the aircraft or ship by the member of the diplomatic mission of the sending State entrusted with taking delivery of the diplomatic bag. He felt certain that the Special Rapporteur had not intended to convey that impression, as was clearly shown by the statement in his report that assistance for handing over the diplomatic bag should be accorded in order to facilitate "free and direct delivery" of the bag to the member of the mission who was to take possession of it, and that "free and direct access to the plane or ship should be provided for reception of incoming diplomatic mail" and also for handing over (A/CN.4/374 and Add.1-4, paras. 241-242) "outgoing diplomatic mail".

36. He himself entirely agreed with those observations by the Special Rapporteur. Unfortunately, there had been instances recently of receiving States refusing access to airport tarmacs to authorized members of a sending State's mission sent to take delivery of the diplomatic bag. Consequently, it was essential to spell out clearly in article 30 the duty of the receiving State to permit those who were authorized to receive the diplomatic bag to have unimpeded access to the aircraft or ship. He accordingly suggested that paragraph 4 of article 30 should be redrafted along the following lines:

"4. The receiving State shall permit duly authorized members of the mission, consular post or delegation to have direct and unimpeded access to the aircraft or ship in order to take possession of the diplomatic bag from the captain or master (or authorized member of the crew) to whom it was entrusted."

As he saw it, it was essential that those who were authorized to take delivery of the bag should be accorded direct access to it on the tarmac or at the docks. That was certainly more important than extending vague and unspecified facilities for the delivery of the bag to the captain, the master or the authorized member of the crew. The alternative formulation he had suggested was in any event closer to the substance of the corresponding provisions in the four codification conventions than the text proposed.

37. Turning to the provisions on the status of the diplomatic bag, he said that draft article 31 was relatively uncontroversial. With regard to paragraph 2, while it might be useful to indicate intermediary points on the labels of diplomatic bags, it should not be a mandatory requirement. In United Kingdom practice, it was customary to indicate only the final destination, simply be-

cause, once a bag had been consigned to an airline or forwarding agent, the sending State had no control over diversions resulting from changes in flight plan or decisions by forwarding agents. He therefore proposed that the phrase "as well as of any intermediary points on the route or transfer points" should be deleted. That would not prevent States which currently indicated intermediary points on labels from continuing to do so. He had been unable to find any relevant State practice despite a careful study of the relevant sections of the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, paras. 250-272) and fifth report (A/CN.4/382, paras. 54-63).

38. He also saw some problems in paragraph 3 of draft article 31, which provided for the maximum size or weight of the diplomatic bag to be determined by agreement between the sending and receiving States. In his view, it should be left to the practice of States to determine, in their mutual relations, whether a limit should be set. As the Special Rapporteur had noted in his fourth report (A/CN.4/374 and Add.1-4, para. 255), the maximum size or weight of the bag was among the "optional requirements", a view also reflected in his fifth report (A/CN.4/382, para. 63). He therefore considered that there should be no obligation on the sending and receiving States to agree on the maximum size or weight of the bag and that paragraph 3 could be deleted. That, again, should not prejudice the position of States wishing to place limits on the maximum size or weight of diplomatic bags. If, however, it was deemed necessary to retain such a provision, paragraph 3 should be made discretionary rather than mandatory.

39. Draft article 32 stated the basic principle contained in the four main codification conventions, namely that the bag should contain only official correspondence and documents or articles intended for official use. The problem was how to ensure strict compliance by the sending State with that obligation. There was every reason to believe that some sending States paid no attention to restrictions on the use of the diplomatic bag, relying upon the inviolability of the bag to escape detection. Reference had already been made to the incident at Rome in 1964, when a diplomatic bag had been used to transport a drugged Israeli official. Other glaring abuses included a recent incident in which the British public had been treated to the sight, on their television screens, of a diplomatic mission removing from its premises 48 heavy diplomatic bags, one or more of which had undoubtedly contained the weapon or weapons used a few days earlier in the killing of a young policewoman assigned to protect the diplomatic premises from which the shots had been fired. Such facts could not be denied, and there was irrefutable evidence of grave abuses of the obligation stated in article 32.

40. The majority of sending States no doubt complied faithfully with the restrictions on the contents of the diplomatic bag, though there might be a few which, exceptionally, permitted it to be used for private correspondence or to carry articles that could only doubtfully be regarded as intended exclusively for official use. Some examples of that flexible interpretation of the principle

involved were given in the Special Rapporteur's fifth report (*ibid.*, paras. 66-68). The Commission should not, however, concern itself with venial sins, which paled into insignificance by comparison with such grave abuses as using the diplomatic bag for illicitly conveying arms, drugs, foreign currency and other articles that constituted a serious danger to the public order of the receiving State. Given the scale of such abuses, it would be wrong to qualify in any way the basic principle laid down in paragraph 1 of article 32.

41. That distinction between venial sins and grave abuses was also relevant to paragraph 2 of article 32. He noted that although the Special Rapporteur had suggested in his fourth report that a possible remedy might be to impose an obligation upon the sending State to prosecute and punish those responsible for such abuses (A/CN.4/374 and Add.1-4, para. 288), he had intimated in his oral introduction of the articles under consideration (1830th meeting) that he was willing to delete the last clause of paragraph 2 of the article in view of the criticism which a similar proposal had attracted in the context of article 20. That was surely right. For in the case of grave abuses, it might well be the responsible high-level authorities of the sending State that had permitted and, indeed, ordered the abuse, and in such circumstances it was unrealistic to suppose that the prosecution would ever be brought. A provision of the kind proposed would do nothing to discourage those responsible for the really grave abuses and would be regarded by most impartial observers as simply window-dressing. He was therefore grateful to the Special Rapporteur for having so readily agreed to delete that particular provision.

42. The acceptability of draft article 33 depended upon that of articles 35 to 39, to which article 33 made reference, and which had yet to be discussed. The same comment applied to paragraph 1 of draft article 34, which, as had been suggested, should perhaps make reference to article 32 as well as to article 31.

43. Paragraphs 2 and 3 of draft article 34 seemed to be excessively detailed and the Drafting Committee might wish to consider deleting the first sentence of each paragraph. If that were done, the second sentence of paragraph 3 could be redrafted to read: "The competent authorities of the receiving State or the transit State shall facilitate the safe and expeditious transmission of the diplomatic bag dispatched by other means of transportation, whether by land, sea or air."

44. In view of the connection between articles 34 and 35, a possible alternative would be to delete paragraphs 2 and 3 of article 34 and expand article 35 to make it clear that it applied irrespective of the means adopted for the dispatch of the diplomatic bag.

45. Mr. LACLETA MUÑOZ congratulated the Special Rapporteur on having shown flexibility and been receptive to the suggestions made both in the Commission and in the Sixth Committee of the General Assembly. That applied particularly to draft article 30, which, in its present form, reflected the practice of several States, including Spain, of entrusting the transport of the diplo-

matic bag not exclusively to the captain of a commercial aircraft or the master of a merchant ship, but also to an authorized member of the crew. Some speakers had maintained that that possibility was provided for in article 27 of the 1961 Vienna Convention on Diplomatic Relations. That might be true if the latter provision was interpreted broadly, but not otherwise; in fact, it expressly stated only that the diplomatic bag might be "entrusted to the captain of a commercial aircraft". Hence there was some point in specifying that the bag could also be entrusted to a member of the crew, especially as the practice—in Spain at least—was that the relevant official documents were not given to the captain or made out in his name, but given to the member of the crew entrusted with the diplomatic bag. It was that crew member who handed over the bag to the officer of the diplomatic mission appointed to take delivery of it. The captain of the aircraft or ship played no part, and the receiving State did not know whether it was the captain or another person who was responsible for transporting the diplomatic bag and for delivering it to its destination. That made little difference because, as provided in article 30, the operation was completed on board the commercial aircraft or merchant ship. On the other hand, as several members of the Commission had emphasized, it was most important to make explicit and detailed provision for freedom of access to the commercial aircraft or merchant ship by the official responsible for taking delivery of the bag, as had been done in paragraph 4 of article 30.

46. As to draft article 31, he agreed with several of the comments made. In his opinion, the article could be simplified, for it was not necessary to provide, as was done in paragraph 2, that the packages constituting the diplomatic bag must bear a visible indication of any intermediary points on the route or transfer points. In Spain there was no such obligation. Again, paragraph 3 could be deleted or made optional, otherwise it might be interpreted to mean that the sending State and the receiving State were required to conclude an agreement determining the maximum size or weight of the diplomatic bag. Obviously, they could do so if they saw fit, but it was not necessary in all cases.

47. He had no particular difficulty with paragraph 1 of draft article 32, although the terminology should be brought into line with that of article 27 of the 1961 Vienna Convention, since the retention of the word "exclusively" was of no great importance. Paragraph 2, on the other hand, raised some problems. As Sir Ian Sinclair had pointed out, it gave the impression that the abuses of the diplomatic bag which were to be punished were committed without the knowledge of the sending State and perhaps by negligence. In reality, the most serious abuses were committed by the sending State itself. That State was required to fulfil the obligations imposed by article 32, irrespective of whether it was required to take appropriate measures to prosecute and punish those responsible for abuses. It was possible that the sending State might not punish anyone, because it had committed the abuse itself. In his opinion, paragraph 2 was thus quite ineffective. It would be preferable to delete it and regulate the matter on the basis of the responsibility of the State for breach of its obligations.

48. In regard to draft article 33, he fully endorsed Sir Ian Sinclair's comments. He had some doubts about draft article 34. In the first place he found it too detailed. It was really not necessary to provide that the conditions and requirements for the international conveyance of the diplomatic bag by postal services must conform to the international regulations established by UPU or be determined in accordance with bilateral or multilateral agreements between States or their postal administrations. Did that mean that the agreements must contain specific regulations applying to the diplomatic bag? He did not think so; he interpreted the provision as meaning that the conditions and requirements must conform to all the regulations relating to the forwarding of mail, since the diplomatic bag sent by post was, after all, only a postal package, although it enjoyed the appropriate privileges and immunities. Consequently, like other members of the Commission, he was in favour of deleting the first sentence of paragraphs 2 and 3 of article 34, or of deleting the whole of those paragraphs and amending draft article 35 appropriately. For, basically, the diplomatic bag as such retained its status whatever the means by which it was dispatched.

49. He thought that the Drafting Committee could examine a number of the questions raised.

55. Mr. JAGOTA said that he agreed in general with the substance of the articles under consideration. Drafting points could be dealt with in the Drafting Committee in the light of the suggestions made.

51. One matter that had been raised was the reference in draft article 30 to an "authorized member of the crew", which had not been included in the codification conventions. While it had been suggested that such a reference would be in conformity with State practice, it had also been pointed out that the authority of the crew member would be subject to examination, which could lead to difficulty. Since the intention was that it should be left to the captain of the aircraft or the master of the ship to authorize a member of the crew, it might be better not to include any specific reference in the article, but to mention the matter in the commentary.

52. Another point raised during the discussion concerned the reference in draft article 31, paragraph 3, to the maximum size or weight of the diplomatic bag. There was general agreement on the object of the provision, which was to prevent possible misuse of the bag, but it had been suggested that it should perhaps be placed in article 32, on the content of the diplomatic bag, rather than in article 31. Since the whole question of the maximum size or weight of the diplomatic bag was liable to give rise to much controversy, however, it might be better to deal with any possible abuses in the context of article 31. That would also be the best way of dealing with the question of inviolability, which had an immediate link with confidentiality of information—a basic element in the promotion of friendly relations between States.

53. It had also been suggested that paragraph 3 of article 31, as drafted, was mandatory. It could, however, be argued that if one party did not agree, the residual rule would apply, in which case there would be no prescribed

maximum size or weight for the diplomatic bag. It therefore seemed far better to provide that the matter should be regulated by the States concerned. Read in that light, the phrase "shall be determined by agreement" did not strike him as mandatory, but rather as a suggestion that the States concerned should seek agreement on the matter.

54. With regard to the phrase "articles intended exclusively for official use", in draft article 32, paragraph 1, he asked how such articles would be distinguished from the "articles for the official use of the mission" referred to in article 36, paragraph 1 (a), of the 1961 Vienna Convention on Diplomatic Relations. For instance, would a typewriter for the official use of the mission be sent in the diplomatic bag or should it be regarded as coming under article 36, paragraph 1, of the 1961 Vienna Convention? That was a point which had yet to be clarified. He believed that, for the reasons already stated by other members, it would be advisable to delete the last clause of article 32, paragraph 2, after the words "referred to in paragraph 1".

55. It had been suggested that draft articles 34 and 35 should be combined. As he saw it, however, article 35 was a general provision which covered all modes of transport of the diplomatic bag; if it was combined with article 34, it would lose its general character. That was a point which the Drafting Committee should consider carefully: if it was concluded that there was no particular advantage in having a general provision of that kind, the two articles could be merged.

56. The purpose of paragraphs 2 and 3 of draft article 34 was to balance the application of the UPU postal regulations and the general obligations of the receiving and transit States to facilitate the transmission of the diplomatic bag. Although the technical aspects of the UPU regulations could cause difficulty for the transmission of the bag, he doubted whether the deletion of the reference to those regulations would avoid such difficulty. Since the category of bag involved was neither so secret nor so important as the bag accompanied by a diplomatic courier, the point covered by paragraphs 2 and 3 of article 34 could perhaps be dealt with in a single sentence, in which case article 35 could be retained.

57. Lastly, he considered that the position of article 36 in the draft should be examined by the Drafting Committee.

58. Mr. OGISO said he supported the proposed deletion of the reference to an "authorized member of the crew" in draft article 30, because the captain or master, not an authorized member of the crew to whom the bag might have been entrusted, would presumably be responsible for any loss or damage.

59. He also agreed that paragraph 3 of draft article 31, which was too mandatory in its terms, should be deleted. In his view, the question of the maximum size or weight should be left to the development of practice.

60. In connection with draft articles 31 and 32, he noted that, in his fourth report, the Special Rapporteur presented a detailed list of the possible contents of the diplomatic bag (A/CN.4/374 and Add.1-4, para. 280). He would appreciate it if the Special Rapporteur could enlighten him as to the source of his interpretation, which he believed should be reflected in the commentary or the

final report. Since articles 31 and 32 had a close relationship with article 36 and in particular with the question of misuse of the bag, he would also like to know whether he was correct in understanding the phrase "intended exclusively for official use", in paragraph 1 of article 32, to refer to the words "documents or articles".

61. Also with a view to preventing misuse, it might be advisable to recommend that official correspondence and other documents and articles for official use should be contained in separate bags. Such a division would facilitate the adoption of agreed methods of inspection. He would like to know whether that possibility had ever been considered.

62. Lastly, he suggested that articles 31 and 32 should be considered in conjunction with article 36 since, in his view, it was necessary to approach the question of preventing misuse of the bag from two angles: that of inviolability and that of practical procedure.

*The meeting rose at 6.05 p.m.*

## 1843rd MEETING

*Tuesday, 19 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>4</sup>  
(continued)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

ARTICLE 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 31 (Indication of status of the diplomatic bag)

ARTICLE 32 (Content of the diplomatic bag)

ARTICLE 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 34 (Status of the diplomatic bag dispatched by postal services or other means) *and*

ARTICLE 35 (General facilities accorded to the diplomatic bag)<sup>5</sup> (continued)

1. Mr. BALANDA said that, for readily comprehensible economy reasons, it was becoming increasingly common for countries in general and for developing countries in particular to employ the captain or one of the crew members of a commercial aircraft or merchant ship to dispatch diplomatic bags. He therefore welcomed the fact that the Special Rapporteur had attempted to define the status of those persons, while making it quite clear that such status was not special, but rather based on that provided for in the conventions on the codification of diplomatic law.

2. In view of the need to strike an equitable balance between the interests of the sending State, whose diplomatic bag must be dispatched safely and delivered freely and as rapidly as possible, and the legitimate interests of the receiving or transit State, the Special Rapporteur had also been right to try to provide special protection for the diplomatic bag not accompanied by diplomatic courier.

3. In his opinion, the wording of the draft articles under consideration should be simplified. They should cover only the main situations that might arise, without entering into details. Accordingly, the Special Rapporteur should, if possible, closely follow the corresponding provisions of the codification conventions, particularly with regard to draft article 32, paragraph 1. On the basis of the uniform approach on which the Commission had generally agreed at its previous session, he should, moreover, take account of the fact that the provisions being formulated should also apply to the diplomatic bags of special missions, permanent missions and delegations. Some harmonization would therefore be necessary.

4. With regard to draft article 30, paragraph 1, he agreed with the suggestion that the words "or an authorized member of the crew under his command" should be deleted to make it clear that the captain of a commercial aircraft or master of a merchant ship was responsible for the custody and transport of the diplomatic bag. It might, however, be indicated in the commentary that, in the light of State practice, the diplomatic bag could be entrusted to a member of the crew of a commercial aircraft or merchant ship.

5. Contrary to what Mr. Razafindralambo had stated (1842nd meeting), the condition laid down in article 30,

<sup>5</sup> For the texts, see 1830th meeting, para. 1.

paragraph 2, would not give rise to any practical problems in the case of a break in a journey. Explanations in that connection had been provided by Sir Ian Sinclair (*ibid.*) and, in his own view, the words “official document indicating the number of packages constituting the bag” were intended to mean only a dispatch note, which would not bear the name of the captain of the commercial aircraft or master of the merchant ship and which could therefore be turned over, at the same time as the bag itself, to the captains or masters subsequently entrusted with the custody and transport of the bag.

6. Paragraph 3 was a key provision and should therefore be placed at the beginning of article 30. That provision would rule out any possibility of ambiguity because it clearly stated that the captain of a commercial aircraft and the master of a merchant ship entrusted with the custody and transport of a diplomatic bag were not considered to be diplomatic couriers. It could also not be interpreted by analogy to mean that the captain of a commercial aircraft or the master of a merchant vessel entrusted with the custody and transport of a diplomatic bag exercised the same functions as a diplomatic courier and should therefore enjoy the same preferential treatment.

7. In accordance with the uniform approach adopted by the Commission, article 30, paragraph 4, should specify that the diplomatic bag could be delivered not only to the authorities of diplomatic missions, but also to those of consular posts and delegations.

8. Draft article 31, paragraph 1, which related to the visible external marks of the official character of the diplomatic bag, should be combined with paragraph 2, which referred to the visible indication of the diplomatic bag's destination and consignee. Whether or not it was accompanied by a diplomatic courier, the diplomatic bag must always bear visible external marks indicating the sender and the consignee. The intermediary or transfer points on the route of the diplomatic bag did not, however, have to be indicated because the route might have to be changed owing to unforeseen circumstances.

9. Under article 31, paragraph 3, the States concerned would have full freedom to determine the maximum size or weight of the diplomatic bag to be allowed. That was, as other members of the Commission had pointed out, a complex problem because it related directly to the definition of the diplomatic bag, which, according to the relevant provisions of the codification conventions, consisted of official documents and “articles” intended for official use. Such articles could take various forms. One way of solving the problem would be to limit the definition of the diplomatic bag to official documents only and to exclude “articles”. He was, however, not in favour of such a solution because the diplomatic bag had already been defined in international legal instruments and, in particular, in the 1961 Vienna Convention on Diplomatic Relations. He suggested that the draft articles should determine the maximum size and weight of the diplomatic bag to be allowed and leave it to the States concerned to agree on any other size or weight. On the basis of the consultations held by UPU, the Commission could, for example, either set a maximum authorized weight of 10 kilograms or request the views of States in the matter. In

any event, it would have to determine the maximum size and weight of the diplomatic bag in order to avoid the problems referred to by the Special Rapporteur (1830th meeting) and Mr. Jagota (1842nd meeting).

10. Draft article 32, paragraph 1, was necessary, but as other members had pointed out, there were two reasons why paragraph 2 was not: first, because States could not always exercise control over abuses of the diplomatic bag by their agents, for such abuses always took place without the knowledge of the competent authorities; secondly, because, at the international level, it was difficult to control the activities carried out by States in their own territories. It would therefore not be easy to give effect to the provisions of paragraph 2. If that paragraph was retained, it should include a safeguard clause which would be based on article 36, paragraph 2, of the 1961 Vienna Convention and provide that the diplomatic bag could be opened in case of doubt about its contents. In his view, however, it would be preferable simply to delete paragraph 2.

11. Draft article 33 was unnecessary because its contents were covered by articles 31, 32 and 35 to 39, relating to the status of the diplomatic bag itself. The means by which the bag was dispatched was not important enough to warrant an entire provision.

12. Draft article 34 might be merged with the provisions that preceded it or, possibly, with draft article 35. The important thing was to protect the diplomatic bag during transport as such; the means by which it was transported did not warrant special attention.

13. Although he agreed in principle with the provision of draft article 35, he thought that the Commission should explain, at least in the commentary, that that article did not refer to additional obligations of the receiving or transit State, which had to accord all necessary facilities in any case and discharge their responsibilities in the event of damage to the diplomatic bag, in accordance with the relevant rules in force, such as the conventions adopted by UPU and IMO.

14. Mr. EL RASHEED MOHAMED AHMED thanked the Special Rapporteur for his clear and informative report (A/CN.4/382), the general trend of which he endorsed. Associating himself with Mr. Balanda's remarks, he said that the incident in which a young policewoman had lost her life in the United Kingdom and to which Sir Ian Sinclair had referred at the previous meeting had caused much alarm in his own country. Only one month previously the President of the Democratic Republic of the Sudan had revealed that, notwithstanding the ban imposed by the Government in accordance with Islamic law, certain diplomatic missions in Sudan had imported alcohol and similar beverages. It was clear that the bullet with which the young policewoman had been shot in the United Kingdom and the alcohol that had reached Sudan had been brought into those countries by diplomatic bag. The smuggling of arms did not perhaps affect Britain and other European countries so much, since arms could easily be detected and security was tight enough to neutralize any attempt to cause trouble or stage a *coup d'état*, but that was not the case in many parts of the third world.

15. Inspection of the diplomatic bag was therefore essential and could be carried out either by opening it and taking an inventory of the contents or by screening it. That did not mean that the contents would be seized by the receiving State. To prove its bona fides, the sending State should agree to such inspection.

16. The maximum size and weight of the diplomatic bag should be determined according to the nature of its contents. That would not be a derogation from the treaty law embodied in the four codification conventions or an infringement of the inviolability of the diplomatic bag. Rather, it would be an endeavour to fill the interstices in the law. It would also be in line with recent trends in international law. The Commission was, after all, currently considering exceptions to State immunity and it was even in the process of creating something akin to tortious liability for acts not prohibited by international law.

17. As Mr. Razafindralambo had pointed out (1842nd meeting), third world countries were not always able to send a courier with the bag and had to depend on available means of transport. It was therefore essential to introduce measures to ensure the safe delivery of the bag. In that connection, he noted that Sudan, like Spain, followed the practice of appointing a member of the crew to look after the bag.

18. Lastly, he agreed that the order of the draft articles should be changed to deal first with the status and contents of the diplomatic bag and then with the status of the diplomatic courier.

19. Mr. McCAFFREY said that for the reasons he had stated (1832nd meeting) in connection with draft article 30, it might be unnecessary to refer specifically to crew members in draft article 33. He recognized that certain States might follow the practice of entrusting diplomatic bags to crew members, but the deletion of such a reference would not, in his view, prevent that practice from continuing, provided that it was made clear in the commentary that it was a possibility open to States.

20. He agreed with the suggestion made by Mr. Calero Rodrigues (*ibid.*) that the draft would be clearer if article 33, rather than article 30, paragraph 4, provided that the necessary facilities should be accorded to members of missions, consular posts or delegations to enable them to take delivery of or to deliver the bag. He trusted that the Drafting Committee would bear that suggestion in mind. He also agreed that the acceptability of article 33 would depend ultimately on what was done with articles 35 to 39, to which article 33 referred.

21. As to draft article 34, he was of the opinion that paragraph 1 should refer to article 32, as well as to article 31. He also thought that the first sentence of both paragraph 2 and paragraph 3 of article 34 could be deleted: they did not really add anything to the draft and the Commission was concerned not to encumber the articles unnecessarily. If those sentences were deleted, the second sentences of paragraphs 2 and 3 could then be consolidated either as a new paragraph 2 of article 34 or as an addition to article 35.

22. Draft article 35 was acceptable to him, subject to

the possibility of combining it with the second sentences of paragraphs 2 and 3 of article 34. With regard to the position of article 35, which embodied a general principle, he proposed that the order of the provisions on facilities should be reconsidered to determine whether it might not be preferable for general provisions to precede specific applications of that principle.

23. Mr. REUTER recalled that, early in the discussion of the topic under consideration, he had suggested that it might be wiser to rearrange the draft articles, since it would be much more logical and, above all, more acceptable to many Governments to start by defining the status of the diplomatic bag and then go on to that of the diplomatic courier. That question was a basic one because the courier was, after all, only one means by which the diplomatic bag could be dispatched. Many Governments would have misgivings about the draft articles because they would have the impression that the Commission was trying to increase the number of persons who would benefit from freedoms and privileges and about whom they were, wrongly or rightly, somewhat distrustful. That question, however, would arise only during the second reading of the draft articles.

24. He welcomed the fact that specific matters of detail had been raised during the discussion, particularly with regard to the transport of the diplomatic bags of developing countries and the handing over of the packages constituting the diplomatic bag from one person to another during a journey. Since it was, for example, quite obvious that the captain of a commercial aircraft or the master of a merchant ship entrusted with the custody and transport of a diplomatic bag was appointed to perform that function not in his personal capacity, but in an official capacity, it should also be made clear that a member of the crew of a commercial aircraft or merchant ship entrusted with the custody and transport of a diplomatic bag was also appointed in an official capacity, in other words that the crew member in question had to be authorized by the captain or master to ensure the custody and transport of the diplomatic bag. That, too, was an important question because members of the crew of a commercial aircraft or a merchant ship were, for obvious security reasons, subject to strict discipline and came under the authority of the captain or the master.

25. Another question which might be regarded as a matter of detail, but which was in fact a matter of substance, was that of the maximum size and weight of the diplomatic bag to be allowed. In that connection, it was, above all, necessary to define exactly what was meant by the term "diplomatic bag". According to article 31 as proposed by the Special Rapporteur, which was based on the corresponding provision of the 1961 Vienna Convention on Diplomatic Relations, the diplomatic bag was not a physical object in itself; it was a collection of packages, and it was the packages—not the bag—that bore the external marks of their character.

26. Two separate problems thus had to be taken into account. The first related to transport constraints. It should be stated as a general principle that the maximum authorized size or weight of the packages, not of the bag, was defined in accordance with the rules applicable to the

means of transport used. If a package was unusually heavy or large, it would have to be covered by an agreement between the sending State and the service employed to transport it. The second problem was whether the provision of article 31, paragraph 3, was designed to guarantee respect for the provision of article 32, paragraph 1. That substantive issue would have to be dealt with at a later stage during the consideration of article 36, relating to the inviolability of the diplomatic bag. He was entirely convinced that very large articles dispatched under cover of the diplomatic bag would give rise to objections. Article 31 should therefore refer only to the maximum weight or size allowed by the rules that governed the means of transport used.

27. If the term “diplomatic bag” was taken in the strict sense, the wording of certain articles—article 34, for example—would have to be amended. Paragraph 3 of that article referred to the “bill of lading” which indicated the official status of the diplomatic bag. In his view, postal administrations concerned themselves not with the concept of the “diplomatic bag”, but rather only with packages which were of a diplomatic nature, but which were not grouped unless they happened to be in the same mail-bag. In such a case, the diplomatic bag would consist of a single package and the bill of lading would be the document for that package.

28. Many countries which had to dispatch diplomatic bags over long distances and which did not have their own national airline or ships flying their flag nevertheless made the landing of aircraft belonging to foreign airlines and even the operation of those foreign airlines subject to administrative authorizations. It therefore had to be specified in such authorizations that foreign airlines were under an obligation to accept diplomatic bags and deliver them safely.

29. Although he did not think that the Commission should enter into such details, he would point out that some countries which were not developing countries and which, because of their geographical location, had no communication problems did not use the postal services to dispatch urgent or valuable articles. They used private services, which were, of course, more expensive, but which delivered such articles safely and speedily.

30. Sir Ian SINCLAIR said that, if his understanding had been correct, Mr. Jagota had said (1842nd meeting) that it would help to avoid some grave abuses of the diplomatic bag if the draft included a specific provision dealing with its maximum size and weight. He was not entirely persuaded by the arguments that Mr. Jagota had advanced. Setting limits would not prevent such abuses as sending drugs through the diplomatic bag, given the enormous profits to be made from the sale of relatively small amounts. There were also a number of practical problems that could be envisaged. If, for example, it was decided to refurbish and refurnish the British Embassy in Paris and to send the furniture and other articles required for that purpose across the Channel by sea in a container, the container would, in theory, constitute a diplomatic bag, since it would contain solely articles intended for official use; if it was decided to rebuild an embassy in a remote post where building materials were not

available locally, something more than a small package would be needed to send out the necessary materials. In his view, such problems could not be solved multilaterally by setting a maximum limit for the size or weight of the diplomatic bag, but should be left to bilateral regulation between sending and receiving States.

31. Mr. USHAKOV said he would like to enhance the status of the diplomatic courier, which was not, as some had claimed, inferior to that of the diplomatic bag. That was all the more true in that the diplomatic courier was referred to expressly in article 27, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations as one of the appropriate means of communication between the Government and the other missions and consulates of the sending State, wherever situated. The diplomatic bag was only an abstraction: it could be dispatched by any means of transport. The diplomatic courier could, for his part, carry a verbal message. Moreover, as some members of the Commission had pointed out, confidential official documents were not, in principle, dispatched by post or by any other means of transport: they were entrusted to a diplomatic courier. The diplomatic courier's function was not outdated. It would therefore be rather strange if, as Mr. Reuter had proposed, the draft articles started with the status of the diplomatic bag.

32. Even if the captain of a commercial aircraft or the master of a merchant ship entrusted with the custody and transport of a diplomatic bag was not considered to be a diplomatic courier, he exercised functions that were, at least between the point of departure and the authorized point of entry where he handed over the diplomatic bag, very similar to those of the diplomatic courier. Article 30 as proposed by the Special Rapporteur was therefore of great importance in that regard.

33. Mr. JAGOTA said that, while he supported article 31, paragraph 3, it had not been his intention to suggest that the provision on the size and weight of the diplomatic bag should be mandatory. In the absence of a prescribed size or weight, however, the contents of the bag would be a matter of guesswork and that would lead ultimately to a request for inspection. He had therefore indicated that the matter would best be left to State practice and that article 31, paragraph 3, should be regarded as being more in the nature of a directive.

34. Mr. McCAFFREY, referring to the somewhat novel suggestion by Mr. Ushakov that the diplomatic courier rather than the diplomatic bag was the primary means of diplomatic communication, pointed out that many States did not in fact use professional couriers. For financial reasons or on grounds of expediency, the unaccompanied diplomatic bag had become the usual means of communication for those States, and that fact had to be taken into account.

35. The provisions of article 27, paragraph 1, of the 1961 Vienna Convention had been referred to by Mr. Ushakov in support of his approach. Actually, that paragraph did not mention the diplomatic bag at all. It referred to “all appropriate means” of communication to be used by a diplomatic mission. Surely no one could

conclude on that basis that the diplomatic bag did not constitute a means of communication.

36. For his part, he shared the view of the members who considered the diplomatic courier to be a mere vehicle for delivering the diplomatic bag or any other message that constituted the bag. Reference had been made to the possibility of a verbal message or a mere letter being sent by diplomatic courier. Normally, a communication of that kind would be conveyed by a diplomatic agent acting as an *ad hoc* courier. In most cases, moreover, the diplomatic courier had no idea of the contents of the diplomatic bag he was carrying.

37. In that connection, he drew attention to draft article 11, which the Commission had provisionally adopted and which the Drafting Committee had amended in form, but not in substance. That article dealt with the functions of the diplomatic courier and focused on the diplomatic bag. It stated expressly that the functions of the diplomatic courier consisted in taking care of and delivering to its destination the diplomatic bag of the sending State.

38. For all those reasons, it would be dangerous to place undue emphasis on the diplomatic courier and to detract from the importance of the diplomatic bag. Moreover, since many States did not use professional couriers, any attempt to reduce the emphasis on the diplomatic bag and to focus attention on the diplomatic courier would deter a great many Governments from accepting the draft articles.

39. Mr. THIAM said that, since the articles under consideration were acceptable in substance and required only drafting changes, he would comment only on the question of the maximum size and weight of the diplomatic bag to be allowed. During the discussion of that question, dealt with in draft article 31, paragraph 3, there had been a tendency wrongly to broaden the concept of the diplomatic bag. The entire system built up around the bag was, however, designed to protect the confidential nature of its contents. It would therefore be going too far to extend such protection to articles such as gifts from one Government to another or building materials required for the construction of an embassy. Gifts were in no way confidential and did not require special protection. The transport of building materials originating in the sending State and designed to give an embassy a distinctive national style had nothing to do with the diplomatic bag; it could, if necessary, be the subject of derogations or exemptions granted by the receiving State. In the final analysis, the aim was, as stated in draft article 32, to prevent abuses of the diplomatic bag. The diplomatic bag had to retain its original purpose, which was to ensure the safe transport of official correspondence and documents and articles intended exclusively for official use. The concept of the diplomatic bag had to be interpreted restrictively and article 31, paragraph 3, was therefore fully justified.

40. Sir Ian SINCLAIR said that, although Mr. Jagota's explanation of the suggestion he had made at the previous meeting had dispelled any doubts he himself might have had, he thought it would be a mistake to

imagine that a limitation of the size or weight of the diplomatic bag would help to overcome the serious abuses which had been mentioned. When the Commission came to consider draft article 36, it would find that the basic problem still existed. The statements made during the discussion and all the available evidence showed that even an ordinary diplomatic bag could contain small articles that were wholly illicit, such as a small consignment of drugs or three or four revolvers.

41. When he had given examples of very heavy packages, such as containers, he had not in any way been suggesting that they would normally be used as diplomatic bags. Although he fully agreed with Mr. Thiam that the basic purpose of the diplomatic bag was to convey diplomatic documents and confidential material, the fact remained that bulky articles for official use might occasionally be dispatched through the diplomatic bag. That possibility had to be taken into account.

42. Quite obviously, therefore, the problem of abuses could not be solved by placing limitations on the size or weight of the diplomatic bag. That was a matter that could without much difficulty be settled bilaterally by the sending State and the receiving State. The problem the Commission faced was whether the draft articles should contain a provision on the subject. He had doubts on that score, but if a provision was included, he urged that it should be framed in discretionary terms. On no account must it appear to be mandatory, as article 31, paragraph 3, did. The Drafting Committee should therefore review the wording of that paragraph to make it clear that it was a discretionary provision.

43. Mr. QUENTIN-BAXTER, referring to the relationship between the diplomatic bag and the diplomatic courier, said that, as he saw it, the matter was clearly governed by the terms of draft article 11, which expressly stated that the duty of the diplomatic courier was to take care of the diplomatic bag. The courier was thus the custodian of the bag. If all members did not share that view, they would be creating a great risk for the draft articles now under discussion.

44. Another important question raised during the debate related to the role of the diplomatic bag itself, in connection with which he agreed with Mr. Thiam and other members. The real test of articles 31 to 35 would come when the Commission considered articles 36 and 37. The decisions which the Commission would take on articles 36 and 37 would therefore affect practically all the other articles of the draft.

45. Although a limitation of the size of the bag would not dispose of the problem of security, a wide-open concept of an unlimited bag would in some ways destroy the very character of what the Commission was trying to protect. Since the function of the diplomatic bag was to act as a conveyance for diplomatic documents having some degree of confidentiality, it would be dangerous for the Commission to envisage certain limits being exceeded. It should be borne in mind that the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions contained articles providing for methods of conveying various articles under privilege with some degree of

immunity from inspection. There were also, of course, certain circumstances in which it might be convenient and expedient to use the diplomatic bag in ways that went beyond its fundamental character as a means of dispatching confidential diplomatic material; but however convenient such enlarged uses of the diplomatic bag might be, they should not be allowed to detract in any way from the essential use of the bag for diplomatic documents.

46. With regard to draft article 31, paragraph 3, he agreed that, although bilateral relations could be helpful in allowing a relaxed view of the proper content of the diplomatic bag, he did not think that that point had to be reflected in the draft articles. Under bilateral agreements, States would in any case be able to grant one another more favourable treatment than the provisions of the future convention would allow. He therefore urged that the Commission should take care not to suggest a type of diplomatic bag that would call into question its function as a means of conveying diplomatic material.

47. Mr. USHAKOV said that, in his view, there was no point in discussing the question of the size and weight of the diplomatic bag, particularly if it was accompanied by a diplomatic courier. No matter what means of transport the diplomatic courier used, there would be limits on the size and weight of the bag. If he travelled by train or, in particular, by aeroplane, he would not be able to carry a very large bag on board. Moreover, it was not the diplomatic bag, but rather special arrangements between the sending State and the receiving State that were usually used for dispatches by slower means of transport.

*The meeting rose at 12.40 p.m.*

## 1844th MEETING

*Wednesday, 20 June 1984, at 10.05 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Jagota, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

## DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>4</sup> (continued)

ARTICLE 30 (Status of the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 31 (Indication of status of the diplomatic bag)

ARTICLE 32 (Content of the diplomatic bag)

ARTICLE 33 (Status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew)

ARTICLE 34 (Status of the diplomatic bag dispatched by postal services or other means) *and*

ARTICLE 35 (General facilities accorded to the diplomatic bag)<sup>5</sup> (concluded)

1. The CHAIRMAN, speaking as Special Rapporteur to sum up the discussion on draft articles 30 to 35, expressed his appreciation to members for their most useful comments and suggestions. The discussion had not revealed any marked differences in approach to the substance of the draft articles, and their practical importance had been widely recognized. The debate had shown a general feeling that some of the draft articles should be made more concise and brought closer to the text of the corresponding articles of the four codification conventions. The remarks had centred mainly on the extent to which it was desirable to go into detail. That criticism would be taken into account, for although the technical nature of the subject-matter made it necessary to go into detail in some of the provisions, the draft might perhaps have gone too far in that direction. The Drafting Committee would take due account of the suggestions made.

2. Draft article 30 had given rise to much discussion, and it had been suggested that the reference to an "authorized member of the crew" should be deleted. Of course, the term "authorized" meant authorized by the captain of the commercial aircraft or the master of the merchant ship concerned. If the reference to an "authorized member of the crew" was dropped from the article, however, it would have to be retained in the commentary, because it reflected an existing practice of States. In the case of very large aircraft, it was not feasible to give the captain an additional responsibility, and the sending State usually entrusted the diplomatic bag to an authorized member of the crew or, in some cases, to an airline official.

3. There had been a number of drafting suggestions—in particular for shortening the last part of para-

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp.53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1830th meeting, para. 1.

graph 1—which the Drafting Committee would take into consideration.

4. No comments had been made on the substance of paragraphs 2 and 3, but Mr. Ni (1842nd meeting) had suggested that they be merged. He himself would not favour that change, because the two paragraphs dealt with different matters: paragraph 2 described the official document to be supplied to the person entrusted with the bag, whereas paragraph 3 stated the important rule that the person entrusted with the bag was not to be considered as a diplomatic courier.

5. Most of the discussion on article 30, however, had centred on paragraph 4, the main purpose of which was to set out the obligation of the receiving State to facilitate delivery of the diplomatic bag to members of the sending State's mission. Paragraph 4 stated two rules: first, that the captain should be allowed to hand over the bag to members of the mission; secondly, that the members of the mission must be allowed access to the aircraft or ship in order to take possession of the bag. The discussion had revealed a need to redraft paragraph 4 so as to emphasize the second and more important requirement, namely free access for taking direct and unimpeded possession of the bag, without, of course, neglecting the first.

6. Mr. Ushakov (1832nd meeting) had raised the question whether the member of the sending State's mission should not have a document entitling him to take possession of the bag. State practice showed that while in Indonesia and a few other countries the member of the mission was provided with a special pass for access to the aircraft, most countries preferred to rely on the general identification card of the diplomat concerned. In any case, the matter was one to be settled by local regulations.

7. Lastly, the debate had shown that it was necessary to make provision in article 30 not only for the transport of the diplomatic bag to the receiving State, but also for its return to the sending State. At first sight, such a provision might not appear to be necessary, since on its return journey the bag would be delivered in the territory of the sending State. Difficulties could arise, however, if the diplomatic bag was carried on a foreign aircraft, and there was also the question of the obligations, if any, of the transit State when more than one airline was used. The Drafting Committee would take into consideration the various suggestions made on those points.

8. As to draft article 31, Mr. Ushakov (*ibid.*) had maintained that both that article and article 32 were unnecessary, because their substance was contained in the relevant definitions set out in article 3 as provisionally adopted. Other members, however, had held that even if articles 31 and 32 were, strictly speaking, redundant, they should be included in the draft because of the importance of their subject-matter.

9. Paragraph 1 of draft article 31 was modelled on article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, except that it used the verb form "shall bear" instead of "must bear". He had examined the corresponding provisions of more than 100 bilateral

consular conventions and had found that the words "shall" and "must" were both commonly used to convey the idea of obligation. It had been suggested that the concluding words, "of their official character", could be shortened to "of their character", since that change would not alter the meaning.

10. The discussion had shown that the concluding phrase of paragraph 2, "as well as of any intermediary points on the route or transfer points", was not essential, and the Drafting Committee would consider dropping it. It would also consider introducing a reference to any other visible markings that might be required.

11. Several members had proposed the deletion of paragraph 3, but the prevailing view had been that its substance should be retained, since a great many bilateral agreements contained provisions on the maximum size or weight of the bag. The words "shall be determined" should, however, be replaced by the words "may be determined"; he had not intended to suggest that the States concerned were under an obligation to enter into an agreement.

12. With regard to draft article 32, he had accepted during the discussion the deletion of the concluding clause of paragraph 2, "and shall prosecute and punish any person under its jurisdiction responsible for misuse of the diplomatic bag". The article dealt with the content of the diplomatic bag, and his fourth report dwelt at length on the importance of that matter in relation to verification and good faith (A/CN.4/374 and Add.1-4, paras. 274-289). No legal definition of the expression "official correspondence and documents", used in paragraph 1, was to be found in any of the four major codification conventions. Article 27, paragraph 2, of the 1961 Vienna Convention merely stated: "Official correspondence means all correspondence relating to the mission and its functions." The formula "articles intended exclusively for official use" involved even greater difficulties. The intention was to refer to articles of a confidential nature, but any attempt to define what was confidential would create more problems than it would solve. In that connection, he had been asked by Mr. Ogiso (1842nd meeting) for the source of the list he had given in his report of objects which could appropriately be sent by diplomatic bag (A/CN.4/374 and Add.1-4, para. 280); the items included had been drawn from the many examples mentioned in the Commission's discussions. He advised retention of the substance of article 32, but agreed that the final clause of paragraph 2 should be deleted.

13. The purpose of draft article 33 was to set out the same requirements and the same treatment for the unaccompanied diplomatic bag as for the bag accompanied by diplomatic courier. The article, which was mainly concerned with the protection of the bag, had proved generally acceptable in substance, although Mr. McCaffrey had pointed out that for him its acceptability depended on that of article 36. It had been suggested that draft article 33 might be merged with draft article 30, but he would not recommend that change, because the two articles concerned different subjects: article 30 dealt with the status of the captain or master entrusted with the

diplomatic bag, whereas article 33 concerned the status of the bag itself.

14. In draft article 34, paragraph 1, the reference to "article 31" should be replaced by a reference to "articles 31 and 32"; he thanked Sir Ian Sinclair (1842nd meeting) for drawing his attention to that omission. The article had been criticized as being unduly detailed and the Drafting Committee would endeavour to shorten it. He wished to point out, however, that the reference to postal agreements had been introduced on the recommendation of UPU itself; moreover, the practice of States showed that many bilateral conventions provided for arrangements between postal administrations.

15. A number of useful drafting suggestions had been made in regard to paragraphs 2 and 3. The Drafting Committee would consider the possibility of deleting the whole or part of the first sentence of each of those paragraphs. The merging of paragraphs 2 and 3, although they dealt with different means of transport of the diplomatic bag, would also be considered.

16. Draft article 35 dealt with the general facilities to be accorded to all diplomatic bags. It reflected State practice. Many bilateral conventions contained provisions on the carriage and clearance of diplomatic bags and formalities relating thereto. Mr. McCaffrey (1843rd meeting) had suggested that article 35 should be moved to the beginning of part III; but since it concerned all diplomatic bags and not only unaccompanied bags, it seemed preferable to leave it where it was.

17. In conclusion, he proposed that articles 30 to 35 be referred to the Drafting Committee for consideration in the light of the comments and suggestions made during the discussion.

18. Mr. OGISO pointed out that decisions on draft articles 31 and 32 could be affected by the discussion of draft article 36. Consequently, if the Commission decided to refer draft articles 30 to 35 to the Drafting Committee, it should be on the understanding that, when discussing article 36, members could revert to articles 31 and 32.

19. The CHAIRMAN said that there would be no objection to members reverting to articles 31 and 32 during the discussion of article 36. There were many precedents for that procedure, and in any case the Drafting Committee was unlikely to consider articles 31 and 32 before the Commission had discussed article 36.

20. If there were no further comments, he would take it that the Commission agreed to refer draft articles 30 to 35 to the Drafting Committee, together with all the comments and suggestions made during the discussion.

*It was so agreed.*

#### ARTICLES 36 to 42

21. The CHAIRMAN, speaking as Special Rapporteur, introduced draft articles 36 to 42, which read:

##### *Article 36. Inviolability of the diplomatic bag*

1. The diplomatic bag shall be inviolable at all times and wherever it may be in the territory of the receiving State or the transit State; un-

less otherwise agreed by the States concerned, it shall not be opened or detained and shall be exempt from any kind of examination directly or through electronic or other mechanical devices.

2. The receiving State or the transit State shall take all appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, and shall also prosecute and punish persons under its jurisdiction responsible for such infringement.

##### *Article 37. Exemption from customs and other inspections*

The diplomatic bag, whether accompanied or not by diplomatic courier, shall be exempt from customs and other inspections.

##### *Article 38. Exemption from customs duties and all dues and taxes*

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of a 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 other specific services rendered.

##### *Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag*

1. In the event of termination of the functions of the diplomatic courier before the delivery of the diplomatic bag to its final destination, as referred to in articles 13 and 14, or of other circumstances preventing him from performing his functions, the receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State of that event.

2. The measures provided for in paragraph 1 shall be taken by the receiving State or the transit State with regard to the diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship in circumstances preventing the delivery of the diplomatic bag to its final destination.

#### PART IV

#### MISCELLANEOUS PROVISIONS

##### *Article 40. Obligations of the transit State in case of force majeure or fortuitous event*

If, as a consequence of *force majeure* or *fortuitous event*, the diplomatic courier or the diplomatic bag is compelled to deviate from his or its normal itinerary and remain for some time in the territory of a State which was not initially foreseen as a transit State, that State shall accord the inviolability and protection that the receiving State is bound to accord and shall extend to the diplomatic courier or the diplomatic bag the necessary facilities to continue his or its journey to his or its destination or to return to the sending State.

##### *Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations*

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State or by the non-existence or severance of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the receiving State, the host State or the transit State shall not by itself imply recognition by the sending State of the receiving State, the host State or the transit State, or of its Government, nor shall it imply recognition by the receiving State, the host State or the transit State of the sending State or of its Government.

*Article 42. Relation of the present articles to other conventions and international agreements*

1. The present articles shall complement the provisions on the courier and the bag in the Vienna Convention on Diplomatic Relations of 18 April 1961, the Vienna Convention on Consular Relations of 24 April 1963, the Convention on Special Missions of 8 December 1969 and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975.

2. The provisions of the present articles are without prejudice to other international agreements in force as between States parties thereto.

3. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

22. Draft articles 36 to 39 were the last four articles of part III, relating to the status of the diplomatic bag. Draft articles 40 to 42 constituted part IV, which contained miscellaneous provisions.

23. Draft article 36 dealt with the inviolability of the diplomatic bag, which was one particular aspect of the inviolability of the official correspondence and documents of diplomatic missions provided for in article 24 and in article 27, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. The commentary to draft article 36 was contained in his fourth report (A/CN.4/374 and Add.1-4, paras. 326-348).

24. The provision in paragraph 1 of article 36 reflected the rule in article 27, paragraph 3, of the 1961 Vienna Convention: "The diplomatic bag shall not be opened or detained." That rule stated a basic principle of customary international law recognized long before 1961. On occasion, of course, the rule of inviolability had been exploited to conceal the illicit import or export of certain articles, and incidents involving the drug traffic and terrorism warranted concern about such abuses. It was therefore necessary to protect the legitimate interests of the receiving State, although the diplomatic bag was so important for communication that a proper balance with the interests of the sending State had to be maintained.

25. It was relevant to recall the history of article 27 of the 1961 Vienna Convention. That article had had its origin in article 25 of the draft on diplomatic intercourse and immunities, in the commentary to which the Commission had explained the reasons for the unqualified statement of the rule of inviolability of the diplomatic bag (*ibid.*, para. 332). In his fourth report, he had also mentioned the long discussions which had preceded the adoption of the article (*ibid.*, paras. 329-331).

26. It was significant that, at the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, a number of proposals designed to restrict the inviolability of the diplomatic bag had been rejected. The Conference had thus upheld the unconditional character of that inviolability. Article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, however, after stating that

3. The consular bag shall be neither opened nor detained.  
added:

Nevertheless, if the competent authorities of the receiving State have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

27. Nevertheless, most bilateral consular conventions, including those concluded after the 1963 Vienna Convention had entered into force, specified that the consular bag was inviolable and could be neither opened nor detained by the authorities of the receiving State. The recognition of the principle of unconditional inviolability of diplomatic and consular bags thus appeared to be the prevailing trend in the recent practice of States.

28. As noted in the fourth report (*ibid.*, paras. 340-341), Bahrain, Kuwait and the Libyan Arab Jamahiriya had entered reservations to article 27, paragraph 3, of the 1961 Vienna Convention, under which the diplomatic bag could not be opened or detained. Those reservations had evoked a strong reaction from a number of countries on the ground that they were contrary to the principle of inviolability. That was an indication that, despite concern about possible misuse of the bag, unconditional inviolability was regarded as the basic principle.

29. Draft article 36 was modelled on article 27 of the 1961 Vienna Convention. He had not forgotten that article 35 of the 1963 Vienna Convention provided for a different régime, but the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States had reverted to the régime of the 1961 Vienna Convention.

30. The first clause of paragraph 1 of draft article 36 stated the basic principle of the inviolability of the bag; a second clause had been added to meet the concern of some States by giving them the option to agree otherwise. Under bilateral arrangements, the prevailing régime was that of unconditional inviolability, but there were a number of bilateral consular conventions and other instruments which provided that the bag could be opened if there was serious reason to believe that it contained articles other than those stipulated in the instrument concerned.

31. As he understood the principle of inviolability, the protection to be afforded to the diplomatic bag should be such as to prevent any abuse whatsoever. Because of the rapid advances in technology, however, it was now possible to ascertain the contents of a bag without actually opening it, so that there could be a dual régime, with inequality between the countries which possessed the necessary technical equipment and those which did not. It was in the light of that fact that paragraph 2 of article 36 had been drafted. He would, however, suggest the deletion of the phrase "and shall also prosecute and punish persons under its jurisdiction responsible for such infringement".

32. There were, of course, other possibilities. For instance, a paragraph could be added along the lines of article 35, paragraph 3, of the 1963 Vienna Convention to cover the bag used by consular posts. He had also considered the possibility of providing in the draft for States to

make a choice between the provisions of the different conventions to which they had acceded. That would have the advantage of offering more safeguards, while at the same time having a deterrent effect, so that a bona fide sending State would have nothing to fear if it abided by the rules. On the other hand, there could be delays, disputes and suspicion.

33. Another possibility would be to apply the consular bag procedure to all kinds of diplomatic bags. But that would be a serious deviation from the principle laid down in article 27 of the 1961 Vienna Convention, which was one of the most universally accepted of the multilateral conventions sponsored by the United Nations. Moreover, it would not be in accordance with current State practice.

34. Yet another possibility would be to work out a formula distinguishing between the treatment of a diplomatic bag containing only confidential material, which would enjoy unconditional inviolability, and that of a bag containing documents and articles for official use that were not confidential, which could, in certain circumstances, be opened at the request of the authorities of the receiving State in the presence of representatives of the sending State or, if such a request was refused, be returned to the country of origin. But serious consideration would have to be given to the question of who would make the distinction.

35. The most appropriate approach, in his view, would be to follow article 27 of the 1961 Vienna Convention, perhaps adding a reservation to take account of the régime under article 35 of the 1963 Vienna Convention.

36. Turning to draft article 37, he pointed out that an account of the historical background to the provision and the relevant State practice was given in his fourth report (*ibid.*, paras. 350-354). The rule stated in the article was of long-standing application and practical significance. Its basis was the principle of inviolability and the functional necessity of providing for safe and quick delivery of the diplomatic bag. Although the 1961 Vienna Convention and the other relevant conventions contained no specific provision on the subject, the rule could be derived from the general principle of inviolability. He also referred the Commission to article 16, paragraph 2, of the draft articles on diplomatic intercourse and immunities submitted in 1957, which stated expressly that "The diplomatic pouch shall be exempt from inspection" (*ibid.*, para. 351). In the absence of suspicion of misuse of the diplomatic bag, the rule had never created any particular difficulty, and it had always been applied in diplomatic practice.

37. Draft article 37 did not specify the scope of the exemption in detail; that might perhaps be done in the commentary. Broadly speaking, it covered customs inspection, all clearance procedures and any inspection carried out at points of entry and exit or in transit. His understanding of the practical significance and scope of the exemption from inspection was supported by an impressive body of State practice, which he mentioned in his report (*ibid.*, para. 353). Almost all the bilateral conventions to which he had referred contained express provisions to the same effect.

38. The exemptions provided for in draft article 38 had not encountered any difficulty in practical application.

As stated in the report (*ibid.*, para. 356), from being based on *comitas gentium* and reciprocity, they had evolved through customary law to become a conventional rule of modern international law, though the principle of reciprocity was still an inherent part of the operation of the rule. The object of the exemptions was, again, safe and quick delivery of the bag, and their legal foundation was in conformity with article 36, paragraph 1, of the 1961 Vienna Convention. Charges for services such as storage and cartage would, of course, be levied: that too was in accordance with the main codification conventions. The scope of draft article 38 extended to exemption from fiscal dues and taxes levied on the export and import of goods, and related charges for customs clearance. There was abundant practice in that area, to which reference was made in the report (*ibid.*, paras. 358-359).

39. Draft article 39 provided for protection of the bag when the functions of the diplomatic courier terminated before he had delivered it, for instance if he were incapacitated from natural causes. In those circumstances it was incumbent on States to assist each other as an expression of solidarity. Even greater care was needed in the case of the unaccompanied bag, which was provided for in paragraph 2 of the article, since it would not have the protection of the dedicated services of the courier.

40. Part IV of the draft articles (Miscellaneous provisions) was of a very tentative character and limited in scope. It covered three main issues: (a) the obligations of third States which became transit States as a consequence of *force majeure* or fortuitous event (art. 40); (b) the treatment of the courier and the bag in the case of non-recognition of States or Governments, absence or severance of diplomatic or consular relations, armed conflict or state of war (art. 41); (c) the relation between the draft articles under consideration and the codification conventions (art. 42). There were a number of other matters that could be dealt with in part IV: for instance, reservations, especially in regard to participation in conventions and obligations assumed by transit States; settlement of disputes arising out of the interpretation or application of the draft articles; special rules relating to state of war or armed conflict; and final clauses. If he had not seen fit to cover them, it was because he believed that a selective approach would assist the Commission.

41. For the purposes of draft article 40, he had drawn a distinction between a "transit State" as defined in article 3, paragraph 1 (5), and a "third State". For the reasons stated in his report (*ibid.*, para. 370), he considered it preferable to avoid the term "third State" in that context. As he had explained (*ibid.*, paras. 376-377), the term "transit State" would cover a State in whose territory the diplomatic courier or unaccompanied diplomatic bag was compelled to stay as a result of *force majeure* or some fortuitous event. The problem that then arose was whether the State in question should accord the facilities that would have been accorded by the receiving or transit State initially envisaged. Article 40 was proposed for the Commission's consideration on that basis.

42. The provision in draft article 41 had appeared in a codification convention for the first time in 1975, when it

had been incorporated in the Vienna Convention on the Representation of States. The purpose was to ensure that the status of the diplomatic courier and the diplomatic bag would not be affected in cases where diplomatic relations had been severed or did not exist. At the Headquarters of the United Nations in New York, for example, there were a number of missions of States which were not recognized by the host country, but which used diplomatic bags. The references to the "host State" in draft article 41 should be deleted in view of developments in the Drafting Committee.

43. He recognized that, in draft article 42, he had not exhausted a highly complex problem. In any drafting exercise aimed at resolving that problem, more problems automatically arose. That was especially true of legal instruments such as the four codification conventions and the present draft articles, which could be regarded as playing an "umbrella role" for more specific arrangements. While his proposed solution might be over-simplified, he wished to underline three basic points: first, that the draft articles were complementary to the four main codification conventions; secondly, that the draft articles should not prejudice any other international agreements in force; thirdly, that the draft articles should not prevent States from concluding international agreements on the topic under consideration. There was a temptation to set ground rules, as it were, on the diplomatic courier and the diplomatic bag, but draft article 42 had a far more modest purpose.

44. The set of draft articles which he had submitted was not exhaustive, but he understood that the Commission was in favour of a reduction rather than an increase in their number.

45. Sir Ian SINCLAIR noted that, in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, paras. 340-341), the United Kingdom was included in a list of countries which had objected to certain reservations to article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. That was not entirely accurate. The United Kingdom had indeed raised an objection to the reservation entered by Bahrain, but not to those entered by Kuwait, the Libyan Arab Jamahiriya and Saudi Arabia. As a result of recent events in London, the Foreign Affairs Committee of the House of Commons had set up an investigation into the question of diplomatic privileges and immunities under the 1961 Vienna Convention and had addressed a written request to the Foreign and Commonwealth Office for answers to a number of questions. The text of a memorandum from the Foreign and Commonwealth Office, with which he had been provided, explained why the United Kingdom had not registered a formal objection in respect of the Libyan reservation to article 27, paragraph 3, of the 1961 Vienna Convention and also referred to the reservation entered by Bahrain.

46. The CHAIRMAN, speaking as Special Rapporteur, said that Sir Ian Sinclair was quite right. The main point he had wished to make, however, was that both reservations had derogated from the strict rule laid down in article 27, paragraph 3, of the 1961 Vienna Convention.

*The meeting rose at 1 p.m.*

## 1845th MEETING

*Thursday, 21 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Jagota, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup> (continued)

- ARTICLE 36 (Inviolability of the diplomatic bag)
- ARTICLE 37 (Exemption from customs and other inspections)
- ARTICLE 38 (Exemption from customs duties and all dues and taxes)
- ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
- ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
- ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations) *and*
- ARTICLE 42 (Relation of the present articles to other conventions and international agreements)<sup>5</sup> (continued)

1. Mr. BALANDA said that the two key provisions of the draft articles were article 36 and its corollary, article 37.
2. He recalled that diplomatic relations were based on a presumption of mutual trust and that the presumption held true until proven otherwise. Such trust was therefore not absolute or irrefragable. International relations

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1844th meeting, para. 21.

and, in particular, diplomatic relations also had to be based on a constant balance between the interests of the States concerned—which were equal—and on mutual respect.

3. Since the elaboration of the 1961 Vienna Convention on Diplomatic Relations, there had, as stated by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, paras. 328-337), been a change in approach towards the principle of the inviolability of the diplomatic bag. On the basis of international practice and national legislation, article 27, paragraph 3, of the 1961 Vienna Convention enunciated the principle of the absolute inviolability of the diplomatic bag, whereas article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations recognized only the relative inviolability of the bag. In his view, the second approach was more realistic because it took account of the two important points he had just mentioned, namely the need to strike a balance between the interests of the States concerned and the presumed trust on which their relations were based.

4. Since it had apparently been agreed, during the consideration of draft article 24, that for transport safety reasons the diplomatic courier could in some cases be subjected to personal examination carried out at a distance, it would be quite logical if, in the interests of the security of States, the diplomatic bag could also be subject to inspection or at least to examination carried out at a distance. He generally agreed with the view expressed by the Special Rapporteur that:

... Whether the inspection is carried out as a manual search or through mechanical devices, it is in fact an examination aimed at establishing the content of the diplomatic bag and therefore affects the inviolability of official correspondence. (*Ibid.*, para. 346).

Nevertheless, he considered that such an inspection could be physical only: its aim would merely be to ensure that the diplomatic bag did, as it should, actually contain official correspondence or documents or articles intended exclusively for official use, not to obtain information about the contents of that correspondence or those documents or articles.

5. In draft article 36, paragraph 1, the Special Rapporteur had made the principle of the inviolability of the diplomatic bag less unconditional and absolute by providing that States could agree otherwise through multilateral or bilateral agreements. Such a possibility was, however, quite unlikely, since bilateral diplomatic relations were based on a balance of forces. If the States concerned were almost equally strong or had similar interests, they would be able to conclude such agreements. If not, they would be less free to do so. That was particularly true of the developing countries, which were necessarily dependent and would not be in a good position to propose the conclusion of agreements of that kind. Account also had to be taken of a psychological factor: it was difficult to see how two States could agree to allow their diplomatic bags to be inspected or searched, because, in so doing, they would be basing their diplomatic relations not on presumed trust, but on distrust. The element of reciprocity referred to by the Special Rapporteur

would also not come into play, since reciprocity was also based on a balance of forces. The developing countries would be placed at a disadvantage, for they would never take the initiative of requesting such reciprocity. In such circumstances, the rich countries would have nothing to lose: they had highly sophisticated means of determining the content of other countries' diplomatic bags without even opening them, whereas the developing countries did not possess such means. The restriction proposed by the Special Rapporteur would thus have the practical effect of preserving the absolute inviolability of the diplomatic bag and making it impossible to put an end to the abuses of the diplomatic bag that were, unfortunately, so common at the present time. He could therefore not support article 36, paragraph 1, as proposed by the Special Rapporteur.

6. As to article 36, paragraph 2, it was not clear to him how the receiving State or the transit State could take measures to prevent any infringement of the inviolability of the diplomatic bag if the diplomatic courier had the bag in his possession. Paragraph 2 should therefore not be retained, particularly since the majority of the members of the Commission had not been in favour of making it an obligation for the receiving State or transit State to protect the diplomatic courier himself. It would, moreover, be extremely difficult to verify the measures taken by the receiving State and the transit State to give effect to the provisions of that paragraph, since such measures would be adopted at the internal level and, at the international level, it was difficult to verify what States were doing in their own territories.

7. Turning to draft article 37, he again stressed the need to establish an equitable balance between the interests of the parties concerned and to take account of the presumed trust on which international relations were based. Although abuses of the diplomatic bag were, unfortunately, all too common, the security of States must not be sacrificed to the interests of the diplomatic bag itself. Article 3, paragraph 1 (e), of the 1961 Vienna Convention provided that the functions of a diplomatic mission consisted, *inter alia*, in "promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations", but he did not think that those functions included the use of the diplomatic bag to transport narcotic drugs or weapons. It was, moreover, no longer the case today that complete trust could be placed in the word of honour of an individual or a State. Draft article 37 should therefore be brought into line with article 35, paragraph 3, of the 1963 Vienna Convention.

8. He supported the principle enunciated in draft article 38, delimiting the scope of the exemptions set out in the fourth report (*ibid.*, para. 357).

9. In principle, he also supported the general idea on which draft article 39 was based. That provision could, however, be shortened by merging paragraphs 1 and 2. A distinction did not have to be made between the case in which the functions of the diplomatic courier were terminated before the diplomatic bag was delivered to its final destination and other circumstances that prevented him from delivering the diplomatic bag. The same situa-

tion, namely that in which the diplomatic bag did not arrive at its final destination, was being dealt with in both cases and, whatever its cause, it called for appropriate measures. In his view, the words "appropriate measures to ensure the integrity and safety of the diplomatic bag" in paragraph 1 referred only to measures to take care of the diplomatic bag, not to measures which were designed to facilitate its onward journey and which were dealt with in draft article 40. He thus agreed with the wording proposed by the Special Rapporteur, but thought it should be made clear that the obligation for which article 39 provided was only an obligation under civil law, not one which would entail the international responsibility of the receiving or transit State.

10. Draft article 40 was acceptable, but it should provide that, when the diplomatic bag was not accompanied by a diplomatic courier, the transit State had an obligation to notify the authorities of the sending State of difficulties due to *force majeure* or a fortuitous event. It was also his understanding that the facilities to be extended for the continuation of the journey would be those that were normally extended and that the transit States did not, for example, have to charter an aircraft or a ship for that purpose.

11. He agreed with the provisions of draft article 41, whose wording might, however, be improved by the Drafting Committee.

12. He reserved the right to comment at a later stage on draft article 42, whose only counterpart was to be found in article 73, paragraph 2, of the 1963 Vienna Convention. If the draft articles under consideration eventually took the form of a convention, such a convention would, under draft article 42 as proposed by the Special Rapporteur, be only of a suppletive nature and, hence, of a less universal character, particularly if States concluded agreements that were not in keeping with its provisions. If article 42 was retained, it would have to be made clear, as had, after all, been done in article 73, paragraph 2, of the 1963 Vienna Convention, what effect the agreements that might be concluded could have.

13. The CHAIRMAN, speaking as Special Rapporteur, recalled that when he had introduced the draft articles under consideration (1844th meeting), he had said that, in order to avoid any misunderstanding, the words "and shall also prosecute and punish persons under its jurisdiction responsible for such infringement" in article 36, paragraph 2, and the words "the host State" in article 41, paragraphs 1 and 2, should be deleted.

14. Mr. USHAKOV said that draft article 35 did not give rise to too many difficulties. The wording of the French text might, however, be amended to read: *L'Etat de réception et l'Etat de transit facilitent le transport et la remise rapide et en toute sécurité de la valise diplomatique*. It would then be clear that that provision embodied a general obligation.

15. Draft article 36 was crucial. The first clause of paragraph 1 was acceptable, but he did not think that the words "unless otherwise agreed by the States concerned" had to be included in the second part of that paragraph because draft article 6, paragraph 2 (b), already contained a provision to that effect. The words "unless

otherwise agreed by the States concerned" should therefore either be included in every article or deleted in article 36, paragraph 1.

16. The application of article 36, paragraph 1, would, however, give rise to problems only in cases where the diplomatic bag was not accompanied by a diplomatic courier. The diplomatic bag would, of course, still be inviolable, but if it was, for example, dispatched by postal service, how was the word "detained" to be interpreted? The Drafting Committee should look into that problem, which also arose in connection with the application of paragraph 2 in cases where the diplomatic bag was not accompanied by a diplomatic courier. What appropriate measures should be taken in such cases to prevent any infringement of the inviolability of the diplomatic bag? The provisions of paragraphs 1 and 2 were not flexible enough, particularly since the unaccompanied diplomatic bag had to be protected at all times, wherever it might be located. In the circumstances, the solution might be to draft two separate provisions, one relating to the diplomatic bag accompanied by a diplomatic courier and the other relating to the unaccompanied diplomatic bag. In any event, account would have to be taken of every possible situation.

17. The abuses of the diplomatic bag to which reference had been made were not, in his opinion, as important as they might seem. Compared to the drug traffic as a whole, the amounts dispatched by the diplomatic bag were quite small and problems would arise only if drugs dispatched by that means were subsequently made available for sale. Ordinary general measures would then be taken to suppress such drug traffic. The same was true of weapons. Would a member of a diplomatic mission who had a gun permit not be entitled to have a weapon for his own protection dispatched to him by the sending State in the diplomatic bag? That would give rise to problems only if the weapon in question was used to commit acts of terrorism. He was, of course, not advocating the transport of narcotic drugs or weapons in the diplomatic bag, which should contain only articles intended exclusively for official use.

18. Draft article 37 was unnecessary: since the diplomatic bag was inviolable, it was quite clear that it should be exempt from customs and other inspections.

19. In view of the provisions embodied in draft article 4, paragraph 1 and 2, relating to freedom of official communications, he did not think that the phrase "The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of a diplomatic bag" really had to be included in draft article 38. In his opinion, customs duties did not apply to the diplomatic bag, which was only an abstraction or a collection of packages. The articles it contained might, strictly speaking, be subject to customs duties, but since the diplomatic bag itself was inviolable, it could not be opened and its contents could therefore not be determined. By definition, moreover, it contained only official correspondence or documents and articles intended for official use, which were, in principle, all exempt from customs duties. That reasoning also applied to dues and taxes. Article 38 as a whole was therefore unnecessary.

20. If he was right in thinking that the circumstances referred to in draft article 39, paragraph 1, included the death of the diplomatic courier or some other exceptional circumstance, such as illness or an accident that might prevent him from performing his functions, the wording of that provision would have to be amended because, as it now stood, it did not apply to all the cases referred to in article 13 or to the case referred to in article 14. It was, for example, not clear whether a professional courier or an *ad hoc* courier who was declared *persona non grata* or not acceptable by the receiving State or the transit State while in its territory would immediately have to surrender the diplomatic bag and whether the receiving State or the transit State would then be able to take possession of it. In any event, the diplomatic courier had to be able to perform the functions entrusted to him and deliver the diplomatic bag in his custody to its final destination.

21. He did not think that article 39, paragraph 2, should be retained because, if the captain of a commercial aircraft or the master of a merchant ship was prevented from performing his functions, the diplomatic bag in his custody could be handed over to the person designated to replace him.

22. The obligations provided for in draft article 40 were incumbent not on the State which had initially been foreseen as the transit State and whose obligations were clearly defined, but on a "third State", which was not the sending State, the receiving State or the transit State. The wording of article 40 should therefore be amended to refer specifically to that "third State".

23. Referring to draft article 41, he noted that there would be no diplomatic relations and hence no diplomatic courier if the receiving State did not recognize the sending State or its Government. A problem would arise only in the case where a diplomatic bag, whether accompanied or not by a diplomatic courier, was being dispatched to or by a delegation in that receiving State. Unless that point was made clear, article 41 would be incomprehensible. In fact, however, the most important and serious problem which arose in that connection was that of the non-recognition of States or Governments or the absence of diplomatic or consular relations between the transit State, on the one hand, and the sending State or receiving State, on the other, when the territory of the transit State had to be used to dispatch the diplomatic bag. Special provisions would therefore be needed to take account of that situation.

24. Sir Ian SINCLAIR, referring to draft article 36, said it had become apparent that the most critical issue was how to reconcile two conflicting considerations: on the one hand, the need to protect the diplomatic bag and the confidentiality of the official correspondence it contained and, on the other, the need to protect the security interests of the receiving State or the transit State, which could be seriously prejudiced by the risk that the bag might be used to convey illicit articles such as arms, explosive devices or narcotic drugs.

25. Prior to the adoption of the 1961 Vienna Convention on Diplomatic Relations, there had been a fair

measure of agreement among publicists that the inviolability of the diplomatic bag was not absolute, in the sense that the receiving State had the right to request that it be opened in the presence of a representative of the sending State to verify that it did not contain prohibited articles and, if the request was refused, to require the return of the bag to its place of origin. As Eileen Denza had stated in her book *Diplomatic Law*,<sup>6</sup> it had certainly been international practice at that time, and probably international law as well, that where there were grounds for suspecting abuse of the bag the receiving State might challenge it; the sending State might then be given a choice between returning the bag or allowing it to be inspected by the authorities of the receiving State in the presence of a member of its own mission.

26. He knew of one instance in which the receiving State had serious grounds for suspecting that a valuable consignment of diamonds was about to arrive in the country in a diplomatic bag. The head of the mission concerned had volunteered to send a member of the mission to be present when the bag arrived. The bag had been opened and a consignment of diamonds addressed to a diplomatic agent in the mission had been found. The diamonds had been confiscated and the diplomatic agent had been declared *persona non grata*. There had been no protest on the part of the sending State.

27. Mrs. Denza's view of the matter had been confirmed during a discussion in the Commission at its ninth session, in 1957.<sup>7</sup> Mr. François had stated at the meeting that the rule that diplomatic mail could be opened in exceptional circumstances was already being applied where it was considered to reflect the existing state of international law. Mr. François had also proposed that a commentary should be added to the effect that, in laying down the general principle of the absolute inviolability of diplomatic bags, the Commission did not wish to stigmatize as contrary to international law the practice of some countries of claiming the right to open bags in special cases, with the consent of the minister of foreign affairs and in the presence of a representative of the mission. At the same meeting, Mr. Scelle, who had supported Mr. François's proposal, had stated that, although the smuggling of the vital parts of atomic bombs in the diplomatic bag was still confined to the realm of fiction, there was nothing to prevent it becoming a fact. Mr. François's proposal, which had been adopted, had eventually been watered down into the version cited by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 332).

28. That history of events showed that, even in 1957, a majority of the members of the Commission had had serious misgivings about according unqualified protection to the bag because of the risk of abuses. The history of what had subsequently happened in that respect at the United Nations Conference on Diplomatic Intercourse and Immunities, in 1961, had been referred to in the Spe-

<sup>6</sup> *Diplomatic Law. Commentary on the Vienna Convention on Diplomatic Relations* (Dobbs Ferry (N.Y.), Oceana Publications, 1976), pp. 125-126.

<sup>7</sup> *Yearbook ... 1957*, vol. I, p. 79, 399th meeting, paras. 6-7 (Mr. François) and para. 8 (Mr. Scelle).

cial Rapporteur's report (*ibid.*, para. 333) and, in far greater detail, in an article by Ernest Kerley published in 1962.<sup>8</sup> The serious misgivings of the late 1950s and early 1960s had been enormously strengthened by events that had taken place in recent years.

29. At least two methods had been contemplated for dealing with the problem of verifying the contents of the bag. Under the first method, the bag could be opened in exceptional circumstances and on the authority of the ministry of foreign affairs of the receiving State. Under the second, the bag could be challenged by the receiving State when that State had serious grounds for suspecting that it contained prohibited articles; if the sending State refused to comply with a request that the bag be opened, the bag had to be returned to its place of origin. Whereas the first method made a direct inroad into the principle that the bag should not be opened or detained, since it could involve actually opening the bag without the consent of the sending State, the second was less far-reaching and was in fact provided for under article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. There lay part of the difficulty, for, while the 1961 Vienna Convention on Diplomatic Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States placed no qualification on the rule that the bag should not be opened or detained, the 1963 Vienna Convention did, in its article 35, paragraph 3.

30. The question was therefore what the Commission should do. Had it been starting with a clean slate, he would strongly have favoured applying to all bags the solution provided for under article 35, paragraph 3, of the 1963 Vienna Convention, which struck the right balance between the interests of receiving and sending States. The receiving State would be unlikely to invoke that safeguard clause unless it had substantial grounds for believing that the bag contained illicit articles, since it would be aware that the sending State might reciprocate against one of its own bags on spurious grounds. The danger of creating a major inroad into the principle of freedom of communication could be greatly exaggerated. Every receiving State was simultaneously a sending State and was unlikely to wish to put at risk the freedom of its own bag by challenging bags indiscriminately and without justification.

31. Unfortunately, the Commission was not starting with a clean slate and, in formulating article 36, it should therefore seek to take account of the differences in the régimes governing consular bags, on the one hand, and other types of bags, on the other. It would have to abandon the goal of uniform treatment for all types of bags, since Governments would simply not agree, in the light of recent experience, to accord a higher degree of inviolability to bags than that already given. Indeed, pressure was already building for a wide-ranging review of the scale of privileges and immunities granted under the 1961 Vienna Convention. In reply to a question from

the Foreign Affairs Committee of the House of Commons, the Foreign and Commonwealth Office of the United Kingdom had stated that, in the period from 1974 to 1983, there had been 546 instances in which diplomatic agents and members of the administrative and technical staff of missions in London had been suspected of committing criminal offences which, under United Kingdom law, carried a prison sentence of more than six months. That was an indication of the scale of suspected abuses.

32. It was against that background that article 36 had to be considered. There was almost universal suspicion that diplomats, who were unpopular at best, were contemptuously flouting local laws and the statistics he had given lent credence to the charge. He had therefore been surprised at the statement by Mr. Ushakov, who had seemed to express a certain lack of concern about flagrant abuses in connection with narcotic drugs. Six or seven years earlier, it had been discovered that a diplomatic mission in a Scandinavian country had been financing almost all of its activities by selling narcotic drugs that had been imported through the diplomatic bag. Although the scale of abuse should, admittedly, not be exaggerated, it should also not be minimized.

33. In the circumstances, a modality should be established whereby States would be able to apply to all bags—diplomatic bags, consular bags, special mission bags and delegation bags—the régime which now governed the consular bag alone. He therefore suggested that draft article 36 should contain an escape clause which would enable States to apply to all bags the safeguard provided for in article 35, paragraph 3, of the 1963 Vienna Convention.

34. As to the question of the possible screening of the diplomatic bag by means of electronic or other devices, his own view, for which there existed much support, was that screening as such was not contrary to existing international law. Although the Special Rapporteur had doubts with regard to that interpretation of existing law, such screening was, according to a literal interpretation of the terms of the 1961 Vienna Convention, not illicit. Since the bag was neither opened nor detained, screening did not constitute a violation of existing international law.

35. He stressed that the United Kingdom did not apply screening devices to diplomatic bags and that, to his knowledge, it had no intention of doing so in the future, not because of doubts as to the legality of such screening, but simply because of the belief that it would have limited value as a deterrent. Illicit materials could, moreover, easily be disguised so as to make screening largely ineffectual. The fact remained that such screening did not represent a danger to the security or freedom of communication. It was known that States other than the United Kingdom were applying screening methods and he agreed with Mr. Balanda that the Commission should not seek to outlaw the practice of remote examination.

36. He had no specific reformulation to propose for draft article 36, but he wished to state from the outset that it was wrong to refer, both in the title and in the text of the article, to "inviolability". The concept of inviolability in connection with the diplomatic bag was not to be found anywhere in existing conventions. The rules on

<sup>8</sup> "Some aspects of the Vienna Conference on Diplomatic Intercourse and Immunities", *The American Journal of International Law* (Washington, D.C.), vol. 56 (1962), pp. 116-118.

the diplomatic bag were specified in the context of freedom of communication. Any attempt to elevate the protection of the diplomatic bag to the level of “inviolability” would be bound to attract resistance on the part of States.

37. For all those reasons, he suggested that draft article 36 should consist of three parts. The first part would state the rule that the diplomatic bag must not be opened or detained—a rule that would be applicable to all bags other than the consular bag. The second part would deal with the consular bag and would reaffirm the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention. The third part would provide that States could make a declaration reserving the right to apply to all bags the régime of article 35, paragraph 3, of the 1963 Vienna Convention. That would not involve any conflict with any existing convention. In that connection, he drew attention to draft article 42, which specified that the present draft articles “shall complement the provisions” of the 1961 Vienna Convention, the 1963 Vienna Convention, the 1969 Convention on Special Missions and the 1975 Vienna Convention. The possibility he was suggesting did not constitute a derogation from any of those conventions, but would merely supplement them.

38. Mr. DÍAZ GONZÁLEZ said that he would comment on draft articles 36 to 42 as a whole when the Commission came to reconsider them after they had been discussed by the Drafting Committee from the point of view of form and substance.

39. Draft article 36 was a key provision on which all the other articles hinged. Article 36, paragraph 1, which had to be taken together with article 31, paragraph 3, stated the principle of the inviolability of the diplomatic bag. It appeared to be generally agreed that such inviolability related not to the diplomatic bag itself, but to the freedom of communication that States had to enjoy in their relations with their accredited agents abroad. It was also generally agreed that the diplomatic bag could contain only official correspondence and documents or articles intended exclusively for official use.

40. A State could, for example, use the diplomatic bag to transport cassettes intended for official use, but it could not, for the purpose of its official and inviolable communications, use a van or a lorry as a diplomatic bag. Since article 31, paragraph 3, did not specify either the maximum size or weight of the diplomatic bag, would it be reasonable to say that a ship being used as a diplomatic bag and carrying three vans filled with weapons and subversive propaganda intended for the overthrow of the constitutional Government of Venezuela should be allowed to anchor off the Venezuelan coast without being searched? Furniture, or a dog, belonging to an ambassador entered the territory of the receiving State not under cover of the diplomatic bag, but rather as property that was exempt from dues, taxes and customs duties in accordance with the privileges and immunities granted to the sending State and to the head of the mission by the receiving State. Cases of abuses did actually occur; they were not hypothetical. For example, one of the persons involved in a recent attempt on the life of a head of State had managed to escape by hiding in a lorry being used as a diplomatic bag.

41. In general, he agreed with the arguments advanced by Sir Ian Sinclair and Mr. Balanda: although the sovereignty of States had to be respected, sovereignty was reciprocal because every sending State was also a receiving State. What had to be protected were communications between Governments and it was difficult to see how States would be able to accept provisions such as article 36, paragraph 1, and article 31, paragraph 3, which might pave the way for abuses. The Commission must therefore pay the closest attention to the drafting of those provisions.

42. Taken as a whole, the draft articles seemed to give greater protection to the sending State than to the receiving State. In practice, the diplomatic bag could not be completely inviolable and it had never been so. Every State had, at one time or another, had to request that a diplomatic bag be opened because of suspicion about its contents. The most common practice was not to allow the diplomatic bag to be used, for example, to transport narcotic drugs or to import subversive propaganda. In one case, Venezuela had had to sever its diplomatic relations with a State which had used the diplomatic bag to transport subversive propaganda. The law was the only protection available to small States, but it must protect the interests of the sending State and take account of the security requirements and sovereignty of the receiving State.

43. Chief AKINJIDE said he had been struck by the fact that the provisions contained, for example, in draft articles 36, 37 and 42 had come up for consideration only at the present time. The international community had obviously been avoiding any discussion of such provisions for a long time. He could imagine three possible reasons for that delay. The first possibility was that the issues at stake were considered too delicate to be dealt with; countries had therefore left them alone as long as possible. The second possibility was that abuses of the diplomatic bag were so serious that the problems involved were regarded as insurmountable and the adoption of any provisions on the subject would have appeared hypocritical. The third possibility was that countries might have considered that the issues in question should be settled on a bilateral basis.

44. Perhaps the Commission was now dealing with such matters because abuses of the diplomatic bag were so serious that it had become embarrassing not to do anything about them or because the countries involved in such abuses had so many alternative possibilities that the whole exercise became irrelevant and it would not matter to them what kind of provisions the Commission adopted.

45. When he considered the situation, he saw that abuses were being committed on all sides—by sending States, by transit States, by receiving States and even by third States. No one was completely innocent. All nations spent millions on what was known sometimes as “intelligence gathering” and sometimes as “espionage”. Everyone was trying to find out what others were doing; everyone engaged in that exercise, but everyone denied it.

46. It was clear to him that, even if the Special Rapporteur’s draft articles were adopted unamended, they would not prevent abuses or even minimize existing abuses. Even if all the amendments so far proposed by members of the Commission were adopted, there would

continue to be glaring abuses. The truth was that the development of "intelligence gathering" had reached a stage where countries were able to obtain whatever information they wanted.

47. The provisions under consideration were very necessary for developing and developed countries alike. The diplomatic bag had been a very important means of communication between nations 100 or even 50 years previously, but that was no longer the case today, when many nations used the diplomatic bag to send comparatively innocuous articles, while others—partly for financial reasons—used them for all kinds of purposes. When the person carrying the bag was caught committing a breach, the answer would often be that he had not acted under authority. When it could not be denied that the agent had acted under authority, the bold answer was usually that the act had been performed in the vital interests of the State.

48. In the circumstances, the Commission had to decide what action should be taken. In that connection, he supported article 36 as proposed by the Special Rapporteur, but he could not agree with the amendments proposed by Mr. Ushakov and, in particular, with the deletion of the words "unless otherwise agreed by the States concerned", which would go too far in the direction of absolute inviolability. He could also not support the proposal by Sir Ian Sinclair, which went too far in the other direction. On the whole, he found that draft article 36 as it stood struck a balance between two conflicting interests that were very difficult to reconcile.

49. The problem of narcotic drugs was particularly important because drugs could easily be dispatched by the diplomatic bag. He could not agree with those who tried to minimize the drug peril, which was, in his view, nearly as grave as that of the atomic bomb. Some countries had 20 per cent of their youth unemployed and jobless youths often took to drugs. It was no exaggeration to say that drugs could destroy a whole generation. It had been proved that drugs were being pushed not only for gain, but also for political reasons, in order to destabilize nations and demoralize peoples. Drugs had also been used to promote violence and there had even been reports of them being used in some local wars to weaken the enemy. Since it was an established fact that the diplomatic bag was being used to carry drugs, it followed that, if the bag was made inviolable, considerable harm would be done to nations affected by the drug traffic.

50. Another illicit use being made of the diplomatic bag was that of currency smuggling, which could adversely affect a national currency and even precipitate its devaluation. Perhaps the most dangerous illicit use of the diplomatic bag, however, was for the transport of weapons for the purposes of promoting violence in the receiving State. In that connection, reference had been made during the discussion to the recent disgraceful incident that had taken place in London. The closer he looked at all those abuses, the more he hesitated to give the diplomatic bag absolute inviolability. He would continue his statement at the next meeting.

*The meeting rose at 1.05 p.m.*

## 1846th MEETING

*Friday, 22 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup> (*continued*)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs and other inspections)

ARTICLE 38 (Exemption from customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations) *and*

ARTICLE 42 (Relation of the present articles to other conventions and international agreements)<sup>5</sup> (*continued*)

1. Chief AKINJIDE, continuing the statement he had begun at the previous meeting, said that he found draft article 36 satisfactory. The deletion of the words "unless otherwise agreed by the States concerned", proposed by Mr. Ushakov (1845th meeting), would remove all safeguards against abuses. It was the Commission's responsibility to strike a reasonable balance between the com-

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Arts. 1-8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Arts. 9-14, referred to the Drafting Committee at the Commission's thirty-fourth session: *ibid.*, p. 46, footnotes 189 to 194.

Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

<sup>5</sup> For the texts, see 1844th meeting, para. 21.

peting interests of the sending State and the receiving State, while endeavouring to eliminate or at least restrict the possibility of abuses. The phrase “unless otherwise agreed by the States concerned” would seem, in the context of article 36, to refer to arrangements such as those provided for in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, and should be retained.

2. He disagreed with Sir Ian Sinclair’s view (*ibid.*) that all reference to the inviolability of the diplomatic bag should be deleted and that it was sufficient to provide that the bag should not be opened or detained. That, too, would be likely to encourage abuses, not by sending States, but by receiving States eager to pry into the contents of the diplomatic bag. The term “inviolable” was widely used in international treaties and conventions as well as in writings on diplomatic relations, and seemed to be an appropriate way of conveying the nature of the protection to be granted to the diplomatic bag, without detracting from the need to prevent abuses.

3. While agreeing with previous speakers that the provision that the diplomatic bag should be exempt from examination “through electronic or other mechanical devices” was covered by the concept of inviolability, and that it was unlikely to be effective in the case of advanced countries whose airports were equipped with the latest detection devices, he believed that to delete the provision altogether would be a mistake. The Commission should avoid giving the impression that any kind of examination of the diplomatic bag would be in order, unless it was agreed to by the States concerned.

4. Recommending that paragraph 1 of article 36 should be adopted without change, he observed that developments on the international scene since the adoption of the 1961 and 1963 Vienna Conventions had made it necessary to fill certain gaps in those instruments. For instance, it was no secret to anyone that many captains of aircraft and masters of ships were members of the intelligence community.

5. While not directly proposing the deletion of the provision in paragraph 2 that the receiving State or the transit State should prosecute and punish persons under its jurisdiction responsible for infringement of the inviolability of the diplomatic bag, he had serious doubts as to its potential efficacy. The article as a whole was, however, an excellent piece of work and he was strongly in favour of its adoption.

6. He disagreed with previous speakers who had described draft article 37 as superfluous. On the contrary, it was very much to the point in the case of countries having a federal system, where the Governments of individual component States might have constitutional power to exact dues and taxes in respect of the diplomatic bag, even though the federal Government had waived such powers by ratifying a convention. The same consideration applied to the second part of draft article 38, starting with the words “and shall exempt it from customs duties ...”. It might therefore be appropriate to incorporate that provision in article 37.

7. The provision in draft article 39, paragraph 1,

seemed to be necessary, notwithstanding Mr. Ushakov’s very persuasive objections. Not all persons in power were reasonable or reliable at all times, and it was wise to spell out certain basic precautions. He was also in favour of retaining paragraph 2 of article 39; for whatever might befall the captain of an aircraft or the master of a ship, the office of captain or master subsisted, so that some degree of security was assured.

8. Draft articles 40 to 42 did not call for any comment. In conclusion, he congratulated the Special Rapporteur on dealing so successfully with a delicate problem at a difficult time.

9. The CHAIRMAN, speaking as Special Rapporteur, reminded the Commission that in his oral introduction (1844th meeting) he had suggested the deletion of the phrase “and shall also prosecute and punish persons under its jurisdiction responsible for such infringement” from article 36, paragraph 2.

10. Mr. OGISO said he wished to confine himself for the present to expressing some preliminary views on draft article 36; he would speak on the remaining articles later. He fully agreed with the formula suggested by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 326, *in fine*). It was doubtful, however, whether the sending State’s obligation to take appropriate measures to prevent the dispatch of illicit articles through its diplomatic bag, laid down in draft article 32, paragraph 2, would be a sufficient safeguard to prevent abuse of the bag, particularly as the possibility of high officials of the sending State being involved in such abuse could not be totally excluded.

11. The provision in article 36, paragraph 1, meant that, in principle, even indirect examination of the diplomatic bag was prohibited. While appreciating the Special Rapporteur’s efforts to strike a fair balance between the interests of the sending State and those of the receiving State, he must emphasize that a safeguard mechanism should be a real and effective one. In his oral introduction, the Special Rapporteur had suggested three possible approaches to the problem. The first would consist in following the wording of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, with some drafting changes, and adding the word “exclusively” before the words “for official use”, taken from paragraph 4 of the same article, which could have some psychological effect. In his view, however, that solution would not be sufficiently effective in dealing with the problem of abuses.

12. The second approach would be the adoption of a provision on the lines of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Sir Ian Sinclair (1845th meeting), had suggested that the procedure set out in that paragraph should apply when the receiving State had serious reason to believe that a diplomatic bag contained matter other than official correspondence and documents or articles intended exclusively for official use. That suggestion, which would introduce a change in modalities without altering the legal principle embodied in existing conventions, was a valuable one and deserved careful study.

13. As a third possible approach, the Special Rapporteur had put forward the idea that the sending State might be requested to divide the diplomatic bag into two separate bags, one containing only official correspondence and documents and the other containing articles exclusively for official use, different inspection procedures being applied to the two kinds of bag. It was that third possibility which he wished to examine further.

14. Considering that abuses of the diplomatic bag were now common, which had not been the case when the Vienna Conventions had been adopted, and that public opinion was strongly in favour of energetic steps to prevent such abuses, the Commission would be well advised to examine every possibility with an open mind.

15. It was a basic assumption that the principle of inviolability of the diplomatic bag stipulated in article 27, paragraph 3, of the 1961 Vienna Convention should not be changed. Accordingly, the basic provision that the diplomatic bag must not be opened or detained, except with the express consent of the sending State and in the presence of its authorized representative, should be retained. But it should also be borne in mind that the original *raison d'être* of the inviolability of the diplomatic bag had been to safeguard the secrecy of official correspondence and documents, the practice of giving the same protection to "articles intended exclusively for official use" having developed later as a matter of convenience.

16. It might therefore be advisable to introduce some differences in the procedures for dealing with the two different categories of diplomatic bag, while maintaining the principle of inviolability applicable to both. The receiving State might stipulate in advance that official correspondence and documents must be contained in one bag and "articles intended exclusively for official use" in another. It would then be possible to apply a stricter procedure to the bag containing articles. Both bags should be appropriately marked on the outside: one as "official correspondence and documents only", and the other as "articles intended exclusively for official use", with their description and number. The bag containing official correspondence and documents would be exempt from examination, either directly or by indirect methods capable of revealing the contents of the correspondence and documents. The receiving State would not be permitted to use electronic or mechanical devices, but might be allowed to measure or weigh the bag or use a dog to smell it. Where the bag containing articles for official use was concerned, the sending State would not be entitled to refuse examination by electronic or mechanical devices, since there would be no risk of intrusion into the secrecy of official correspondence. As had been mentioned several times, X-ray examination of the baggage or even the person of a diplomatic agent was conducted routinely by airline companies without evoking any protest.

17. If, as a result of examination or information otherwise obtained, the competent authorities of the receiving State had serious reason to believe that the bag contained something other than the items specified in article 32, paragraph 1, they could request that the bag be opened in their presence by an authorized representative

of the sending State; if that request was refused, the bag would be returned to its place of origin.

18. In conclusion, he reminded the Commission that he had supported (1842nd meeting) the deletion of paragraph 3 of article 31. His main reason for doing so had been the mandatory nature of the provision. A further reason, which he had not mentioned at the time, was that if the suggestion he had just made concerning article 36 was adopted, article 31 would have to be redrafted. The question of the size or weight of the diplomatic bag might become relevant in regard to whether the content of the bag for official correspondence and documents was actually limited to them, or included articles.

19. Mr. NI, referring to the question why an article as important as that on the inviolability of the diplomatic bag did not appear earlier in the draft, said that, on comparing the structural arrangement of part III with that of part II, he found no inconsistency in the arrangement of the draft articles. If any change in their order were to be made, he would only suggest that the content of the diplomatic bag, covered by article 32, should precede the indication of the status of the bag, dealt with in article 31. The two articles might, in the interests of simplicity, be combined, the provisions concerning content appearing first.

20. With regard to draft article 36, it should be made clear from the outset that the diplomatic bag was inviolable whether or not it was accompanied by a diplomatic courier. In view of the confidentiality and secrecy of the official correspondence and documents contained in the bag, it was essential that complete inviolability should be accorded. But complete inviolability did not necessarily mean absolute inviolability. Nor could abuses or the security of the receiving State be ignored. Article 31 of the 1963 Vienna Convention on Consular Relations provided, in paragraph 1, that consular premises were inviolable; but in paragraph 2 of the same article, it was stipulated that consent to enter might be assumed "in case of fire or other disaster" and the same idea had been adopted for article 21 of the present draft, concerning the inviolability of temporary accommodation used by the diplomatic courier. In view of the increase in acts of terrorism, hijacking, the illicit drug traffic and the abuse of diplomatic privileges, however, it might be necessary to reconsider the exemption from examination of the diplomatic courier and the diplomatic bag.

21. Referring to paragraph 2 of article 36, he expressed appreciation of the flexibility shown by the Special Rapporteur in agreeing to delete the clause concerning prosecution and punishment. It might, instead, be provided that States could agree on a reciprocal basis that in special circumstances the diplomatic bag could be opened in the presence of an officer of the sending State in order to satisfy the receiving State or a transit State that the bag did not contain anything other than the items permitted. That point could perhaps be considered in conjunction with the second part of paragraph 1 of article 36, following the words "unless otherwise agreed by the States concerned". It was essential that, on the one hand, complete inviolability of the diplomatic bag should be main-

tained and that, on the other hand, abuses should be avoided or mitigated as far as possible, through arrangements to be made between the parties concerned.

22. The exemption of the diplomatic bag from customs and other kinds of inspection was a long-established international custom and a corollary of the inviolability of the bag. Exemption from customs duties and other dues and taxes was also a long-established rule in international law and State practice. Article 37 and 38 therefore had their place in the draft, but in view of their similar subject-matter and the relative simplicity of their wording, it might be advisable to combine them into one.

23. Draft article 39 had no parallel in the codification conventions. Although the circumstances envisaged might not arise frequently, the possibility nevertheless had to be covered. A case could be made out, however, for incorporating article 39 in article 40, dealing with cases of *force majeure* or fortuitous events, or at least for transferring it to part IV of the draft.

24. Draft article 41 did not raise any great difficulty, but in paragraph 1 it might be necessary to indicate that the granting of facilities, privileges and immunities was not affected by "subsequent" non-recognition of the sending State by the receiving State, the host State or the transit State, or by "subsequent" non-existence or severance of diplomatic or consular relations between them, since it was the subsequent change of circumstances that was relevant. If the receiving State granted facilities, privileges and immunities despite lack of recognition, there would be no need for the provision. The wording of paragraph 2 of the article should be simplified.

25. Paragraphs 1 and 3 of draft article 42 seemed to state the obvious and could perhaps be deleted, in which case paragraph 2 could be amplified to read:

"2. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or to those in international agreements in force as between States parties thereto."

Should the Commission wish to retain paragraphs 1 and 3, however, he would have no objection.

26. Lastly, he congratulated the Special Rapporteur on the completion of his *magnum opus*, on which he had worked so assiduously for many years.

27. Mr. THIAM said that draft article 36 clearly showed that the topic entrusted to the Special Rapporteur for study not only was highly technical, but also raised very important questions of principle. At the present time, it was difficult to affirm the rule of absolute inviolability of the diplomatic bag. For the abuses to which the bag was exposed were no longer confined to the old, classical activities such as espionage, but included new activities such as subversion and terrorism, which were carried out by individuals or groups as well as by States. In addition, as he himself had emphasized in his capacity as Special Rapporteur for the draft Code of Offences against the Peace and Security of Mankind, it would perhaps be necessary to treat as such offences the activities of persons enjoying diplomatic privileges and

immunities and using them in a manner injurious to the public order of the country to which they were accredited. Consequently, it was important to take account both of those new activities and of the abuse of privileges and immunities, since the stability of States, particularly that of the weakest of them, could be threatened thereby.

28. In the report under consideration (A/CN.4/374 and Add.1-4, paras. 342-348), the Special Rapporteur appeared to recognize the need for some examination of the diplomatic bag, but that need was not made sufficiently clear in article 36. It would be advisable to treat the problem of inviolability of the diplomatic bag more restrictively than in the past. Formerly, diplomatic relations had been based on a code of honour, which was respected and based on such concepts as honesty and the observance of custom. As that foundation for diplomatic relations was tending to crumble, it was important to draft any provision on the inviolability of the diplomatic bag accordingly. It was true that article 36 affirmed the inviolability of the diplomatic bag in so far as States respected its normal and customary function. But it was a fact that the bag was increasingly being used for other functions, such as the transport of arms, drugs, subversive literature and foreign exchange. Thus its use might infringe laws or regulations which prohibited or restricted the import of certain goods. In that case, the inviolability of the bag no longer served merely to protect the confidential nature of the correspondence and documents or articles intended exclusively for official use which it was supposed to contain.

29. It was probably on the basis of that finding that Mr. Ogiso had been led to propose making a distinction between the bag used for the conveyance of official correspondence and documents, and the bag used to carry articles. In the latter case, however, it was no longer truly a diplomatic bag. It should be borne in mind that for the transport of articles to be used for the normal operation of a mission, the four codification conventions provided sufficient privileges and immunities. Packages of that kind must be distinguished from those for which the diplomatic bag was intended to be used. The bag should merely facilitate communication between a State and its missions, and to accept the notion of a diplomatic bag used solely for the transport of articles would be to recognize a function other than that naturally assigned to it. That would involve a danger of legalizing the very abuses which the Commission's codification work was intended to prevent.

30. It was therefore important to try to confine the concept of the inviolability of the diplomatic bag within precise limits. It was difficult to accept the possibility of abuses, which were referred to in articles 32 and 36, without mentioning the possibility of examination. The Commission could not confine itself to indicating in the commentary to article 36 that an examination could be carried out by agreement between the sending State and the receiving State. The limits of such examination must be fixed. While it was true that all examination must not be prohibited, neither must the examination go beyond what was necessary. A check on correspondence con-

tained in the diplomatic bag could certainly be carried out without violating the secrecy of that correspondence.

31. The abuses of which some diplomatic missions had been guilty and of which Sir Ian Sinclair had given examples could no longer pass unnoticed. They had been possible owing to the laxity which States had permitted themselves, under cover of courtesy, at a time when security had not been of so much concern as it was at present. But it was quite certain that the use of the diplomatic bag must not enable States to infringe or evade the laws and regulations of the receiving State. It could not be maintained, as Mr. Ushakov had done (1845th meeting), that the presence of narcotic drugs in a diplomatic mission did not concern the receiving State so long as those drugs did not leave the mission, without asking how they had entered it. In his opinion, both the introduction into the territory of a State of a diplomatic bag containing prohibited objects and the transport of that bag within the territory of the State were criminal acts which could not be ignored. Consequently, the Commission should take care not only to protect the secrecy of the sending State's communications, but also to safeguard the security and public order of the receiving State.

32. The other articles under consideration called for no comment, except that draft articles 40 and 41, which dealt, respectively, with *force majeure* or fortuitous event and with the non-recognition of States or Governments or absence of diplomatic or consular relations, should probably be placed elsewhere than in part IV of the draft, "Miscellaneous provisions". Those articles were, indeed, too important to be placed under a heading which generally grouped provisions of secondary importance.

33. Mr. JAGOTA said that draft article 36, which was a key article, required careful consideration. The difficulties stemmed from the different approaches of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, and from increased awareness of the possible abuses of the diplomatic bag. In reviewing the current legal position, as reflected in the codification conventions, it should be borne in mind that diplomatic bags, as defined in the draft articles, fell into two broad categories, namely those accompanied by a diplomatic courier and those entrusted to the captain of a commercial aircraft or the master of a merchant ship or dispatched by postal services or other means.

34. It was then necessary to determine whether it was the contents of the bag that were inviolable, by virtue of their character as documents of State, or the bag itself. The 1961 Vienna Convention contained a number of separate provisions on that point: article 24, under which the archives and documents of the mission were inviolable; article 27, paragraph 2, under which the official correspondence of the mission was inviolable; article 27, paragraph 3, under which the diplomatic bag must not be opened or detained; and article 27, paragraph 4, which unlike the other three provisions, referred to "articles intended for official use". Arguably, if all four provisions were read together, the concept of inviolability could be

said to apply to the diplomatic bag itself. He was not sure, however, whether that was correct.

35. The next question to be decided was whether the basic requirement that the diplomatic bag must not be opened or detained should be absolute or qualified. At the present stage, it was necessary to consider how to deal with the increasing number of abuses of the diplomatic bag, such as the smuggling of arms and currency, which could be a threat to the security and economic stability of States, and the smuggling of narcotic drugs, which could be a danger to the health of nations. If the archives, documents and official correspondence of the mission were to be treated as inviolable, and the opening and detention of the diplomatic bag was to be prohibited, the principles of good faith and reciprocity would have to apply. In other words, the bag would have to contain only what it was supposed to contain and, if it did not, the receiving State could take reciprocal action.

36. It was necessary to look to State practice to determine whether that approach was still adequate or whether some kind of remedy should be prescribed. Specifically, the Commission should consider whether action should be taken only in the event of an emergency or a grave breach; whether an element of proportionality or some form of time element should be introduced; and what criteria should govern the inspection or opening of the bag. His own feeling was that, if the Commission delved too deeply into such matters, it could undermine the whole object of the draft, which was to protect the diplomatic bag and its contents, the confidentiality of which was in the interests of all States. Consequently, he would suggest that for the time being the Commission should confine itself to providing a framework for consideration by the Sixth Committee of the General Assembly.

37. The draft articles should include a provision on the identification of the bag, which should be carefully drafted to close any loopholes. Most abuses would, of course, relate to the unaccompanied bag, and if such a bag were opened unintentionally or broke open, spilling, say, alcohol, the normal reaction of the person taking delivery would be to deny that the bag was his. It would also be useful to include a provision, such as article 31, paragraph 3, on the maximum size or weight of the bag, though the question whether or not it should be couched in mandatory terms would have to be decided later.

38. Many possibilities had been mentioned for the treatment of the diplomatic bag, but he would narrow the choice down to three. The first, proposed by Sir Ian Sinclair (1845th meeting), was to provide for an optional declaration to be made by States wishing to apply article 35, paragraph 3, of the 1963 Vienna Convention. That would involve an implicit amendment to the other codification conventions and might operate to weaken the customary law aspects of inviolability. The second possibility was to adopt article 36 as proposed by the Special Rapporteur. The third was to adopt Mr. Ogiso's proposal that there should be two categories of diplomatic bag: one containing official correspondence and documents, which would enjoy complete inviolability, and the other containing articles intended for the official use of the mission, to which the régime of article

35, paragraph 3, of the 1963 Vienna Convention would apply. The difficulty there was how to distinguish between the two categories of bag, and careful consideration would be needed to ensure that the inviolability of diplomatic correspondence was not unduly affected. In view of the complex issues involved, he would suggest that the matter be left for further consideration by the Sixth Committee of the General Assembly and by the Commission at its session in 1985.

39. Draft articles 37 and 38 could be referred to the Drafting Committee for consideration in the light of the comments and suggestions made. He agreed that draft articles 39 and 40, the subject-matter of which was similar, should be placed together, either in part III or in part IV of the draft.

*The meeting rose at 1.05 p.m.*

## 1847th MEETING

*Monday, 25 June 1984, at 3 p.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)**  
(A/CN.4/374 and Add.1-4,<sup>1</sup> A/CN.4/379 and Add.1,<sup>2</sup> A/CN.4/382,<sup>3</sup> A/CN.4/L.369, sect. E, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPporteur<sup>4</sup> (concluded)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs and other inspections)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

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Arts. 15-19, referred to the Drafting Committee at the Commission's thirty-fifth session: *ibid.*, pp. 48-49, footnotes 202 to 206.

ARTICLE 38 (Exemption from customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligation of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations) *and*

ARTICLE 42 (Relation of the present articles to other conventions and international agreements)<sup>5</sup> (concluded)

1. Mr. EL RASHEED MOHAMED AHMED, referring to draft article 36, said that States which reserved the right to open, or request the opening of, the diplomatic bag were perhaps sounding an indirect warning that States which sought to abide by the principle of absolute inviolability should be estopped from claiming that right. He noted that the Special Rapporteur, in his survey of the practice of States (A/CN.4/374 and Add.1-4, paras. 338-341), had referred to certain bilateral agreements, such as the Consular Convention between the United Kingdom and Norway, under which a request could be made for consular bags to be opened in special cases (*ibid.*, para. 339). Sir Ian Sinclair (1845th meeting) had referred to the fact that there was a measure of agreement among publicists that the inviolability of the bag was not absolute—a fact borne out by the misgivings expressed by a majority in the Commission at its eleventh session, in 1959. The Commission was still plagued by misgivings, and States were concerned about the abuses of the diplomatic bag perpetrated behind the shield of inviolability. As had rightly been observed, the moral standards of the eighteenth century had been such as to warrant mutual confidence in State practice. Regrettably, however, the prevailing situation was one that justified caution, if not outright suspicion, on the part of States.

2. Draft article 36 permitted bilateral agreements, as was clear from the proviso in paragraph 1, "unless otherwise agreed by the States concerned", but he wondered whether such agreements really solved the problem. He agreed that it was necessary to strike the right balance between the interests of sending, transit and receiving States and considered that the suggestions made by Mr. Jagota (1846th meeting) merited further consideration. He also supported Sir Ian Sinclair's suggestion that States should be given the option of making a declaration to apply article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations.

3. There was nothing in existing law that prohibited the use of electronic screening to examine diplomatic bags and, indeed, he saw no harm in such screening, although it was not always available to third world countries. He therefore suggested that the exemption from examination by electronic or mechanical devices should be dropped from article 36, paragraph 1. He also considered that paragraph 2 could be deleted.

4. Draft article 41 was acceptable to him, since it was possible to imagine a situation in which a bag was sent to

<sup>5</sup> For the texts, see 1844th meeting, para. 21.

an international agency in a receiving State whose Government was not recognized by the sending State. He would speak on draft article 42 later.

5. Mr. McCaffrey had noted that the Commission was prepared to consider the possibility of re-examining the régime governing the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations. A number of speakers had suggested various ways of achieving a more equitable balance between the interests of sending and receiving States, without compromising the confidentiality of the official communications whose transmission was the real purpose of the diplomatic bag. Nearly all speakers seemed to agree on the need to afford the receiving State some form of protection against abuses of the bag, which had been increasing at an alarming rate. It was also generally agreed that the diplomatic bag should not be allowed to become a latter-day Trojan Horse, whose entry into the receiving State might seriously threaten its public order, instead of fulfilling the intended purpose of the bag, which was to promote harmonious international relations.

6. In regard to draft article 36, he associated himself with the general approach of those who had examined the extent to which inviolability of the bag was necessary to ensure the confidentiality of diplomatic communications, having regard to the need to provide the receiving State with a reasonable assurance of security. In his view, it was better not to speak of the inviolability of the bag, because that confused the issue; the Commission would be better advised to align the language of draft article 36 with that of the codification conventions.

7. As had already been noted, article 24 of the 1961 Vienna Convention referred to the inviolability of the archives and documents of the mission and article 27, paragraph 2, stated that its official correspondence was inviolable; furthermore, article 27, paragraph 3, said nothing about the bag being inviolable, but only that it must not be opened or detained. Neither did the Convention say anything to the effect that articles for official use were inviolable.

8. The Special Rapporteur's fourth report referred to the "broader principle of the inviolability of the archives and documents of the diplomatic mission" (A/CN.4/374 and Add.1-4, para. 342) and to the "inviolability and secrecy" of the bag (*ibid.*, para. 343). The Special Rapporteur had presumably meant the inviolability and secrecy of the content of the bag, but his wording was symptomatic of the tendency to treat the bag as inviolable. According to the Special Rapporteur: "The opening of the diplomatic bag constitutes a method of direct examination of its content" (*ibid.*, para. 344). While that was true, in one sense at least, he agreed that there was a clear distinction between the content of the bag and the content of official communications contained in the bag. The content of the bag did not seem to be confidential, given the terms of article 27, paragraph 4, of the 1961 Vienna Convention; it was the content of the communications that was sacrosanct. Mr. Ogiso's analysis (1846th meeting) was very interesting in that regard and the proposals he had made deserved further consideration.

9. Sir Ian Sinclair (1845th meeting) had referred to the legislative inquiry being conducted into abuses of diplomatic privileges and immunities by the Foreign Affairs Committee of the House of Commons in the United Kingdom. In the United States of America legislation had been introduced with a view to restricting certain diplomatic privileges and immunities. Such developments were a reflection of the mood of national legislatures and would seem to indicate that the Commission was on the right track. Nobody was suggesting any radical departure from previous régimes, but in the light of the abuses that had occurred it was incumbent on the Commission to subject the area to close scrutiny. It should give serious consideration to introducing a measure of flexibility into the régime governing the bag. As the Special Rapporteur pointed out (A/CN.4/374 and Add.1-4, para. 347), the return of the bag to its place of origin could provide a possible solution in the event of a dispute between the sending and receiving States.

10. The Commission would be well advised to consider dropping the exemption from screening provided for in article 36, paragraph 1. As Mr. Balanda had pointed out (1845th meeting), there was general agreement that the courier should not be exempt from security checks at airports, and similar considerations would appear to apply to the diplomatic bag because of the receiving State's interest in its own internal security. As Sir Ian Sinclair had rightly noted, a literal interpretation of the four codification conventions would seem to permit such checks. Admittedly, the requisite technology had not been available when the earlier conventions had been drafted, but as Sir Ian Sinclair had also pointed out, such an examination could in any event be frustrated by the sending State.

11. As to the phrase "unless otherwise agreed by the States concerned", Mr. Balanda might well be right in saying that since all States were not on an equal footing it might be illusory to provide that they could enter into agreements at arm's length. That was something which had not always proved to be a practical possibility at the domestic level, depending on the equality or otherwise of the bargaining position of the parties, and it was therefore a point to be borne in mind. In any event, a better solution, in his view, was to allow the receiving State to treat all bags in the same way as the consular bag.

12. A number of proposals had been made for safeguards, including a separate provision on consular bags allowing receiving States to continue to treat those bags as provided in the 1963 Vienna Convention on Consular Relations. That suggestion was well worth considering, with a view to introducing a measure of flexibility into the draft. He would, however, urge the need for an article allowing States to declare that they retained the right to discriminate between different kinds of diplomatic bag, which was, in effect, permitted under current conventional régimes.

13. With regard to the nature of the Commission's work on the topic, he wished to raise the question whether the Commission was purporting to codify customary international law—a question on which he had already had occasion to express doubts. In that context, article

42 was a critical element in the draft, and careful consideration should be given to reconciling article 42, paragraph 3, with article 6, paragraph 2 (b), since there seemed to be some inconsistency between the two provisions. It was also necessary to consider the extent to which States should be allowed to opt out of the provisions of the draft by means of bilateral agreements. That point also applied to article 36, into which it might be necessary to introduce an element of flexibility.

14. Mr. LACLETA MUÑOZ, referring to draft article 36, emphasized its crucial importance. It was true that States were trying to prevent abuses of diplomatic privileges and immunities and of the diplomatic bag, and that such abuses were becoming more frequent. Some abuses were not dangerous, but they were made easy by the fact that article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations provided that the packages constituting the diplomatic bag could contain "articles intended for official use". Those articles were not distinguished from the other articles "for the official use of the mission" referred to in article 36, paragraph 1 (a), of the same Convention, which were exempt from "all customs duties, taxes, and related charges". It would be advisable to try to restrict the articles for official use which could be sent through the diplomatic bag to articles of a confidential nature, such as coding and decoding material.

15. What gave most cause for concern was that the diplomatic bag could be used for the transport of narcotic drugs, arms and subversive propaganda against the Government of the receiving State. It was therefore necessary to draft a rule under which it would be possible to verify that the diplomatic bag was not being used for such purposes. He was inclined to agree with Sir Ian Sinclair (1845th meeting) that article 27, paragraph 3, of the 1961 Vienna Convention, which provided that "The diplomatic bag shall not be opened or detained", was not incompatible with article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, which reproduced that principle with a reservation. That was also the interpretation given by the Spanish Ministry of Foreign Affairs. He would not take up the question whether it meant that the diplomatic bag was inviolable or that it was not.

16. Some members of the Commission had said that the title of article 36 proposed by the Special Rapporteur, "Inviolability of the diplomatic bag", might go too far, and that inviolability did not attach to the diplomatic bag itself, but to its contents. In his opinion, that depended on what was to be understood by the term "inviolability", as applied to the diplomatic bag. It could be maintained that under the terms of article 35 of the 1963 Vienna Convention the consular bag was inviolable, in the sense that the receiving State was not entitled to take possession of it or to impair its integrity, and that it could be opened only with the consent of the sending State.

17. In his view, however, that was not the problem; the problem was to find a means of ensuring that the diplomatic bag was not misused. The bag could, of course, be examined by electronic means; indeed, he believed that the 1961 and 1963 Vienna Conventions did not

prohibit that kind of examination; but that did not solve the problem, particularly since such means of examination might make it possible to ascertain the contents of the bag. For instance, the devices used to change the cipher in certain decoding appliances, which could legitimately be sent by diplomatic bag, could be discovered when the bag was X-rayed. He was therefore opposed to such examination.

18. In his opinion, it would be preferable to include in draft article 36, as proposed by Sir Ian Sinclair, a new paragraph containing a provision under which States could reserve the right to apply to all diplomatic bags the régime provided for in article 35 of the 1963 Vienna Convention. It was to be hoped that States which had chosen that option would not reply to every request to open a diplomatic bag by the immediate opening of another bag, whether or not there was reason to believe that it was being misused. Unfortunately, that might happen under cover of the principle of reciprocity, which was really another name for retaliation and reprisal. It was therefore to be hoped that States would not apply the principle of reciprocity automatically and would request the opening of diplomatic bags only in order to verify, without violating their contents, whether they were being used for illicit purposes. He would comment on the last articles submitted by the Special Rapporteur at the next opportunity.

19. Mr. BARBOZA said that draft article 36, which was modelled on the 1961 Vienna Convention on Diplomatic Relations, presented two kinds of difficulty: conceptual and practical. The conceptual difficulties related to the underlying principle of the article, which was to protect the freedom of official communications between the sending State and its missions and between those missions themselves. In that respect, there would be no problem for official correspondence; for as some members of the Commission had observed, the archives and documents which were, after all, part of the correspondence were already protected by the provisions of article 24 of the 1961 Vienna Convention. The problem arose in regard to the "articles" which the diplomatic bag might contain. The first question to be decided was that of the relationship between those articles and the freedom of communication which was to be protected. In the 1961 Vienna Convention and in the draft under consideration, the definition of those articles was far too broad, since it referred only to articles intended for official use. On that point he fully agreed with Mr. Lacleta Muñoz; the borderline between official use and non-official use was very difficult to trace. Obviously, many articles used in an embassy were for official use: for instance, the furniture and vehicles. But it was also obvious that the articles in that category came under different régimes. Some could be sent as freight and others by post and the receiving State naturally reserved the right to decide whether they would be admitted free of duty. But other articles were sent by diplomatic bag: for instance, medicines in exceptional circumstances. And there were others whose dispatch by diplomatic bag should be authorized, namely articles really connected with freedom of communication, such as coding and decoding material, transmitters for sending coded messages, cassettes

on which messages were recorded, etc. There were other articles, again, which should benefit from special security, such as seals. An appropriate provision should therefore be drafted under which, in exceptional cases, certain articles intended for official use could be sent by diplomatic bag, so as to restrict that class of articles as much as possible.

20. The practical difficulties arose from the need to reconcile the principle of inviolability of the diplomatic bag with the security of the receiving State. The inviolability of the diplomatic bag was necessary for the maintenance of good diplomatic relations, but current events showed that the bag could be used for illicit purposes or in contravention of the laws of the receiving State, in such a way as to cause danger. Provision should therefore be made for examination of the diplomatic bag, the inviolability of which could not be absolute. The draft articles submitted by the Special Rapporteur contained some safeguards. The first was in article 5, paragraph 1, but in view of recent events that seemed inadequate. Article 31, paragraph 3, was also relevant: it was not entirely ineffective, since it excluded the possibility of using the diplomatic bag for smuggling large objects, such as arms; but it left the door open for other abuses.

21. Among the ideas put forward during the discussion, he thought Mr. Ogiso's proposal (1846th meeting) that the diplomatic bag should be separated into two, according to its content, and that electronic examination should be permitted for the one containing articles was worth considering. Nevertheless, a preliminary analysis showed that it had drawbacks. For if a State was prepared to send prohibited articles by diplomatic bag, it would also be prepared to declare that the bag contained only correspondence. Thus the absolute inviolability of the bag declared to contain only correspondence would protect the quite dangerous smuggling of small objects such as diamonds, forged banknotes and propaganda literature.

22. Sir Ian Sinclair (1845th meeting) had referred to a practice obtaining before the adoption of the codification conventions, which was reflected in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. That practice was fairly general and many States regarded it as a right. The provision in question certainly had the advantage of preserving the principle of the inviolability of the bag, which could be opened only with the consent of the sending State and in the presence of its representative, while at the same time protecting the security of the receiving State. He agreed with Sir Ian that the principle of reciprocity might prevent the receiving State from abusing that provision; it was to be hoped that that principle would be reasonably applied. On first reading, he thought it would be well to give careful consideration to any solution of that kind. Of course, the inviolability of the diplomatic bag was a principle which must be applied in good faith and not abused. And since the sending State was required to act in good faith, it must also be recognized that the receiving State was required to act in good faith when it claimed to have serious reason to believe that a diplomatic bag was being misused.

23. He believed that most members of the Commission, concerned about abuses of the diplomatic bag since the adoption of the codification conventions, were in favour of subjecting the diplomatic bag to some form of examination. On the basis of the many suggestions made during the discussion, the Drafting Committee should not have much difficulty in finding an adequate formulation.

24. Mr. QUENTIN-BAXTER said he fully agreed on the need to be very careful in protecting the interests of receiving and transit States as well as the security of the diplomatic bag itself. In general, he associated himself with what seemed to be a remarkably uniform trend in the discussion. He wondered, however, whether the Commission should not again try to assess what particular importance people attached to the use of the bag. The Special Rapporteur had done his best to produce a uniform text, but at the present stage in the debate there were various dichotomies. For instance, the Commission had been reminded of the difference between the treatment of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations and of the consular bag under the 1963 Vienna Convention on Consular Relations; it had been suggested that it might be necessary to make that distinction in the draft articles and perhaps to add a general provision that would enable States to declare their preference for the rule laid down in the 1963 Vienna Convention.

25. There was also a general distinction between the bag accompanied by a diplomatic courier and the unaccompanied bag, as well as the distinction to which Mr. Ogiso (1846th meeting), among others, had drawn attention between the use of the bag for its primary purpose of sending communications and what might be, in some circumstances, perfectly useful and mutually agreed uses for other purposes. Medicine was an excellent example, for most States would not object to its being sent through the diplomatic bag. Again, there was the distinction between the receiving State and the transit State, in which connection it had often been mentioned that the receiving State was, after all, also a sending State; diplomatic relations tended to be reciprocal and there were thus certain checks and balances. That did not necessarily apply to a transit State, which was subjected to much the same risks of abuse without having quite the same focus of attention or quite the same measure of control.

26. It seemed to him that, if the Commission was to do justice to all the interests involved, it would probably have to understand a little better exactly what mattered most to different countries. He understood, for example, that there was a very real problem with customary points of trans-shipment. For historical reasons, or because of lines of communication, bags in transit might go to points in a different continent before coming back to an addressee in the same continent; the unaccompanied bag could suffer all kinds of delays and misfortunes during such trans-shipments. It was difficult to know quite how to approach the question. Was it a matter of attempting a solution within the terms of the article? Or was it rather a matter of making some arrangements with Governments, or possibly with non-governmental agencies at important

transfer points, with a view to improving the service? Was the question at issue really a security question of the kind involved in article 36, or was it more the kind of interest in efficiency and security that everybody had when sending a parcel or letter by post? Depending upon what the interests were, the reactions to the need to relax or split up article 36 would be quite different.

27. It also seemed to him that the interests in bags accompanied by a courier were probably slightly different in their general balance from those relating to the unaccompanied bag. The unaccompanied bag, sent by some commercial means or through the post, already had considerable exposure to interference of one kind or another, without any dereliction on the part of the receiving or the transit State, and possibly bags sent in that way would actually be protected by a provision of the kind relating to consular immunities, which drew the receiving State's attention to the proper procedure if it wished to challenge a bag.

28. He did not propose to follow those questions to any definite conclusion, but he did consider that the Commission should endeavour to determine just what were the interests at stake and how they could best be protected, together with the very real interest of the security of the sending State.

29. Mr. MALEK said that the drafting of article 36 called for much reflection and care, since it was perhaps the most important article in the draft. It dealt with the inviolability of the diplomatic bag, which States were trying, sometimes zealously, to protect, while being fully aware—however paradoxical that might seem—that in doing so they were only increasing the danger by giving unlimited encouragement to the hijacking of aircraft, international terrorism, the fomentation of civil war, the shaking of economic and social foundations, attacks on morality and many other such acts.

30. It must not be forgotten, however, that the rule stated in the article was one of the oldest and best known rules, and had been recognized since the division of the world into modern independent States. Thus the article could only be declaratory, since the rule it stated had already been clearly and distinctly established by a large body of uniform practice. It was therefore necessary to inquire why its formulation raised so many difficulties. The apparent answer, which was quite simple, had been stated many times during the discussions. It had been said that it would be neither technically easy nor politically reasonable to draft an article on the inviolability of the diplomatic bag without first knowing what the bag was—without having in advance a precise and generally accepted definition, or at least a description, of that mysterious object which was understood differently by different States.

31. Various ideas had been put forward to fill the gap. One of them was that the diplomatic bag should be defined. In his opinion, that was undoubtedly an excellent idea, but he feared that putting it into practice would require as much time and effort as had been needed to define similar terms covering equally controversial notions. In any case, the question of defining what the diplomatic

bag was, or should be in regard to its content, form, weight, size and other pertinent characteristics, had already been dealt with in draft articles 31 and 32, which had been referred, after laborious discussion, to the Drafting Committee, whose task would no doubt be facilitated by the practical proposals put forward.

32. The other difficulty in drafting article 36 arose from the fact that it was proposed to include unnecessary details. The rule stated in the article was simple and was supported by universal and consistent practice, in spite of the sometimes inevitable irregularities to which it gave rise. Any particulars that it was desired to add to the rule would be useless unless they could be generally agreed on. He believed that article 36 should be strictly confined to stating the rule in question, namely that the diplomatic bag was inviolable. He had serious doubts about the necessity or advisability of including the second part of paragraph 1, especially the clause exempting the bag from any kind of examination by electronic or mechanical devices. He had already expressed his views on that point (1829th meeting) in regard to the similar exemption proposed for the diplomatic courier and would not revert to the matter. He wished to add, however, that it was of little importance that exemption of the diplomatic courier, the diplomatic bag, diplomatic agents or other persons and documents or articles intended for official use from search or examination by electronic or mechanical means had become a generally recognized rule. What was important was to take care not to encourage the strict application of that rule, even in particularly dangerous situations.

33. Since paragraph 2 of article 36 imposed on the receiving State or a transit State the express obligation to take appropriate measures to prevent any infringement of the inviolability of the diplomatic bag, he wondered why that article, rather than article 32, did not impose the same obligation on the sending State in regard to abuses relating to the same rule. From the principle of protection of the status of the diplomatic bag, which was at the root of the whole draft, there followed both the obligation of the sending State to comply with the rules concerning the content of the diplomatic bag and the obligation of the receiving State and the transit State not to infringe the rules on inviolability of the bag. The order of presentation of the articles, or parts of articles, proposed needed revision in the light of the very useful suggestions made on the subject.

34. Mr. MAHIU, confining his remarks to draft article 36, emphasized the equal importance of the two principles to be established in that provision: on the one hand, respect for the secrecy of exchanges and communications between the sending State and its missions, and on the other hand, respect for the security of the receiving State. The receiving State must be permitted to ensure that the diplomatic bag was not used to introduce prohibited imports into its territory, especially those which might impair its security, but at the same time the secrecy of the sending State's communications must be guaranteed. With that object in view, several members of the Commission had made interesting suggestions which merited careful consideration at the next session.

35. In trying to reconcile the two principles involved, it was important to start from the idea that the status of the diplomatic bag was based on the good faith of the sending State and the receiving State. The Commission should be careful not to over-emphasize certain abuses by sending States, however well authenticated they might be, lest they gave rise to other abuses by receiving States when examining the diplomatic bag. At first sight, it seemed useful to make a distinction between the bag carrying official communications of the sending State, which would be inviolable, and the bag used to carry other articles, which might not come under the same régime. But that distinction, suggested by Mr. Ogiso (1846th meeting), would raise the problem of determining the content of the bag and might cause fresh difficulties.

36. Mr. RAZAFINDRALAMBO said that certain points which had emerged from the discussion might lead to a solution. First of all, the situation was no longer the same as it had been when the four codification conventions had been adopted, namely between 1961 and 1975. The abuses to which the absolute inviolability of the diplomatic bag had been subject in recent years must be taken into account. Next, it was still necessary to maintain the balance between the interests of sending States and those of receiving and transit States, at a time when the emergence of numerous States which were geographically remote from each other had accentuated the role of some of them as transit States or receiving States and increased exchanges of diplomatic correspondence. Lastly, for reasons which he had explained earlier (1842nd meeting), certain States could not employ diplomatic couriers and were obliged to send their official correspondence by ordinary means of communication, whence the imperative need to protect the diplomatic bag not accompanied by diplomatic courier.

37. There appeared to be three possibilities. First, the principle of absolute inviolability of the bag, proclaimed in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, could be reaffirmed; the bag could then be neither opened nor detained. Secondly, the possibility of detaining and opening the bag, if there were serious reasons for doing so, could be provided for, following the example of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Thirdly, a distinction could be made between official correspondence and articles intended for official use, examination being permitted only for packages containing the latter.

38. In draft article 36, the Special Rapporteur stated the principle of the inviolability of the diplomatic bag, which could be neither opened nor detained unless otherwise agreed between the States concerned. That system, which tempered the absolute nature of inviolability, seemed to be authorized by the Commission's commentary to paragraph 3 of draft article 25, which became paragraph 3 of article 27 of the 1961 Vienna Convention. In that commentary, referred to by the Special Rapporteur (A/CN.4/374 and Add.1-4, paras. 332 and 346), the Commission did not exclude the possibility of opening the diplomatic bag if there were serious reasons for

suspicion. Draft article 36, however, linked the possibility of opening the bag with the existence of an agreement between the States concerned, which had the disadvantage that, in the absence of an agreement, the receiving State or transit State could only return the bag to the sending State. But as Mr. Balanda (1845th meeting) had remarked, an agreement was not always possible; it was also to be feared that the bag, and particularly the unaccompanied bag, might be subjected, without the knowledge of the sending State, to examination by mechanical or electronic means.

39. The system established by article 35, paragraph 3, of the 1963 Vienna Convention, which provided for the possibility of examination if there were serious reasons, might also lead to systematic examination when there were no diplomatic relations between the States concerned or when relations were strained. If the authorities of the sending State opposed the opening of the bag, it was returned to its place of origin. That system had the disadvantage of leaving it to a transit State or the receiving State to judge whether there were serious reasons for opening the bag.

40. The mixed system proposed by Mr. Ogiso (1846th meeting) had the advantage of protecting the secrecy of official correspondence and of subjecting to examination only packages containing articles intended for official use. That system should not encounter serious objections, but it raised the problem of the content of the bag. It might be necessary to place packages of one kind and the other in separate bags. If that system were adopted, it would be necessary to introduce specific provisions into draft articles 32 and 36. Paragraph 1 of article 32 should be subdivided into two subparagraphs dealing, respectively, with official correspondence and with articles intended exclusively for official use. That distinction should also be made in two separate paragraphs of article 36. The principle stated in the present paragraph 1 applied only to official correspondence, whereas a second paragraph, reproducing the wording of article 35, paragraph 3, of the 1963 Vienna Convention, would apply to articles intended exclusively for official use. The present paragraph 2, which related to measures to be taken by the receiving State or the transit State to prevent any infringement of the inviolability of the diplomatic bag, should be retained, since it stated an obligation parallel to that imposed on the sending State by article 32, paragraph 2.

41. The CHAIRMAN, speaking as Special Rapporteur, said that although he would have preferred consideration of the draft articles on first reading to have been completed at the present session, the matter was, of course, entirely in the hands of the Commission. Since it seemed to be the Commission's wish to defer consideration of draft articles 36 to 42 until the following session, he would refrain from summing up the discussion and would confine himself to offering a few clarifications, some of them of a purely factual nature. Before doing so, however, he wished to say how greatly he had appreciated the debate on the question of the inviolability of the diplomatic bag, and how grateful he was for the comments and criticisms made in the course of an exceptionally rich discussion.

42. The central idea of achieving a proper balance between protection of the confidential nature of the diplomatic bag and prevention of abuses, as well as between the interests of the sending State and those of the receiving or transit State, had been in the forefront of his mind throughout the preparation of his five reports on the topic. It had certainly been his intention at every stage to ensure such a balance, but, of course, good intentions might not be enough and he was ready to make further efforts to achieve that aim. As many speakers had rightly pointed out, the main practical problem that arose in connection with all aspects of the draft articles, but most of all in connection with the inviolability of the diplomatic bag, was that of providing safeguards that were both realistic and effective.

43. On the question whether the principle of inviolability of the archives and documents of a diplomatic mission was applicable to the diplomatic bag, he had been guided by the provisions of article 24 and article 27, paragraphs 2, 3 and 4, of the 1961 Vienna Convention on Diplomatic Relations, which, in his view, were inter-related and had to be considered together. The confidential nature of articles intended exclusively for official use, as well as of official correspondence and documents, required special protection. Mr. Laclata Muñoz had drawn attention to the highly confidential nature of articles such as code books and equipments for coding and decoding procedures which might legitimately be contained in the diplomatic bag.

44. As to the question whether opening the diplomatic bag constituted an infringement of the principle of inviolability, he explained that he had avoided using such adjectives as “absolute” or “complete” to qualify the concept of inviolability, because that concept did not seem to require qualification. The purpose of not permitting the diplomatic bag to be opened was to ensure that its contents were not revealed. Similarly, detention of the diplomatic bag was considered to be an infringement of its inviolability because it presupposed an opportunity to ascertain its contents. No useful purpose would be served by trying to distinguish between the inviolability of the diplomatic bag’s contents and that of the bag itself; indeed, there had been no suggestion that such a distinction should be made.

45. If the content of the bag could be ascertained by the use of electronic or mechanical devices, as seemed to be the case at the highest level of current technological development, the possibility of infringing the inviolability of the diplomatic bag without opening it would somehow have to be faced, whether or not a provision such as article 36, paragraph 1, was included in the draft. On that issue, as on all others, he was, however, prepared to accept the majority view in the Commission.

46. Another point which he wished to bring to the Commission’s attention was the possible adverse effects of returning the diplomatic bag to its place of origin if a request to open it was refused by the sending State. The delays, suspicions and retaliatory measures to which such action might give rise would not be in the interests of either party. Of course, the 1963 Vienna Convention on Consular Relations, ratified by more than 100 States,

contained an explicit provision on procedure for opening the bag, a provision whose existence could not be ignored. On the other hand, the Commission should, he thought, be very careful about applying that provision to the diplomatic bags of permanent diplomatic missions and other missions which were not within the framework of existing conventions. A compromise solution should be sought, bearing in mind all the advantages and disadvantages involved.

47. The Commission should, of course, take account of the concern felt over abuses of the diplomatic bag; but it should also bear in mind that the rule of confidentiality and protection of official correspondence had always been a recognized safeguard for official communications. It was far from his intention to belittle the gravity of the various offences committed by persons protected by their diplomatic status; but it would be a mistake to ascribe all such offences to the shortcomings of the status of the diplomatic bag. Without being over-optimistic, he continued to believe that the Commission would succeed in producing an article on the inviolability of the diplomatic bag which was satisfactory to all its members.

48. Some speakers had questioned the necessity of including articles 38 and 39 in the draft, but both those articles were based on State practice. Similar provisions were to be found among the national laws and regulations of Argentina, Austria, Finland and Mexico, to name only a few countries, as well as in bilateral agreements between France and Mexico, Guatemala and Mexico, Argentina and Brazil, Brazil and Uruguay, and between other countries.

49. The question had been raised in connection with article 39 whether, in addition to the obligation of the receiving or transit State to take appropriate protective measures in circumstances preventing the delivery of the diplomatic bag, a further obligation should not also be placed on the sending State to assist in the delivery of the bag. His own view was that the protective measures proposed in the article were sufficient, but there again it was for the Commission to decide. He was quite willing to consider the suggestion that article 39 should be merged with article 40.

50. With regard to Mr. Ushakov’s comment (1845th meeting) that it would be more in line with other conventions to speak of a “third State” rather than a “transit State” in article 40, he reminded the Commission that after its discussion of article 3, paragraph 1 (5), it had been decided to adopt the term “transit State” as meaning “a State through whose territory a diplomatic courier or a diplomatic bag passes in transit”, whether or not such passage had been foreseen originally.<sup>6</sup> Thus the concept of a third State was covered by that of the transit State.

51. He had no comments to make on articles 41 and 42 at the present stage, but could assure the Commission that the title “Miscellaneous provisions” given to part IV was purely tentative and could be changed if it was so desired.

<sup>6</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 57, commentary to article 3, paras. (14)-(15).

52. Lastly, he understood it to be the majority view that consideration of articles 36 to 42 should be continued at the next session. That being so, he would prepare a further report taking account of the comments and proposals made at the current session and the debate in the Sixth Committee at the next session of the General Assembly.

53. Mr. USHAKOV said it was essential for the Commission to complete the first reading of the draft articles at the current session; otherwise it would not be able to start the second reading until 1986, since the draft had to be sent to Governments for their comments in the meantime. It would be regrettable if the Commission did not manage to complete a set of draft articles during the term of office of its present members.

54. Sir Ian SINCLAIR said he had some sympathy with Mr. Ushakov's view that it was highly desirable for the Commission, if at all possible, to complete the second reading of the draft during its present term of office. However, many members of the Commission had spoken on the articles still outstanding in a very tentative manner and had reserved their positions. In any event, the Drafting Committee was most unlikely to complete its work on the draft articles at the current session, so that in practice matters would not be delayed by deferring consideration of articles 36 to 42 until the next session.

55. Mr. McCAFFREY agreed. Although the Drafting Committee was working very hard on the draft articles and had devoted only one of its meetings so far to another topic, it was unlikely to reach article 36 by the end of the session. Postponing completion of the first reading of the draft articles until the next session would not materially retard the Commission's work.

56. Since a discussion in the Sixth Committee concerning the Commission's debate on draft article 36 would be extremely useful, he wondered what arrangements would be made for appropriate presentation of that debate in the Commission's report to the General Assembly.

57. The CHAIRMAN said that the report on the work of the session would be prepared and submitted to the Commission for approval in the usual way. Concluding the discussion on item 4 of the agenda, he noted that consideration of the item had not been completed at the current session and that consideration of articles 36 to 42 on first reading would be resumed at the next session.

*The meeting rose at 6.05 p.m.*

## 1848th MEETING

*Tuesday, 26 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Lacleta Muñoz,

Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/373, <sup>1</sup>A/CN.4/378, <sup>2</sup>A/CN.4/383 and Add.1, <sup>3</sup>A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)**

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR

FIFTH REPORT OF THE SPECIAL RAPPORTEUR *and*  
ARTICLES 1 TO 5

1. Mr. QUENTIN-BAXTER (Special Rapporteur), introducing his fifth report on the topic (A/CN.4/383 and Add.1), said that he was very much aware of the large volume of work still to be done in the remaining four weeks of the session and therefore proposed to confine his presentation of the topic to reasonable limits. He also fully recognized that the topic overlapped to some extent with that of the law of the non-navigational uses of international watercourses. Both topics were essentially concerned with reconciling the rights of one State with those of another State. In a world that was becoming progressively smaller and more crowded, the need to evolve more subtle methods of regulating problems which involved a State's freedom of action, as well as its right to be free from the harmful effects of action by other States, was assuming increasing importance.

2. Before introducing his fifth report, he drew attention to the survey of State practice relevant to the topic which had been prepared by the Secretariat (ST/LEG/15). That document was now available only in English, but it would be translated for publication, possibly in the *Yearbook* of the Commission. However, the Legal Counsel had indicated in the Enlarged Bureau and in the Planning Group that, if the Commission so wished, arrangements for the translation of the survey could be made immediately. In his view, the Commission should avail itself of that offer, so that, if the treatment of the topic were to run its allotted course, all the relevant materials might be available to all members. He also drew attention to the document containing replies received from a number of international organizations in response to the questionnaire he had prepared with the assistance of the Secretariat (A/CN.4/378), which provided valuable information on the role of international organizations in the field under consideration.

3. The following five draft articles, submitted in his fifth report, corresponded to section 1 of the schematic outline annexed to the fourth report (A/CN.4/373) and modified in accordance with paragraph 63 of that report.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

## CHAPTER I

## GENERAL PROVISIONS

*Article 1. Scope of the present articles*

The present articles apply with respect to activities and situations which are within the territory or control of a State and which give rise or may give rise to a physical consequence affecting the use or enjoyment of areas within the territory or control of any other State.

*Article 2. Use of terms*

In the present articles:

## 1. "Territory or control"

(a) in relation to a coastal State, extends to maritime areas in so far as the legal régime of any such area vests jurisdiction in that State in respect of any matter;

(b) in relation to a State of registry, or flag-State, of any ship, aircraft or space object, extends to the ships, aircraft and space objects of that State while exercising a right of continuous passage or overflight through the maritime territory or airspace of any other State;

(c) in relation to the use or enjoyment of any area beyond the limits of national jurisdiction, extends to any matter in respect of which a right is exercised or an interest is asserted;

2. "Source State" means a State within the territory or control of which an activity or situation occurs;

3. "Affected State" means a State within the territory or control of which the use or enjoyment of any area is or may be affected;

4. "Transboundary effects" means effects which arise as a physical consequence of an activity or situation within the territory or control of a source State, and which affect the use or enjoyment of any area within the territory or control of an affected State;

5. "Transboundary loss or injury" means transboundary effects constituting a loss or injury.

*Article 3. Relationship between the present articles and other international agreements*

To the extent that activities or situations within the scope of the present articles are governed by any other international agreement, whether it entered into force before or after the entry into force of the present articles, the present articles shall, in relations between States parties to that other international agreement, apply subject to that other international agreement.

*Article 4. Absence of effect upon other rules of international law*

The fact that the present articles do not specify circumstances in which the occurrence of transboundary loss or injury arises from a wrongful act or omission of the source State is without prejudice to the operation of any other rule of international law.

*Article 5. Cases not within the scope of the present articles*

The fact that the present articles do not apply to the obligations and rights of international organizations, in respect to activities or situations which either are within their control or affect the use or enjoyment of areas within which they may exercise any right or assert any interest, shall not affect:

(a) the application to international organizations of any of the rules which are set forth in the present articles in reference to source States or affected States, and to which international organizations are subject under international law independently of the present articles;

(b) the application of the present articles to the relations of States as between themselves.

4. In the fifth report, he had tried to provide as careful and complete a statement as possible of the considera-

tions he had had in mind during the preparation of the five articles in chapter I (General provisions) of the draft, making only limited use of the vast amount of State practice that could have been cited.

5. His main concern in drafting the articles had been the preparation of a scope clause. That was a situation that might be unprecedented in the Commission's history. Most topics dealt with earlier had been so clearly defined from the outset that the preparation of a scope clause had presented few problems. In the case under consideration, the scope clause itself represented the crystallized result of a discussion spreading over a period of five years. Virtually the whole of the fifth report was related to the scope clause. Draft article 2, in so far as it contributed anything new, simply explained the meaning of the term "territory or control" as used in the scope clause. Draft article 3 was essential in connection with the scope clause. The draft articles would always serve as the background to other agreements. Their purpose was, above all, to encourage the development of State practice and to promote other agreements.

6. Draft article 4 dealt with the relationship between the draft articles and other rules of international law. The draft articles were not concerned with the wrongfulness of causing harm to another State, but rather with methods of regulating the rights of the parties without resort to the question of wrongfulness. At the same time, the draft articles should not be seen as interfering in any way with other rules that did specify the wrongfulness of certain acts. Sometimes, for example in cases of violation of State sovereignty, such rules were precise and clear-cut. Such precision was, however, only rarely possible in the present context. One such rare case had occurred when the city of Chicago had, for reasons of its own convenience, proposed to lower the level of Lake Michigan, a step whose physical consequences would have been unacceptable to Canada. The federal department concerned had conceded that the proposed action would not have been lawful and the scheme had accordingly been dropped. That was, however, an example of an extreme situation; in general, the proposing State, while willing to recognize the other State's interests, was not necessarily prepared to accept the latter's right of veto. If possible, an agreement was reached between the parties and that new agreement would always have priority over the more general provisions contained in the draft articles.

7. In the process of negotiation between States—a process in which neither party should be allowed a positive advantage—the draft articles under consideration could be helpful in two ways. First, they could prescribe certain procedural requirements which would, when accepted by both sides, usually make substantive problems appear less difficult. Secondly, they could establish certain criteria or, in other words, a common scale of values which would either mitigate the need for joint decisions or obviate such decisions altogether by providing the degree of assurance that an affected State might reasonably require.

8. Turning to the draft articles themselves, which were to be considered in relation to the schematic outline, he pointed out that the scope clause (art.1) was composed of

three elements: the first was that of a political boundary; the second, that of a physical consequence entailing some crossing of that boundary; and the third, that of the transboundary effect of the physical consequence.

9. In that connection, it should be noted that the definition of the term "territory or control" (art. 2, para. 1) was not intended to be comprehensive, but merely gave three relevant indications. The reason he had provided such a partial definition was that modern rules relating to territory and control in maritime areas were so complex. State practice very clearly recognized the situation of ships in passage—and, by analogy, that of scheduled aircraft in authorized overflight and that of space objects—as a transboundary one. That was not, of course, true of ships in passage in every case without exception; but if, as was usually the case, the coastal State, in observing the rules of the right of passage, allowed a ship in passage to proceed upon its course, then that ship remained under the control of its flag-State, and was in a transboundary relationship with the coastal State. Without wishing in any way to interfere with existing rules determining the extent of territorial authority and extraterritorial controls, he had merely wished to indicate that, in cases of continuous passage or overflight, it was proper and in accordance with the general practice of States to treat the situation as a transboundary one even if the ship, aircraft or space object in passage was within the territory of the coastal State.

10. The object of article 2, paragraph 1 (a), defining the term "territory or control", was to draw attention to the point that the coastal State in a maritime area had jurisdiction which was territorial in origin, but which was limited to specific purposes. Paragraph 1 (b) dealt with the obverse situation in terms of the State of registry, or flag-State; while paragraph 1 (c) made the point that all high seas situations were transboundary ones in the sense that States were the controllers of their own ships, aircraft and space objects on or above the high seas or in outer space and were responsible for the activities of persons within their control which affected areas or persons under the control of other States. In that connection, he drew attention to article 139 of the 1982 United Nations Convention on the Law of the Sea.<sup>4</sup>

11. In preparing draft article 1, it had been his intention to accept the existing law on territory or control and to use an open-ended definition so that the draft articles might remain responsive to future developments in general law.

12. The second element of the scope clause, that of a physical activity, was consequent upon the Commission's earlier decision to confine the topic under consideration to matters arising from a physical activity giving rise to a physical consequence. As indicated in the fifth report (A/CN.4/383 and Add.1, para. 18), the activities and situations dealt with had to have a physical quality and the consequence had to flow from that quality, not from an intervening policy decision. Thus the stockpiling

of weapons did not entail the consequence that the weapons would be put to a belligerent use and would therefore not, on that ground, be covered by the draft articles. On the other hand, in so far as the stockpiling of certain weapons could involve a danger of accident or misappropriation, it entailed an inherent risk of disastrous misadventure and it would come within the scope of the draft articles. The element of a physical activity was central to the whole scheme. Every other element was open to adjustment by mutual agreement between the parties, but the element of a physical activity leading to physical consequences was essential.

13. As pointed out in the fifth report (*ibid.*, para. 19), the chain of causation of the physical consequence was not interrupted by human intervention or failing. It was also noted (*ibid.*, para. 20) that there was nothing to prevent States, if they so wished, from establishing régimes operating on the analogy of a physical activity giving rise to a transboundary consequence even where no such consequence existed. For example, the growing and manufacture of opiates was not an activity that had transboundary effects, but, in practice, States found it convenient to treat it as a problem with transboundary implications. In short, the element of a physical consequence was a vital and rigorous one and it could not be bypassed; no one turning to the draft articles could insist on applying them to a matter having no demonstrable physical consequences. States might, however, find it useful, in the interests of mutual co-operation, to treat matters as having a physical consequence and transboundary effect even if they were not technically within the scope of the draft articles.

14. That left the largest element of all, namely the effect on use or enjoyment of areas within the territory or control of any other State. It was easy enough to envisage circumstances in which, in the view of any ordinary sensible person, the physical consequence itself measured the effect. For instance, if a space object landed in a heavily populated area, rather than in some icy waste, the effects would be correspondingly large. But there was the added question of evaluating the physical consequence in terms of its effect upon use or enjoyment. Throughout the topic, it would be found that States were less and less disposed to talk in terms of absolutes. There was probably no such thing as complete freedom from pollution and, even if there were, it would probably come at a price that no one could afford. Consequently, in any agreements that they reached with one another in matters pertaining to pollution, States were always considering costs and benefits and not merely an ideal state of freedom from pollution; they were placing their own values on how much it mattered to them to put up with an agreed level of pollution in a particular watercourse, air corridor or maritime area. Use and enjoyment therefore always involved priorities and States might find it necessary to indicate what mattered to each of them most in given areas.

15. The scope clause referred both to activities and to situations, but the focus of the draft articles was on activities, by which he meant something which was done within the territory or control of the source State and

<sup>4</sup> See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

which had a physical consequence with transboundary effects. Yet he believed it was also essential, at the outset of the work on the topic, to consider any particular activity in the wider context of activities and situations. In most cases, activities involved an initiative of the source State, which was then required to consider its effect upon other people. There were, however, occasions when an affected State might need to take an initiative, not necessarily to complain of a known activity within another State, but perhaps, in more general terms, to alert that other State to a problem in the territory of the affected State which it believed arose from a situation in the territory of the other State and to seek the co-operation of that other State in finding out how it could be stopped.

16. There were other circumstances in which existing law placed a duty upon a State to take some account of the interests of its neighbour, even in relation to a situation that had no elements of activity in it. For example, if a forest fire was raging in a border area, it would amount to no more than minimal compliance with an international obligation to give a warning of the danger to persons across the border. Very often such an obligation was provided for in a boundary treaty, but even if it were not, a State had a duty to do what was reasonably possible to warn a neighbouring State of a danger which arose in its own territory, but which might be far more serious for the neighbouring State. The same applied to water. A State might have reason to fear the behaviour of a river or a body of water within a neighbouring State without necessarily making any accusation that the trouble was due to an activity of that neighbouring State. It might be that a river was apt to change its channel and that, if something was not done about it in the neighbouring State, it could one day inundate a large city across the border. In such cases, the danger complained of might itself prove to be the consequence of a past activity. In human affairs, there always had to be a starting-point and boundary and river treaties invariably favoured the *status quo*. Sometimes, therefore, it was not so easy to draw a dividing line between activities and situations. It was very much a part of the practice of States, for instance, when considering the conservation of a stock of fish on the high seas, to speak not so much in terms of the activities of individual States that affected the fish stock, but rather in terms of the situation in relation to that stock and, on that basis, to demand consultations that might lead to identification and regulation of activities.

17. In his view, therefore, the importance of the word "situation" in the scope clause stemmed not from the fact that, in the final analysis, duties of reparation would be based upon situations—for he had found nothing in State practice to justify such a result—but rather from the fact that, in the early stages which were so important to the resolution of actual or potential disputes, there should be complete equality. The draft articles would not assign penalties to source States that failed to respond to requests for information or to meet requests to establish fact-finding machinery or régimes. The consequences of any such failure, if unreasonable, would be to leave the source State with an unsettled obligation for any losses, injuries or adverse effects caused by the position that it

had taken. On the other hand, given perfect equality, it would seem essential to allow the affected State the opportunity to take the initiative by apprising the other State of its concern about a particular situation which it believed arose partly or wholly in the territory of the other State and to seek the co-operation of that State in its redress.

18. Article 5, unlike articles 3 and 4, was not essential to the main thrust of the draft, but it was needed to take account of the fact that there were established cases, particularly in the treaties on outer space and in the 1982 United Nations Convention on the Law of the Sea,<sup>5</sup> in which it was contemplated that international organizations could be in control of activities that had physical consequences and transboundary effects.

19. Lastly, the provisions of the 1982 United Nations Convention on the Law of the Sea relating to the protection and preservation of the marine environment (part XII) pointed clearly to the principles on which it was proposed that the draft articles should be formulated and, in particular, to the notion that responsibility and liability were not just an accrued debt because someone had behaved wrongly, but were, on the contrary, an indication of the pattern of conduct which was expected of States and which, if observed in good faith, could prevent the point of wrongfulness from being reached.

20. Mr. MALEK said that the Commission had been dealing with the topic under consideration for many years and had been following the same methods of work as for other topics, but the question whether it should be discussed further had continued to be raised. In the Special Rapporteur's fourth report, which the Commission had not had time to consider at its previous session, it was stated that a few representatives in the Sixth Committee of the General Assembly had been sceptical about the value of the topic or its viability (A/CN.4/373, para. 10). Moreover, the Chairman of the Commission had stated in the Sixth Committee that the Commission's debate had shown that "some members had taken the view that the topic should not be further discussed for want of any basis in general international law or because of existing difficulties" (*ibid.*, para. 11). In the same report, the Special Rapporteur had requested the Commission to decide whether or not it should continue its consideration of the topic and had even referred to the possibility that the topic might be removed from the Commission's agenda (*ibid.*, para. 59).

21. He personally stressed once again that, if the Commission wanted to maintain the distinguished scientific reputation it had gained in its field, it could not recommend the suspension of work on a topic on which it, the General Assembly and the Secretariat had carried out extensive and fruitful research. There was, moreover, no need to take the decision proposed by the Special Rapporteur, since nearly all members of the Commission appeared to be in favour of continuing the work on the topic under consideration. When he himself had first spoken on the topic at the Commission's thirty-fourth session, in 1982, he had expressed doubts whether

<sup>5</sup> Annex IX of the Convention (see footnote 4 above).

the topic would be of any value in the distant future, since the activities to which it related were, sooner or later, likely to be prohibited.<sup>6</sup> He now realized that the Commission had to study the current situation, which required immediate attention, and not think too much about the future, which was uncertain. In view of continuing scientific developments and constant technological advances, there would always be human activities that were not prohibited. The importance of the topic and the need to discuss it further were, in his view, becoming increasingly obvious. The Special Rapporteur's firm belief in the growing importance of the topic had been demonstrated in the five excellent reports he had prepared with unswerving determination to find appropriate solutions to the problems encountered. The topic dealt with a *de facto* situation that might, if left alone, lead to conduct by one State that was harmful to another. It was thus to be feared that such a situation would offer a scientifically and technologically developed State all the elements it needed in order seriously to harm the vital interests of a neighbouring State and, at the same time, to claim the right to invoke the legitimacy of its actions.

22. In any case, eleven years after the topic had been identified by the Commission, six years after it had been described by a working group and placed on the active agenda, and after five reports had been submitted by the Special Rapporteur, it would be most unusual for the Commission to decide not to discuss the topic further. For the past two years, the Commission had even had before it a schematic outline relating to the various aspects of the topic and five draft articles of a general nature had been submitted to it at its current session. After indirectly taking the initiative of including the topic on its agenda and discussing it with a great deal of enthusiasm for many years, the Commission could not suddenly inform the General Assembly that it had decided not to continue its study. The topic had, of course, been included in the Commission's programme of work as a separate item in 1974, but it could not be dissociated from the topic of State responsibility, which had been included in the list drawn up by the Commission itself in 1949. The two topics were based on the same legal concept and the topic under consideration had commanded attention ever since the Commission had been dealing with the question of State responsibility for internationally wrongful acts.

23. At its twenty-second session, in 1970, the Commission had laid down a number of criteria as a guide for its future work on the topic of State responsibility.<sup>7</sup> It had stated that it intended to confine its study of international responsibility, for the time being, to the responsibility of States; that it would first proceed to examine the question of the responsibility of States for internationally wrongful acts; and that it intended to consider separately the question of responsibility arising from certain lawful acts, such as space and nuclear activities, as soon as its programme of work permitted. Members of the Commission and representatives in the Sixth Committee of

the General Assembly had expressed the view that the study of State responsibility had to cover responsibility for lawful acts. Some had been of the opinion that the two aspects of the question must be dealt with at the same time, while others had considered that they should be treated separately. In the course of the work on State responsibility, the need to consider the question of international liability had become increasingly apparent. In view of the progress it had made in its work on State responsibility for internationally wrongful acts, the Commission had decided at its twenty-ninth session, in 1977, to place the topic of international liability on its active programme.<sup>8</sup>

24. In the report it had submitted to the Commission in 1978,<sup>9</sup> the Working Group set up for the general consideration of the scope and nature of the topic under discussion had pointed out that the variety and volume of State practice in the fast-growing field of the law relating to international liability for acts not prohibited by international law warranted and indeed demanded a systematic study of the topic, which was suitable for codification and progressive development in accordance with the Commission's usual working methods. There was no doubt that the work already carried out and, in particular, the five reports prepared by the Special Rapporteur could be used to give States appropriate guidelines for the solution of the problems that arose in that connection, whether judicially, by arbitration or by formal agreement. The schematic outline (A/CN.4/373, annex) gave a fairly clear idea of the various aspects of the topic and of the way in which they should be approached and discussed.

25. One of the main problems to which the topic gave rise was that opinions continued to differ with regard to the substance of the concept on which the topic was based. Until the relatively recent conclusion of the *Trail Smelter* arbitration case,<sup>10</sup> neither of the two States concerned, namely Canada and the United States of America, had appeared to adopt the same approach to the concept as that followed in the work so far carried out by the Commission. As the Special Rapporteur had noted in his second report,<sup>11</sup> Canada had, at least at the outset, argued that it could have disclaimed international responsibility, since the case did not, in its opinion, come within any of the ordinary categories of international arbitration. The United States had held that it was entitled to insist that an agency operating outside its borders which was causing air pollution within its territory should desist from doing so. Canada had thus refused to recognize that it was liable under international law for the transboundary harm caused by the activities of a smelter located in its territory. The United States had considered that such damage was, quite simply, wrongful. The conclusions reached by the arbitral tribunal had been entirely different from what the parties had ex-

<sup>6</sup> *Yearbook ... 1982*, vol. I, p. 242, 1739th meeting, para. 2.

<sup>7</sup> *Yearbook ... 1970*, vol. II, p. 306, document A/8010/Rev.1, para. 66.

<sup>8</sup> *Yearbook ... 1977*, vol. II (Part Two), p. 129, para. 108.

<sup>9</sup> *Yearbook ... 1978*, vol. II (Part Two), pp. 150-152.

<sup>10</sup> United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>11</sup> *Yearbook ... 1981*, vol. II (Part One), pp. 108 *et seq.*, document A/CN.4/346 and Add.1 and 2, chap. II.

pected and it was on those conclusions that the Special Rapporteur had drawn in proposing his schematic outline.

26. The scope of the topic, which was another major problem, did not, according to the schematic outline, appear to be limited to a particular "activity", since the term "activity" had been defined as including "any human activity". In that connection, some members of the Commission had stressed that the scope of the topic should be defined specifically and that some important activities, such as economic and financial activities, should be listed as examples. In his own view, the scope of the topic should include any activity, conduct or situation that gave rise to loss or injury so that States would have adequate protection against the consequences of scientific and technological progress.

27. In the schematic outline, the Special Rapporteur had also attempted, rather concisely, to define the meaning of the term "loss or injury". In that connection, it had been suggested that that term should not be limited to its material aspect. In his third report, the Special Rapporteur had indicated that that term should include all kinds of loss or injury, whether material or non-material.<sup>12</sup> In his fourth report (A/CN.4/373, para. 63), however, he had stated that the scope of the topic would be confined to physical activities giving rise to physical transboundary harm, primarily because State practice was at present insufficiently developed in other areas. The limitation which the Special Rapporteur intended to place on the scope of the topic had been reflected in draft article 1, submitted together with four other draft articles, in his fifth report (A/CN.4/383 and Add.1). In view of the significance of those five draft articles, he himself would comment on them only after he had given them further thought.

28. Section 2, paragraphs 1 and 2, of the schematic outline dealt with the duty of the acting State to provide the affected State with all relevant and available information, which could, moreover, be requested by the affected State. Paragraph 3, which was not clear enough, at least in the French version, appeared to allow the acting State to withhold certain relevant information for reasons of national or industrial security. Such reasons would, however, not justify a failure to give the affected State a specific indication of the kinds and degrees of loss or injury to which it was being subjected. Paragraphs 4 to 7 provided that fact-finding machinery would be established when the acting State and the affected State did not agree on the effectiveness of the measures being taken to protect the affected State. Paragraph 7 also contained a provision on the costs of the fact-finding machinery, which must be shared "on an equitable basis". That provision might not fully take account of the particular situation of the affected State, which could suffer serious loss or injury, although no responsibility of any kind could be attributed to the acting State to make it halt the activity or situation in question. It would, moreover, be difficult to make the affected State

bear even a small share of the costs of the fact-finding machinery. In the *Trail Smelter* case, the arbitral tribunal had, of course, rejected the request by the United States for the reimbursement of the costs it had incurred in obtaining information about the problems to which the operation of the smelter had given rise in United States territory. The tribunal had referred not to a rule of existing law, but rather to the intentions of the parties, which it had established on the basis of the arbitration and the negotiations which had preceded it.

29. If the fact-finding procedure was unsuccessful, section 3 of the schematic outline required the acting State and the affected State to enter into negotiations at either one's request with a view to determining which régime might reconcile their diverging interests.

30. The obligations provided for in sections 2 and 3 of the schematic outline were not regarded as necessarily having to continue to be obligations. Section 2, paragraph 8, and section 3, paragraph 4, stated that failure to take any step required by the rules contained in those respective sections did not in itself give rise to any right of action. In his third report, the Special Rapporteur had questioned whether the courses of conduct prescribed in those two sections were requirements or recommendations, rules or guidelines.<sup>13</sup> Although he himself agreed with the Special Rapporteur that they should take the form of rules, he did not think that it should be indicated that failure to observe such rules would not engage the responsibility of the State for wrongfulness, as the Special Rapporteur had proposed in his third report.<sup>14</sup>

31. The non-compulsory nature of the rules being formulated in the context of the topic under consideration was, in fact, a matter of some concern. In his third report, the Special Rapporteur had pointed out that

... The distinctive feature of the present topic is that no deviation from the rules it prescribes will engage the responsibility of the State for wrongfulness except ultimate failure, in case of loss or injury, to make the reparation that may then be required. ...

He had added that

... the whole of this topic, up to that final breakdown which at length engages the responsibility of the State for wrongfulness, deals with a conciliation procedure conducted by the parties themselves or by any person or institution to whom they agree to turn for help.<sup>15</sup>

The Special Rapporteur appeared to be suggesting that the topic had distinctive characteristics that set it apart from other topics, but that was not, in fact, the case. The Commission's work on a particular topic had never been confined to the establishment of a "conciliation procedure" that would be made available to States.

32. As it now stood, section 5, which might well contain the most important provisions in the entire schematic outline, did not give the affected State adequate protection. Its aim was to give the acting State freedom of choice in relation to activities within its territory and in relation to the way in which such activities would be

<sup>12</sup> *Yearbook ... 1982*, vol. II (Part One), p. 59, document A/CN.4/360, para. 34.

<sup>13</sup> *Ibid.*, p. 58, para. 32.

<sup>14</sup> *Ibid.*, pp. 58-59, para. 33.

<sup>15</sup> *Ibid.*, p. 58, para. 31.

carried out. Paragraph 2 of that section was intended to specify the limits of such freedom of choice. It did not require the acting State either to ensure that the activities in question did not give rise, in the territory of the affected State, to loss or injury of a particular kind or degree or, if that was not possible, to halt such activities. If loss or injury did occur, he did not see how mere measures of reparation would be enough, particularly since such measures would have to be determined with due regard to the importance of the activities in question and their economic viability. It would therefore be necessary to take account of and expand upon the idea expressed by the Special Rapporteur in his third report:

... the underlying purpose of this topic is not merely to requite, or even to avoid, losses and injuries: it is to enable States to harmonize their aims and activities so that the benefit one State chooses to pursue does not entail the loss or injury another has to suffer. ...<sup>16</sup>

Particular emphasis always had to be placed on the right of States not to have to suffer transboundary harm of a serious nature. In that connection, he drew attention to article 9 of the draft articles on the law of the non-navigational uses of international watercourses,<sup>17</sup> which prohibited activities with regard to an international watercourse that might cause appreciable harm to other watercourse States.

33. The Commission thus appeared to be applying different rules to two topics that covered the same situation. In the first case, it had affirmed that appreciable harm was wrongful, while, in the second, it was considering the possibility of stating that transboundary injury, however extensive, would not be wrongful if the acting or source State had done everything in its power to prevent such injury. He was certain that the members of the Commission were aware of that difference in treatment, for which there was absolutely no justification. The Commission had to ensure that the rules it was formulating would not enable one State to benefit at another's expense.

34. Mr. REUTER said that, although the topic under consideration was similar to the others with which the Commission was dealing, it involved some risks. When the Commission had undertaken to study the topic, it might have had some doubts about the results it could achieve; but now a definite shape—a schematic outline and five draft articles—was finally beginning to emerge from the raw material entrusted to the Commission by the General Assembly. It was to the Special Rapporteur's credit that he had attempted to pin-point the elements of the topic that still had to be identified. The best encouragement the Commission could give the Special Rapporteur would be to express its satisfaction with the progress being made.

35. Despite the risks involved in the work in which it was engaged, the Commission must not have any doubts about the usefulness of the topic, if only because progress could not be stopped and the traditional rules of international responsibility for wrongfulness were no

longer responsive to needs. Even if the Commission never managed to agree on a full set of draft articles, it would have been right to deal with the topic under consideration.

36. One of the problems to which the topic gave rise was that, in dealing with no-fault liability, the Commission would have to formulate rules and would inevitably have to discuss the question of responsibility for wrongfulness. That was one reason why the Special Rapporteur had placed so much emphasis on procedures, as opposed to rules of substance. At one point or another, the Commission would, however, have to enunciate such rules. Although the Special Rapporteur for the topic of State responsibility was dealing with abstract and general concepts of responsibility and with secondary rules, the Commission must not be afraid to lay down primary rules for no-fault liability. He also did not think that there was any problem in dealing at the same time with the law of the non-navigational uses of international watercourses and with the topic under consideration. He could therefore not agree with Mr. Malek's view that the decisions to be taken with regard to international watercourses would contradict the views expressed by the Special Rapporteur with regard to international liability. The main point was that progress should be made on both studies.

37. He commended the Special Rapporteur for having followed the method of proposing draft articles, which would enable the Commission to see where it was going. As to the first two draft articles, which were designed to define the scope of the topic, he said that he found draft article 2 particularly satisfactory and that he supported the Special Rapporteur's idea of setting aside a number of situations involving human economic activities that might give rise to loss or injury.

38. In that connection, the Special Rapporteur and the Secretariat had considered the question of the international control of narcotic drugs, which should, of course, not be dealt with as part of the topic under consideration, but which had often been discussed in connection with studies relating to traditional responsibility. Until quite recently, a clear distinction had been drawn between producer countries and consumer countries, but it had not been possible to attribute responsibility for the drug problem to one or the other. Today, the situation was even more complex because, with few exceptions, producer countries had become consumers as well. What legal solution could be found to that problem and how could it be dealt with from the point of view of no-fault liability? In his view, the only answer lay in international solidarity, since no country could solve the problem on its own.

39. For the time being, it would therefore be preferable to confine the study of the topic under consideration to physical consequences, since there was still a great deal of uncertainty about the exact definition of the type of cases to be taken into account. In that connection, he said that he did not fully agree with Mr. Malek: the case in which a State deliberately carried out activities that impaired the quality of the water of an international watercourse by reducing its flow or changing its temperature

<sup>16</sup> *Ibid.*, p. 57, para. 24.

<sup>17</sup> See 1831st meeting, para. 1.

did not come within the scope of the current study, which related only to activities which were not intended to have harmful effects as such. He also pointed out that the dangerous nature of the activities in question had not been referred to in the definitions contained in the draft articles. Perhaps further consideration should be given to draft articles 1 and 2 to see whether greater precision was necessary and whether, for example, a distinction should be made between the disastrous consequences and the insidious effects of a particular activity. That was not the only distinction which the Commission would have to introduce. The problem of damage and, hence, of causality which was encountered in the context of responsibility for wrongfulness also arose in connection with the topic under consideration, and if the possibility of a disaster was taken into account, the Commission would have to decide whether bilateral relations alone could provide a solution or whether, in some cases, action by the international community as a whole was not required.

*The meeting rose at 1 p.m.*

## 1849th MEETING

*Wednesday, 27 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law** (*continued*) (A/CN.4/373,<sup>1</sup> A/CN.4/378,<sup>2</sup> A/CN.4/383 and Add.1,<sup>3</sup> A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR  
(*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

ARTICLE 5 (Cases not within the scope of the present articles)<sup>4</sup> (*continued*)

1. Mr. REUTER, reverting to the draft articles on which he had made some comments at the previous meeting, reiterated his satisfaction at the Special Rapporteur's decision to submit them. For while the Commission needed a well documented report by the Special Rapporteur to examine the topic entrusted to him, it also needed draft articles to clarify its thinking. He was not sure that, at the present stage in the work, the draft articles could usefully be examined by the Drafting Committee, but they had the great advantage of facilitating reflection.

2. The first two articles were intended to delimit the scope of the draft by defining the transboundary nature of the activities in question and certain elements relating to the material character of the situations which the Commission was to examine. While glad of that progress, he thought the particulars insufficient. It might be necessary to make a deeper analysis and inquire whether the problems arose in exactly the same way when the material consequences were abrupt and isolated in time as when they made themselves felt more slowly, gradually or continuously. The Special Rapporteur had chosen the broadest formula. Should the Commission adopt that solution? Should it introduce distinctions, or exclude particular cases? He could not give an opinion at present. But as the Special Rapporteur had observed, the situations and activities in question could be seen as being due to natural or to human action. If one were tempted to exclude from the scope of the draft situations and activities which pertained solely to man, because they came within the economic or moral sphere and were already subject to a multitude of primary rules, one found that the heart of the subject lay in situations involving human intervention and something which seemed to be beyond human control, namely situations created by advanced technology.

3. The Special Rapporteur had evoked situations which at first sight appeared to be facts of nature, such as forest fires. It was true that some might be due to malice, but generally they were natural disasters. Should such cases be included? There was also the case of the destroying swarms of locusts which attacked African countries. That kind of phenomenon, which had received attention from international organizations in the past, should not be excluded from the scope of the draft; but it called for special procedure. For instance, a riparian State on a river subject to periodic flooding might offer to collaborate with the other States concerned in dealing with the problem. The proposal might be accepted or refused, but a refusal might have legal consequences. Research should therefore be continued in order to determine what cases should be included and delimit the scope of the undertaking.

4. Articles 3 and 4 differed from the first two articles,

<sup>4</sup> For the texts, see 1848th meeting, para. 3.

but seemed to have the same purpose. They appeared to be well conceived and useful, and he had no objection to them. But, as the Special Rapporteur had intended, they were purely provisional texts. They expressed a certain concern which they endeavoured to meet. He noted that, as in the case of other drafts being prepared, there was some difficulty in defining the legal effect of the articles in relation to other instruments, bilateral or multilateral. The Commission should therefore ponder that problem, since it would be led to draft provisions that were intended to be binding but would not have a very marked legal character.

5. Article 5 was drafted on the model which would henceforth be found in all the Commission's draft conventions. He doubted the validity of the very principle of excluding international organizations from the scope of the draft because the Commission was not prepared to include the liability of international organizations in its programme of work. He was not certain that it was justified in leaving that question aside. He reminded the Commission of the precedents created by treaties relating to outer space, in particular the 1972 Convention on International Liability for Damage Caused by Space Objects<sup>5</sup> and annex IX of the 1982 United Nations Convention on the Law of the Sea,<sup>6</sup> which made provision for international organizations. Those organizations should be bound by the rules stated in international instruments if they had made a declaration to that effect, if a reasonable number of member States accepted the principles involved and if member States showed their solidarity in that respect. On that basis he could accept article 5 provisionally, but he suggested that the Commission should revert to the matter later.

6. Lastly, the schematic outline annexed to the fourth report (A/CN.4/373) called for a number of comments concerning the Commission's methods of work. In his opinion, that question was too serious to be left to the Planning Group; the Commission should discuss it in plenary meeting. Faced with a subject as difficult as international liability and so large a body of work for the Special Rapporteur, for which a programme would have to be drawn up, the Commission should invite members to formulate their comments in writing, especially as several members who held high positions were not always able to attend the Commission's sessions regularly. The topic under study provided a unique opportunity for making that experiment. Members of the Commission invited to submit their views in writing would feel morally obliged to respond.

7. Mr. USHAKOV said that, in spite of the efforts made by the Special Rapporteur, he still believed that the topic was artificial and in the nature of a dead end. He knew of no provision of international law which would establish material liability for activities that were lawful and even necessary for mankind and society. The only instruments applicable were special agreements—universal, multilateral or bilateral—relating to particular dangers, activities or situations. The terms used in the first two articles suggested that they might be dealing

with the problem of protection of the environment. But was the Commission competent in that matter? Moreover, was it supposed to draft substantive rules or rules relating to material liability?

8. Co-operation between States was the only way to check the transboundary effects of any particular injurious activity. He had in mind, in particular, the abusive exploitation of forests. The irrational exploitation of the forests of the Soviet Union, for instance, which extended over millions of square kilometres, could have dramatic effects on climate for the whole of mankind. Similarly, increased production of energy in the world could cause climatic changes which would have dangerous chain reactions, such as warming of the atmosphere and consequent melting of the polar ice-caps.

9. It was not by rules on material liability that the problem could be solved. The solution was to be found in the conclusion of agreements fixing quotas, whether for forest exploitation or energy production. International co-operation could also guard against the dangers to humanity caused by nuclear energy production and nuclear weapons. The consequences of a breakdown in a Soviet nuclear power station might well remain confined to the Soviet Union, but what would happen in a country of Western Europe with less extensive territory? He also had in mind the transboundary damage that might be caused by the use in agriculture of chemical fertilizers or insecticides—the use of DDT was a good example. Could an "affected State" claim compensation because it had suffered from the effects of an activity that was lawful and even necessary? The answer was in the negative and he remained convinced that secondary rules could not solve the problem.

10. Mr. NI congratulated the Special Rapporteur on his scholarly report (A/CN.4/383 and Add.1), and the Secretariat on its survey of relevant State practice (ST/LEG/15). As a result of rapid scientific and technological development and increasing contacts between States, the world was becoming smaller. The topic under study was therefore of practical importance, especially for developing States; it was usually they that suffered injury from the activities of neighbouring and industrially more developed States, which had the know-how to avoid harm within their own boundaries. The development of a régime to regulate such matters would persuade developed States to pay more regard to their less developed neighbours, and prepare the latter to abide by the same rules when they themselves became developed and might become "source States".

11. With regard to the scope of the topic, he noted that the Special Rapporteur had referred in his fifth report (A/CN.4/383 and Add.1, paras. 17-21) to a number of phenomena which could result in harmful consequences to neighbours if prompt steps were not taken to avert the danger. Those phenomena included the flow of water, which was perhaps more specifically connected with the topic of the law of the non-navigational uses of international watercourses, air pollution, which had been the subject-matter of the *Trail Smelter* arbitration,<sup>7</sup> as well

<sup>5</sup> United Nations, *Treaty Series*, vol. 961, p. 187.

<sup>6</sup> See 1848th meeting, footnote 4.

<sup>7</sup> *Ibid.*, footnote 10.

as noise, vibration, ionizing radiation, radioactive waste, the spread of forest fires and contagious diseases, depletion of natural resources, stockpiling of weapons, and the growing dangers from ships, aircraft and space objects. As the Special Rapporteur observed (*ibid.*, para. 31), the topic was thus concerned “almost exclusively with obligations arising from human activities”, and those activities entailed “initiatives within the territory or control of the source State taken in pursuance of its own rights of use or enjoyment, but with a proper regard for their transboundary implications”. Legitimate and beneficial human activities could not be prohibited, but consequential harm that was foreseeable should be regulated.

12. It was therefore necessary to strike a balance between the freedom of a State to engage in activities within its own territory, and the freedom not to suffer harm done by another State. To achieve that balance, a spirit of good-neighbourliness and co-operation would be required. States were not only bound by a moral obligation to assume responsibility for the consequences of any activities in which they engaged that caused harm to a neighbouring State; as was clear from the Secretariat’s survey (ST/LEG/15), they were also bound by legal principles of justice and equity to avoid transboundary harm resulting from lawful activities. The 1972 Convention on International Liability for Damage Caused by Space Objects<sup>8</sup> clearly set out, in articles IX, XI and XIV, the procedure by which any damage caused should be made good. Of the many bilateral treaties on the subject, the Special Rapporteur had selected the 1909 Boundary Waters Treaty between the United States of America and the United Kingdom and the 1964 Finnish-Soviet Agreement concerning Frontier Watercourses, the contents of which he had summarized (A/CN.4/383 and Add.1, paras. 23-25). As the Special Rapporteur had noted, those treaties tended to show “that States attach equal significance to their freedom to undertake activities and to their freedom from transboundary interference” (*ibid.*, para. 25, *in fine*).

13. From the practice of States it could perhaps be inferred that the source State had a prior duty to notify the affected State or States of the occurrence or possible occurrence of danger or harm, since it was the source State which engaged in the activity and was able to foresee the possibility of danger or harm. Sometimes, however, the affected State might notify the source State, for example if the affected State was the more apprehensive of some impending harm or if it had advance information. In both cases, good faith and co-operation were essential. An investigation might follow to determine the apportionment of costs, which should, of course, be fair and reasonable. In the *Trail Smelter* arbitration, very complicated and expensive arrangements had been made to carry out the necessary investigation. Developing States, which were often the affected States, might be unable to meet or even share in the costs of such an arrangement, which could deter them from notifying the source State.

14. It was therefore necessary to devise appropriate criteria for the allocation of costs. More weight should be

given to abuses in use or enjoyment on the part of the source State than to the “benefit” that might accrue to the affected State if the danger of doing harm was removed as a consequence of investigation and settlement. The affected State gained nothing from such investigation or from any measures taken to avoid or mitigate the adverse consequences. For the affected State, freedom from transboundary harm was not a positive “benefit” and should not be taken into consideration in allocating costs. He therefore had some doubts about the evaluation and distribution of benefits and costs suggested by the Special Rapporteur (*ibid.*, paras. 29 and 31, *in fine*), and he trusted that those doubts could be dispelled.

15. As to the draft articles submitted, in his view only article 1 involved a matter of substance; article 2 covered use of terms and articles 3, 4 and 5 were in the nature of saving clauses. In general, he thought it would be preferable to place the articles that dealt with substantive matters at the beginning of the draft.

16. Initially, he had had some difficulty with the expression “territory or control” in article 1; in other contexts the expression sometimes used was “under the jurisdiction and control” of a State. He had, however, been convinced to a certain extent by the Special Rapporteur’s explanation in his report (*ibid.*, paras. 7-8). While he was still not entirely free from doubt, therefore, he believed that he could accept the Special Rapporteur’s three-point partial definition of “territory or control”.

17. Another source of doubt was the omission of the word “adversely” before “affecting the use or enjoyment”, in draft article 1. Although the Special Rapporteur had explained (*ibid.*, para. 47) that the proposed scope article was widely drawn, if the physical consequences involved did not adversely affect the use or enjoyment of areas within the territory or control of another State, there would be no question of international liability and hence no claim for settlement between the parties. In view of the Special Rapporteur’s further explanation in the penultimate sentence of paragraph 47, he wondered whether the word “affecting” could not be replaced by the words “likely to affect adversely”.

18. Lastly, the Special Rapporteur had stated (*ibid.*, para. 46) that the strength of the proposed articles lay in four main points. While the first three points were convincing, the fourth point, the theme of voluntarism, was perhaps a chimera of fact and law. In particular, in view of the opinion expressed in the last sentence of paragraph 6 and the last two sentences of paragraph 48 of the report, he wondered whether it would not be possible to reverse the argument and say that the draft articles should constitute “framework articles” or what the Special Rapporteur had referred to as “the general law”, leaving any gaps to be filled by bilateral agreements.

19. Sir Ian SINCLAIR said that his initial doubts about the apparently almost limitless scope of the topic had dissipated, at least partly, and he was able to see rather more clearly the outline of what the Special Rapporteur had in mind. The topic was very much one of the present and the future. As had rightly been observed, the innovative genius of scientists and the ever-improving expertise

<sup>8</sup> See footnote 5 above.

of technologists were rapidly outstripping the regulatory and other techniques available to those who bore political responsibility. More and more activities were being undertaken within States, or within their jurisdiction or control, which, while not dangerous in themselves, had the potential to cause significant transboundary harm. Although the Commission was concerned only with transboundary effects, it should not neglect the broader considerations, to some of which Mr. Ushakov had drawn attention.

20. It was possible to start from the traditionalist approach, which held that international law made a clear distinction between the legal consequences of an internationally wrongful act, for which the State concerned was responsible, and the legal consequences, if any, of an act or activity not prohibited by international law, and to deny that there was any State responsibility or liability for the latter. While the logic of that argument was not easy to refute, it failed to take account of the growing demand for regulatory techniques that would go some way towards avoiding, minimizing and repairing transboundary harm resulting from non-prohibited activities. The wealth of material consulted by the Special Rapporteur provided sufficient evidence of the willingness of States to acknowledge and accept certain procedures for preventing and, where necessary, repairing transboundary harm arising out of activities within their territory or subject to their control.

21. The Special Rapporteur's fourth report (A/CN.4/373) clearly showed that the lineaments of the topic were becoming apparent. The Commission was concerned with activities within the territory or control of a State that gave rise or might give rise to physical consequences affecting the use or enjoyment of matters or things in another State. It was identifiable or foreseeable physical consequences which generated the rules or procedures that would follow. As he understood it, the Commission was not required to elaborate any additional rules about the wrongfulness of causing transboundary harm. On that point, he referred the Commission to the phrase "dynamics of the distillation process", used in the fourth report (*ibid.*, para. 24), which described very well what the Commission was trying to achieve. An adjustment or adaptation of the Commission's traditional techniques for preparing drafts would be required, and it would have to concentrate much more on the elaboration of suitable procedures and modalities than on drafting legal rules in the strict sense. As the very title of the topic indicated, the Commission would not have to deal with general rules of prohibition, but would be required to propose a framework instrument incorporating generally acceptable procedures for reducing the danger of transboundary harm.

22. In its task, the Commission could not take too strict a view of its own competence. The Special Rapporteur's thought-provoking remarks in his fourth report were particularly pertinent:

... In one sense, therefore, the question which underlies this topic is whether lawyers take so narrow a view of their discipline that they do not share the sense of responsibility of others who influence the behaviour of States, and wait until the latter have provided the materials from which general rules of prohibition may be discerned. (*Ibid.*, para. 38, *in fine.*)

23. The further development of the topic presented a considerable challenge to the Commission: it overlapped with the topic of international watercourses and was also highly relevant to the topic of State responsibility. But that did not cause him undue concern; as he saw it, the topic would develop into a residual framework instrument applicable to all activities having physical transboundary consequences which were not regulated or governed by other international instruments. The Special Rapporteur did not appear to have any intention of interfering with the conventional régimes regulating certain specific activities. In so far as they embodied rules establishing strict liability for certain dangerous activities, those rules would continue to apply in the relations between the States parties to agreements.

24. There was already a mosaic of differing régimes covering specific activities which had foreseeable injurious consequences for other States, and those régimes were tailored to the particular circumstances of the events with which they dealt. That was commendable, since the legal consequences of a particular activity could differ from case to case, calling in some cases for a régime of strict liability and in others for some form of risk-sharing. Clearly, the Commission should not make recommendations which would cut across and perhaps dilute the content of existing conventional régimes.

25. The course suggested by the Special Rapporteur would not have any such adverse effects. It might perhaps be fraught with risk, but given ingenuity and courage it should be possible to devise procedures to prevent and minimize transboundary harm. He did not underestimate the difficulties which the Commission would have to face in following the bold path set for it by the Special Rapporteur. In particular, he was concerned at the implicit assumption in the Special Rapporteur's approach that the source State was, if not responsible in the strict sense of the term, at least answerable for—or possibly required to assume some measure of quasi-vicarious liability for—the injurious transboundary consequences of activities carried on lawfully by private entities within its territory. That aspect of the matter should, in his view, be more fully investigated. Attributability to the State was a basic factor of the law of State responsibility and it could not be ignored in the present related field.

26. Referring to draft article 1, he suggested that the word "situations", which was unduly passive, should be replaced by the word "occurrences". The word "occurrences" would cover anticipated occurrences and hence most natural disasters, such as those mentioned by the Special Rapporteur in his fifth report (A/CN.4/383 and Add.1, para. 32). The word "situations" could give the impression that the source State might have certain duties even in cases where nothing had been done, or nothing had occurred or happened, within its territory. He also had some doubts about the expression "affecting the use or enjoyment of areas". Harmful transboundary effects could extend beyond areas; they could, for example, damage the health of populations in the affected State. He suggested that the Drafting Committee should be asked to find a broader expression to cover all possible harmful transboundary effects.

27. He would reserve his position on draft article 2; the definitions it contained were bound to be affected by subsequent decisions on the content of the draft. He had some doubts, however, about the definition of a "source State", because, particularly in cases of transboundary air pollution, it would be difficult to identify which of several States was the actual source State.

28. Article 3 was an absolutely essential provision and had rightly been placed early in the draft so as to make it amply clear that the régime established was a residual régime. Article 4 was equally necessary in order to preserve the operation of other rules of international law. He shared Mr. Reuter's doubts about the wisdom of including draft article 5.

29. Chief AKINJIDE said that he supported without reservation the view that the Commission should accept the challenge presented to it. He commended the Special Rapporteur for his penetrating analysis of the issues, and the Secretariat for its valuable contribution to the preparatory work. The topic was one which concerned all human beings, regardless of country or race. When a disaster occurred, the human element invariably came to the fore; the nationality or race of the victims was immaterial.

30. The Special Rapporteur had analysed the leading cases, such as the *Trail Smelter* arbitration, the *Cosmos 954* satellite case, the "*Fukuryu Maru*" case, the *Poplar River Project* case, the *Colorado River* case and the *Lake Lanoux* award (A/CN.4/373, paras. 25-52), as well as the cases concerning nuclear tests between Australia and New Zealand on the one hand, and France on the other. Those cases illustrated the modern aspects of the topic, with which a number of speakers, including Mr. Malek (1848th meeting), Mr. Ni and Mr. Ushakov, had dealt in detail.

31. For his part, he proposed to dwell on the interests of the developing countries of Africa, which were particularly concerned with the issues raised by the present topic. For Africa, because of its historical development, was affected more than any other continent by those issues. At the end of the last century, it had been divided into colonial spheres of influence and, as a result, with the coming of independence in the 1960s, many small States had emerged. Furthermore, tribes had been divided between States: for example, his own tribe had been split between Nigeria and Benin. A similar position obtained between Nigeria and Chad, and between Nigeria and Niger.

32. Because of the smallness of many African States, a number of rivers flowed from one country into another. An example was the Yuroro River between Nigeria and Niger, which fed Lake Sokoto; if that lake dried up, at least 50 per cent of the agriculture of Niger would be ruined, but there was no treaty or law to regulate the use of those river and lake waters. Again, because of climatic conditions in the Sahel region, cattle-breeding nomads in Niger had to cross the border into Nigeria for part of the year, so that their cattle could graze there. At other times, it was the cattle-breeding peoples of Nigeria who had to cross into Chad for the same reason. Boundaries

meant nothing to nomadic peoples, and in those circumstances it was possible for one State to take action which caused grave transboundary harm to another's livestock and could even ruin its economy.

33. To take an example from another area, much of the paper used in his country came from New Zealand and Australia; deforestation in the paper-pulp producing countries could thus quite possibly have transboundary effects. Offshore oil drilling in his own country and Cameroon could produce transboundary harm as a result of oil spills. He was not aware of any treaties or other international instruments covering those matters. Accordingly, the present work could go a long way towards protecting the various interests at stake, and he welcomed the Special Rapporteur's proposals.

34. With regard to the procedure to be adopted, he strongly urged that it should be simple, inexpensive and informal, so as to avoid placing the developing nations at a disadvantage. More important, there should be no statute of limitations, since the harmful effects of transboundary emanations could well remain unknown for a very long time. On no account should claims for reparation be barred by the lapse of any period of time.

35. The Special Rapporteur's proposals were intended to cover issues which affected the sea, the land, the air and outer space. It was worth noting, however, that only a very few States knew what was happening in outer space. Lastly, he pointed out that a source State could itself become an affected State as a result of the reaction of another State. In Africa, where States were often small, that point was particularly important and should be borne in mind when examining the definition of the term "source State".

### Co-operation with other bodies

[Agenda item 10]

#### STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

36. The CHAIRMAN invited Mr. Herrera Marcano, Observer for the Inter-American Juridical Committee, to address the Commission.

37. Mr. HERRERA MARCANO (Observer for the Inter-American Juridical Committee), referring to the visit of Mr. Reuter, Chairman of the thirty-fourth session of the Commission, to the Committee, said that his report on the work of the Commission, his participation in the Committee's discussions and the personal contacts he had made with its members had been of immense value.

38. Since the previous session of the Commission, the Committee had met twice, in August 1983 and January 1984. As the Committee's activities extended to both private international law and public international law, those two sessions had been characterized mainly by the desire to contribute to the success of the Third Inter-American Specialized Conference on Private International Law, which had been held at La Paz, Bolivia, in May 1984. On the basis of a draft submitted by one of its members, the Committee had adopted a draft convention which had in turn served as the basis for the Inter-

American Convention on the Legal Personality and Capacity of Juridical Persons in Private International Law, which had been adopted by the Conference. That Convention had concluded the work which had begun with the Inter-American Convention on Conflicts of Laws concerning Commercial Companies, adopted at Montevideo in 1979. The Convention open for signature at La Paz was not confined to regulating, between the parties, recognition of the existence and capacity of juridical persons in private law; it also extended to States and to public law corporations on the one hand, and to international organizations on the other. For juridical persons in the first category, the basic principle was that their existence and capacity were governed by the law of the place of their constitution, and that they were fully recognized by the States parties. The conditions in which such juridical persons could exercise the capacity accorded to them were also specified. Although the Convention related to private international law, it contained more substantive rules than rules on competence. With regard to public international law, it introduced recognition of the capacity of international organizations to act as juridical persons under private law, even if the State on whose territory they acted was not a member of the organization. For obvious reasons, the Convention did not extend to acts *jure imperii* of States, public institutions or international organizations, and it did not deal with problems relating to immunity from jurisdiction.

39. At its session in August 1983, the Committee had also responded to the request made to it by the General Assembly of OAS regarding the possibility of setting up machinery for appeals against decisions of the OAS Administrative Tribunal. Unlike the Administrative Tribunal of the United Nations and those of some specialized agencies, whose decisions could be appealed before the ICJ in certain cases, the Administrative Tribunal of OAS was a sole instance without appeal. On the basis of a report by one of its members, the Committee had proposed a procedure before an *ad hoc* chamber of the Tribunal and had specified the modalities. At the same session, the tenth Course in International Law had been given, which was organized by the Committee and at which several foreign ministers had lectured.

40. At its session in January 1984, the Committee had been mainly occupied in drafting an inter-American convention on conflicts of laws concerning the adoption of minors, on the basis of a text submitted by one of its members. The international regulation of that matter had become urgent as a result of the increase in international adoptions due to the lack of adoptable children in some countries, and the number of abandoned children in others. The situation was complicated by the great diversity of national laws. The Committee's draft was based on the principle of protection of the interests of the minor and was designed especially to guarantee the continuity and recognition of international adoption. With regard to the applicable law, the draft had adopted a harmonious system which combined the law of the domicile of the adoptive parents and the law of the habitual residence of the minor. The draft had served as a basis for discussion at the Third Inter-American Specialized Conference on Private International Law, which had led to the adoption of an

inter-American convention on the subject. The Conference had also adopted an Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, both of which had been based on drafts prepared by the Committee.

41. Also at its session in January 1984, the Committee had adopted a document, based on a draft by one of its members, which proposed that machinery be set up for the inspection of armaments and military forces. That document, which had been addressed to the Permanent Council of OAS, contained recommendations on the criteria for negotiation, qualitative and quantitative limitations on armaments, the limitation of military budgets and co-operation by arms manufacturers, and suggested concrete measures. Lastly, mention should also be made of a resolution by the Committee proposing the establishment of an international association of national societies for international law.

42. The items on the Committee's agenda for its forthcoming sessions were the following: the powers of the Secretary-General of OAS as depositary for a convention; the law of international peace and security, including definition and development of the principles governing relations between States in addition to those embodied in the Charter of OAS and in other inter-American instruments; the meaning of the word "aggression" in the context of article 9 of the Inter-American Treaty of Reciprocal Assistance; international judicial co-operation in criminal cases; the prohibition or restriction of the use of extremely cruel or indiscriminate weapons; inter-American co-operation to facilitate disaster relief; the principle of self-determination and its scope; the promotion, updating and development of means for the peaceful settlement of disputes; international maritime transport and international overland transport; measures to promote the access of non-self-governing territories to independence within the inter-American system; the right to information; the forms of development of the law of the environment; revision of the Committee's statute and rules of procedure; and revision of the inter-American conventions on industrial property.

43. Finally, he emphasized that the Committee wished to maintain and develop its relations with the Commission, in the interests of the work of both bodies, which, in the last analysis, contributed to co-operation and peace between nations.

44. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for his most interesting statement. He had been greatly impressed by the broad range of subjects considered by the Committee and by the equally important programme of future work in the spheres of both private and public international law. The activities of the Committee had often been an inspiration to the Commission. In its work, the Committee had shown itself remarkably close to the realities of international life and to the requirements of international co-operation in the western hemisphere. It had thus set an admirable example to all those who worked in the same field.

45. He asked Mr. Herrera Marcano to convey to the

Committee the Commission's appreciation and its best wishes for future success. He also took that opportunity to express the Commission's gratitude to Mr. Reuter for representing it at the Committee's session. Lastly, he assured Mr. Herrera Marcano of the Commission's earnest wish for continuing co-operation with the Inter-American Juridical Committee.

46. Mr. DÍAZ GONZÁLEZ congratulated Mr. Herrera Marcano on his excellent statement. The members of the Commission were well aware of the work which the Committee was doing, not only in the sphere of inter-American relations, but also as a research body working on international law in general. It had often been said that Latin Americans were inclined to be too active in the legal field. That was explained by their heritage of two very strong cultural influences: on the one hand, the Graeco-Roman and Judaeo-Christian influence exerted through Spain, a country in which the law had played a primordial role, and on the other hand the cultural influence of France, another country much attached to legal rules, whose influence on the legislation of the Latin countries had been decisive. It was in the interests of the whole international community that the close co-operation established between the Committee and the Commission should continue.

47. Mr. BARBOZA thanked Mr. Herrera Marcano for his detailed statement on the Committee's activities, the extent of which should not surprise those who had followed its progress and knew how it honoured the legal tradition of Latin America.

48. Mr. REUTER asked Mr. Herrera Marcano to convey his gratitude to the Inter-American Juridical Committee for the welcome it had given him. The Committee differed from the Commission in that it held two sessions a year, had a permanent secretariat and concerned itself with both public and private international law. He took pleasure in emphasizing the family spirit which prevailed among its members.

49. Mr. MAHIOU, speaking on behalf of the African members of the Commission, thanked Mr. Herrera Marcano. His statement on the contribution of the Inter-American Juridical Committee to international law had shown the mutual interest of co-operation between the Committee and the Commission, both of which were trying to promote the rule of law, though sometimes by different means.

50. Mr. McCAFFREY, speaking also on behalf of the Western European members and Mr. Quentin-Baxter, expressed admiration for the fruitful and ambitious work of the Inter-American Juridical Committee. Like the Commission itself, the Committee provided an excellent example of what could be achieved by constructive co-operation between experts representing not only different cultural traditions, but also different legal systems. That remark was fully borne out by the Committee's past achievements and also by its programme of work, which covered the most important problems of the day in both public and private international law. The Commission had greatly benefited, both directly and indirectly, from the work of the Inter-American Juridical Committee.

*The meeting rose at 1.10 p.m.*

## 1850th MEETING

*Thursday, 28 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law** (*continued*) (A/CN.4/373, <sup>1</sup>A/CN.4/378, <sup>2</sup>A/CN.4/383 and Add.1, <sup>3</sup>A/CN.4/L.369, sect. H, ILC(XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR  
(*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

ARTICLE 5 (Cases not within the scope of the present articles) <sup>4</sup> (*continued*)

1. Mr. SUCHARITKUL recalled that, when he had spoken on the Special Rapporteur's fourth report (A/CN.4/373) at the previous session, he had concurred with the approach adopted by the Special Rapporteur. <sup>5</sup> As the representative of his country in the Sixth Committee of the General Assembly at its thirty-eighth session, he had expressed similar views and had supported the Special Rapporteur's schematic outline. <sup>6</sup> He was therefore pleased to see that there appeared to be growing support for the topic under consideration.

2. The Special Rapporteur's fifth report (A/CN.4/383 and Add.1) contained general provisions in the form of draft articles 1 to 5. As it now stood, draft article 1 afforded a very satisfactory working basis for further discussion. It contained many useful elements, such as the reference to "activities and situations", which adequately covered all possibilities. The reference to the

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

<sup>4</sup> For the texts, see 1848th meeting, para. 3.

<sup>5</sup> *Yearbook ... 1983*, vol. I, p. 266, 1801st meeting, paras. 1-6.

<sup>6</sup> See *Official Records of the General Assembly, Thirty-eighth Session, Sixth Committee*, 36th meeting, para. 59.

“territory or control” of both the source State and the affected State was also particularly useful. The reference to the use or enjoyment of “areas” within the territory or control of a State would serve a dual purpose: the term “area” had a spatial or territorial connotation, but it also had a substantive connotation and related to the subject-matter of control.

3. Turning to draft article 2 and, more specifically, to the definition of the term “territory or control”, he expressed support for the Special Rapporteur’s approach, which expanded the meaning of the term “territory” to include maritime areas. With regard to areas beyond the limits of national jurisdiction, the provisions of article 2 fastened liability on to States. In future, however, the Special Rapporteur would also have to explore the situation of the injured party; it was not always possible to dissociate the damage sustained by a State from the injury suffered by the individual or individuals actually affected.

4. The problem of the liability of the State for injury arising out of internationally lawful acts had been described as corresponding to a “twilight zone” and the present topic was undoubtedly one that was suitable for the progressive development of international law. He recalled that, in 1960-1961, when the Asian-African Legal Consultative Committee had, at the request of the Government of India, examined the problem of the legality of nuclear tests, it had arrived at the conclusion that such tests were illegal when carried out on land, in the atmosphere or over the oceans, but it had not taken any decision with regard to underground tests.<sup>7</sup> In 1966, the Asian and Pacific Council had adopted a similar approach. The attitude towards the problem of nuclear tests thus clearly showed that something which was not unlawful today might become totally illegal tomorrow.

5. Referring to the problems created by the transfer of factories from developed to developing countries, he noted that such highly industrialized countries as the United States of America and Japan had suffered serious physical harm as a result of the activities of industrial complexes. They had, in particular, been obliged to spend enormous amounts of money and to devote much scientific knowledge and technical skill to reducing or abating air and water pollution. In the light of that experience, those countries had adopted very strict laws and regulations with regard to the operation of factories.

6. Developing countries such as Thailand and many Pacific islands were now faced with the problem of pollution and other detrimental effects caused by the activities of factories transferred to their territories by industrialized countries such as Japan. In the circumstances, he considered that an activity which was unlawful in Japan should also be regarded as unlawful in those new industrial regions.

7. As an example of such an activity, he referred to the discharge of mercury into a river in a developing country by a factory transferred there from an industrialized

country. In a situation of that kind, it could be said that both the countries concerned were to blame. The developing country was perhaps at fault for failing to regulate the matter, even though it had probably been taken by surprise, while the industrialized country was responsible for the situation because the damage had been foreseeable, but had not been foretold. There should be a duty to give reasonable notice in such a situation. Cases of that sort often led to *ex gratia* payments, but that solution was totally unsatisfactory. In cases of transboundary loss or injury, clear international liability should be established. For all those reasons, he welcomed the inclusion in draft article 2 of the definitions of the terms “source State” and “affected State”.

8. He also welcomed the introduction by the Special Rapporteur of the idea of “a physical consequence” flowing from an act which was not prohibited by international law and of the concepts of the equitable allocation of risk, the equitable sharing of responsibility and the duty to prevent the occurrence of harm, which would all be extremely helpful to the Commission in its work on a very important topic.

9. Mr. RIPHAGEN said that, since the Commission was still trying to find a solution to the problem of the scope of the topic under consideration, with which draft articles 1 to 5 were in fact all concerned, it was quite understandable that members should continue to have some doubts, but he did not think they should decide that the topic should not be discussed further. What was needed was, rather, some further reflection on the exact scope of a subject which truly belonged to a “twilight zone”. The general technique of international law started with a division of rights between States, especially with regard to territory, and then established all manner of obligations regarding the exercise of those rights. Failure to fulfil any of those obligations gave rise to State responsibility. The phenomenon of solidarity among States had, however, come into being as a result of the moral development of international law. The concept of solidarity was, of course, known in national societies, but it was more often imposed than accepted by all.

10. The topic under consideration lay in the intermediate zone between the concept of substantive obligations established by treaty or by customary law and the idea of solidarity which the international community accepted because it realized that a limitation on the exercise of sovereign rights was necessary in its own interests. That intermediate or “twilight” zone had been illustrated by the *Trail Smelter* case,<sup>8</sup> in which it had been held that a State had no right to do certain things, although no ruling had been made on the existence of any legal obligation to refrain from certain acts. If such a ruling had been made, the issue of State responsibility would have arisen.

11. A duty to co-operate existed in that twilight zone and, in dealing with the topic under consideration, the Commission had to determine the source of that duty. In his own view, that source was to be found in the relationships between ecosystems that resulted in activities in one

<sup>7</sup> See *The Work of the Asian-African Legal Consultative Committee (1956-1974)* (New Delhi, 1974), pp. 95-96.

<sup>8</sup> See 1848th meeting, footnote 10.

State having effects in another. The Commission had to translate that relationship between chance and necessity into a legal relationship, namely a duty to co-operate, which, as pointed out by Sir Ian Sinclair (1849th meeting), was more a procedural duty than a substantive one. States thus had to be urged to co-operate in establishing procedural rules either in abstract terms or in concrete circumstances, as had happened in the *Trail Smelter* arbitration.

12. Although it was difficult to define the limits of a twilight zone, the Special Rapporteur and the Commission itself had already limited the topic under consideration by deciding to deal only with the physical consequences of the activities of one State within the territory of another. The Special Rapporteur had thus drawn on that fact of nature to propose that, in addition to their existing obligations under customary law or treaty law, States had a general duty to co-operate. In that connection, one unavoidable legal problem was that of determining exactly what action a potential source State had to take in order to prevent transboundary harm and whether it would be required to place under control every activity that could possibly cause such harm. The problem of the dumping of waste at sea was a case in point. The States parties to the relevant treaties already had a duty to establish a licensing system for the transport of waste by sea, but it was doubtful whether that duty could be made generally applicable.

13. Another problem was to determine whether the draft articles could add anything to existing régimes, such as that established by the 1982 United Nations Convention on the Law of the Sea.<sup>9</sup> He had some misgivings about the references in draft article 2 to matters relating to the law of the sea. The Commission must, for example, avoid giving the impression that there was any right of sovereignty in respect of the 200-mile economic zone. In matters relating to maritime areas, it would be inappropriate to consider the coastal State as being an affected State by definition and the flag-State as being a source State by definition. Actually, both States had a duty to co-operate, as well as a duty to prevent damage and to mitigate damage when it occurred. In many cases, moreover, transboundary harm resulted from unco-ordinated land uses. If a State built a residential area on its side of the border and a neighbouring State built an industrial complex on its side, transboundary harm would be inevitable, but both States would be at fault because they had failed to co-ordinate their land uses.

14. He agreed with Sir Ian Sinclair's suggestion that, in draft article 1, the term "situations" should be replaced by the term "occurrences". A "situation" was created by nature, but it was "activities" and "occurrences" that gave rise to the duty to co-operate.

15. In conclusion, he stressed that the problem of the attribution of liability or, rather, of the determination of the source of the duty to co-operate lay at the core of the topic under consideration and required a common understanding on the extent to which a State was obliged to keep certain activities under control. Further thought

would thus have to be given to the definition of the scope of the topic, but the result of the Commission's efforts might well be a model of co-operation that could be recommended to States.

16. Mr. OGISO said that the Special Rapporteur seemed to have reached the tentative conclusion in his fourth report (A/CN.4/373) that the rules being formulated should not embody the principle of strict liability. Although that principle had, of course, been reflected in a number of international treaties, such as the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,<sup>10</sup> it was still far from being a principle of international law. In the same report, the Special Rapporteur had objectively stated various views and a reader who was not very familiar with the topic might find them somewhat confusing. However, in his final considerations, he had said that the idea of treating strict liability as an alternative set of "secondary" rules had "never appealed to the Commission or to the Special Rapporteur", basically because of the "need to avoid even the appearance of putting the principle of strict liability on the same level as the responsibility of States for wrongful acts or omissions" and because "nothing should be allowed to threaten the unity of international law" (*ibid.*, para. 66). That was a very clear statement and, if his own understanding of it was correct, it would assist him greatly in participating in the discussion of the topic.

17. In dealing with the topic, the Special Rapporteur had started with the general obligation of prevention and had moved on to the obligation of co-operation or reparation. While that was an interesting approach, he for his own part would continue to be unconvinced about the viability of the topic until he had seen the substantive provisions which the Special Rapporteur would put forward in the next stage of his work.

18. The five draft articles which the Special Rapporteur had submitted in his fifth report (A/CN.4/383 and Add.1) were in the nature of an introduction to the proposed draft convention, which would cover what had been described as a "twilight zone" of international law. In the circumstances, it might be a little dangerous to enter into a discussion of the introductory part without having a clearer idea of the draft as a whole, or at least of the substantive provisions that would be submitted. Admittedly, the Special Rapporteur's fourth report included a schematic outline which was meant to be read together with the introductory draft articles. It would, however, be desirable for that schematic outline to be couched in terms that were more akin to treaty language. The very fair and objective manner in which the Special Rapporteur had presented his ideas made it somewhat difficult to see in which direction he planned to proceed.

19. It was not clear to him why the fourth and fifth reports did not refer to the concept of the abuse of a right by a State, particularly, of course, by the source State. Specifically, he wondered whether any refusal to co-operate in taking preventive measures or making repara-

<sup>9</sup> *Ibid.*, footnote 4.

<sup>10</sup> United Nations, *Treaty Series*, vol. 610, p. 205; see article VI.

tion could be interpreted or explained on the basis of the concept of the abuse of a right. He had not studied all the relevant cases in full and had been unable to attend all the meetings during which the Commission had discussed the present topic, so that question might already have been settled. If so, he apologized for raising it.

20. The transboundary element of a physical consequence, on which the Special Rapporteur had placed the main emphasis, provided a reasonable basis and starting-point for the Commission's discussions; but, in view of the obligation to take preventive measures, the question might not be so simple. Under a specific régime governing, for example, oil pollution, an obligation could perhaps be imposed on the State to grant a licence to an oil tanker, but, if a general obligation to take preventive measures were laid down, he wondered what form it would take. He would appreciate any further clarification the Special Rapporteur could provide in that regard.

21. He also noted that the Special Rapporteur had not used the words of the title of the topic and, in particular, the word "liability" in any of the five draft articles. Was that mere coincidence, or had the Special Rapporteur deliberately avoided using the word "liability"?

22. Sir Ian Sinclair had expressed some reservation about the use of the word "situation" in draft articles 1 and 2. His own view was that that word might be useful if, for example, a number of sources, such as industrial smoke, motor vehicle exhaust and waste disposal, caused air pollution and the source State was unable to specify the exact source. The word "activities" might not suffice to cover such cases, although it would be difficult to take a definite stand on the matter before the Commission had taken cognizance of the substantive provisions of the draft. In Japan, the rules governing the disposal of factory waste in rivers or the sea were extremely strict and took account of the fact that pollution could come from multiple sources, which might raise the pollution to a dangerous level. Although Japanese standards were perhaps much stricter than those of other countries, he believed that they pointed to the general direction in which the international community would move in the future.

23. The Special Rapporteur had made a very interesting comment in his fifth report (*ibid.*, para. 38) in connection with the questionnaire addressed to international organizations. Such organizations sometimes laid down guidelines for pollution control or waste disposal. He would like to know whether the Special Rapporteur also considered that any such guidelines which had been laid down by an international organization with restricted membership and communicated to non-member States should be taken into account in connection with the general obligation to take preventive measures or make reparation. That point might be relevant to the further study of the topic.

24. Lastly, he considered that the form which the draft articles should take could be decided only when all the provisions, including the substantive provisions, had been placed before the Commission. He also considered

that the topic would require further examination before any decision could be taken on whether or not it should be removed from the Commission's agenda.

25. Mr. QUENTIN-BAXTER, referring to the element of a physical consequence, said that the Commission had initially taken the view that the scope of the topic could not be delimited until its content had been clearly defined. On the basis of the schematic outline subsequently proposed, the current members of the Commission had urged him to adopt the limitation now expressed by the proposal that the draft articles should apply only to activities giving rise to a physical consequence.

26. The element of a physical consequence was quite rigorous. A basic criterion of the entire topic was that something done within the territory or control of one State would produce a physical consequence which would or might have transboundary effects. That requirement was justified because it was not within the power of the affected State to prevent that consequence or its effects. Of course, if the water of a river was polluted, it could be argued that the affected State could have installed a purification plant at the border; that was not the point, however. If activities in State A polluted the water at the point of entry into State B, the physical consequence of those activities would inevitably produce transboundary effects.

27. He had endeavoured to emphasize the limiting effect of the element of a physical consequence in his fifth report (A/CN.4/383 and Add.1, paras. 17-21). In the case of armaments, for example, it could be said that it was highly dangerous to build up large stocks liable to be used in the event of war. That case did not, however, fall within the scope of the topic, since any such use would depend on some other human decision. On the other hand, the case in which a stock of weapons was dangerous in itself and was liable, if it fell into the wrong hands, to explode with catastrophic consequences was within the Commission's terms of reference. The distinction was absolutely rigid, so that many matters of real international interest would fall outside the topic. Despite its narrow limits, however, the topic had tremendous force, for States would, as a matter of choice, treat some of those matters as transboundary issues even though they did not fall within the scope of the topic.

*The meeting rose at 11.50 a.m.*

## 1851st MEETING

*Friday, 29 June 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*later:* Mr. Julio BARBOZA

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Malek, Mr.

McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law (continued)** (A/CN.4/373,<sup>1</sup> A/CN.4/378,<sup>2</sup> A/CN.4/383 and Add.1,<sup>3</sup> A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR  
(continued)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

ARTICLE 4 (Absence of effect upon other rules of international law) and

ARTICLE 5 (Cases not within the scope of the present articles)<sup>4</sup> (continued)

1. Mr. BALANDA said he would speak on the Special Rapporteur's fourth report (A/CN.4/373) as well as his fifth report (A/CN.4/383 and Add.1), which contained draft articles testifying to a commendable effort.

2. Referring to the fourth report, in which the Special Rapporteur had analysed the views of representatives in the Sixth Committee of the General Assembly on the topic under consideration, he explained that the feeling he had expressed in the Sixth Committee (A/CN.4/373, footnote 35) had not been disappointment, but rather a certain scepticism which he had shared with others at that time. However, after reading the fifth report, which grasped the subject more firmly, he wished to encourage the Special Rapporteur to continue his work.

3. In the fourth report (*ibid.*, para. 63), the Special Rapporteur had stated that the scope of the topic would be confined to physical activities giving rise to physical transboundary harm, and it was on that basis that article 1 had been drafted. Some speakers had said that it was quite unnecessary to draft rules on the topic under consideration, for since it fell within the exclusive competence of the States concerned, no rules of international law as such were applicable. He did not think that view could be accepted, at least not in principle or in such absolute terms. Internal law on the subject had once been where international law was now, and it had been very reluctant to adopt the notions of risk-based liability, strict liability or no-fault liability. That precedent should encourage the Commission to explore the subject further, albeit

with caution, and to consider the possibility of drafting rules to regulate an area not yet regulated except by specific agreements.

4. The study should therefore focus on the nature of the rules to be adopted. Should they be binding or even peremptory? The question raised some difficulties. The first was inherent in the subject-matter itself, which was still in the raw state; it would be for the Special Rapporteur to refine it, taking account of the comments made in the Commission and in the Sixth Committee of the General Assembly. He noted that it was stated in the fourth report that the schematic outline could not "provide for the enthronement of the principle of strict liability" but that it could "work pragmatically for its near-accomplishment" (*ibid.*, para. 68). He subscribed to the second of those statements and thought that the Special Rapporteur's remark that not all transboundary harm entailed the acting State's liability deserved attention. The Special Rapporteur did not wish to establish a direct link of cause and effect between the activity and its injurious consequence. But it was necessary first to define what was meant by the "acting State". The State which was the source of the injurious act could not always be identified precisely. For example, if several neighbouring States having common frontiers conducted similar activities which affected another neighbouring State, it would be difficult to determine which of them had caused the damage and might have to make reparation. The Special Rapporteur was certainly aware of those difficulties and should perhaps study specific cases to find means of overcoming them.

5. The question also arose as to which State should be asked to make reparation in a case where one State had authorized another to use its territory to carry out an activity which had caused harm to a third State. For example, a State might have authorized another State to carry out nuclear tests in its territory. In the event of an accident, which State would be responsible for the harm done: the State which had lent its territory, or only the State which had in fact carried out the injurious activity? Or could there be joint liability? That question would have to be decided, and it would also be necessary to determine whether, if a claim was made against it, the State which had lent its territory could have recourse against the State which had actually carried out the activity. Similarly, it would have to be determined whether a State which carried out an activity in the territory of another State was required in every case to make reparation for injurious consequences, or whether it could benefit from an exoneration clause. The Special Rapporteur had hinted at the latter possibility, which should be explored.

6. The Special Rapporteur had said that he wished to confine his study to physical transboundary harm, as opposed to moral harm. Yet draft article 2 implied that a natural person could be the victim of an injurious act. If that were so, moral injury could not be completely ignored in the draft articles.

7. In his desire to avoid the controversy which loomed behind the concept of strict liability, the Special Rapporteur was trying to exclude any systematic causal link between the act as such and the possible injury. To that end,

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> For the texts, see 1848th meeting, para. 3.

he had introduced the element of a "tolerable threshold" of harm, beyond which reparation should be made. That approach was in line with the conduct of States, which declined to recognize their liability directly, but were willing to compensate when they had committed the injurious act. The case of the "*Fukuryu Maru*", mentioned by the Special Rapporteur (*ibid.*, para. 38), illustrated that point. But who was to determine the threshold: the source State alone, or the affected State, or both States in collaboration, or a third party? Developing countries making use of advanced technologies would find it difficult to take part in joint prevention activities because of the limitations imposed by their financial and human resources.

8. The concept of a "tolerable threshold" also raised the question whether the draft articles under consideration were not related to the draft on State responsibility. In other words, could the element of wrongfulness be completely excluded? Even if emphasis was placed on strict liability, the element of wrongfulness would arise in one way or another and it was precisely through the notion of a threshold that the draft articles would connect with the topic of State responsibility. For if a threshold was set, States which were unable to ensure the security of other States beyond that threshold would be acting wrongfully. As the Special Rapporteur had himself recognized, if the notion of a tolerable threshold was maintained it would be necessary to revert to that question at a later stage in the work.

9. The Special Rapporteur was proposing a set of rules, including rules on co-operation and solidarity between States, and there the topic connected with that of the law of the non-navigational uses of international water-courses. He would not go so far as to attempt to determine the foundations of the obligation of co-operation and solidarity, but would point out that such co-operation would sometimes be difficult to achieve. For all co-operation in preventing harm necessarily presupposed good relations between the partners and common interests. Within the framework of the draft under consideration, however, such community of interests was not in evidence. States wishing to carry on an activity were guided by their own interests and did not care about their neighbours. He therefore believed that the realization of such co-operation and solidarity, of which he was in favour, would meet with some difficulties. The balance frequently mentioned in the fourth report could only be established if the interests of States coincided.

10. He agreed with the Special Rapporteur that the rule on sharing costs and benefits should not apply automatically on a mandatory basis. Such sharing could take place only if an interest existed, and a State which had no interest could not be obliged to contribute towards the prevention of damage. That was especially true of developing countries, which could not afford to help other States in their efforts to prevent the injurious consequences of activities which those other States carried on in their own interest.

11. He took the view that international organizations should be excluded from the scope of the draft. If States alone were concerned, it would be logical that, for the

time being at least, only their activities, and not the activities of commercial companies within their territory, should be taken into account. It would be difficult to establish the liability of States when they had not themselves conducted the injurious activity. It might perhaps be appropriate, therefore, to delete the word "international" before the word "liability" in the title of the draft articles.

12. It seemed to him that, in the case of State liability for an injurious act, to consider that the victim of that act could be either a juridical or a natural person was tantamount to creating a direct liability of the State to such a person. Outside the field of human rights, that was an innovation in international law which deserved consideration. The Commission should ask itself whether, apart from the machinery of diplomatic protection as such, it was possible to establish a direct obligation of a State to a natural or juridical person. Some clarification would be welcome, because if that was possible the question arose whether the rule of exhaustion of internal remedies should not also be omitted from the draft articles. If direct liability of the State was to be established, should the exhaustion of internal remedies be required or would the injured natural or juridical person be able directly to invoke the international liability of the State which had committed the injurious act?

13. The Special Rapporteur dwelt at length on the continuum of prevention and reparation, and he himself agreed that the effort to prevent injurious acts required attention. But if the effort came to nothing and injury occurred, it was necessary to accept all the consequences, not to stop half-way saying that liability would not always arise. Liability was bound to arise, and the Commission would be compelled to revert to the causal connection which had been rejected at the outset.

14. As he had already said, for developing countries the cost of prevention was high in terms of financial and human resources. Prevention did not necessarily preclude reparation; when a State took specific measures to remedy an injurious situation, it could also take preventive measures at the same time, as was shown by the *Colorado River* case (*ibid.*, para. 48). Hence the effort of prevention should not be categorically contrasted with reparation, at least so far as the prevention of future risks was concerned.

15. Turning to the Special Rapporteur's fifth report (A/CN.4/383 and Add.1), he expressed the view that draft article 1 should refer only to activities by States, to the exclusion of activities carried out by entities other than the State within its territory, and of "situations". Geographically speaking, the draft articles were supposed to apply to the whole of a State's territory, including outer space. But developing countries could not always control what happened within their territory, understood in that broad sense—that was true of Zaire, whose territory was immense. That being so, it would be difficult to make them responsible for "situations" occurring in their territory if those situations had injurious consequences. Liability should be confined to specific activities and not extend to situations.

16. The Special Rapporteur had introduced the notion of “control” side by side with that of the “territory” of a State. But it was difficult to determine the extent to which a State, especially a developing one, exercised control over its territory. Hence the reference to “control” should perhaps be deleted and draft article 1 be amended to read:

“The present articles apply with respect to activities which are within the territory of a State and which give rise or may give rise to physical damage (or injury) affecting areas within the territory of another State.”

That provision would suffice, and would allow a balance between the interests of States to be maintained.

17. Draft article 2 was indispensable. Draft article 3 was premature at the present stage of the work; the content of the topic should be more clearly defined before tackling that problem. Draft article 5 would be improved by being cast in affirmative rather than in negative form, so that cases within the scope of the draft would be precisely defined.

18. In conclusion, he believed that the Special Rapporteur, aided by the comments of members of the Commission, should continue his research on the very thorny topic entrusted to him.

19. Mr. McCaffrey expressed gratitude to the Special Rapporteur for an impressive report (A/CN.4/383 and Add.1) which reflected profound thought and scholarship. The topic was not an easy one, since it did not involve a traditional branch of international law. Rather, it was a topic of the present and the future, and one that would therefore demonstrate the responsiveness of the law to the revolutionary changes of mankind. The fact that it was a new field did not mean that there was not a solid foundation for the Commission’s work: indeed, such a foundation was to be found in the principles of co-operation, friendly relations and good-neighbourliness. Those principles, however, were but skeletons and it was the task of the Commission to put flesh on the bones.

20. With regard to the title of the topic, he considered that the French version was more accurate than the English, because it spoke of activities rather than acts. He would, however, prefer not to speak of liability, since that was not what the topic was about: it was more concerned with the methods devised by States to avoid and resolve transboundary environmental problems—methods necessitated by one of the great imponderables of international law, the principle of territorial sovereignty. “Transboundary environmental problems” usually meant transboundary problems in regions that happened to be divided by politically drawn borders to which natural phenomena owed no allegiance. He would therefore encourage the Special Rapporteur to develop a title for the topic that conformed more closely to its existing contours, even if they had yet to be precisely delineated. Members of the Commission should assist the Special Rapporteur in that task. As to the ultimate form of the draft, the Commission’s immediate task was to draft a framework instrument of some kind; in his view,

the ultimate form of that instrument need not concern it at the present stage.

21. In regard to the scope of the topic, he endorsed the Special Rapporteur’s view, stated in his fourth report (A/CN.4/373, para. 63), that it should be confined to “physical activities giving rise to physical transboundary harm”. Naturally, at the present stage its outer limits were still blurred, and one of the Commission’s tasks should be to identify more precisely the types of activity or situation that fell within the scope of the topic. For that task, the Commission’s rich debate had been of great assistance.

22. The Special Rapporteur had provided the Commission with three groups of factors to consider in its attempt to define the scope of the topic: the transboundary element; the element of a physical consequence; and the effects of the physical consequence on use or enjoyment. As he saw it, those three elements were vectors which intersected and the Commission was endeavouring to narrow them so that the area covered by the topic could likewise be narrowed. In that context, the Commission should perhaps consider whether the topic should cover, for instance, actions by one satellite or space object in respect of another, whether accidental or otherwise. It might also wish to consider the extent to which radio waves and other forms of energy, referred to in the fifth report (A/CN.4/383 and Add.1, para. 17), should be included, even though that might seem to be an area that touched upon the realm of theoretical physics. In a case decided in the United States of America, an action in trespass had been brought for inconvenience and damage to property caused by imperceptible matter emitted from a factory. The court, relying on a theory of Einstein, had held that the imperceptible matter could be regarded as a physical invasion, in the same way as any physical entry by a defendant onto the territory of a plaintiff. On that basis it would seem that radio waves and other forms of energy that gave rise to a disturbance should fall within the scope of the topic.

23. He shared some of Mr. Riphagen’s concern (1850th meeting) regarding the relationship between the topic under consideration and the law of the sea, and in particular the principles embodied in the 1982 United Nations Convention on the Law of the Sea.<sup>5</sup>

24. He applauded the Special Rapporteur’s efforts to identify situations which would fall within the topic but did not involve a classical transboundary situation of the type dealt with in the *Trail Smelter* case<sup>6</sup>. The Special Rapporteur had said, for instance, that the topic could also cover a situation involving continuous passage, overflight and space objects. In his own view, however, the kinds of situation that would be particularly amenable to treatment and would cause least difficulty were those that could be regarded as involving what had been referred to as “regional land-use planning”, except that the regions in question were bisected by political boundaries.

<sup>5</sup> See 1848th meeting, footnote 4.

<sup>6</sup> *Ibid.*, footnote 10.

25. Mr. Balanda had observed that it was difficult for States which had no common or reciprocal interests to co-operate, and it should be noted that in his schematic outline the Special Rapporteur had described certain procedures which could be very helpful in cases of that kind. In practice, however, States nearly always did have reciprocal interests, simply because it was in their own best interests not to act in total disregard of the interests of their neighbours. There were, for instance, two projects involving the United States and Canada—the Garrison Diversion Project and the Poplar River Project—in which the course of the dealings between the two countries demonstrated that it was in the interests of each of them to come to a mutually satisfactory arrangement.

26. The Garrison Diversion Project involved an attempt to irrigate an expanse of land in North Dakota by pumping water from the Missouri drainage basin system into a reservoir. Canada's difficulty was that it feared that micro-organisms and other living organisms would be pumped along with the water and find their way into Canada, with the result that the fish population and other Canadian species would be destroyed. The first phase of the project had been completed. The second phase, however, involving the pumping of the water into the reservoir, had not been completed, largely in response to a report by the International Joint Commission. The Poplar River Project involved, among other things, the working of an opencast coal-mine in Saskatchewan, which the downstream interests in the United States feared would reduce the quality of the water of the Poplar River flowing into the United States. Following a reference to the International Joint Commission, the Canadian interests had agreed not to allow any significant deterioration in the quality of the water used on the other side of the border. Thus it was not so much a question of an absolute veto as of a shared expectation with regard to the uses and needs on both sides of the border.

27. There was also the *Salzburg Airport* case, in which it had been held by the Austrian Administrative Court that the aggrieved parties across the border in the Federal Republic of Germany who had objected to the proposal to lengthen the runway did not have the right to intervene in administrative proceedings in Austria to challenge the application. The States involved had therefore had to deal with the matter at governmental level.<sup>7</sup>

28. Another question raised by the scope clause was the extent to which a risk-exposed State could avail itself of the procedures provided for in the schematic outline if it believed that the siting of a facility in a border region created an intolerable or serious risk of grave transboundary harm. In his view, the procedures envisaged in the schematic outline would apply to such a situation, and the scope clause itself used the words "give rise or may give rise". In an article on abnormally dangerous activities in frontier areas, Professor Günther Handl, a leading expert on the subject, had concluded that it was generally

not lawful for a State unilaterally to locate in a frontier area an activity involving a major risk of transboundary harm (see A/CN.4/373, footnote 46). One of the authorities relied upon in support of that proposition was the Swiss case *Aargau v. Solothurn*,<sup>8</sup> in which one canton had claimed protection against risks arising from target practice in a border area of another. The court had initially held that the risk-exposed canton was entitled to complete protection from the risk,<sup>9</sup> but had subsequently reversed its own decision in the light of federal legislation enacted later, under which cantons were required to provide rifle-ranges for the military. The court's initial decision none the less went a long way towards illustrating the kind of situation with which the topic might deal and supporting the inclusion within the scope of the draft of activities within the territory or control of a State that created a significant risk of transboundary harm.

29. He agreed with Sir Ian Sinclair (1849th meeting) that some clarification of the concept of "areas" might be helpful. If he understood correctly, the Special Rapporteur intended to restrict the application of the draft to transboundary cases by requiring that the harm must occur within the territory or control of another State. But the question remained whether injury to health, for example, was covered by the notion of "enjoyment of any area". He requested clarification on that point.

30. He agreed with the view expressed by the Special Rapporteur in the fifth report on the concept of "situations" and particularly that there were states of affairs to which the topic applied (A/CN.4/383 and Add.1, para. 31). It might well be that there was no better term than "situations" to describe such states of affairs, but it would be helpful if the concept could be clarified. He was not sure whether the term "occurrence" would cover it, and work on identifying the kind of situation to which the articles should apply would obviously have to continue.

31. With regard to the transboundary element and the extent of the duty of the State to regulate, he was perhaps not so greatly concerned as some other members, since it seemed to him that the Special Rapporteur had anticipated the problem and started to deal with it. It was clear that, for a case to be covered by the topic, the Special Rapporteur would require it to involve a transboundary element and, as stated in the fifth report (*ibid.*, para. 15), such an element might not be deemed to be present where a State imported an inherently dangerous activity. There was, however, a certain dilemma which was well stated in Principle 21 of the Stockholm Declaration (*ibid.*, para. 34), relating to the sovereign right of States to pursue their own environmental policies. Certainly, there should be no question of paternalism in the draft; there was a delicate balance to maintain in that respect.

32. The transboundary element and the extent of the duty to regulate involved a question of imputability, or

<sup>7</sup> See Agreement between the Federal Republic of Germany and the Republic of Austria concerning the Effects on the Territory of the Federal Republic of Germany of Construction and Operation of the Salzburg Airport, of 19 December 1967 (United Nations, *Treaty Series*, vol. 945, p. 87).

<sup>8</sup> Judgment of the Swiss Federal Court of 4 February 1915 (*Recueil officiel*, vol. 41 (part I), p. 126).

<sup>9</sup> *Solothurn v. Aargau*, judgment of 1 November 1900 (*ibid.*, vol. 26 (part I), p. 444).

attribution, of private conduct to a State. It seemed to be a well-established principle that the extent to which a State was answerable for the acts of private individuals was a function of that State's control over the activities in question. Without any other limiting factors, that might still leave room for doubt about the scope of the topic. But at the present stage in the work, his tentative opinion was that the traditional criterion of control, viewed in the context of the Special Rapporteur's three limiting factors, was sufficient. It was a point on which the Commission should continue its work and perhaps even try to introduce some kind of explanation to the effect that attribution or imputability was a function of the ability of a State to control the activity in question.

33. With regard to draft article 5, he believed that the Commission should consider further whether to include international organizations within the scope of the topic. Admittedly, the Special Rapporteur's careful formulation would permit the application of the draft articles to international organizations, but given the ever-increasing involvement of such organizations in activities that might cause transboundary harm, he tended to agree that the Commission might wish to consider including them in the draft in more affirmative terms.

34. As to the elaboration of procedural rules, he noted that there were a number of fundamental principles which would provide the basis for a general approach, such as those contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>10</sup> There was also the duty to co-operate, the precise meaning of which in the context of the topic would have to be refined, as well as the duty to consult and to warn. The Special Rapporteur's approach to the avoidance and resolution of environmental problems was itself epitomized in the basic principle that one State should not do to another what it would not wish to have done to itself. There were also several recent examples of the type of co-operation envisaged in the schematic outline: for example, the Agreement between the United States of America and Mexico on Co-operation for the Protection and Improvement of the Environment in the Border Area, of 14 August 1983,<sup>11</sup> and the Agreement between Canada and the United States of America to Track Air Pollution across Eastern North America, of 23 August 1983.<sup>12</sup>

35. It should, however, be constantly borne in mind that the topic dealt with by Mr. Riphagen picked up where Mr. Quentin-Baxter's topic left off and that, independently of the latter topic, there was a residual rule of wrongfulness which provided the affected State with a safety net. He regretted that so few meetings had been allocated to discussion of the topic and trusted that at future sessions there would be more time to do justice to it.

*Mr. Barboza, Second Vice-Chairman, took the Chair.*

<sup>10</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

<sup>11</sup> *International Legal Materials* (Washington, D.C.), vol. XXII, No. 5 (September 1983), p. 1025.

<sup>12</sup> *Ibid.*, p. 1017.

36. Mr. AL-QAYSI said it was evident that the doubts regarding the viability of the topic had not yet been dispelled, and a critical stage had now been reached. In his fourth report, the Special Rapporteur had confirmed the opinion of some representatives in the Sixth Committee of the General Assembly that "the Commission should take an early decision whether to continue its consideration of the topic" and had said that "1984 is perhaps the earliest and the latest year in which such a decision should be taken" (A/CN.4/373, para. 59). The Commission was therefore duty-bound to answer the question raised by the Special Rapporteur.

37. The Commission's conclusions should be put forward on the basis of what was now being advocated, rather than of what had originally been conceived. In his fourth report, the Special Rapporteur had said that

... It was the study of the origin of State responsibility that gave rise to the study of the present topic; for there were indications in State practice of patterns of behaviour that could not readily be explained by reference to rules of prohibition. ... (*Ibid.*, para. 1.)

Despite the link with State responsibility, however, the present topic was different in nature: it was concerned with liability arising directly from a primary rule of obligation which always depended upon the occurrence of loss or injury, regardless of wrongfulness.

38. In his preliminary report,<sup>13</sup> submitted to the Commission at its thirty-second session, in 1980, the Special Rapporteur had stressed that the main thrust of the topic should be to minimize the possibility of injurious consequences, and to provide adequate redress where injurious consequences did occur, with the least possible recourse to measures which prohibited or hampered creative activities. In that regard, two principles were said to be involved: a standard of care commensurate with the nature of the danger, and guarantees related to the occurrence of injury, rather than to the quality of the act causing injury.

39. In his second report,<sup>14</sup> submitted to the Commission at its thirty-third session, in 1981, the Special Rapporteur had put forward the structure of a broad obligation for a State not to allow activities within its territory or control to cause "substantial", "physical" transboundary harm to other States and their nationals, coupled with a supporting obligation to do whatever might be necessary to make the first obligation effective. A régime had to be constructed providing for a duty of care or protection, composed of obligations of prevention and an obligation to compensate where prevention had proved insufficient.

40. A considerable difference of opinion had arisen in the Commission, however, regarding the validity of the structure presented by the Special Rapporteur, the central principle of which was the duty of care. That duty, in the opinion of several members, did not yet have the status of a rule of customary international law. To others, however, it was a fundamental duty representing

<sup>13</sup> *Yearbook ... 1980*, vol. II (Part One), p. 247, document A/CN.4/334 and Add.1 and 2.

<sup>14</sup> *Yearbook ... 1981*, vol. II (Part One), p. 103, document A/CN.4/346 and Add.1 and 2.

the minimum standard of acceptable behaviour in an age of interdependence. Others, again, saw the topic as a "twilight zone".

41. Those difficulties were not surprising, since the scope of the topic could not be determined, in the absence of a determination of its inner content, on the basis of State practice. The only course open to the Commission had been to venture cautiously into those areas where States had shown a sense of obligation, with a careful eye on progressive development, in the hope of identifying general rules through a pragmatic and empirical examination of the sources, with minimum recourse to rules of prohibition.

42. In its report on its thirty-third session, the Commission had made the following interesting comment:

... The topic is concerned not with a breach of the duty of care—which goes to wrongfulness—but with care as a function of a primary rule of obligation. Under the present topic, the ambit of the duty of care may be a little more far-seeing than in other contexts: it may encompass a duty of reparation at least when it is foreseeable that preventive measures cannot eliminate danger. ...<sup>15</sup>

43. In his third report,<sup>16</sup> submitted to the Commission at its thirty-fourth session, in 1982, the Special Rapporteur set out three basic aims: (a) alignment of the topic with the régime of State responsibility; (b) emphasis on prevention, as well as reparation; (c) a balance between freedom to act and duty not to injure. In addition, he had presented a schematic outline to chart the course of the topic and, in that connection, had stated in his fourth report that

... the motive power of the schematic outline is the duty of the source State, subject to factors such as sharing and the distribution of costs and benefits, to avoid—or minimize and repair—substantial, physical transboundary loss or injury which is foreseeable, not necessarily in its actual occurrence but as a risk associated with the conduct of an activity. That duty is a concomitant of the exclusive or dominant jurisdiction which international law reposes in the source State as a territorial or controlling authority. ... (A/CN.4/373, para. 63.)

44. Three major qualifications had been set out in the fourth report. First, the scope of the topic was to be confined to physical activities giving rise to physical transboundary harm, thereby setting aside, for example, questions that might arise in the economic sector. Secondly, the freedom of action within a State was to be preserved with regard to beneficial activities, but not at the expense of the interests of other States and their citizens. Thirdly, greater account was to be taken of the role of international organizations.

45. He believed he could safely draw a number of conclusions from that background. First, the scope of the topic had become sufficiently limited in regard to content and it was accordingly ready for mature consideration. Secondly, the cardinal issue was not that of wrongfulness or of strict liability, but simply that of equity or fairness, which flowed from the obligation of States to co-operate and maintain good-neighbourly relations. Thirdly, since the poorer and less developed States

were usually those which sustained physical transboundary harm, legal regulation constituted the best guarantee for their development. Fourthly, the crucial question was that of the political will of States; hence it was the duty of the Commission as a body of independent legal experts, particularly when studying areas in which progressive development of the law was inevitable, to emphasize general and common interests rather than special and single interests. Fifthly, the main thrust of the Special Rapporteur's work was a strong plea for co-operation between States and good-neighbourly relations.

46. Those conclusions led him to believe that the topic was viable. It was, indeed, vital for the interests of all States, since it involved modalities for the resolution of conflicts, and thus made for a peaceful, orderly and stable world. Such a topic brought the Commission very close to modern realities, in regard to which the need for developing innovative legal rules and modalities for conflict resolution far outstripped dogmatic doctrines and traditional views. There was a maxim of Islamic law which could be translated as "No harm and no harming". It was interesting to note the interrelationship between the static and the dynamic aspects of harm in that maxim. To paraphrase it in more modern language, one might say: "Harm out of wrongfulness is one thing, and harming not necessarily out of wrongfulness is quite another."

47. The five draft articles submitted in the fifth report (A/CN.4/383 and Add.1) appeared on the whole to be a sound basis for discussion. Draft article 1 was the key article of the group, since it dealt with the scope of the topic. The substance was clear, but the wording needed further reflection. In particular, he shared the doubts of other members about the use of the word "situations". The Special Rapporteur had pointed out the need to deal not only with activities, but also with situations, and had indicated that situations meant "the existence of a state of affairs, within the territory or control of the source State, which gives rise or may give rise to physical consequences with transboundary effects" (*ibid.*, para. 31). The Special Rapporteur had gone on to explain that those consequences could have either natural or man-made causes. But if a situation was due to man-made causes, it constituted an activity and was covered by that term. There remained the case of a natural situation, which required clarification. The suggestion made by Sir Ian Sinclair (1849th meeting) that the term "situations" should be replaced by "occurrences" was perhaps the best, since it would cover most of the cases contemplated, including anticipated occurrences and also many of the examples given by the Special Rapporteur in his fifth report (A/CN.4/383, para. 32).

48. The term "areas", as used in draft article 1, was vague and needed clarification. The reference to "areas within the territory or control" of a State could connote a right or an interest, or alternatively a means for the exercise of a right or an interest. When it came to using the word "enjoyment", however, a reference to rights or interests would appear to be necessary. As to the term "affecting", the transboundary effect of the physical

<sup>15</sup> *Yearbook ... 1981*, vol. II (Part Two), p. 149, para. 183.

<sup>16</sup> *Yearbook ... 1982*, vol. II (Part One), p. 51, document A/CN.4/360.

consequences was fundamental to the operation of the rules to be drafted, since without such an effect those rules would not come into play. As the topic was predicated upon the duty to avoid, minimize or repair transboundary harm, a mere effect would not suffice, since it might involve only tolerable harm, or even none at all.

49. He would refrain for the time being from commenting on draft article 2, since its content would largely depend on the form of later articles. Articles 3 and 4 were essential because they emphasized the residual character of the draft. Those two articles should appear early in the draft, so as to allay the anxieties of States which were already parties to treaty régimes, or were likely to construct treaty régimes tailored to their own particular needs. On draft article 5, he reserved his position for the time being.

50. In regard to the burden of sharing costs and benefits, it was important to consider the interests and needs of developing countries. Under the duty of co-operation, the level of action required of States depended to a large extent on their level of development. The overall beneficial results that would ensue from the duty of co-operation should not be sacrificed to notions of strict equality in cost-sharing at a time when the potential partners were not in fact equal in economic, financial, technological or industrial terms.

51. Law aimed at the regulation of conduct. Axiomatically, it should embody systems of conflict resolution. Such systems might antedate a conflict, in the sense that they were constructed in an anticipatory fashion. On the other hand, they might post-date a conflict and be constructed in a fashion related to the interplay of specific facts. The present topic seemed to be in the first category. The best the Commission could achieve as a final product was a universally accepted set of procedural modalities for the enhancement of co-operation and good-neighbourliness among States.

52. Lastly, he paid a special tribute to the quality of the work done by the Special Rapporteur and to the officers of the Secretariat responsible for the preparation of the very useful survey of State practice (ST/LEG/15).

*Mr. Yankov resumed the Chair.*

53. Mr. BARBOZA said that he had been among those who had expressed doubts about the desirability of continuing the study of the topic, and at the thirty-fourth session, in 1982, he had said that the Commission should take a decision on the way in which it intended to deal with the topic and inform the General Assembly accordingly.<sup>17</sup> In the Special Rapporteur's early reports, the topic had been approached from a rather philosophical point of view and had not yet been precisely delimited. Furthermore, it had been difficult to form an exact idea of the extent of the changes proposed. The schematic outline contained in the third report, which all members of the Commission had welcomed, had provided a more complete picture of the way in which the Special Rapporteur intended to develop the topic. It was because the schematic outline had been rather far removed from the

Commission's original intentions that in 1982 he had thought it preferable to seek the views of the General Assembly. However, the Commission had decided not to adopt that course, but to encourage the Special Rapporteur to continue on the path he had chosen, and the General Assembly had confirmed that approach. Thus the metamorphosis of the topic had now become official.

54. That being so, the Commission was bound to continue its study and was not required to take the decision called for by the Special Rapporteur in his fourth report (A/CN.4/373, para. 59). The topic had aroused a great deal of interest, both in the Commission and in the General Assembly. It concerned transboundary harm which resulted or could result from activities which were not yet regulated, and consequently not prohibited, and which were carried out within the territory or control of a State. In his fourth report (*ibid.*, footnote 8), the Special Rapporteur gave a number of examples of activities of that kind. While it was true that many of them were regulated by international agreements, others were not yet so regulated, and it was to be expected that rapid technological development would lead to further activities that would not be regulated from the outset. It followed that the topic was of a residual nature: it dealt with activities which were not regulated and with the unregulated aspects of regulated activities.

55. Sections 2 and 3 of the schematic outline did not appear to propose any real obligations, the Special Rapporteur having deliberately tried to find procedures that were as flexible as possible. In his own terms, he was placing at the disposal of States an "apparatus" through which certain rules could be distilled (*ibid.*, para. 24). He did, however, provide for the duty of the State within whose territory dangerous activities took place to provide the affected State with all available information on those activities and on their foreseeable consequences; and the proposed measures also had to be communicated to the affected State. In his view, that information phase was essential. The schematic outline then proposed what appeared to be a duty to agree to the establishment of fact-finding machinery to gather information, assess its implications and, to the extent possible, recommend solutions.

56. The setting up of international commissions of inquiry was not much in favour, despite the undeniable advantages of establishing facts at the international level, as was shown, for example, by the *Dogger Bank* case.<sup>18</sup> The establishment of fact-finding machinery could often prevent a dispute from degenerating into a dangerous conflict. Many international disputes were due to differences of opinion on the facts, and impartially conducted inquiries could obviously help to remove many misunderstandings.

57. Section 2, paragraph 6 (b), of the schematic outline stated that the report of the fact-finding machinery "should be advisory, not binding the States concerned". That formula seemed rather too schematic and should be

<sup>17</sup> See *Yearbook ... 1982*, vol. I, p. 290, 1744th meeting, para. 32.

<sup>18</sup> *The North Sea or Dogger Bank case between Great Britain and Russia*, findings reported 26 February 1905 (J.B. Scott, ed., *The Hague Court Reports* (New York, Oxford University Press, 1916), p. 403).

developed. A report on facts could not be advisory; the facts would have to be accepted by the parties. It might even be desirable to make the assessment of the consequences of those facts more binding. Moreover, section 2, paragraph 8, considerably weakened the procedure by stating that failure to take any step required by the rules contained in the section did not in itself give rise to any right of action. Since the draft did not provide for the establishment of a tribunal, it might well be asked what right of action was meant. Must it be concluded that, in that case, States would be deprived of a remedy available to them under general international law?

58. According to section 3, paragraph 1, if the fact-finding procedure gave rise to difficulties or if the report of the fact-finding machinery so recommended, the States concerned had a duty to enter into negotiations with a view to determining whether a régime was necessary and what form it should take. That duty to negotiate, which the Commission had already encountered in its work on the topic of international watercourses, was justified. However, paragraph 4 of section 3, which again deprived States of any right of action, put that general duty seriously in doubt.

59. The provisions relating to the prevention of harm, taken as a whole, might therefore be more binding. As the Commission had found when studying the topic of international watercourses, prevention was important, because many disputes arose before the dangerous activities were actually carried out. At that stage, the disputes were minor ones, but they could in time produce irreversible situations, especially if large investments had been made in infrastructure or interests had been created. The reason why the Special Rapporteur had not wished to impose any real obligations on States was clearly that the topic did not come under the régime of international liability so long as no harm had been done. Nevertheless, as the Commission had modified the nature and scope of the topic, it could consider introducing real obligations into section 3. In fact, the only rule which seemed to come close to international liability was the rule stated in section 4, paragraph 2, that "Reparation shall be made by the acting State to the affected State in respect of any such loss or injury". That was an elementary principle of international relations, which the Special Rapporteur subordinated to the "shared expectations" of the States concerned. That expression would have to be precisely defined, but the fact remained that that was the principle on which the whole draft should be based, even if it meant engaging in progressive development of international law.

60. Not having had time to study the fifth report (A/CN.4/383 and Add.1) with all the attention it deserved, he would only say that it might be better not to refer draft articles 1 to 5 to the Drafting Committee until the Commission had been able to study them together with the succeeding articles. Article 1, which affected the whole draft, considerably restricted its scope by confining it to physical consequences. That limitation not only had the effect of dividing the topic into two, but also raised the problem of defining physical consequences. Was it to be inferred that economic injury, or injury of a social nature, must be left out of account?

61. In conclusion he expressed the hope that the Commission, together with the Special Rapporteur, would succeed in drafting a set of articles that would meet the international community's expectations, now that the need to study the topic had been established.

*The meeting rose at 1.05 p.m.*

## 1852nd MEETING

*Monday, 2 July 1984, at 3 p.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*later:* Mr. Julio BARBOZA

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Ushakov.

### Tribute to the memory of Mr. Erik Castrén, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Erik Castrén, who had been a distinguished member of the Commission from 1962 to 1971.

*At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Erik Castrén.*

**International liability for injurious consequences arising out of acts not prohibited by international law (*continued*)** (A/CN.4/373,<sup>1</sup> A/CN.4/378,<sup>2</sup> A/CN.4/383 and Add.1,<sup>3</sup> A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem*.

ARTICLE 5 (Cases not within the scope of the present articles)<sup>4</sup> (*continued*)

2. Mr. EL RASHEED MOHAMED AHMED stressed the great difficulty of the topic and congratulated the Special Rapporteur on his success in the arduous task of delimiting its frontiers with a fair degree of certainty. At the thirty-fourth session, he had supported the proposal by Mr. Reuter that the aim of the study should be to establish a framework agreement.<sup>5</sup> That line of thought appeared to be gaining ground and had been supported by a number of members. The Special Rapporteur himself, after a careful analysis and evaluation of State practice, had arrived at the following conclusion in his fourth report:

... Again, it has often enough been said that, while States continue to give attention to the need to prevent transboundary losses and injuries, they have signally failed to develop a sense of obligation to make good the losses and injuries that have not been prevented. ... (A/CN.4/373, para. 46.)

That approach was both wise and practical. States were simply not prepared to subject themselves to legal obligations predicated on inchoate principles of law, however equitable or logical those principles might be. Accordingly, the thrust of the subject was to reduce the need for reliance on general principles of prohibition, so as not to restrict the free exercise of national sovereignty.

3. The major question remained, however, whether there could be an obligation without fault. It was evident from the discussion in the Sixth Committee of the General Assembly that no one was prepared to go so far. There had, however, been a tendency on the part of the majority to endorse the aim pursued by the Special Rapporteur, which was to devise a scheme whereby States could find reasonable solutions to the problems that might arise. The Special Rapporteur had very appropriately pointed out:

The first aim of the present topic is to induce States that foresee a problem of transboundary harm to establish a régime consisting of a network of simple rules that yield reasonably clear answers; those simple rules may be rules of specific prohibition or rules of authorization subject to specific guarantees. The second aim of the present topic is to provide a method of settlement that is reasonably fair, and that does not frighten States, when there is no applicable or agreed régime. ... (*Ibid.*, para. 69.)

The first of those aims was predicated upon the general duty to co-operate—a well-established principle of international law embodied in Article 1 (3) of the United Nations Charter.

4. Attention had been drawn to the doctrine of abuse of right and, albeit with certain misgivings, he shared the view that that doctrine deserved consideration. Principles of internal law, like that of abuse of right, could perhaps throw some light on the scope of the present topic. In refuting the principle of strict liability, the Special Rapporteur had stated that, in his opinion, the most fundamental reason was

... the need to avoid even the appearance of putting the principle of strict liability on the same level as the responsibility of States for wrongful acts or omissions. Nothing should be allowed to threaten the unity of international law. ... (*Ibid.*, para. 66.)

Notwithstanding that remark, the principle of abuse of right would appear to be relevant in clarifying the concept of the duty to make good whatever wrong had been caused to a neighbour as a consequence of the unreasonable use of property by its owner.

5. As propounded by Islamic jurists, the doctrine of abuse of right was slightly different from the European law concept. Under Islamic law, an owner was not allowed to use his property in such a way as to injure or annoy a neighbour. The term used in Arabic was not the equivalent of “abuse of right” but indicated rather the exercise of a person’s right in a stubborn or excessive manner. At the thirty-fourth session, he had had occasion to refer to a residual principle of Islamic law which indicated the pattern of behaviour that an individual was expected to observe.<sup>6</sup> The doctrine relating to the excessive use of a right was a corollary to that principle.

6. Mr. Balanda (1851st meeting) had suggested exploring the whole domain of law to see whether there were any rules which might be useful in delineating the present topic. As he himself had pointed out, such rules could be of value, even if only in identifying methods for solving problems.

7. Referring to the draft articles, he noted that the Special Rapporteur had emphasized the physical consequences of transboundary effects. He was not at all certain that the term “physical” was wide enough to comprise all the damage or injury that could be caused; he thought the term “material” would be more appropriate. He also had doubts as to how evidence could be established to prove the claim of the affected State. If the source State alleged that the chain of causation had been interrupted by human activity, it was difficult to see how that fact could be proved, or how the allegation could be refuted.

8. As to the suggestion that the word “situations” should be replaced by “occurrences”, he found the first term preferable, because it was broader than the second. The term “occurrences” would not be broad enough to cover the case of transboundary harm caused by pests such as locusts or flies, to take the example given by Mr. Reuter (1849th meeting). With regard to the expression “territory or control”, the argument had been advanced by Mr. Balanda that control might not be feasible in a country like Zaire. But that argument could be double-edged, because countries like Zaire and Sudan were more likely to be affected States than source States. One only had to think of outer-space activities such as those which had led to the *Cosmos 954* satellite case (see A/CN.4/373, para. 29) or of a nuclear-powered vessel sailing in the waters of one of those countries. The fears expressed by Mr. Balanda were not without reason, but the Special Rapporteur had given an assurance that the definition was open-ended and responsive to change.

<sup>4</sup> For the texts, see 1848th meeting, para. 3.

<sup>5</sup> *Yearbook ... 1982*, vol. I, p. 285, 1743rd meeting, para. 46.

<sup>6</sup> *Ibid.*, p. 284, para. 44.

9. Mr. DÍAZ GONZÁLEZ associated himself with the congratulations addressed to the Special Rapporteur, who had first endeavoured to find a foundation for the topic proposed by the General Assembly and to build a framework suitable for the elaboration of rules conforming to the Assembly's directives. He had then gradually delimited the topic until, in his third report and again in his fourth report (A/CN.4/373), he had submitted a schematic outline, which had been supplemented by his fifth report (A/CN.4/383 and Add.1), which contained draft articles. In his fourth report, which the Commission had not been able to examine at the previous session, the Special Rapporteur had asked the Commission to decide, in 1984 at the latest, whether the study of the topic was to be continued or abandoned (A/CN.4/373, para. 59).

10. The Special Rapporteur had, however, finally proceeded on the assumption that his fourth report had been approved, and he had submitted a fifth report containing draft articles based on the first part of the schematic outline. There appeared to be no objection to that procedure, especially as in the meantime the Secretariat had published an important study (ST/LEG/15) which reviewed, almost exhaustively, all the agreements, resolutions and other relevant instruments relating to the topic as now defined by the Special Rapporteur. As stated in that study (*ibid.*, para. 12), the topic related to "activities concerning the physical use and management of the environment". As the Special Rapporteur was, in effect, proposing a new topic, it would be advisable for the Commission to ask the General Assembly whether the title should not be amended to read: "Liability of States for transboundary physical damage caused by acts not prohibited by international law".

11. The fifth report dealt entirely with the environment and, in the Special Rapporteur's view, the draft articles which the Commission was to prepare could probably contain only residual rules in relation to those already embodied in international agreements. The Commission would have to take care that its work on the topic did not duplicate that on the non-navigational uses of international watercourses. In its study, the Secretariat indicated the degrees of liability and specified that the rules to be drafted would not be legal rules, but principles derived, for instance, from General Assembly resolutions, the Stockholm rules or decisions adopted by UNEP concerning the environment and habitat. Most members of the Commission who had spoken on the fourth report had not mentioned the decision which the Special Rapporteur had requested the Commission to take during the current session. Personally, he was in favour of continuing the study of the topic, which was bound to arouse great interest, especially as it was now delimited.

12. In the schematic outline, the Special Rapporteur had used the expression "shared expectations", which required clarification. The draft articles were necessarily very provisional. Article 1, which defined the scope of the draft articles, stated in the Spanish version that they applied to activities and situations *que se verifiquen* (which occur) within the territory or control of a State. That expression contained an idea of verification which

had no equivalent in the original English text. Moreover, the idea of "situations" was rather too broad. With regard to the words "activities and situations... which give rise or may give rise to a physical consequence", it should be noted that, for an activity or a situation to cause damage, it must be such that its physical consequences could be determined. Hence one could not speak of a hypothetical physical consequence. In relations between States there were harmful non-physical activities which were lawful. For instance, a State could lawfully raise *ad libitum* its customs duties on imports of products from the third world, to the point of bringing ruin on a particular developing country.

13. On the other draft articles he had no comment to make, except that article 5 was probably premature. While he hoped that the Special Rapporteur would be able to submit concrete proposals to the Commission at its next session, he still believed that, before continuing the study of the topic, the Commission should complete its work on State responsibility and on the law of the non-navigational uses of international watercourses.

14. Mr. LACLETA MUÑOZ said that he was among those who had never questioned the value and importance of the topic and considered that it would contribute to the progressive development of international law. True, it was not easy to identify in international law problems which had long arisen in internal law. The topic comprised activities which were not prohibited by international law, but which involved identifiable risks and damage. In dealing with the subject, there was some danger of becoming absorbed in the prevention of damage; but as soon as prevention machinery was established, non-compliance with the rules in force constituted a wrongful act generating responsibility, which produced a situation falling within another topic being studied by the Commission, namely State responsibility. If there were a general obligation not to cause damage, all damage would be unlawful and the study of the topic would serve no purpose. In Spain, the former highway code had not established the causal responsibility of a driver, but in order that an innocent victim should not be deprived of compensation, it had provided that every driver must always be in control of his vehicle. It was probably a step forward to consider that, in international law, all acts causing damage were not wrongful acts.

15. With regard to the expression "activities and situations" used in draft article 1, he wondered whether what was harmful was the concrete act or the activity in the course of which it was performed. It was true that the terminology was not the same in French as in Spanish, even in the title of the topic. It was possible to conceive of an act or an activity which was not wrongful but caused damage, or of activities which were not prohibited but, if continued without interruption, had injurious consequences that appeared later. That was probably the case to which the word "situations" applied.

16. In view of the complexity of the topic and the need to establish the existence of a transboundary consequence, it was very difficult to define the terms appearing in draft article 2. The expression "territory or control" was defined, in relation to a coastal State, as ex-

tending to “maritime areas in so far as the legal régime of any such area vests jurisdiction in that State”. Rather than referring to “maritime areas” it would be better to speak of “maritime zones”, in so far as the coastal State was competent in certain matters; for the contemporary law of the sea gave the coastal State differing degrees of jurisdiction over various maritime zones.

17. In the next subparagraph, the expression “right of continuous passage or overflight” was not satisfactory, because in the contemporary law of the sea the expression “right of continuous passage” had a very specific meaning. It would be better to refer in that subparagraph to “ships, aircraft and space objects ... in the maritime territory or airspace of any other State”. It might also be asked whether, if their presence in the maritime territory or airspace was not lawful, all the acts performed would be wrongful.

18. Draft articles 3 to 5 did not call for any comment at present. Such provisions seemed to be premature, since they generally appeared at the end of draft articles.

*Mr. Barboza, Second Vice-Chairman, took the Chair.*

19. Mr. RAZAFINDRALAMBO said that, in view of the exceptional importance of the topic, it was regrettable that the discussion had been held rather hastily and that some of the documents had so far been distributed only in English—in particular, the excellent Secretariat study (ST/LEG/15). Moreover, as the French version of the Special Rapporteur’s fifth report had been distributed late, his comments on it could only be of a preliminary character.

20. The work of the Special Rapporteur and the Secretariat showed the richness and scope of the practical applications of the principles of the international liability of States, and justified the encouragement given to the Special Rapporteur and the efforts he had made to produce a schematic outline and viable provisions. In studying acts which were not at present prohibited but were about to be so, the Special Rapporteur was running two risks: either, as a result of over-strict application of the inductive method, he might encroach upon fields already covered by conventions on matters that were related, but specific, or came within subjects entrusted to Mr. Riphagen or Mr. Evensen as Special Rapporteurs; or he might see his subject of study shrink because acts hitherto considered lawful became unlawful as a result of the progress of science and technology.

21. Of course, the Special Rapporteur wished to codify the whole of the régime of State liability. Although he recognized that, outside the régime of responsibility for wrongful acts, there was only the régime of strict liability, the Special Rapporteur did not wish to adopt the latter régime in order to conform to the views of the majority of members of the Sixth Committee of the General Assembly. The régime he proposed was based on the practice of States in regard to transboundary damage and consisted in giving effect to the duty to avoid, minimize or repair transboundary loss or injury—that was to say, the obligation to co-operate—emphasizing the link between prevention and reparation.

22. The Special Rapporteur had kept to transboundary problems concerning the physical environment and had left aside the delicate problems that arose in the economic sphere, in particular loss or injury due to economic causes. In his fourth report (A/CN.4/373, para. 14), he said that the loser in a race “must attribute his loss to his own lack of prowess”, although there were “rules of fair play that have to be observed even in the running of races”. That wording seemed to refer to economic pressures; and the economic element could not be left entirely out of account even in regard to the physical use of territory when it had harmful economic consequences. In that connection he referred to the 1964 Finnish-Soviet Agreement concerning Frontier Watercourses, mentioned in the fifth report of the Special Rapporteur (A/CN.4/383 and Add.1, para. 24), and to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters, mentioned in the Secretariat study (ST/LEG/15, para. 51). In view of those limitations, it might be asked what attraction the draft articles would have for States in general and for developing countries in particular.

23. The obligation to co-operate had sometimes been regarded as a sort of procedural obligation which had no marked legal character. It might also be asked whether the topic lent itself to the statement of precise and binding legal rules, and whether the Commission should not confine itself to drafting model rules or even a code of conduct. Even the co-operation procedures suggested by the Special Rapporteur would probably not be found entirely satisfactory. In the sphere in question, co-operation could be interpreted by some developing countries as encouraging a tête-à-tête that was dangerous and in any case frustrating.

24. It was difficult to see how a balance could be established between the interests of the source State if it was industrialized, and those of the affected State if it was a developing country. If the source State was a developing country, two situations might arise. In the first, it was directly responsible for the acts complained of, but often had only used an imported technology that was insufficiently mastered or had been badly installed by the technology-exporting country or by an entity under its control. In the second situation, it was merely an undertaking situated in the territory of a developing country which had carried out the injurious activity; such undertakings were often companies formed with imported capital. Various considerations raised the problem of the liability of the State supplying the technology, especially if that State was itself operating on the territory of another State as in the case of the establishment of foreign bases. The fifth report (A/CN.4/383 and Add.1, para. 12) seemed to provide reassuring solutions to those problems.

25. Referring to the draft articles under consideration he noted that, unlike article 3 of part 1 of the draft on State responsibility,<sup>7</sup> draft article 1 did not mention omissions. It would probably be too bold to assume that the term “activities” included omissions, as did the term

<sup>7</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 30.

“conduct” used in article 3 of part 1 of the draft on State responsibility. Moreover, certain practices mentioned in the Secretariat study (ST/LEG/15, para. 22) related to inactivity. As to the term “situations”, if, as indicated in the fifth report (A/CN.4/383 and Add.1, para. 31), it referred to the existence of a state of affairs, it seemed preferable to terms such as “events” or “occurrences”, which excluded the case of a pre-existing state of affairs. In the French text of draft article 1, it would be better to refer to situations *qui existent* rather than to situations *qui se produisent*. The French expression *conséquence matérielle* did not perhaps fully render the idea of a physical link, physical event or physical cause, which was the basis of the proposed régime; the English expression “physical consequence” seemed to convey that idea better.

26. He would comment later on the terms defined in draft article 2. Draft articles 3 to 5 appeared to be acceptable as to substance, but would require careful study. The principle stated in article 3 that the draft articles would apply in relations between States parties to another international agreement was not in conformity with the Special Rapporteur’s statement in the fifth report, namely that the draft articles could not “take the place of the more specific agreements which it is their main objective to promote” (*ibid.*, para. 48). Perhaps it would be advisable to amend the last part of article 3 to read as follows:

“the present articles shall, in relations between States parties to that other international agreement, only apply subject to that other international agreement”.

In draft article 4, the Special Rapporteur might specify in what way the fact that the articles did not specify circumstances in which the occurrence of transboundary loss or injury arose from a wrongful act or omission of the source State was without prejudice to the operation of any other rule of international law. In draft article 5, which referred to international organizations, subparagraph (a) was in conformity with subparagraph (b) of article 3 of the 1969 Vienna Convention on the Law of Treaties.

27. Mr. EVENSEN said that the difficulties experienced by the Commission stemmed from the manner in which the topic had been formulated, as was illustrated by the title itself. The Commission was concerned with injurious consequences arising out of “acts not prohibited by international law”; but international law had developed to a point where many of the acts causing damage or injury were already prohibited and consequently fell outside the topic.

28. It was quite clear that the law of international watercourses had developed to the point of establishing legal principles that required an international watercourse to be shared between watercourse States in a reasonable and equitable manner, based on good faith and good-neighbourly relations. He also firmly believed that the principle stated in draft article 9 submitted in his second report on the law of the non-navigational uses of international watercourses (A/CN.4/381) was a prevailing principle of international law. That article read:

A watercourse State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to an international watercourse that may cause appreciable harm to the rights or interests of other watercourse States, unless otherwise provided for in a watercourse agreement or other agreement or arrangement.<sup>8</sup>

29. He therefore maintained that international watercourse law was not a topic which, in principle, came under the title of the present topic. Acts which caused appreciable harm to other watercourse States constituted violations of international law and clearly could not be classed as “acts not prohibited by international law”. It would only weaken the established principles of watercourse law to try to subsume that law under the heading of the topic under study.

30. Another issue which had been taken up as pertaining to the present topic was pollution. But pollution which caused serious transboundary harm, or harm to the common heritage of mankind, was prohibited by international laws. That followed from the maxim *sic utere tuo ut alienum non laedas* and also from the 1972 United Nations Declaration on the Human Environment (Stockholm Declaration), which clearly took it for granted that “activities causing damage to the environment of other States or of areas beyond the limits of national jurisdiction” were not permissible under international law. An example was provided by Principle 21 of the Stockholm Declaration quoted by the Special Rapporteur (A/CN.4/383 and Add.1, para. 34). There were many multilateral and bilateral treaties which testified to that state of the law. For instance, in the 1982 United Nations Convention on the Law of the Sea, part XII dealt with protection and preservation of the marine environment; he believed that its provisions had become, or would become in the near future, basic principles of international law.

31. In his second report, he had prepared paragraph 1 of draft article 23 (Obligation to prevent pollution) in the belief that it, too, expressed prevailing principles of international law, albeit in a form suitable for a general framework agreement. That paragraph read:

1. No watercourse State may pollute or permit the pollution of the waters of an international watercourse which causes or may cause appreciable harm to the rights or interests of other watercourse States in regard to their equitable use of such waters or to other harmful effects within their territories.<sup>9</sup>

32. The *Trail Smelter* arbitration,<sup>10</sup> often mentioned in connection with the present topic, did not constitute a decision on an act or on activities permissible under international law. Its significance was just the opposite, for the tribunal had held that pollution of a magnitude that caused serious transboundary harm was prohibited by international law. The Special Rapporteur was not unaware of that fact, as could be seen from his fourth report (A/CN.4/373, para. 25). The same applied to weather modification activities, changes in the biosphere or in the general ecology of a region, in so far as they had harmful transboundary effects. Such activities could on

<sup>8</sup> See 1831st meeting, para. 1.

<sup>9</sup> *Ibid.*

<sup>10</sup> See 1848th meeting, footnote 10.

no account be regarded as permissible under international law.

33. Any modern regulation or progressive development of international law which stressed the interdependence of different regions and the need for closer co-operation to solve global and regional problems clearly fell outside the topic under study. To the extent that restrictions and regulations were established, the activities concerned were regulated by international law and any action in breach of such regulations would no longer be permissible. It was therefore necessary to determine the main direction which the Commission's work should take.

34. In his view, the main purpose of assigning the present topic to the Commission, despite its somewhat unclear contours, had been to request it to deal with certain problems arising out of developments now confronting the world. Those developments were: first, the modern technological revolution, especially that following the Second World War; secondly, the advent of the nuclear age; thirdly, the advent of the space age; and fourthly, perhaps, the new accessibility of the deep ocean floor.

35. Those main developments had placed the world in an entirely new situation, with highly promising, but equally ominous possibilities for the well-being and future of mankind. Some of those possibilities would come under the heading of extra-hazardous activities or pertain to the quagmire of an uncontrolled nuclear age. Questions relating to armaments would, however, fall outside a realistic conception of the Commission's task. The advent of the space age had had repercussions for mankind which would call for principles of co-operation and regulation of the common heritage.

36. Turning to the draft articles, he said that he had had some difficulty in evaluating their underlying principles, since their true meaning could be clarified only by the subsequent articles. The expression "territory or control", in article 1, was perhaps not adequate, and the definition of that expression in article 2 did not alleviate his concern. If the intention behind the phrase "affecting the use or enjoyment of areas within the territory or control of any other State" was to confine the activities to such areas, he feared that it could have unacceptable consequences. Under basic principles of international law, the expression "territory or control" would apply *inter alia* to the territorial sea, to the territorial airspace and to ships and aircraft. But what about the economic zone, the airspace above that zone, the high seas and their airspace and outer space in general? More generally, he wondered whether the draft articles themselves should apply only to the very restricted areas and objects described as being under the territory or control of the affected State. What about the high seas, including the 200-mile economic zone and the continental shelf used for purposes other than exploration for and exploitation of natural resources? And what about the Antarctic, the permanently frozen areas of the North Pole and outer space?

37. In article 2, paragraph 1 (b), the meaning of the expression "continuous passage or overflight" was difficult to grasp. If the intention was to refer to "innocent

passage", then that was the term that should be used. He also had difficulty with the term "maritime territory". Did it mean the "maritime areas" referred to in subparagraph (a) or did it mean only the territorial sea? Further clarification was required. The provision relating to a "State of registry" was rather difficult to understand. If the implication was that vessels registered in a coastal State were subject to the legislation of that State, he thought the point was quite clear under general principles of international law. He therefore assumed that that provision had a different intention.

38. He suggested that discussion of articles 3 and 4 should be postponed. So far as article 3 was concerned, he doubted the wisdom of relegating the draft articles to the lowest rank in the hierarchy of conventions and agreements before their exact scope and content were known.

39. With regard to article 5, he wondered whether it was wise, at the present early stage, to decree that the draft articles did not apply to the rights and obligations of international organizations. That might run counter to clear trends in the modern law of nations, which accepted international organizations as subjects of international law in regard both to rights and to obligations. Indeed, many of the activities to be regulated by the draft articles would be activities conducted by international organizations rather than by individual States. An obvious example was the telecommunications satellites to be launched and operated by telecommunications unions. In addition, the functions and powers of organizations such as the European Economic Community were such that it would seem only natural to include them within the scope of the draft.

40. Mr. QUENTIN-BAXTER (Special Rapporteur) said he was grateful for the words of encouragement offered by members, and also for their words of caution. He would derive profit from the debate, although it would be difficult for him to do full justice to it in his summing-up in the limited time available. Referring to Mr. Evensen's comments on the *Trail Smelter* arbitration, he pointed out that the finding as to wrongfulness had been based on an assessment of the technical and economic aspects of the situation and of the relative interests of the parties. The tribunal had also found that Canada's duties were not confined to repairing the harm that had occurred wrongfully, but extended to providing reparation for any future harm that might occur without a wrongful act on Canada's part. Such harm could have occurred, for example, because the standards which the tribunal had considered to be adequate could have proved, in practice, to be inadequate, or because those who had been engaged in the conduct of the enterprise might not have performed their duties skilfully enough to prevent accidental pollution. It was an important feature of that decision, and indeed of the topic before the Commission, that States should be encouraged as a matter of policy to do everything in their power to reduce the issues that remained at large to particular rules—if possible, to simple rules of what was right and what was wrong—or at least to provide criteria on the basis of which their representatives could reach a decision. By the same token, the

purpose of the topic was to encourage States to make agreements and the main focus of his work, therefore, like that of Mr. Evensen or of the work on succession of States in respect of matters other than treaties, was on the possibilities of such agreement.

41. As Mr. Ushakov (1849th meeting) had rightly pointed out, the enormous problems affecting the physical universe and man's relation to it could not be resolved by rules of liability, but called for agreement between States. In such areas, progress could be achieved only through agreements under which, either on a regional or on a global basis, States accepted some measure of responsibility not to do a particular thing or to take account of the relevant criteria. The issues involved were very much at large and could not be reduced to a precisely measured obligation of one State towards another. But it was quite a different matter to say that such issues did not fall within the realm of law.

42. One thing that had emerged fairly clearly in the debate was that lawyers, along with scientists, technologists and politicians, did have a role to play. If they failed to provide the means for progress, together with the practitioners of other disciplines, the role of law would tend to be a negative one. They had suffered to some extent from the conception that prevention and reparation were totally different matters, a view encouraged by certain aspects of the law of State responsibility and, in particular, by the need for attribution; as a description of the way in which States behaved, however, that conception was woefully inadequate. States attempted to perform their duties towards one another by preventing harm, in so far as possible, or else by repairing it; far from the obligation of reparation being bigger than the obligation of prevention, the opposite was usually the case. To take, for example, the case of the carriage of oil by sea, a certain amount could be done by insisting on certain minimum standards, but when the point was reached at which the technical and cost limitations produced a decreasing return for an increasing expenditure, industry and the States concerned found it expedient to adopt a régime that provided for a greater element of reparation to compensate for what was lacking in terms of perfection of prevention.

43. It had always seemed to him that conventional modes of legal thinking caused difficulty when it came to the principle of strict liability. Although it appeared to be a principle of the utmost rigour, it had in fact been used to provide the basis for a limitation of liability in many régimes, such as that governing the carriage of oil by sea. It therefore seemed entirely reasonable to make the application of the principle of liability extend backwards into the whole range of prevention and reparation, and also to stress that reparation was more than compensation: when possible, it meant putting things right and reverting to first principles as a guide to future conduct.

44. If the scope of the topic remained as broad as it was at present, very large areas would be covered and it should not be thought that it would be possible to make rules that could be applied precisely and mechanically.

There was something to be said, however, for the power of ideas, for in law, as in philosophy or any other learned discipline, the manner of looking at things sometimes had more influence than the precise rule to be applied in a given situation.

45. His emphasis, therefore, had been on providing States with every encouragement to make agreements. But if they did not reach agreement, and if the matter was one that could be measured in terms of a specific obligation between two States, there should be a set of principles to settle the same kind of questions that the two States might have taken into account had they made an agreement. He did not think that that idea was lacking in legal quality. He was not prepared to be as categorical as Mr. Evensen in suggesting that transboundary harm attracted rules of prohibition. Indeed, it was one of his objectives that the areas with which he was concerned should not attract such rules. So far as possible he wished to preserve the right of each State to act freely, but also to be the judge of what was owed to other people. If it could not settle a matter by agreement it should at least be able to defend the position it had assumed unilaterally.

46. Applying those generalities to certain of the points raised, he explained that he had not provided that failure in a duty of notification would be a breach of an obligation, or that failure to establish a régime would involve a right of recourse by the other party, simply because it was necessary to consider what would be effective. In many cases States making agreements would provide, quite properly, for a mandatory duty to notify. What, however, was to be gained in a general context by making such conduct wrongful? And what would be the measure of compensation? The answer was that the ultimate gain would be quite small, but the obligation imposed upon the State would be quite large.

47. Mr. Malek (1848th meeting) had referred to the question of secrecy, which might arise if an atomic power plant in State A was to be sited near the border with State B, and State A informed State B that it could not provide detailed information because a matter of State secrecy was involved. While there could, of course, be an obligation not to invoke a requirement of secrecy, there was no reason to believe that States would accept such a limitation. Rather more important was the need to bear in mind that the rules should be considered in conjunction with the rules on State responsibility, for in the atomic power plant example he had cited, if some catastrophe did occur, the source State would certainly be unable to deny attribution so far as the decision on siting was concerned.

48. The Commission could exert most influence on the conduct of States by sheer persuasiveness, using procedures and principles. The alternative of claiming that there had been a wrongful act none the less remained, and it would not be affected by the draft articles. It was perhaps for that very reason that he had endeavoured meticulously to preserve a balance between the parties, and he was gratified to note that nearly all members had recognized that the word "activities" alone was inadequate. That was also the reason why he had not used

the expression “adverse effects”. It would be well to recall Aesop’s fable of the stork and the fox, the moral of which was that one State’s beneficial effects were not necessarily another’s. It was a matter of cardinal importance, and one that had been clearly stated by the arbitral tribunal in the *Lake Lanoux* case (A/CN.4/383 and Add.1, para. 22), that States were judges of their own situation. They were not required to accept somebody else’s account of the situation. That was why he would suggest that the word “adverse” had no place in the scope clause and in the definition of transboundary effects. If, however, there was a discussion at an early stage in relation to a proposed activity, it was to be hoped that the parties would agree on what was and what was not beneficial.

49. With regard to scope, and specifically to the decision to confine the topic to cases in which there was a physical consequence, that was a rigorous limitation and one that permitted of no exception. Much had been sacrificed to it; for instance, questions such as misuse of drugs, problems of refugees and even product liability all fell outside the scope of the draft articles because of the requirement of a physical consequence. However, once that limitation had been accepted, as it had been by the majority, it was necessary to follow it through. That did not, however, preclude an assessment of the effects of an activity with due regard to economic, social and other relevant factors.

50. The sole purpose of the definition of “territory or control” was to relate the scope of the articles to existing law, and even to developing law, as it pertained to control over territory, ships, expeditions on the high seas and objects in outer space. The only possible policy element in the definition was the treatment of ships in passage or aircraft in authorized overflight as being in a transboundary situation *vis-à-vis* the State through whose territory they were travelling. All else was a matter of drafting.

51. So far as narrowing the scope of the draft articles was concerned, international law did not expect States to be omnipresent and to control every aspect of what happened in their territory. The draft articles certainly could not impose standards that States were not willing to apply in their own domestic affairs. It would, however, eventually be necessary to consider the point at which municipal law met international law.

52. With regard to articles 3 and 4, he agreed that, had there been a clear idea of the content of the subsequent articles, a radically different view could have been taken; but he considered that, at the present stage in the development of the draft, those two articles were essential. As to article 5, the role of international organizations under treaties was sufficiently evident to leave no doubt about the need to include some provision on that point.

53. Lastly, he suggested that, rather than referring the draft articles to the Drafting Committee, a small committee might be appointed to examine them and report back to the Commission.

*The meeting rose at 6.10 p.m.*

## 1853rd MEETING

*Tuesday, 3 July 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**International liability for injurious consequences arising out of acts not prohibited by international law (concluded)** (A/CN.4/373,<sup>1</sup> A/CN.4/378,<sup>2</sup> A/CN.4/383 and Add.1,<sup>3</sup> A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (concluded)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

ARTICLE 5 (Cases not within the scope of the present articles)<sup>4</sup> (concluded)

1. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, in suggesting at the end of the previous meeting that a small committee should be appointed to consider draft articles 1 to 5, he had not intended that those provisions should be discussed further at the current session. He simply believed that draft articles which had not been fully considered by the Commission itself should not be referred to the General Assembly. His suggestion had, moreover, been purely tentative.

2. The CHAIRMAN suggested that the Commission should take note of the fact that draft articles 1 to 5 would not be referred to the Drafting Committee at the current session and that it should invite the Special Rapporteur to prepare further draft articles, which could be considered together with draft articles 1 to 5.

*It was so agreed.*

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> *Idem.*

<sup>4</sup> For the texts, see 1848th meeting, para. 3.

**The law of the non-navigational uses of international watercourses (continued)\* (A/CN.4/367,<sup>5</sup> A/CN.4/381,<sup>6</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4**

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>7</sup> (continued)

3. Mr. EVENSEN (Special Rapporteur) recalled that he had introduced his second report on the topic (A/CN.4/381) at the 1831st meeting to enable three members of the Commission to make their statements before they left Geneva.

4. Mr. AL-QAYSI said that, in view of the complex and highly technical nature of the topic and of the vital State interests involved, the Commission's aim should be to reconcile those interests and arrive at legal provisions that would command broad acceptance. A variety of considerations were involved. Given the relevance of the physical facts to the legal rules to be formulated, the possible need for scientific and technical advice should be borne in mind. In view of the differences in the physical characteristics of international watercourses, a delicate balance also had to be struck between generality and specificity; the general rules should not be so general that they would not serve as guidelines for the practice of States and the Commission should always be prepared to supplement them where necessary with detailed rules. Furthermore, the physical features of international watercourses invariably gave upper riparian States a dominant position. There was thus a real possibility that the balance of interests which the Commission was seeking to achieve might be determined by such States, since lower riparian States were at the end of the receiving line. Such a result would be contrary not only to the fundamental duties of cooperation, solidarity and good-neighbourliness among States—duties that afforded the only viable basis for a solution to the development, population and environmental problems inherent in the use of water—but also to the physical interdependence of States in the matter of the non-navigational uses of international watercourses.

5. The acceptability of the legal norms to be drawn up would depend to a large extent on the Commission's response to the rights of the riparian States concerned. Those norms should strike a harmonious balance between the underlying interests involved and that balance-of-interests approach should in turn be based on State practice and be flexible enough to ensure the most equitable enjoyment of those rights. Existing laws should be codified and progressively developed to provide States with an indication of the direction they might wish to take in their enjoyment of international watercourses.

\* Resumed from the 1832nd meeting.

<sup>5</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>6</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>7</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

6. Commending the Special Rapporteur on his second report (A/CN.4/381), he expressed his broad agreement with its general approach, which, as the Special Rapporteur had pointed out,

... seemed necessary in order to strike the right balance in those matters between the interdependence of riparian States and their sovereignty, independence and right to benefit from the natural resources within their borders. ... (*Ibid.*, para. 3).

7. The proposed draft articles, which had been given the form of a framework convention, dealt in an appropriate manner with the rights and obligations of States, the basic concept being that each State had a sovereign right to a reasonable and equitable share in the uses of water, subject to a duty not to affect to any appreciable extent the rights of other States in respect of that water.

8. In draft article 1, the Special Rapporteur had abandoned the "international watercourse system" and "system State" concepts in favour of the concepts "international watercourse" and "watercourse State". One reason for the change was that the system concept had attracted the same criticism as the drainage basin concept. The Special Rapporteur, who had noted that the topic was fraught with political as well as legal aspects, had concluded that the use of the system concept approach might "be a serious hurdle in the search for a generally acceptable instrument" (*ibid.*, para. 18). It had to be recognized that the system concept, with its possible connotation of jurisdiction over land areas, was not altogether free from ambiguity, and approval of it had in any event been tentative and contingent upon the final shape which the draft articles would take. The arguments in favour of the conceptual change were, moreover, quite convincing and the emphasis placed on surface water was not excessive, since such water constituted the bulk of the resource. The Special Rapporteur had, however, accepted the fact that "international watercourses have a wide variety of 'source components'" (*ibid.*, para. 24) and had given expression to that acceptance by referring in draft article 1, paragraph 1, to "the relevant parts or components" of the watercourse. He endorsed the Special Rapporteur's flexible approach, whereby the body of draft article 1 referred broadly to the components and parts of an international watercourse and further reference to the various types of components was made in the commentary. On that basis, he was prepared to give his tentative approval to draft article 1.

9. In his second report (*ibid.*, para. 33), the Special Rapporteur had suggested that it might be possible to delete draft article 3, which defined a watercourse State, since the system concept had been abandoned. His own view was that it would help to eliminate controversy if that provision was retained. One important question that must, however, be answered was whether, in the light of draft article 4 and, in particular, paragraph 3 thereof, draft article 3 meant that a watercourse State which contributed only ground water should be placed on an equal footing with a watercourse State which had hundreds of miles of the watercourse within its territory.

10. Draft article 4 was well conceived and the first sentence of the new paragraph 1 should alleviate some of

the misgivings referred to in the commentary to that article (*ibid.*, para. 38, first sentence). In the case of agreements concluded between States parties to the framework convention subsequent to its entry into force, as provided for in the second sentence of the new paragraph 1, however, it would seem correct to assume that the States concerned would be obliged to comply with the standards laid down in the framework convention.

11. With regard to draft article 5, paragraph 2, he wished to know whether, in the light of draft article 9, the term “affected to an appreciable extent” meant “harmed to an appreciable extent”. He also noted that, in that same paragraph, the Special Rapporteur had deleted the cross-reference to article 4 in order to make it clear, as stated in his commentary (*ibid.*, para. 42), that the watercourse State concerned was entitled only “to participate in the negotiations in order to make its concerns known to the negotiating States”. In his own view, a better solution would be to include a cross-reference to article 4, paragraph 2, immediately after the words “programme or use” in article 5, paragraph 2, thereby making it easier to determine the extent to which the use of a watercourse was affected. Also with regard to article 5, paragraph 2, what would the legal position be in respect of the problem of non-recognition?

12. Another point concerning draft article 5 related to the standard of “appreciable extent” which had been introduced in connection with the right of the watercourse State to participate in the negotiation of a proposed watercourse agreement. In that connection, he noted that, in paragraph (9) of the commentary to article 4 as provisionally adopted by the Commission at its thirty-second session, in 1980, the Commission had rightly inquired

... whether the rule should include qualification of the degree to which State interests must be affected in order to support a right to negotiate and become party to a system agreement.<sup>8</sup>

The Commission had taken the view that, while it would be far more useful to quantify any such effect, such quantification was not practical in the absence of technical advice. Owing to the importance of the standard under discussion and bearing in mind the criticism levelled against it, such technical advice should, in his own view, be sought in order to incorporate the necessary quantitative elements in the text and eliminate any ambiguity about the standard itself. In 1980, the Commission had considered that the standard of “appreciable extent” could be established by objective evidence and that there had to be a real impairment of use.<sup>9</sup> His question was therefore at what point the criterion of impairment to an appreciable extent would start to operate. Could it be substantiated on the basis of objective scientific data at the stage when a given project was being planned or executed, or only definitively after its operation? If at the latter stage only, was it realistic to assume that the project could be amended or abandoned?

<sup>8</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 119.

<sup>9</sup> *Ibid.*, para. (10) of the commentary.

13. Chapter II, which contained articles 6 to 9 on the rights and duties of watercourse States, was the core of the draft articles. He agreed with the Special Rapporteur (*ibid.*, para. 46) that articles 11 to 14, dealing more with issues of management and co-operation, should not be placed in that chapter, but kept in chapter III. The significant change made in draft article 6 with the elimination of the concept of an international watercourse as a “shared natural resource” had been introduced in response to the opposition which had been voiced in the Commission and in the Sixth Committee of the General Assembly and which had led the Special Rapporteur, in his commentary (*ibid.*, para. 48), to express doubts as to the advisability of retaining the concept as originally expressed. The basic starting-point, namely that each watercourse State was entitled within its territory to a reasonable and equitable share of the uses of the waters of an international watercourse, had, however, been retained.

14. In drafting general principles on the topic, it was necessary to bear in mind the applicable rules of customary international law. It must also be remembered that the subject involved limitations on the territorial sovereignty of States: upstream riparian States had a right to use the waters in their territory, but must not do so in such a way as to deny the rights of lower riparian States also to use the waters in their territory. The uses of the waters of an international watercourse therefore had to be regulated in a reasonable and equitable manner with a view to eliminating injustice and conflict; that, in turn, involved reciprocal rights and obligations. The legal consequences that flowed from draft article 6 should not, however, give rise to any concern that States with different shares would have the right to equal benefits from the use of the watercourse as a whole: it was evident that the right of a watercourse State to enjoy equal benefits from the watercourse applied exclusively to its share. On the basis of those considerations, draft article 6 merited support.

15. The basis for the general principles set forth in draft article 6, namely good faith and good-neighbourly relations, was to be found in draft article 7. The two articles were thus closely linked in substance, but draft article 7 introduced the concept of the development of the waters of an international watercourse on the basis of equitable sharing. Whereas the reasonable and equitable share envisaged in draft article 6 related to the uses of the waters of an international watercourse, the principle of reasonableness and equity envisaged in draft article 7 related to the development, use and sharing of the waters. That point needed clarification. The notion of protection and control also required more precision. Otherwise, article 7 was acceptable to him.

16. Draft article 8, which listed factors for determining reasonable and equitable use, was not only a “useful corollary to the legal standard set forth in article 7”, as the Special Rapporteur stated in his commentary (*ibid.*, para. 54), but was also essential. Of particular importance was paragraph 2, which was in keeping with article 7 and also with chapter V of the draft.

17. If the purpose of draft article 9 was to prohibit cer-

tain activities relating to the uses which a watercourse State made of its share of the waters of a given watercourse, that should be made clear. If not, the relationship between the words "uses" and "activities" should be explained.

18. Referring to chapter III of the draft, he welcomed the addition to draft article 10 of a new paragraph 2 relating to assistance from the United Nations and other relevant international agencies.

19. As far as the notification procedure was concerned, he considered that time-limits had been dealt with in an appropriate manner, but he wondered whether, in draft article 12, paragraph 1, it would not be useful to add the requirement of sufficiency to that of reasonableness. It might also be useful to list certain criteria, possibly in the commentary, as examples of what was meant, in article 12, paragraph 2, by "justifiable requests" for additional information.

20. A significant change had been introduced in draft article 13, paragraph 3, in response to the criticism that the original text virtually gave the receiving State the right to veto the plans of the notifying State. He fully agreed that it was neither realistic nor in keeping with the underlying principles of the draft articles to envisage such a right. Since the standard of appreciable harm had been adopted under draft article 9, however, it seemed important to refer to that standard in draft article 13, rather than to substantial effects. With a view to strengthening the possibility of recourse to the procedures for peaceful settlement of disputes provided for in chapter V of the draft, it was also essential to replace the words "must be settled", in draft article 13, paragraph 4, by the words "shall be settled". Similarly, the word "should" in draft article 18 should be replaced by the word "shall".

21. As to chapter IV of the draft, he considered that the purpose of draft article 23, paragraph 1, would be clearer if the last part of the paragraph were amended to read: "in regard to their equitable use of such waters free from other harmful effects within their territories." In that connection, he also noted that the Special Rapporteur had not given any reasons for the substantive changes made in draft articles 23 to 25. Some of the terms used, such as "prevent", "abate", "mitigate" and "neutralize", should be examined more closely with a view to achieving greater precision.

22. He agreed with the view expressed by the Special Rapporteur in his commentary (*ibid.*, paras. 91-92) regarding the position of article 27 in the draft. He could also accept the new draft article 28 *bis* and the view expressed in the commentary thereto (*ibid.*, para. 97).

23. With regard to draft article 29 (now draft article 15 *ter*), paragraph 2, he considered that the words "and benefits" should be added after the words "equitable distribution". He also wondered whether paragraph 4 as it now stood was sufficient to resolve any conflicts that might arise in connection with use preferences and whether a cross-reference to the provisions on peaceful settlement of disputes of chapter V might not be appropriate.

24. Chapter V of the draft was crucial as a balancing factor in the interplay of the rights and interests involved. Although the Commission usually left the elaboration of procedures for peaceful settlement to the conference or body that adopted a draft convention, that balancing factor had to be kept constantly in focus during the formulation of the substantive provisions. The final shape that those provisions would take would, of course, have an influence on the modalities of the procedures for peaceful settlement of disputes.

25. Mr. STAVROPOULOS said that the Special Rapporteur's second report (A/CN.4/381), which contained a full set of revised draft articles, represented an attempt to reconcile competing interests and was a step towards the achievement of solutions that would be acceptable to all. The useful amendments to the draft articles could not but enhance the balance of the draft and might well lead to agreement in due course.

26. The most significant amendment was that the word "system" had completely disappeared and the draft articles no longer referred to "system States", "watercourse systems" or "system agreements." Instead, the revised draft dealt with "international watercourses", "watercourse States" and "watercourse agreements". He welcomed that new presentation, which no longer brought to mind the "drainage basin" concept.

27. He agreed with the Special Rapporteur (*ibid.*, para. 8) that the term "uses", which included all uses except, of course, navigational uses, should be taken not in the narrow sense, but should relate to such issues as environmental protection, pollution, and prevention and control of water-related hazards.

28. Turning to the draft articles themselves, he said that he approved of article 1, including the additions and changes thereto, and of articles 2 and 3. He had no objection to articles 4 or 5.

29. As to chapter II of the draft, he endorsed the Special Rapporteur's view that, in draft article 6, it would not be conducive to the attainment of a generally acceptable convention to retain the concept of an international watercourse as a "shared natural resource" (*ibid.*, para. 48). There had been strong opposition to that concept both in the Commission and in the Sixth Committee of the General Assembly, on the grounds that the words "shared natural resource" could be taken to mean that natural resources had to be shared equally by downstream and upstream States. The Special Rapporteur had therefore amended the text of draft article 6, paragraph 1, to read:

1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

He himself had had no objection to the earlier version of draft article 6 and could also agree to the new version because he had always believed that a watercourse State was, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse. The concept as now drafted had, moreover, been endorsed by other members of the Commission, including Mr. Njenga (1831st meeting) and Mr. Jagota (1832nd meeting).

30. He could accept draft article 7 on equitable sharing in the uses of the waters of an international watercourse, as well as draft article 8 on the determination of reasonable and equitable use, and draft article 9 on the prohibition of activities causing appreciable harm. In article 8, a new factor had been added in paragraph 1 (c) and he supported that addition.

31. Paragraph 2 of the revised draft article 10, which dealt with general principles of co-operation and management, provided that watercourse States should obtain the appropriate assistance from the United Nations and other relevant international agencies and supporting bodies. There was no doubt that the Economic and Social Council, the Secretary-General of the United Nations, the appropriate specialized agencies and even the General Assembly could provide assistance in many instances. That question had been raised in recommendation 85 of the 1977 Mar del Plata Action Plan (see A/CN.4/367, para. 34). It would therefore have been a serious omission if no provision on the subject had been included in the present draft articles.

32. Mr. BALANDA said that, as far as the African countries were concerned, the Special Rapporteur should be able to achieve the goal of preparing a generally acceptable legal instrument, since the basic principles embodied in the draft differed very little from those contained in the agreements in force between African watercourse States. The draft articles submitted in the second report (A/CN.4/381) were basically the same as those contained in the first report (A/CN.4/367), on which he had already commented. His remarks would therefore relate to only a few of the provisions proposed at the current session.

33. He was in favour of the Special Rapporteur's initiative of abandoning the concept of an international watercourse as "a shared natural resource", which was far too unclear (A/CN.4/381, para. 48). In so doing, the Special Rapporteur had dispelled some States' fears that they would have to share with other States resources that belonged to them alone. For the sake of consistency, any reference to the idea of sharing should therefore be avoided throughout the text of the draft.

34. Like Mr. Al-Qaysi, he was not sure about the nature of the legal instrument that was being elaborated. The idea of a framework convention seemed to be generally acceptable, but it was not clear whether the members of the Commission all agreed on the meaning of that idea and whether the purpose of that convention would be only to provide guidelines for States or whether States would have to undertake to abide by the envisaged procedure for the settlement of disputes. The Special Rapporteur should define the exact nature of the draft convention so that conclusions could be drawn about the type of procedure to be established. Could a compulsory arbitration procedure be established if the future convention was not binding on States?

35. He would have no objection if the Special Rapporteur dealt with environmental protection problems and, in particular, with the prevention of water-related hazards. As far as developing countries were concerned,

however, the duty to provide information, which lay at the heart of the topic, might give rise to financial problems. The implementation of the provisions of the 1964 Niamey Agreement<sup>10</sup> relating to exchanges of information was, for example, being hampered by the Niger River riparian States' lack of resources. In that connection, draft article 10, paragraph 2, relating to assistance from international organizations, was essential.

36. In his view, the wording of the draft articles should be simplified. The Drafting Committee might, for example, shorten draft articles 6, 10-14, 20 and 23 and make them more readable. As a result of criticism voiced in the Commission and in the Sixth Committee of the General Assembly, the Special Rapporteur had, moreover, replaced the term "system State" (*Etat du système*) by the term "watercourse State" (*Etat du cours d'eau*), which was rather awkward in French, but satisfactory in other respects. The Drafting Committee might therefore examine that term more closely. Although the words "reasonable and equitable" had been used several times in the draft articles and it was important to stress the need for equity, he did not think that the word "reasonable" added much to the text, except in draft article 12, in which a specific time-limit would be difficult to set.

37. Referring to the substance of the draft articles, he commended the Special Rapporteur for having drawn a distinction in draft article 5 between the negotiation of an agreement applying to an international watercourse as a whole and the negotiation of an agreement applying only to part of a watercourse. That distinction took account of situations that could actually arise.

38. Draft article 12, paragraph 1, referred to the "decision" which the watercourse State or States would be allowed to communicate to the notifying watercourse State. In order to avoid any possibility of a veto, however, those States should rather be invited to communicate their "reply" or their "position" concerning the notification. That paragraph also provided that the six-month time-limit could be extended because of the complexity of the issues at stake, the magnitude of the work involved or other reasons. That time-limit could, however, not be extended indefinitely without harming the States concerned. That provision should therefore establish a means of dealing with such a situation. Draft article 12, paragraph 2, which also referred to the time-limit set forth in the notification, was likely to give rise to practical problems because it did not specify whether the time-limit would be interrupted when the receiving State requested additional information or whether a new time-limit would start when that State had received the additional information it had requested.

39. Draft article 15 provided for the establishment of "permanent" institutional machinery. The word "permanent" should, however, be deleted because it was for States to decide whether the system of consultations they established would operate on a permanent basis or only occasionally. The meaning of the words "regular meetings and consultations" was also difficult to define be-

<sup>10</sup> United Nations, *Treaty Series*, vol. 587, p. 19.

cause regularity was an entirely relative concept. The only aim of draft article 15 was to encourage consultations among watercourse States. Since the establishment of permanent institutional machinery or of a system of regular meetings and consultations would, moreover, involve financial implications, draft article 15 should not go into so much detail and should simply enunciate general principles.

40. Although he had no objection to the fact that some information might be regarded as "restricted", he was not sure that draft article 19 would not hamper exchanges of information. A State which frequently classified the information in its possession as "restricted" might prevent consultations from being held with the other States concerned.

41. As to draft article 26, paragraph 2, which referred to "early warning systems", he was of the opinion that the word "early" was inappropriate because it implied the use of advanced technology that was not available to all countries. The aim of that provision was to encourage the States concerned to exchange information about potential water-related hazards.

42. The new draft article 28 *bis*, which related to the problem of "internal armed conflicts", seemed to imply that a group of individuals who did not agree with the established Government of their country and who damaged international watercourse installations or works would be held internationally responsible. It was, however, difficult to see how a legal instrument which was supposed to be effective could provide that individuals had an obligation to repair the damage they had caused.

43. Draft article 30, paragraph 2, would also give rise to practical problems because it implied that all watercourse States would be bound to co-operate in protecting a part of a watercourse which one watercourse State had declared a protected site. It must be borne in mind that the interests of one State were not necessarily the same as those of other States.

44. In his view, the draft articles did not place enough emphasis on the idea of compensation. The question of reparation arose in the case where one watercourse State built an installation that caused appreciable harm to the rights or interests of another watercourse State. Should the installation in question be destroyed or should the possibility of compensation be envisaged in such a case? In that connection, he referred to the example of a hydroelectric power station built during the colonial period on the Mpozo River, of which Zaire and Angola were riparian States. The construction of the dam had caused flooding in Angola and the Portuguese authorities at the time had requested compensation in the form of 15 per cent of the electric power produced.

45. Mr. BOUTROS GHALI said that the draft convention under consideration would serve as a basis for the formulation of international legislation relating to the non-navigational uses of international watercourses. Such legislation was of particular importance to third world countries in general and to African countries in particular. Until recently, there had been full freedom of

action in that field: there had been no customs to respect or situations to take into account. The African States had then drafted conventions and adopted resolutions which all urged them to co-operate actively in the area of river law, since international rivers were regarded as the basis for the regionalism or subregionalism which would enable Africa to overcome micronationalism and achieve macronationalism.

46. The importance which Africa attached to the topic under consideration was, for example, reflected in the African Convention on the Conservation of Nature and Natural Resources, which had been adopted at Algiers in 1968<sup>11</sup> and had entered into force in 1969. That Convention stated:

*Article V. Water*

1. The Contracting States shall establish policies for conservation, utilization and development of underground and surface water, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water, taking appropriate measures with due regard to:

- (1) The study of water cycles and the investigation of each catchment area;
- (2) The co-ordination and planning of water resources development projects;
- (3) The administration and control of all water utilization; and
- (4) Prevention and control of water pollution.

2. Where surface or underground water resources are shared by two or more of the Contracting States, the latter shall act in consultation, and if the need arises, set up Inter-State Commissions to study and resolve problems arising from the joint use of these resources, and for the joint development and conservation thereof.

47. Moreover, according to the Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa, adopted in 1980,<sup>12</sup> the problems of the integration, development and management of water resources had to be dealt with at the sub-regional level by strengthening existing river commissions and, at the regional level, by establishing an intergovernmental committee on water for the African region, as decided by the ECA Conference of Ministers at its fifth meeting, held at Rabat in 1979.

48. Because of drought, many African States had been making increasing use of river water, rather than rain water, for soil cultivation and, in the near future, that would give rise to problems with regard to water distribution and the construction of dams. Serious armed conflicts, such as the border and tribal disputes now taking place in parts of Africa, could break out between States belonging to the same international river basin. The problem of the shortage of water did not, however, affect Africa alone, for, as the Special Rapporteur had stated in his second report (A/CN.4/381, para. 2), it was "a major scourge for more than one third of the population of the world". The elaboration of the law of the non-navigational uses of international watercourses would therefore contribute to the maintenance of international peace and security and promote the economic development of the third world countries.

<sup>11</sup> *Ibid.*, vol. 1001, p. 3.

<sup>12</sup> A/S-11/14, annex I.

49. The major problem dealt with in the Special Rapporteur's second report was that of striking a balance between the interdependence of riparian States, which might be regarded as the "co-owners" of the waters of a watercourse, and their sovereignty or, in other words, their right to use the waters which were located in or flowed through their territory. That problem arose particularly when a State decided to implement a watercourse project that might harm the interests of another riparian State. A solution to the problem of reconciling the interests of upstream and downstream States would help to determine the object and purpose of the draft convention and to establish guidelines for procedures for the settlement of disputes between States.

50. Referring to draft article 8 on the determination of reasonable and equitable use of the waters of an international watercourse by a watercourse State, he suggested that an additional relevant factor to be listed in that article was one that had already been mentioned in draft article 4, namely special watercourse agreements. Account should also be taken of the fact that, in the current computer age, there were various measurable criteria that might be important. Draft article 8, paragraph 1 (g), referred to co-operation among watercourse States in projects or programmes "taking into account cost-effectiveness and the costs of alternative projects"; but comparative project costs were another relevant factor to be considered. Account should also be taken of the population which depended on the waters of an international watercourse and of the feasibility of awarding compensation to one or more riparian States as a means of re-establishing a balance between the interests of those involved in a possible conflict and of ensuring the reasonable and equitable use of the waters of the watercourse. Such compensation would strengthen and institutionalize solidarity among riparian States. For example, if, after building a dam, State A increased its water consumption at the expense of State B's consumption, State B should be entitled to a larger share of the electric power produced.

51. Long-term demographic and hydrographic forecasts should also serve as criteria for determining reasonable and equitable use. Major international river projects took decades to complete and, during that time, the economic and social balance between the watercourse States concerned was liable to change. New scientific techniques could offer new solutions for reconciling the present and future interdependence of riparian States and their particular immediate interests. Moreover, account had not been taken of the criterion of navigation. The fact that the topic related to the non-navigational uses of international watercourses was no justification for that omission, because the implementation of a project could, in fact, hamper navigation on an international river.

52. It would, of course, be very difficult, if not impossible, to list all the relevant factors to be taken into account in accurately determining reasonable and equitable use and to classify them in order of priority, but the following three factors warranted particular attention: (a) existing special agreements; (b) measurable criteria such as pollution, silt loss and water quantity an-

alyses; (c) long-term forecasts of, for example, changes in the balance in relations between watercourse States.

53. Draft article 13 did not establish the right balance between a State which was executing a watercourse project and a State which was harmed by that project, since paragraph 3 provided that a "notifying State" which deemed that a project was extremely urgent could proceed with that project. The affected State's only satisfaction was that compensation should be based on good faith and a spirit of friendly relations. Since that imbalance weakened the principle of interdependence, it would be necessary to find a formula that would place the two States on an equal footing. The problem would, however, be even more complicated if the State which was executing the project was an upstream riparian State and the State which was harmed was a downstream riparian State.

54. The balance between the two should be dealt with in a more detailed study that would take account of different types of projects relating, for example, to the construction of canals and dams and the diversion of the waters of a watercourse; the different types of harm; the situation of upstream and downstream riparian States; different forms of compensation; and different types of co-operation in the execution of projects. Such a study would, of course, involve problems and risks, since such details should be worked out in the specific régimes to be established as part of special agreements, whereas the draft convention was to be only a framework agreement.

55. If the Commission merely enunciated general principles, however, it would, no matter what procedures it adopted, end up giving absolute power to the notifying State or a right of veto to the State receiving the notification. A general principle which would place upstream and downstream riparian States on an equal footing might, moreover, not establish the desired balance. In either case, the principle of interdependence would suffer, and the main objective of the draft convention was to strengthen the principles of co-operation and interdependence. The Commission should attempt either to classify types of project and harm or to formulate rules of law that would promote co-operation between watercourse States. Only genuine solidarity among such States would make it possible to reconcile conflicts of interest and enable the joint institutions referred to in the draft articles to function smoothly.

56. Draft article 10, paragraph 2, which related to co-operation with the United Nations and other relevant international agencies, was essential in order to promote solidarity among watercourse States. An international organization could not only play a catalytic role and resolve differences of opinion, but could also offer financial and technical assistance that would provide a strong foundation for solidarity among States. Conflicts of interest often arose because of a lack of information. In that connection, he referred to a hydrometeorological study of Lakes Victoria, Kioga and Albert which was being subsidized by UNDP in co-operation with WMO and which related to the water balance of the Upper Nile. That study had helped to strengthen contacts between riparian States of the Nile, despite their conflicts of interest.

57. The new draft article 28 *bis*, which was extremely important, might be supplemented by a paragraph based

on article 54, paragraph 2, of the first 1977 Additional Protocol to the Geneva Conventions,<sup>13</sup> which read:

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as ... drinking-water installations and supplies and irrigation works ...

58. Mr. USHAKOV said that the position of principle he had adopted some 10 years previously had not changed. It was, moreover, becoming increasingly clear that, instead of elaborating a framework convention, the Commission should be drafting model articles which might or might not be taken into account by the States concerned. The draft conventions that the Commission elaborated were usually universal in scope, but the draft articles under consideration would be of no interest whatever to island countries or even to adjacent countries which did not share an international watercourse. It would, in any case, not be possible to apply rules adopted in Europe to other continents.

59. The concept of an international watercourse could be considered from different points of view. There was nothing to prevent States, if they so wished, from managing a watercourse as a hydrographic basin, as a watercourse system or simply as a river.

60. With regard to specific uses of the waters of a watercourse, it should be noted that, in some countries, drinking-water was of major importance to the population, whereas, in others, water was used mainly for agricultural or industrial purposes. In the light of the wide variety of situations that could arise, no generalizations could be made. Accordingly, the Commission could draft only model articles, that would serve as guidelines for the conclusion of agreements relating to particular situations. Otherwise, it would continue to be divided on the question whether its starting-point should be a basin, a system, a watercourse or even part of a watercourse. If it drafted model articles, States would then be able to use those articles to define the concepts to which the agreements they concluded would relate.

61. The draft articles contained more than one reference to "the present Convention". Usually, however, it was only after having drafted a set of articles that the Commission recommended that the General Assembly should adopt them in the form of a convention. In the present case, the Commission had to decide at the outset whether or not it intended to draft model articles, so that its work and the praiseworthy efforts made by the Special Rapporteur would not have been in vain.

62. Referring to draft article 1, paragraph 2, he stressed the need to take account of the geographical location of States, which might be upstream States or downstream States. In principle, the components of a watercourse located downstream did not affect the use of the waters of the watercourse by upstream States. Downstream States must, however, be included in agreements on the use of the waters of a watercourse concluded by upstream States, since the water that subsequently flowed into their territory might, for example, be polluted.

*The meeting rose at 12.55 p.m.*

<sup>13</sup> See 1831st meeting, footnote 5.

## 1854th MEETING

*Wednesday, 4 July 1984, at 10 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*later:* Mr. Julio BARBOZA

*Present:* Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

**The law of the non-navigational uses of international watercourses (*continued*)** (A/CN.4/367,<sup>1</sup>A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>3</sup> (*continued*)

1. Mr. CALERO RODRIGUES said that, as a result of the welcome changes which the Special Rapporteur had made in the draft articles to take account of the views expressed in the Commission and in the Sixth Committee of the General Assembly, the Commission now had a generally acceptable basis for discussion. The Special Rapporteur had rightly maintained the structure of the draft, which had not attracted many objections and could, on the whole, be approved, although it still included too many elements in the form of recommendations. As a framework convention, the draft could be simpler and should be limited to strictly legal provisions.

2. With regard to chapter I of the draft, he welcomed the fact that the Special Rapporteur had decided, as stated in his second report (A/CN.4/381, para. 18), to abandon the "system" concept approach, which might be "a serious hurdle in the search for a generally acceptable instrument". As it now stood, draft article 1 explained the term "international watercourse", which was used in draft article 2 to define the scope of the draft articles.

3. The replacement of the term "international watercourse system" by the term "international watercourse" involved more a semantic than a conceptual change, since the "system" concept, which had replaced the "drainage basin" concept, had lost many of its objectionable features when the Commission had agreed in its 1980 provisional working hypothesis that

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

To the extent that parts of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. ...<sup>4</sup>

The concept agreed upon by the Commission in 1980 and included in the Special Rapporteur's first report (A/CN.4/367) was thus expressed more adequately by the new term "international watercourse" than by the former term "international watercourse system".

4. Except for drafting changes made as a result of the abandonment of the "system" concept, the only meaningful amendment in chapter I had been the inclusion in draft article 4, paragraph 1, of a provision stating that nothing in the draft convention would "prejudice the validity and effect" of special watercourse agreements concluded prior to or subsequent to its entry into force. That provision was both useful and necessary, but it should be placed at the end of draft article 4 after the present paragraphs 2 and 3, and the words "which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof" should be deleted because they might cause problems in the future by casting doubt on the continuing validity of existing treaties and agreements.

5. The most basic principle in chapter II of the draft was that contained in article 9, which established a legal obligation for each watercourse State to refrain from and prevent, within its jurisdiction, uses or activities with regard to an international watercourse that might cause appreciable harm to the rights or interests of other watercourse States. The entire draft convention could in fact be built on that principle, which formed the basis for the principles embodied in draft articles 7 and 8. He was certain that all existing situations with regard to international watercourses could be taken into account and that the interests of the countries concerned could be protected if it was agreed that: (a) no State could cause appreciable harm to another State; (b) to that end, every State must use the waters of an international watercourse in a reasonable and equitable manner; (c) what constituted reasonable and equitable use had to be determined through negotiations between the States concerned.

6. Those three elements had been included in the first draft articles submitted by the Special Rapporteur, but the former draft article 6 had added a further controversial element by providing that the waters of an international watercourse were to be regarded as a "shared natural resource". That concept had, as the Special Rapporteur had stated in his first report (*ibid.*, para. 81) been introduced to support the assertion that "each of the system States is entitled to a reasonable and equitable share" of the waters of an international watercourse. The idea of "reasonable and equitable sharing" did not, however, have been supported by as vague a concept as that of a "shared natural resource". It could be indepen-

dently developed in the draft articles themselves on the basis of analyses of the specific situations that could arise in connection with the non-navigational uses of international watercourses.

7. In his new draft articles, the Special Rapporteur had wisely eliminated the reference to the concept of a "shared natural resource", which had created political and legal difficulties that would probably have been impossible to overcome. The concept of "sharing" had, however, been retained in draft articles 6 and 7. Those provisions were, in his view, intended to mean that a watercourse State was entitled to use the waters of an international watercourse in a reasonable and equitable manner and that, for such use to be considered reasonable and equitable, that State must not prevent other watercourse States from also using the waters of the watercourse in a reasonable and equitable manner. The attainment of a balance between such uses constituted "sharing".

8. Draft article 7 provided that "the waters of an international watercourse shall be developed, used and shared by watercourse States in a reasonable and equitable manner". The use of the term "developed" was a rather awkward way of a referring to the general principles of co-operation and management embodied in chapter III of the draft, but he would not make an issue of that terminology problem. It was, however, redundant to say that States must "use" and "share" the water of a watercourse in a reasonable and equitable manner. If each of the States concerned used the waters in a reasonable and equitable manner, the concept of "sharing" would be implied, and it did not have to be referred to explicitly. The idea that reasonable and equitable use by one State would take account of reasonable and equitable use by another State would be more precise and understandable than the abstract idea of "sharing". Although the reference in the body of draft article 6 to a "share of the uses of the waters of an international watercourse" was less objectionable than the reference in the title of that article to "the sharing of the waters of an international watercourse", he did not think that "sharing" had to be referred to at all in the draft under consideration. It would be enough simply to provide that States must use the waters of an international watercourse in a reasonable and equitable manner and that every watercourse State was entitled, within its territory, to use the waters of that watercourse in that manner.

9. He also did not think that draft article 8, paragraph 1, had to contain a long, non-exhaustive list of factors to be taken into account in determining whether the waters of a watercourse were being used in a reasonable and equitable manner. The words "all relevant factors shall be taken into account, whether they are of a general nature or specific for the international watercourse concerned", in the first sentence of paragraph 1, would enable the States concerned to decide which factors should be taken into consideration. Since the proposed list would be of limited value for that purpose, he suggested that it should be included as an illustration in the commentary to draft article 8.

10. With regard to the organization of work on the

<sup>4</sup> *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

complex topic under consideration, the Commission must, despite the Sixth Committee's impatience, take its time and attempt to accommodate different points of view. After a slow start on the topic, it now appeared to be on the right track, but it could not have considered all 41 draft articles at the current session. It had therefore been right to concentrate mainly on the draft articles in chapters I and II, which could, in his view, be referred to the Drafting Committee. At its next session, the Commission might focus on chapters III and IV and leave chapters V and VI for the thirty-eighth session, in 1986, the last year of the term of office of the current membership.

11. Mr. NI congratulated the Special Rapporteur on his second report (A/CN.4/381): his approach, which combined codification with the progressive development of the law, offered the best prospects for a solution to the problems involved and commanded a fairly wide measure of support. The complexity of the legislative endeavour that was being undertaken was universally recognized. Each watercourse was unique, as were the needs and interests of the States concerned, and the success of the task would depend largely on the extent to which a balance could be struck between the various conflicting interests. The Special Rapporteur had introduced a number of amendments to meet the concerns expressed in connection with the first report (A/CN.4/367). His second report would thus provide a suitable basis for the Commission's future work, although some further refinements might still be needed.

12. A number of changes both of form and of substance had been made in chapter I of the draft. Perhaps the most obvious was the abandonment of the term "international watercourse system" in favour of the term "international watercourse", which appeared in draft article 1 and subsequent articles. The "international watercourse system" concept was unacceptable for a number of reasons, *inter alia* because it could be said to imply a certain rigid conceptual approach which would necessarily lead to the formulation and adoption of some undesirable concepts and rules. Although the possibility of such an interpretation had been excluded in the first report (*ibid.*, para. 14), subsequent criticism in the Sixth Committee of the General Assembly had led the Special Rapporteur to conclude in his second report (A/CN.4/381, para. 18) that the use of the system approach could be a serious hurdle in the search for a generally acceptable instrument. The Special Rapporteur had therefore deemed it advisable to reformulate article 1, using the simpler and purely geographical term "international watercourse". The underlying objective was perhaps the same as with the use of the term "international watercourse system", namely to adopt a purely descriptive and non-doctrinal term with a view to facilitating the task of formulating draft articles. If that objective could be achieved without prejudicing anybody's position, there was no reason not to use that new term.

13. Draft article 4, paragraph 1, had been amended to meet the concern expressed with regard to the obligation of States to bring any special watercourse agreement or agreements into line with the draft convention. The last part of the first sentence of the paragraph imposed what

seemed to be a rigid condition and he was not sure that the validity of a special watercourse agreement should be made subject to the proviso that it should "provide measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof".

14. He also had doubts about the need for draft article 4, paragraph 3, which required watercourse States to negotiate for the purpose of concluding watercourse agreements. The obligation to negotiate was expressly provided for in the Charter of the United Nations and in many other international instruments and had frequently been resorted to by States, although usually in the context of disputes. There seemed to be no point in providing for such an obligation in the absence of a dispute. As noted in the Sixth Committee (A/CN.4/L.369, para. 400), it was not always politically feasible or legally sound to impose an obligation on States to conclude watercourse agreements. Furthermore, the words "In so far as the uses of an international watercourse may require" were vague and could give rise to problems of interpretation. Paragraph 3 therefore called for further reflection. One solution might be to place it in chapter V of the draft, dealing with the peaceful settlement of disputes.

15. Chapter II, which set out the rights and duties of watercourse States, was regarded as the most important in the draft and the Special Rapporteur had introduced certain amendments to take account of comments made both in the Commission and in the Sixth Committee. Perhaps the most significant change had been the elimination of the concept of an international watercourse as a "shared natural resource", on which views in the Commission and in the Sixth Committee had been sharply divided. The highly controversial nature of that concept had led the Special Rapporteur to doubt, in his second report (A/CN.4/381, para. 48), "whether it will prove conducive to the attainment of a generally acceptable convention to retain that concept in the form in which it was expressed in article 6". Article 6 had therefore been redrafted and a new paragraph had been introduced to provide expressly for the right of a watercourse State, within its territory, to a reasonable and equitable share of the uses of the waters of an international watercourse. The notion of sharing had not been lost in the new draft article 6, but rather reflected in a more flexible and practical manner. The new article was thus designed to maintain a balance between the right of a watercourse State to benefit within its territory from the uses of the waters of an international watercourse and the rights of other watercourse States to share in those uses and, at the same time, to avoid both the doctrinal overtones implicit in the concept of a "shared natural resource" and its undefined legal consequences. While sharing did not necessarily mean strict equality in terms of the quantity of water to be shared, it should be reasonable and equitable in accordance with the terms of draft articles 7 and 8. The principles and factors set forth in those two articles were well conceived and conducive to the determination and realization of reasonable and equitable uses of the waters of international water-

courses. In general, the amendments to chapter II were a welcome improvement.

16. With regard to draft article 9, the maxim *sic utere tuo ut alienum non laedas* should obviously have a place in the draft. The term “appreciable harm” had been the subject of different interpretations and account should be taken of the many amendments proposed in that regard. The main problem, however, was how to reconcile the idea of equitable use, as provided for in draft article 7, with the duty not to cause harm to other watercourse States, as provided for in draft article 9.

17. Another difficulty was that draft article 9 would tend to give more protection to a State that was already making use of the resources of an international watercourse, no matter whether other watercourse States had obtained an equitable share of those resources, and it could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from the use of those resources. The result would be that developed States, being the first to benefit from watercourses, would be favoured to the detriment of developing states, which would normally be late-comers in developing and utilizing international watercourses. The effect of the saving clause in draft article 9 was simply to require the express permission of the first or prior user State. A clause could perhaps be added to avoid any possible conflict between the principle of refraining from causing appreciable harm and the principle of equitable use. One solution would be to go back to the draft article 8 (Responsibility for appreciable harm) submitted by the previous Special Rapporteur in his third report, which prohibited the infliction of appreciable harm “except as may be allowable under a determination for equitable participation for the international watercourse system involved”.<sup>5</sup> Other solutions could also be considered with a view to achieving a balanced régime that would ensure, on the one hand, that the freedom of a State to use its watercourse was not unduly restricted and, on the other, that the freedom of other States from being harmed thereby was adequately safeguarded.

18. Lastly, the new version of draft article 13 seemed to meet the concerns which had been expressed, particularly with regard to paragraph 3, in the Commission and in the Sixth Committee. It was also in conformity with the established principles of international law and was more in line with State practice.

*Mr. Barboza, Second Vice-Chairman, took the Chair.*

19. Mr. MAHIU, commenting generally on the Special Rapporteur’s second report (A/CN.4/381), said that it supplemented the first report (A/CN.4/367) and contained a number of constructive new elements that had been added to take account of the discussions in the Commission and in the Sixth Committee of the General Assembly. As indicated in the second report (A/CN.4/381, paras. 5-6), the Special Rapporteur had adopted the approach of a framework agreement, for which there had been considerable support in the Com-

mission and which would not only pave the way for future special watercourse agreements, but also safeguard existing agreements. The framework agreement under consideration was based on a balance between the rights and interests of watercourse States and was, in particular, designed to reconcile those States’ interdependence and their sovereign right to benefit from the natural resources located in their territory. In that connection, the Special Rapporteur had stressed that adequate fresh water supplies, in terms both of quantity and of quality, were of fundamental importance to the population of all countries. He had also referred (*ibid.*, para.8) to the United Nations Water Conference, held at Mar del Plata in 1977, in order to draw attention to the economic impact of water problems on developing countries and to stress the need for the co-ordinated development and management of water resources and for forecasting on a long-term basis. Although that Conference had focused on drought and its disastrous effects on developing countries, the principles it had established applied to all countries.

20. The elaboration of a framework agreement that would strike the right balance between the interests at stake and effectively promote co-operation among States involved the problem of determining which basic concepts should be taken into account. In that connection, the Special Rapporteur’s doubts and the changes he had introduced in his draft articles were entirely justified. He had, for example, had to decide whether the draft should be based on the “drainage basin” concept, the “international watercourse system” concept or the “international watercourse” concept. The first concept, which the Commission had not endorsed, was so geographically oriented that a framework agreement might not be able to deal with all the consequences to which it would give rise. As to the second concept, which the Commission had provisionally adopted in 1980, he personally had stated at the Commission’s previous session that the way in which it was used would determine whether it was needed.<sup>6</sup> As a purely functional term, whose scope and consequences could be accurately defined, it was definitely useful, but as a conceptual term, from which a number of unforeseen and perhaps even uncontrollable consequences could be deduced, it certainly gave rise to doubts and controversy. It was moreover, often difficult to distinguish between a functional term and a conceptual one. The Commission and the Sixth Committee had subsequently endorsed those views. If the concept of a “watercourse system” gave rise to problems and was not generally acceptable, it should not be retained, since a balanced and stable legal régime could not be established if it was based on concepts that caused doubt and uncertainty. In abandoning controversial concepts, the Commission must, however, not lose sight of the fact that its aim was to find the best possible means of promoting co-operation among riparian States.

21. Draft article 1, in which the “international watercourse system” concept had been abandoned in favour of the “international watercourse” concept, contained

<sup>5</sup> See *Yearbook ... 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156, art. 8, para. 1.

<sup>6</sup> *Yearbook ... 1983*, vol. I, p. 225, 1793rd meeting, paras. 5-6.

the words "parts" and "components" in its first two paragraphs. Those words were, in his view, unnecessary, particularly since the Special Rapporteur's commentary (*ibid.*, paras. 24-25) referred almost exclusively to the "components" of an international watercourse. Those terms were also used in draft article 3. In his observations on specific ground-water aspects (*ibid.*, paras. 26-30), the Special Rapporteur had rightly drawn a distinction between ground-water resources that were related to a surface watercourse, of which they would be a component, and independent ground-water resources. Logically, only the former should be governed by the draft articles, but the latter should also be developed and managed as rationally as possible in the interests of the States concerned.

22. Draft article 4, on watercourse agreements, must be taken together with draft article 39, dealing with the relationship between the draft convention and other conventions and international agreements. Because the earlier version of draft article 4 had gone too far in requiring that system agreements should be adjusted to the draft convention, the Special Rapporteur had completely redrafted paragraph 1 of that provision. Now, however, he had perhaps gone too far in the other direction by including in article 4 a provision that duplicated the provision of article 39. Since the basic purpose of draft article 4 was to define watercourse agreements, the beginning of the first sentence and the entire second sentence of paragraph 1 should be placed in draft article 39. He therefore suggested that the Commission should follow the model of the earlier version of draft article 4, paragraph 1, and amend that provision to read:

"1. A watercourse agreement is an agreement between two or more States which, taking into account the characteristics of the particular international watercourse or watercourses concerned, provides measures for the reasonable and equitable administration, management, conservation and use of the international watercourse or watercourses concerned or relevant parts thereof."

23. Draft articles 6 to 9, which formed chapter II of the draft relating to general principles and the rights and duties of watercourse States, were fully justified. In draft article 6, the controversial concept of an international watercourse as a "shared natural resource" had been abandoned. The comments which he had just made with regard to the concept of a "watercourse system" also applied to the concept of a "shared natural resource".

24. Draft article 8 was the corner-stone of chapter II, if not of the entire draft. When States were unable to agree during the elaboration of special watercourse agreements, they would probably rely on that article. The drafting problems to which it gave rise had been cleverly overcome by the Special Rapporteur. He had thus had to decide whether an exhaustive list was preferable to a selective list, whether the relevant factors should be listed according to their importance, and whether qualitative or subjective factors should be referred to in addi-

tion to quantitative factors. Some factors might, of course, have been left out and others might not have been sufficiently stressed. Although it was not desirable to give the relevant factors an order of priority, drinking-water supplies for the population of the countries concerned, for example, were of such high priority that they should be regarded as one of the "special needs" of watercourse States referred to in draft article 8, paragraph 1 (*b*).

25. He would not comment further on the other draft articles, except to say that the new draft article 28 *bis* was fully justified. At the previous session, he had already stated that the Commission had to examine the question of the link between the protection of installations relating to the use of international rivers and armed conflicts. In that connection, the amendment to draft article 28 *bis* proposed by Mr. Boutros Ghali (1853rd meeting) was very much to the point.

26. Mr. EL RASHEED MOHAMED AHMED thanked the Special Rapporteur for his excellent second report, (A/CN.4/381), the general trend of which he endorsed. Commenting on chapters I and II of the draft, he noted that, in draft article 1, the Special Rapporteur had abandoned the term "international watercourse system" in favour of the term "international watercourse". In its ordinary meaning, the term "watercourse", which covered distribution and control, did not comprise the hydrological aspects of a volume of water running in a unified and identifiable channel. He therefore agreed with Mr. Al-Qaysi (1853rd meeting) that scientific and technical advice would be needed to amplify the definition contained in draft article 1, paragraph 1. For the time being, however, he was prepared to accept the definition, which was the best that could be achieved in the circumstances.

27. Paragraph 2 of draft article 1 should, in his view, be deleted, partly because, as Mr. Ushakov (*ibid.*) had pointed out, it was unfair to downstream States. The main reason, however, was that he did not see how the components or parts of a watercourse could possibly fail to affect the uses of that watercourse. If a component or part was blocked, it would definitely have an adverse effect on the discharge of the river and thus decrease the volume of water that might otherwise run to the downstream State. If a component or part was polluted, the mainstream would be affected accordingly.

28. With regard to draft article 2, he said that, although navigation fell outside the scope of the draft articles, he agreed with Mr. Boutros Ghali's proposal (*ibid.*) that navigation should be taken into consideration as a criterion affecting other equitable uses of the waters of an international watercourse, particularly when the watercourse was used for both navigational and other purposes.

29. The words "reasonable and equitable share" in draft article 6 were not without difficulty. In the first place, the word "reasonable" implied an entirely subjective test, since it would be for the watercourse State concerned to determine what was reasonable. What was

needed was an objective and external test, somewhat akin to the test in English law of the “man on the Clapham omnibus”. Secondly, it was difficult to know what the precise meaning of “reasonable and equitable” was in the context: reasonable and equitable in the light of the needs of the watercourse State, or reasonable and equitable when such needs were weighed against other needs? It had been suggested that the question should be resolved by negotiation, but it would be hard to convince the State concerned that its use or share of the waters of the watercourse was not reasonable. He therefore suggested that the word “reasonable” should be replaced by the word “fair”; it would be appealing to a State’s sense of justice to ask it to be fair and it would, in all probability, respond by acting in a fair manner. The same comment applied to the words “reasonable and equitable” in draft article 7.

30. Referring to draft article 8, he noted that population growth should also be regarded as a major factor in determining what constituted fair and equitable use of the waters of a watercourse. In a letter to *The Times* of London of 3 July 1984, Mr. Frank Vogl of the World Bank had pointed out that, by the middle of the twenty-first century, the population of the poorer nations of the world would be more than double its current level of 3.6 billion and that, as a result, there would be increased pressures on arable land, natural resources, urban conditions and, indeed, on political stability. The situation verged on the inflammable and, in the interests of the entire world, the right balance had to be established between the various needs. He agreed with Mr. Calero Rodrigues that the list of relevant factors should not be incorporated in the text of article 8, but should be left to the commentary.

31. Although he welcomed the Special Rapporteur’s initiative in introducing the new draft article 28 *bis*, he considered that the reference to “internal armed conflicts” should be deleted, since it was tantamount to giving advance recognition to insurrection and internal disturbances, wherever they occurred.

*The meeting rose at 12.10 p.m.*

## 1855th MEETING

*Thursday, 5 July 1984, at 10 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

### Welcome to Mr. Kalinkin, Director of the Codification Division of the Office of Legal Affairs and Secretary to the International Law Commission

1. The CHAIRMAN said that it was his pleasure to welcome Mr. Kalinkin, the newly appointed Director of the Codification Division of the Office of Legal Affairs and Secretary to the International Law Commission. As a member of the United Nations Office of Legal Affairs, Mr. Kalinkin had worked for a number of years on matters relating to the legal aspects of outer space and had been associated in the formulation of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, and the Convention on International Liability for Damage Caused by Space Objects. Subsequently, he had held a number of important positions with his Government in the field of international law and had taken part in major international legal conferences.

2. Mr. KALINKIN (Secretary to the Commission) said that it was a great honour to be present as Secretary to the International Law Commission, a unique institution of great prestige and distinction. He assured members of his fullest co-operation and looked forward to providing the Commission with all the necessary substantive services.

### The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect.F, ILC (XXXVI)/Conf. Room Doc.4)

[Agenda item 6]

#### DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR<sup>3</sup> (*continued*)

3. Mr. BARBOZA said that the chief merit of the set of articles submitted by the Special Rapporteur was that they tried to reconcile the divergent opinions expressed in the Commission; but personally he would have preferred to keep to the former version. In his excellent oral statement (1831st meeting), the Special Rapporteur had pointed out that the subject entrusted to him was not of a purely legal character, but also had political and economic aspects, which were really what the Commission was studying. But the Commission was a body which expressed itself in legal language, by formulating articles to regulate international relations; consequently, its work was concerned with international obligations. Chapter III of the draft, which dealt with co-operation and management, clearly showed the course the Commission should adopt. According to draft article 10, paragraph 2,

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

for example, watercourse States "should obtain the appropriate assistance from the United Nations Organization and other relevant international agencies ... at the request of the watercourse States concerned". But that language did not enunciate a legal obligation; it would be more suitable in a General Assembly resolution or in the conclusion of an international conference such as the United Nations Water Conference. Moreover, international organizations would not be parties to the future convention. As to the obligations embodied in draft articles 11 to 14, such as the obligation to notify, they did not derive from the obligation to co-operate, but from the obligation not to cause appreciable harm. It was obvious that the latter obligation had a much more precise content than the rather vague obligation to co-operate, and the whole draft was based on it. It followed that articles 11 to 14 should be placed in a chapter other than chapter III, on co-operation and management. On the other hand, provisions such as those concerning the establishment of commissions and the collection, processing and dissemination of information and data were correctly placed in chapter III.

4. In his oral statement, the Special Rapporteur had mentioned the need to establish a balance between the interdependence of international watercourse States and their sovereign right to exploit the natural resources of their territories. To do that, the interests of the upstream and downstream States would have to be brought into balance, so as to make them equal in negotiating power. But a downstream State was necessarily in a position of inferiority in regard to the use of the waters of an international watercourse, because the upstream State enjoyed physical priority. That being so, there could be no balance unless the emphasis was on protection of the downstream State. In draft article 13, paragraph 3, that balance was not achieved because, according to that provision, the notifying State could proceed with the planned project if it deemed that its rights or interests or those of one or more other watercourse States might be "substantially affected by a delay". It must then proceed "in good faith and in a manner conformable with friendly neighbourly relations". The Special Rapporteur had chosen that solution rather than requiring the notifying State not to proceed with the project until the outstanding issues had been settled. However, he found the new wording of paragraph 3 dangerous, because it did not provide sufficient safeguards. Perhaps it would be advisable for a duly authorized body to pronounce on the "utmost urgency" and "unnecessary damage" which States might be tempted to invoke. It was true that some situations called for large investments and entailed damage which it was subsequently difficult to repair. In any case, it was important that the Commission should try to establish a better balance in that provision.

5. As the Special Rapporteur had pointed out in his second report (A/CN.4/381, para. 5), the drafting of a framework agreement based on general legal principles seemed to have wide support. Among those principles he had given prominence to good-neighbourly relations and good faith, although good faith was presumed in the performance of treaties and need not be given any special

consideration in the present case. He had also introduced a notion which, while not rejected in the previous texts, was not confirmed by them either, namely that of reasonable and equitable sharing by watercourse States in the use of the waters of an international watercourse. That notion should dispel much anxiety.

6. The Special Rapporteur had also abandoned the notion of an "international watercourse system", partly because it might create a legal superstructure from which principles could be deduced that were not confirmed by the draft articles. He had nothing against dropping that notion, in so far as it would help to reconcile opinions, but had the impression that it was a mere change of form, not of substance. It was really a question of determining the scope of the régime being elaborated. In his revised draft articles, the Special Rapporteur did not define an international watercourse, but emphasized the importance of water and indicated that a watercourse comprised a number of components. Those components, which were qualified as "relevant", were not defined either and it might be asked what they were relevant to. Article 1, paragraph 2, made it possible to solve the problem, however, since it provided that the components of a watercourse, when situated in one State and not affected by the uses of the watercourse in another State, were not to be treated as being included in the watercourse. It could be deduced that the components of a watercourse were "relevant" if they were interdependent and formed a whole. The scope of the régime then became clearer: it covered tributaries, lakes, ground-water, springs, snow and glaciers which fed the watercourse, in so far as they were joined together so that the use of the water at one place affected its use at other places. One thus came back to the idea of the watercourse system. In its former version, draft article 1 had not excluded the simultaneous involvement of several systems, considered, for example, from the point of view of pollution or irrigation—a case which the new draft article 1 did not appear to exclude either.

7. The concept of a "shared natural resource", which had been included in draft article 6, had also been abandoned by the Special Rapporteur following the serious controversies to which it had given rise in the Sixth Committee of the General Assembly. At the previous session of the Commission, he (Mr. Barboza) had observed that the concept was not in the nature of a legal principle, but that it expressed a legal reality.<sup>4</sup> In the case of water flowing in the territories of several States, each of which was sovereign in its own territory, it was logical that those States should share the common natural resource. It was from that fact that the real principles applicable and the right of the watercourse State to a reasonable and equitable share in the use of the waters of an international watercourse derived. They did not derive from good-neighbourly relations. Consequently, he was not opposed to abandoning the concept of a shared natural resource, if that would help to reconcile divergent views, but he was against the introduction of other sources of principles which would deprive the draft of its real legal character.

<sup>4</sup> *Yearbook ... 1983*, vol. I, pp. 201-202, 1789th meeting, paras. 9-11.

8. It should be noted that the obligations linked with good-neighbourly relations were quite different from those deriving from a condominium. In internal law, the rights and obligations when several persons were co-owners of a piece of land were not the same as when each person was owner of a parcel of land. Similarly, in international law, the rights and duties deriving from the sharing of a common natural resource were very different from those deriving from good-neighbourly relations. Consequently, he was opposed to the introduction of good-neighbourly considerations where they were out of place, as in draft article 7.

9. According to draft article 4, watercourse agreements concluded before or after the entry into force of the future convention would be valid if they took account of the principles set out in that instrument. Thus stated, the rule laid down in that article might give the impression of being a curious rule of *jus cogens*, which might not be found acceptable since important interests were at stake, and might raise serious difficulties. In order to ensure the viability of the future convention, it might perhaps be better to delete paragraph 1 of article 4.

10. With regard to draft article 6, Mr. El Rasheed Mohamed Ahmed (1854th meeting) had expressed doubts about the word “reasonable”. In principle, every State could freely use the waters in its territory, unless there was a risk of causing appreciable harm to another State. It was precisely the difficulties raised by that risk that the draft was intended to overcome, by establishing a balance between the interests of the States concerned and providing for various procedures.

11. Article 8 enumerated a number of factors to be taken into account in determining whether the use of water was reasonable and equitable. But in matters of equity it was difficult to draw up general rules in the abstract, since equity had sometimes been regarded as the “justice of particular cases”. Hence the factors enumerated in article 8 had only an indicative character. He proposed that draft articles 1 to 9 should be referred to the Drafting Committee.

12. Mr. McCaffrey expressed his appreciation of the Special Rapporteur’s tireless efforts to produce a generally acceptable set of draft articles. It had rightly been said that water was life itself; it had also been said that there was only one body of water on the planet and that it was vital to the future of mankind. Such fundamental and immutable principles must never be forgotten. Furthermore, as the Special Rapporteur had noted in his second report (A/CN.4/381, para. 2), the lack of adequate fresh water was “a major scourge for more than one third of the population of the world”; and, as Mr. El Rasheed Mohamed Ahmed (1854th meeting) had observed, the increase in population was placing ever greater strains on the world’s limited water resources.

13. Those facts highlighted the Commission’s responsibility as architect of the framework of principles that would govern the use of water resources; it was akin to a fiduciary responsibility, since the international community had placed in the Commission a trust to be exercised on behalf of all States in which watercourses were

located. No matter what term was eventually given to the framework of principles—model rules, code of conduct or convention—it would be relied upon by States and tribunals in settling competing claims for the earth’s fresh water.

14. As to the nature of the Commission’s task, he believed that, while it could not ignore political considerations, its first step should be to formulate the applicable legal principles, and that only as a second step should it endeavour to temper those principles to the extent necessary to conform to the wishes of the General Assembly. He also believed that, wherever possible, the draft articles should be cast in the form of legal rules rather than hortatory provisions. That did not mean that the Commission should not attempt to formulate procedural rules, which were the core of the draft, but rather that it should endeavour to codify international obligations as revealed in the practice of States.

15. It was not generally a good idea to reopen consideration of draft articles that had already been adopted, even if only on first reading; to do so would not be making the best use of the limited time available to the Commission. That was particularly true in view of the backlog in the Drafting Committee. While he recognized that there were good reasons for reconsidering the six draft articles already adopted<sup>5</sup> and the provisional working hypothesis approved by the Commission in 1980,<sup>6</sup> not the least of which was the fact that the Commission had a new and enlarged membership, it was important for it to make progress in its work and therefore, in principle, not to re-examine articles until they were given a second reading.

16. The Commission should also decide whether the intention was to examine the draft articles in chapters I and II and refer them to the Drafting Committee, or whether it was to have a general discussion on the acceptability of the changes in approach reflected in the Special Rapporteur’s second report. Of those two approaches he would opt for the first, but would appreciate clarification on the point.

17. Turning to the draft articles, he said that he had no objection in principle to the deletion from draft article 1 of the term “system”, though he considered that the expression “international watercourse system” more accurately described the hydrographic facts with which the draft dealt. The deletion of the term “system” also presented the conceptual problem to which Mr. Barboza had referred, namely that there could be different systems, or régimes, with respect to different uses of the watercourse. That point also required clarification.

18. With regard to paragraph 2 of article 1, it would be more accurate to refer to “uses of components” than simply to “components”, since it was uses and benefits that were the focus of the draft. He therefore proposed that, in paragraph 2, the words “uses of” should be added before the word “components”, and that the word “they” should be replaced by “such components or parts”.

<sup>5</sup> See footnote 3 above.

<sup>6</sup> See 1854th meeting, footnote 4.

19. He believed it was proper to include the examples of hydrographic components of an international watercourse given in the Special Rapporteur's second report (A/CN.4/381, para. 24), some of which should perhaps be examined more closely to determine whether they should form the subject of separate articles or at least of a more detailed commentary. He had in mind, in particular, canals and ground water. In the case of canals, it seemed obvious that one canal could rapidly widen the scope of a given international watercourse, as defined in article 1, and could have consequential effects on the watercourse States involved. The Danube Canal and the Garrison Diversion Project, to which he had referred in his statement (1851st meeting) on Mr. Quentin-Baxter's topic, were examples of how two different watersheds could be connected and, arguably, under the terms of article 1, form one international watercourse for the purposes of the draft. It was perhaps necessary to consider whether that was desirable and whether such situations called for a special régime.

20. In regard to ground water, which was dealt with by the Special Rapporteur (A/CN.4/381, paras. 26-36), he would merely ask whether the scientific and legal aspects of that component had been sufficiently examined to enable the Commission, on the one hand, to identify so-called independent ground-water resources, and, on the other, justifiably to exclude such resources from the scope of the draft. His initial reaction was that, in view of their importance, such resources should not be excluded merely because the law in that area was relatively undeveloped. He noted that the fact that a given aquifer might be totally independent and unrelated to a specific surface watercourse would apparently be taken into account in any equitable apportionment of either the surface watercourse or the waters of the aquifer (*ibid.*, para. 30).

21. Draft article 4, paragraph 1, was generally acceptable to him, although Mr. Calero Rodrigues' point (1854th meeting) regarding the conditions laid down for the validity of special watercourse agreements merited further consideration. He doubted that the proposed provisions rose to the level of norms of *jus cogens*, but recognized the attractiveness of building the same protection into the draft for States that were or had been disadvantaged *vis-à-vis* their treaty partners. That seemed to be one of the effects of the conditions laid down in the first clause of paragraph 1; that point too deserved further consideration.

22. In paragraph 2 of article 4 he would suggest that the word "should" be replaced by the word "shall". The second sentence of the paragraph was not very clear; he assumed that the intention was that the States concerned should be permitted to enter into a special watercourse agreement provided that it did not adversely affect use by other watercourse States. If so, the idea could perhaps be expressed in more direct terms.

23. Draft article 5, paragraph 1, as he read it, covered watercourse agreements that applied to the watercourse as a whole and hence entitled every watercourse State not only to participate in the negotiation of such agreements, but also to become parties to them. Paragraph 2, on the other hand, covered watercourse agreements that applied

to only part of an international watercourse or to a particular project, programme or use. Thus, assuming that a river rose in State A and ran successively through States A, B and C, with a tributary running through States A and B but not State C, and assuming further that State A decided to construct a dam on the tributary, an agreement between States A and B in that regard would presumably fall under paragraph 2, since it would relate to only part of the international watercourse concerned. Furthermore, paragraph 2 entitled a watercourse State whose use of the waters of the watercourse was affected "to an appreciable extent" to participate in the negotiation of such an agreement, but not to become a party, as under paragraph 1. Accordingly, State C could participate in the negotiation of the agreement, provided that its implementation would appreciably affect State C's use of the waters of the river, but would not be entitled to become a party.

24. His first question, therefore, was why such States were not given the right to become parties to such agreements, since by definition their use of the waters would be appreciably affected by the agreements. Since agreements concerning part of an international watercourse, or a particular project or use of an international watercourse, were likely to form the bulk of watercourse agreements, the point should perhaps be given further consideration. It might also be worth while reconsidering the usefulness of the distinction between agreements applicable to a watercourse as a whole and those applicable to only part of a watercourse.

25. He would also like to know what was meant by the expression "appreciable extent" and how it related to the definition of an "international watercourse" in article 1 and of "watercourse States" in article 3. If, and in so far as, a State's uses of the waters of an international watercourse were not affected, article 1, paragraph 2, read in conjunction with article 3, would indicate that such a State was not a watercourse State. He therefore wondered what was added by the word "appreciable". If an effect was so slight as not to be appreciable, then it was inconsequential. He doubted that the effect required under article 5 was of a greater degree than that required under article 1, but he would be grateful for clarification.

26. Referring to chapter II of the draft, he observed that, while the principle of equitable sharing of the waters of an international watercourse was dealt with in articles 6 to 8, the methods of ensuring equitable apportionment were dealt with in chapter III; ideally, therefore, the two chapters should be considered together.

27. He had no strong objection to the deletion of the concept of a "shared natural resource" from draft article 6. Equitable use was, however, an elusive concept, and he wished to refer to certain aspects of practice in the United States of America which threw some light on the way in which that concept had been interpreted. The first case in which the doctrine of equitable apportionment had appeared was *Kansas v. Colorado* (1902),<sup>7</sup> in which the State of Kansas had filed suit against the State of Colorado over the Arkansas River. The Supreme Court of the United States, which had recognized that principles of international law were applicable,

<sup>7</sup> *United States Reports*, vol. 185 (1910), p. 125.

had opined that one cardinal rule underlying all relations between States was that of equality of right. It had further opined that neither State could force its law upon the other and that each was entitled to an equitable apportionment of the benefits. It was important to note, however, that that did not mean a literal division of the water of the river, but rather a division of the benefits from the flow of the river. The Supreme Court had never laid down a definition of equitable apportionment and it was difficult to construct one from the few cases on the subject. As had rightly been observed, the very notion of equity implied a response to an individual situation, not the application of a fixed rule. Apportionment could, however, involve the assignment of a benefit to one State and the denial of a benefit to another. Thus water, electric power and fish had been held to be divisible benefits, whereas instream benefits such as estuarine oyster fisheries, anadromous fish runs, navigation and recreation were tied to particular places. Conditions of time and place also shaped apportionment.

28. Paragraph 1 of article 6, as reformulated, was preferable to the original wording, because it provided that a watercourse State was entitled to an equitable share in the uses of the waters of a watercourse, rather than to a share of the water itself. The provision could perhaps be further improved, however, if the term “uses” were replaced by the wider term “benefits”, to make it clear that the article guaranteed more than a share in the water itself. Share benefits could include, for example, electricity, money generated by a project or paid in compensation for detriment caused by a project, fish, navigation and environmental benefits. He was not certain, however, whether the phrase “within its territory” was intended to exclude any of those benefits; if it was, he was not sure why they should be excluded.

29. Paragraph 2 of article 6 made the obligation to share contingent upon the use in one State affecting uses in another State. Again, it seemed to him that without an effect there would be no obligation to share, because the States concerned would not be watercourse States within the meaning of articles 1 and 3, and article 6 would consequently not apply.

30. His only question in regard to draft article 7 concerned the expression “optimum utilization”, which seemed to have the economic connotation of most efficient use. Since it was presumably not intended to award priority to the most efficient user, the last part of the article could perhaps be rephrased to read: “with a view to attaining maximum benefits for each watercourse State from its share of the resource consistent with adequate protection and control of the international watercourse and its components”.

31. With regard to draft article 8, he believed, unlike Mr. Calero Rodrigues, that it would be helpful to provide a non-exhaustive list of factors to be taken into account by negotiating States in determining what was reasonable and equitable use in their particular situation. The factors in question were not binding, in the sense that their relative importance would vary according to the situation concerned; in many situations some of the factors listed would not be relevant, while factors not

listed might well be crucial. He agreed with other speakers that several factors might usefully be added to the list, without, however, purporting to make it any more exclusive. Such additional factors included regional and special agreements and the effect on navigation of a particular project or particular use.

32. Draft article 9, which prohibited activities that might “cause appreciable harm”, should be reconsidered. It would be more appropriate to proscribe “exceeding a State’s equitable share” or “depriving another State of its equitable share” of the benefits of the waters of an international watercourse. Another solution, suggested by Mr. Ni (1854th meeting), would be to revert to the formula employed in article 8 (Responsibility for appreciable harm) as proposed by the previous Special Rapporteur in his third report,<sup>8</sup> which provided that a State had a “duty not to cause appreciable harm”, except as might be “allowable under a determination for equitable participation for the international watercourse system involved”.

33. The term “harm” raised the question of the relationship between “harm” and equitable allocation. A conflict could arise between the concept of an “equitable share”, under article 6, and that of not causing “appreciable harm”, under article 9. It was implicit in the concept of an equitable allocation of benefits that probably neither party would get all it wanted. If that were so, they could both claim to have been “harmed”—unless the concept of “harm” was itself defined in the context of equitable allocation, so that a State could not be considered to be harmed by an equitable allocation of the benefits of an international watercourse.

34. The “no harm” rule seemed in effect to create a prior appropriation system that could result in a far from equitable division of benefits. That point could be illustrated by the example of an upper riparian State and a lower riparian State each planning a large project when there was not enough water for both. If the upper riparian moved first, it could claim (a) that it was exercising its right under article 6; (b) that it was causing no harm under article 9; (c) that it had no obligation to notify under article 11. The lower riparian State would then find that its project was precluded for lack of water supply. If, on the other hand, the lower riparian acted first, it could assert that it was causing no harm and owed no duty of notice. If the upper riparian State then initiated its project, the lower riparian would be able to claim that it was being harmed.

35. That example showed that the first developer, whether the upper riparian or the lower riparian, acquired the better right. It was undesirable to encourage that type of race, since it would allow the State with the greater capability, or the one which acted quickest, to acquire superior rights to the water. In order to avoid that unintended result, he had suggested, at the previous session,<sup>9</sup> that the expression “appreciable harm to the rights or interests” of other watercourse States should be interpreted as including not only present harm to existing uses and benefits, but also future harm, in the sense of lost

<sup>8</sup> See 1854th meeting, footnote 5.

<sup>9</sup> *Yearbook ... 1983*, vol. I, p. 221, 1792nd meeting, para. 31.

opportunity to carry out a project, for example. It was essential to take such "opportunity costs" into account, in order to provide some protection against loss of future benefits by one State as a result of action taken by another State. If opportunities were to be made the basis for allocating an equitable share of the unused water to a State, then the lower riparian State would have a legal basis for requesting that some water be left for it.

36. In any event, a rule to the effect that a State could not exceed its equitable share, or deprive another State of its equitable share, would present far fewer difficulties than the rule that a State must not cause appreciable harm; it could also be more easily construed to include the requirement that future benefits must be taken into account.

37. Chapter III dealt with an aspect of the draft which the experience of the United States of America, at both the international and the internal levels, had shown to be most important for smoothing and harmonizing relations between co-riparian States. That chapter provided procedures for arriving at an equitable apportionment, for the building of régimes and for the establishment of joint commissions, and United States experience was particularly rich in that respect. He need only mention the International Joint Commission established by Canada and the United States, and the International Boundary and Water Commission between Mexico and the United States. A reference to the first of those commissions was contained in an interesting passage of the fifth report of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/383 and Add.1, para. 23).

38. As he saw it, joint commissions provided the best, if not the only way out of the dilemma posed by the parallel freedoms of upper and lower riparian States, which were of equal dignity. That dilemma was illustrated by the different views which had been expressed on the procedures proposed in draft article 13. If the duty to cooperate and the principles of good-neighbourliness and friendly relations were to have any real meaning in the context of international watercourses, they called for States to use their best efforts to build régimes and establish joint commissions.

39. The procedures set out in draft articles 11 to 14, dealing with such matters as notice, reply and liability, seemed to him very unrealistic. Among other things, they were tort-oriented, *post hoc* and quasi-judicial; they placed the emphasis on action taken after the event. It would be much better to start at an earlier stage and eliminate the possibility of a quarrel arising at all. What was really needed was some mechanism for determining in advance the share of each State or whether a particular project was allowable, and for establishing the rights of the States concerned.

40. His suggestion for a better procedure would be to create a mechanism for determining, by agreement or adjudication, the equitable share of each State. That could be done by expanding articles 10 and 15 into a system of prior clearance of projects. Article 16 could also be expanded to encompass the modern concept of water planning, raised to the international level—a move which

would go far towards achieving watercourse peace and harmonious development, without need of regulation or sanctions. There could be procedures for review of each project by an international agency, which would follow the various stages of conception, feasibility study, formulation of project design, preparation of construction blueprints, etc., at each stage studying alternatives, making choices, setting trade-offs and avoiding causes of conflict. Procedures could be established for negotiating agreements to identify the shares of States. There could be powers to decide the equitable shares in the water to be allocated among the States concerned. The operations of the International Joint Commission between Canada and the United States provided a valuable example. A useful United States model for an international river agency was also provided by the Delaware River Basin Commission.

41. Mr. REUTER said that he had kept silent on the draft articles under consideration for a long time, but he thought it better to speak late than never. He had three general comments to make. The first concerned the content of the draft articles. The Commission was divided between two contradictory alternatives: to prepare draft articles which, because of their lack of precision, would not mean much, but would be favourably received; or to draft a precise text which would raise difficulties because of its precision. He would prefer the second course and thought that, in trying to establish a balance between the two, the Commission should not take the easy way out.

42. Like other members of the Commission before him, he noted the non-legal character of some of the provisions. He fully appreciated that the Commission was bound to use general terminology which had little binding force. But while he was not opposed to the notions of good faith and good-neighbourly relations, they were certainly very vague. He recognized that general formulations were sometimes useful, as in the 1982 United Nations Convention on the Law of the Sea, but he wondered whether it would ever be possible to establish the breach by a State of its obligation to co-operate, for example. He seemed to be the only member of the Commission to have reservations on that aspect of the draft.

43. Similarly, while he could not be accused of hostility to humanitarian law, he was opposed to the introduction into the draft of a provision such as draft article 28 *bis*. That article was far from being sufficient to settle the difficult problem of armed conflicts. "Water war" was not something purely theoretical; if it had happened that a State had set its capital on fire to make the enemy retreat, could not other States break open their dams for the same purpose? Thus article 28 *bis* did not meet the needs that might arise. Similarly, paragraphs 2 and 3 of draft article 10 had been conceived with good intentions, but they were not binding; and developing countries, like international organizations—which, moreover, would not be parties to the future instrument—lacked the necessary resources to implement those provisions.

44. Secondly, it was true that the substance of the articles, the procedures provided for and the provisions on settlement of disputes were linked, so that it was difficult to study questions of substance until the procedures had

been established and the Commission had some idea of the method to be adopted for settling disputes; hence the reservations on the part of members of the Commission. What was more, procedures were especially important in that context and came into play as early as draft article 5. The procedures outlined in the draft articles should therefore be refined. Furthermore, in his opinion it would not be possible to apply the draft articles in practice unless more important functions were assigned to international organizations. He was not sure that recourse would be had to arbitration and to international justice as often as he would wish. Some of the provisions could not be applied without an international organization being responsible for the functions of a secretariat, mediation, information and consultation. An example was provided by the 1982 United Nations Convention on the Law of the Sea, the negotiators of which had had the felicitous idea of anticipating the action of international organizations.<sup>10</sup>

45. Thirdly, he regretted the insufficiently concrete character of the draft articles. It was true that a universal instrument was bound to be abstract, but he wondered whether all the uses of watercourses other than navigation had been included. For instance, had any attention been given to timber floating? The uses of watercourses were of two kinds: some, such as human consumption, agriculture and industrial uses, took the form of withdrawals which could go so far as exhaustion of the resources and thus have dramatic consequences; others, such as hydroelectric power production, fishing and timber floating, which were of a temporary nature, could raise technical problems which, although difficult, were relatively amenable to solution. He had the feeling that the Special Rapporteur had had the first kind of uses in mind when drafting certain provisions calling for the sharing or distribution of water, and the second kind when drafting rather scientific articles. But he would like the Commission to adopt an even more differentiated approach, in order to take account of those two kinds of use, even though it might be objected that they sometimes overlapped.

46. Commenting next on individual articles, he said he was glad to see from draft article 1 that the Special Rapporteur was willing to change the terminology used if it caused difficulties, though he wondered whether the drafting difficulties in question did not conceal a more serious problem. The Commission would not be able to avoid defining the expression “an international watercourse in its entirety”, used in several draft articles. The fundamental problem was that a “floating”, totally relative definition of an international watercourse restricted, for each problem, the number of States concerned and consequently reduced the servitude of States; that was an important factor. The question was whether the system could work and whether it was not too complicated. Even if the provisions remained abstract, it would be essential to give examples in the commentary. Did the proposed definition cover a case in which the international watercourse included everything that had formerly

been called the “system”? Serious pollution, for example, if it came from sources in the upstream State, would still be felt at the river mouth and all the riparian States would be concerned; but if the pollution was not serious, it would have disappeared for the downstream State at the river mouth. Perhaps it would be possible to think of another situation in which all the watercourse States would be concerned if there were rules providing for the establishment of a water consumption balance sheet, but he was not quite sure and would like to have a more concrete view of the matter.

47. In draft articles 2 and 3, a distinction appeared to have been made between watercourses and their waters. Was that entirely a matter of drafting? Should the expression “watercourse” be taken to refer to the different uses and the word “waters” to refer to consumption?

48. Draft article 4 contained the expression “international watercourse in its entirety”, which remained to be defined. He did not quite see the need for paragraph 3 of that article, and he had reservations about the reference to *jus cogens* in the Special Rapporteur’s commentary (A/CN.4/381, para. 38).

49. Draft article 5 dealt more with the uses of water than with the watercourse. He understood the article, but feared that its practical application might raise problems. It was an entirely new and even extraordinary text, since it provided for a right which did not exist in international law, namely the right to participate in the negotiation and conclusion of a treaty binding only a few States. That problem did not arise in the case of universal treaties concluded under the auspices of the United Nations; but what would be the situation in regard to universal instruments negotiated outside the United Nations? By what machinery would the participation be brought about? In order to overcome that difficulty, he thought it essential to provide for an organized structure, if only a simple one. In his view, draft article 5 was the pivot on which the procedures hinged.

50. He noted that draft article 6 referred to the uses of water, but not of the watercourse. Perhaps there were reasons for that wording.

51. The drafting of article 9 raised a problem, because it was necessary to take account of the cases envisaged by Mr. Quentin-Baxter, for example the collapse of a retaining dam. At present, draft article 9 referred only to regular and continuous uses of water which could themselves cause harm.

52. Draft article 8 contained an accumulation of unrelated elements, and he found it unacceptable. He could accept the reference to equitable and reasonable principles, even though the wording implied a failure, but he would suggest going further and classifying the fundamental elements by which equity and reason could be established, two of which were of exceptional importance, namely the needs referred to in paragraph 1 (b) and the contribution of water referred to in paragraph 1 (d). There might be other elements, but they were of secondary importance. The text of the article should therefore be drafted differently. Why refer to geographic, hydrographic and hydrological factors? It was obvious that

<sup>10</sup> Annex IX of the Convention (see 1831st meeting, footnote 6).

the negotiators would have them in mind. Like Mr. Calero Rodrigues (1854th meeting), he preferred a more austere style. He also had doubts about the meaning of the expression "optimum utilization", which suggested a rather naïve view of things. To express an opinion on draft article 8 he would need concrete examples, showing that in a particular case a court had attached so much importance to one factor and so much to another. So it mattered little whether draft article 8 was reduced to a single sentence or disappeared altogether; it was the Commission's commentaries that were important. He suggested referring to factors "whose relative importance will vary depending on all the circumstances".

53. In draft article 29 (now draft article 15 *ter*), which excluded preferential uses, he was surprised to see a text which did not recognize the priority of a State whose supply of water was a matter of survival, if it requested priority. That omission was most unfortunate.

54. In conclusion, he expressed full confidence in the Special Rapporteur, who had been most self-sacrificing. If the Special Rapporteur thought it opportune to refer the draft articles to the Drafting Committee, he would have no objection.

*The meeting rose at 1 p.m.*

## 1856th MEETING

*Friday, 6 July 1984, at 10 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

### **The law of the non-navigational uses of international watercourses (continued) (A/CN.4/367, <sup>1</sup> A/CN.4/381, <sup>2</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)**

[Agenda item 6]

#### **DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR <sup>3</sup> (continued)**

1. Mr. RIPHAGEN said that the topic under consideration had much in common with the topic of inter-

national liability for injurious consequences arising out of acts not prohibited by international law. Both were concerned with rules of international law which offset the effects of the arbitrary division of the world into many individual States. It was for that purpose that Grotius had devised the legal construction of *jus communitationis*, which dealt with human movement across borders.

2. Since the territories of the States through which international watercourses flowed were not watertight compartments and the waters of those watercourses were essential for human life, State practice in respect of their use had taken shape long ago. There was thus a body of rules which established the substantive and procedural rights and obligations of watercourse States. Those obligations included the duty not to overstep certain limits in the exercise of territorial sovereignty, the duty to co-operate and, in some cases, the duty to ensure that the watercourse would be managed jointly as an integrated whole.

3. In view of the limits on territorial sovereignty, vague concepts such as what was "reasonable", "fair" and "equitable" had to be used to qualify the right to exercise such sovereignty. With regard to the obligation of a watercourse State to prevent within its territory any interference with the uses of water in the territory of another State, it was necessary to resort to the very vague term "to an appreciable extent". The flexible concepts of "good faith" and "good-neighbourliness" were also used to describe the way in which the duty to co-operate should be fulfilled.

4. The limitation of the right to exercise territorial sovereignty over an international watercourse was in fact the mirror image of the definition of the obligations of watercourse States. That point had important drafting implications because it was, for example, not clear that the prohibition provided for in draft article 9 was the mirror image of the right of all watercourse States to a reasonable and equitable share of the use of the waters of the watercourse in their territories.

5. The notions to which he had referred were open to divergent interpretations. Priorities therefore had to be set with regard to water uses. High priority had to be given to drinking-water supplies, but the use of water for the disposal of industrial waste had low priority. It was also clear that the existence of a use did not in itself confer any priority. Nor should an existing use be the basis for a claim to participation in the negotiation of watercourse agreements or the exercise of other procedural rights.

6. The question of alternative uses and compensation also had to be taken into account in determining what was fair, equitable and reasonable. In some cases, such a determination could lead to the prohibition of certain uses or activities, particularly in view of the needs of future generations. The concept of the conservation of a resource by non-use thus implied the joint management of that resource as an integrated whole.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

7. Because of the vagueness of the terms “equitable” and “reasonable”, States had a duty to co-operate and to negotiate with regard to the scope of the rights they were entitled to exercise. If, however, the negotiations failed and no agreement was reached, they would also have a duty to seek a solution by other appropriate means.

8. One important feature of the new draft articles was that they were intended to provide for compulsory conciliation procedures. The wording of the articles in chapter V of the draft should, however, be amended to make it quite clear that the conciliation procedures in question were, indeed, compulsory. Stronger emphasis should also be placed on the fact that the Conciliation Commission decided on its own procedure and jurisdiction, as had been made clear in annex V to the 1982 United Nations Convention on the Law of the Sea.<sup>4</sup>

9. Although he had no objection to the Special Rapporteur’s decision to delete the term “system”, he did not think that that decision would improve the text of the draft articles. Whatever wording was used, an international watercourse had to be defined as constituting a unit of some kind that would be divided among the States concerned.

10. It also had to be made clear that the draft referred not only to the waters of a watercourse, but also to the bed of the watercourse and to watercourse installations, whose legal status was extremely important. The extent of co-operation between watercourse States and the content of the duty to co-operate would, of course, depend on the location and characteristics of the watercourse in question; those factors could not be defined in the abstract.

11. He noted that the former draft article 39 had begun with the words “Without prejudice to article 4, paragraph 3”, while in the new version of that article that proviso had been eliminated. As he saw it, that deletion required some explanation. The reason for the reference to article 4, paragraph 3, was that the Commission had recognized that agreements in force relating to a particular international watercourse might, in due course, have to be extended to other projects, programmes or uses. Existing agreements which related only to specific uses might, therefore, have to be updated to take account of new projects, programmes or uses.

12. Mr. QUENTIN-BAXTER said that, although he came from an island country which was thousands of miles away from the nearest land boundary, he was fully aware of the importance of the topic under consideration. He therefore congratulated the Special Rapporteur on his second report (A/CN.4/381) and on his decision to abandon the concept of an international watercourse as a “shared natural resource”, which had been at the centre of the Commission’s work on the topic for some six or seven years. It was encouraging to note that, during the current discussion, no one had questioned the correctness of the Special Rapporteur’s decision. It had been recognized that the “shared natural resource” concept unduly limited the freedom of action of water-

course States, but it remained to be seen how the abandonment of that concept would affect the draft as a whole.

13. He recalled that Mr. Kearney, the first Special Rapporteur for the topic, had convincingly explained the “drainage basin” concept in his report<sup>5</sup> and had followed the tradition of the Helsinki Rules prepared by the International Law Association in 1966.<sup>6</sup> At the time, he himself had been impressed not only by the first Special Rapporteur’s presentation, but also by the reserve shown by nearly all members of the Commission.

14. Mr. Schwebel, the second Special Rapporteur, had had to grapple with the conflict between recognition of the “drainage basin” concept and the shadow of the “shared natural resource” concept, which meant that no State could take decisions without the concurrence of the other States concerned. That rule was one which States were prepared to apply in matters relating to boundary waters. In such circumstances, the “shared natural resource” concept obviously had a place in the draft, but there also had to be a more flexible means of dealing with other matters.

15. In his second report,<sup>7</sup> Mr. Schwebel had therefore suggested the concept of a “watercourse system”, which recognized the unity of a river system while emphasizing that it consisted of components. That concept had been designed to mitigate the rigour of the “shared natural resource” concept, while paying due regard to the facts of geography, the unity of rivers and the nature of water. After an inconclusive debate in the Commission, the matter had been referred to the Drafting Committee, which had thus had a very heavy responsibility thrust upon it. The Drafting Committee had then produced a set of draft articles<sup>8</sup> prefaced by a “working hypothesis”<sup>9</sup> which had been provisionally adopted by the Commission.

16. Like some other members, he had difficulty in agreeing with the current Special Rapporteur’s decision to abandon the term “watercourse system”. The elimination of that term might be more a matter of language than of substance, but caution was necessary because, if importance was attached to a change of wording, the change might not be purely cosmetic.

17. Two major elements of draft articles 1 to 9 appeared to be connected with the concept of a “watercourse system”. The first was the “shared natural resource” concept; with its elimination, one of the reasons for the idea of a “watercourse system” had disappeared. The second element was the very important, but elusive, principle embodied in draft article 5, which dealt with the parties to the negotiation and conclusion of watercourse agreements and had also been patterned on the “watercourse system” concept. Since that concept had been

<sup>4</sup> See 1831st meeting, footnote 6.

<sup>5</sup> *Yearbook ... 1976*, vol. II (Part One), p.184, document A/CN.4/295.

<sup>6</sup> See 1831st meeting, footnote 4.

<sup>7</sup> *Yearbook ... 1980*, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

<sup>8</sup> See footnote 3 above.

<sup>9</sup> See 1854th meeting, footnote 4.

abandoned, however, the text of the new draft article 5, paragraph 1, had become a tautology. It provided that every watercourse State was entitled to participate in the negotiation of and to become a party to any watercourse agreement that applied to that international watercourse as a whole. If some watercourse States chose to conclude an agreement which left out another watercourse State, they could do no more than regulate their own part of the watercourse and their agreement would clearly not apply to the watercourse as a whole. Any agreement relating to a watercourse in its entirety would obviously require the participation of all the States having territorial control over that watercourse.

18. The question of agreements which applied to part of a watercourse, as dealt with in draft article 5, paragraph 2, could be usefully illustrated by the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in frontier waters, which contained the following provision relating to pollution:

The Contracting Parties have agreed to abate the pollution of frontier waters and to keep them clean to such extent as is specifically determined in each particular case in accordance with the economic and technical possibilities and requirements of the Contracting Parties.<sup>10</sup>

Those two countries had agreed to improve the quality of boundary waters, but had not committed themselves to spending more than was reasonable for that purpose. Boundary waters had thus been treated as a shared natural resource. In view of the geographical location of Czechoslovakia and Poland, the boundary waters between them would inevitably flow into the territory of other States. Although downstream States might be affected by the pollution of the waters in question, Czechoslovakia and Poland had no obligation to canvass the situation of those States. A provision such as draft article 5, paragraph 2, would, moreover, be of no assistance in such a situation; it might well hinder the countries concerned.

19. Draft article 4 was unlikely to have the effect of encouraging States to conclude watercourse agreements. Rather, it placed particular emphasis on the framework convention, even to the extent of specifying the content of special watercourse agreements and of playing down the need for watercourse States to conclude such agreements. That article should therefore be redrafted to encourage the States of a single river system to conclude agreements governing its uses.

20. With regard to chapter II of the draft, he noted that, although the "shared natural resource" concept had been eliminated, article 6 still referred to the idea of sharing. The emphasis in paragraph 1 of that provision was, however, wrong: it spoke of a "share of the uses of the waters of an international watercourse", but it should refer to the sharing of the waters themselves. Water was a commodity in short supply to which each riparian State had a right, although it could waive that right in return for something else, such as electric power from a dam.

21. The redrafting of article 6 and the elimination of the "system" concept had produced a curious consequence: paragraph 2, taken together with paragraph 1, established an obligation that was very similar to an obligation under liability for injuries arising out of acts not prohibited by international law, although it did not draw the same distinction between the physical consequence and its effects. In his view, paragraph 2 could not be placed side by side with paragraph 1, which provided that every watercourse State was entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

22. Draft article 9 appeared to offer a final guarantee for downstream States because the rule it established would engage State responsibility. If the aim of draft article 9 was to deal only with pollution, the obligation for which it provided would be very strong, since pollution was an area of transboundary harm in which rules of prohibition were coming to be accepted, at least by developed countries, on the basis of the principles established in the *Trail Smelter* case.<sup>11</sup> Chronic pollution was something that could be avoided, usually within an economic framework. There was therefore some merit in an article along the lines of draft article 9.

23. The rule stated in draft article 9 nevertheless had its limitations. If the flooding which had occurred in 1983 in the Colorado river basin in the United States of America and which had been caused when the sluice-gates of a dam had been opened to release waters that had reached dangerously high levels had taken place, for example, in Europe or in Africa, it would have had broad international implications. In such a case, draft article 9 could not have been invoked as a basis for claiming the international responsibility of the source State and, even if it could have been, the case would have been one of *force majeure* under the rules of State responsibility. The apparently strong protection afforded by draft article 9 thus melted into nothing and the only remedy left was that provided by the principles of liability. It was probably safe to say that the United States authorities would never think of such a case in terms of State responsibility; to them, it would clearly be a case of liability for the injurious consequences arising out of the lawful use of the waters of a watercourse in their territory. It would be on that basis that arrangements for compensation would be made internally. That situation was thus one in which State responsibility was precluded and in which there were nevertheless a number of important obligations that had to be fulfilled.

24. Draft article 9 dealt not only with transboundary harm, but also involved an element of sharing. Draft article 6 provided for the right of each watercourse State to a share of the waters of the watercourse and, if a State did not receive a fair share of those waters, its rights and interests would be harmed and State responsibility would be engaged. In that connection, he drew attention to the need to take account of the concept of equity. As the example of the 1958 Agreement between Czechoslovakia and Poland concerning the use of water resources in

<sup>10</sup> Art. 3, para. (4) of the Agreement (United Nations, *Treaty Series*, vol. 538, p. 110).

<sup>11</sup> See 1848th meeting, footnote 10.

frontier waters had clearly shown, there was no definite agreement even on the definition of pollution. Those two countries had thus set their own admissible levels of pollution for particular purposes, with an eye to costs and benefits as well as to priorities. That was a reasonable approach and one which was adopted by countries throughout the world, which nevertheless had to take account of the interests of downstream States in setting those priorities. There was thus no automatic formula for determining what constituted “harm” and the problems involved could not be solved merely by using terms such as “appreciable harm”, however useful such terms might be.

25. If the question of sharing “in a reasonable and equitable manner” was also raised in connection with draft article 9, the hard rule of State responsibility would have to be made subject to the soft rule of estimating what was fair, reasonable and equitable. Referring again to the example of the dispute between Mexico and the United States relating to the Colorado River, whose waters had been used so intensively for irrigation in the United States that only a trickle of salt water was reaching Mexico across the frontier, he noted that a settlement had been reached as a result of negotiations between the two Governments concerned and that it had been agreed that the United States would spend large amounts of money to set up desalination plants, to provide outlets for contaminated salt water and to pay compensation for the losses incurred by Mexican farmers (see A/CN.4/373, para. 48). That result was in keeping with the concept of what was “reasonable and equitable”. The “equitable” solution in that case would have been for the United States to stop using the waters of the Colorado River and leave them to Mexico, since Mexico was the poorer country, but, in view of the agricultural situation in the United States, that solution would not have been “reasonable”. The best solution was thus that the wealthier country, the United States, should spend money to strike a balance in favour of Mexico.

26. The main issue in that context related to draft article 8. Some members of the Commission attached a great deal of importance to that article, while others, including Mr. Calero Rodrigues (1854th meeting) and Mr. Reuter (1855th meeting), wished to dispense with it. A list of relevant factors, such as that contained in draft article 8, involved the question of an equitable balance of interests. Indeed, where the law provided no firm automatic rule, the only answer was a balance of interests and the natural tendency was to produce a list of the relevant factors to be taken into account: hence the content of draft article 8, which had been based on article V of the Helsinki Rules.<sup>12</sup>

27. It was interesting to compare article V of the Helsinki Rules with article 3, paragraph (1), of the Montreal Rules adopted by the International Law Association in 1982,<sup>13</sup> which read:

<sup>12</sup> See 1831st meeting, footnote 4.

<sup>13</sup> ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), p. 2.

(1) Without prejudice to the operation of the rules relating to the reasonable and equitable utilization of shared natural resources, States are in their legitimate activities under an obligation to prevent, abate and control transfrontier pollution to such an extent that no substantial injury is caused in the territory of another State.

That provision was adequate to deal with transboundary pollution where no question of sharing was involved, but it would not be satisfactory if sharing were involved. That pointed to the crux of the problem with regard to draft article 8. Sharing was the foremost issue in the topic under consideration and a draft on international watercourses could not be elaborated without dealing with that issue. The rules that might engage State responsibility therefore had to be qualified by means of a prior determination of “reasonable and equitable” shares and it must be the Commission’s aim to encourage States to solve the problems they faced in particular situations by means of special watercourse agreements.

28. Although he was not in favour of the suggestion that draft article 8 should be deleted, he agreed that a long, non-exhaustive list of relevant factors would be inelegant. He therefore proposed that the list contained in paragraph 1 (a) to (k) should be included in a schedule to the future convention, not in the commentary to article 8.

29. As Mr. Boutros Ghali had suggested (1853rd meeting), account should also be taken of quantitative factors, comparative costs and population growth. Mr. Reuter, moreover, had stated that needs and contributions were the basic factors to be considered and that a distinction had to be drawn between consumption and non-consumption uses of water, while Mr. Boutros Ghali had also drawn attention to the navigational uses of international watercourses. Bilateral water boundary agreements in Europe and in North America often contained entire chapters on timber floating, which could be regarded either as a navigational use or as an industrial use, depending on circumstances. The main point was that it was a competing use which had to be given priority. Although draft article 2 could be retained for the time being, he thought that the Commission would eventually have to decide whether the draft articles should also apply to the navigational uses of international watercourses.

30. Mr. BOUTROS GHALI, referring to the statement he had made at the 1853rd meeting, said he wished to make it quite clear that a distinction had to be drawn between the various uses of international watercourses. For example, a cubic metre of water from the Nile did not have the same intrinsic value in Egypt and in Ethiopia. Egypt, which was a desert country and had, moreover, been called a gift of the Nile, had only that river to rely on for water supplies. The different possible uses of an international watercourse should therefore be defined before any attempt was made to determine the consequences of such uses or to decide on a procedure for the settlement of disputes.

31. Mr. CALERO RODRIGUES said that he wished to clarify a point raised by Mr. Quentin-Baxter. At no point had he said that he found draft article 8 unnecessary. He was, rather, not far from agreeing with Mr. Mahiou (1854th meeting) that the article was very important.

What he had said was that he did not think that the list of relevant factors contained in paragraph 1 (a) to (k) should be included in the text of article 8. Unless an exhaustive list could be produced—and that would be an impossible task—the value of such a list would be very limited; the inclusion of some elements and the omission of others would only complicate matters. He therefore assured Mr. Quentin-Baxter that his intention had been only to suggest either that the list should be deleted or that it should be included in the commentary to draft article 8.

32. Mr. USHAKOV proposed that draft article 1 should read:

“An international watercourse means a watercourse which crosses the territory of two or more States and whose components are defined by agreement between the watercourse States concerned.”

The first part of that provision defined the main characteristic of an international watercourse. It would, of course, be difficult to identify the “States concerned”, to which the second part of the provision referred, since there were various criteria, including that of a “drainage basin”, that could be used.

33. Mr. OGISO said it had been stated that the topic under consideration should not concern island countries, such as Japan and New Zealand. Mr. Quentin-Baxter *inter alios* had, however, explained his interest in the subject very well. In addition to the interest in the subject he himself had as a member of the Commission, Japan was interested—even though it had no international rivers—in making a contribution to the development of areas where international rivers flowed, since the use of their waters was indispensable for the economic development of the riparian States.

34. In draft article 1, one major change had been the deletion of the word “system”. According to the Special Rapporteur, the main reason for the deletion had been the doubts expressed by a number of delegations in the Sixth Committee of the General Assembly. He was, however, not sure whether there was any substantive difference between the present text, which used the words “international watercourse”, and the former text, which had used the words “international watercourse system”. If the change was not purely cosmetic and there was in fact a difference of substance and legal meaning, an explanation should be included in the commentary.

35. He was also not sure whether draft article 1 placed all the components or parts of a watercourse on the same footing or whether there was a distinction between the main components and the subsidiary components. Assuming, for instance, that the mainstream of a large river flowed through State A, with one tributary flowing from State B into the mainstream in State A, would the entire stream become an international watercourse or only the tributary? He would appreciate it if the Special Rapporteur could clarify that point. Difficulties might arise if an attempt were made to distinguish between the main and subsidiary components of a river. His own view was that a particular river would be regarded as an

international river if the mainstream flowed through more than two countries, but not if it flowed through one country and had a tributary flowing into it from another country.

36. He would also like to know whether it was the Special Rapporteur’s intention to include in the definition of an international watercourse man-made canals or lakes that had formed as a result of the construction of a large dam. He believed that the reference to canals and lakes in the Special Rapporteur’s commentary (A/CN.4/381, para. 24) covered cases in which a canal or lake formed a subsidiary part of a watercourse, not those in which it was the main component of an international watercourse. He did not know whether there were in fact any large canals that extended into the territory of more than one country, but, assuming that they were to be constructed in future, they would presumably be covered by a special international agreement. On that basis, it would seem that man-made canals should be excluded from the definition of an international watercourse, but he would appreciate having the Special Rapporteur’s views in that regard.

37. As to draft article 1, paragraph 2, he was not sure about the meaning of the words “components or parts of the watercourse in one State are not affected by or do not affect uses of the watercourse in another State”. In particular, the words “are not affected by or do not affect uses” implied that it was present uses that would be affected; but that did not take account of the situation which might arise if a project was undertaken to develop parts of an international river. If, as he believed, it was the Special Rapporteur’s intent to cover such a contingency, he would suggest that the words in question might be amended to read “are not affected by or are not likely to be affected by uses...”. That suggestion might be referred to the Drafting Committee for consideration.

38. Ground water had been referred to by a number of speakers. In his view, ground-water resources located in the border area between two countries and of the kind referred to in the Special Rapporteur’s commentary (*ibid.*, paras. 27-29) should be excluded from the draft convention. Ground water that supplied water to a main international stream might, however, affect the flow of that particular international river. That was another point that required clarification by the Special Rapporteur.

39. With regard to draft article 4, he agreed with Mr. Ni (1854th meeting) that the last part of the first sentence of paragraph 1 could be deleted. As it now stood, moreover, that provision was ambiguous and should be redrafted with a view to greater clarity.

40. There was a slight difference in nuance between two statements made by the Special Rapporteur in his comments on that article. The Special Rapporteur stated (A/CN.4/381, para. 38) that “Great caution should ... be exercised especially in claiming that special watercourse agreements in force must be re-examined ...”, which seemed to suggest that he discouraged re-examination of special watercourse agreements, whereas later he stated that

... considerable restraint should be demonstrated in regard to allegations that special watercourse agreements concluded in good faith subsequent to the entry into force of the framework convention would have to apply and adjust the provisions of the framework convention to a special watercourse agreement or arrangement if the States parties held a different opinion. ... (*Ibid.*, para. 39.)

He would like some clarification in that regard and trusted that the commentary would make the position a little clearer.

41. Like other speakers, he had some misgivings about the term “to an appreciable extent” used in draft article 4, paragraph 2. If the use of the waters of an international watercourse was adversely affected, such adverse effect must of necessity be “appreciable”; if it were not, he did not see how the use could be “adversely” affected. To his mind, the term “to an appreciable extent” could confuse the issue. He also noted that the term appeared at a number of other points in the draft and he had the impression that, in some places, it was used more for psychological reasons than out of legal necessity.

42. The comment he had made on the words “are not affected” in draft article 1 could also apply to draft article 4, paragraph 2, and to draft article 5, paragraph 2. With regard to the latter provision, he would like to know whether the intent was that any decision as to whether the use of the watercourse was “thereby affected” should rest with the State whose use of the water was, or was likely to be, affected, or whether the other watercourse State which proposed an agreement also had a right to take part in such a decision. Since the paragraph in question provided for an entitlement to participate in the negotiation, he thought it was proper to interpret it as conferring a sole right of decision upon the State whose use of the water was affected. That should, however, be made clear, if not in the body of the draft, then in the commentary.

43. Referring to draft article 6, he said that it was not clear whether any substantive difference from the original text of the article had been introduced by discarding the concept of a “shared natural resource”. Since the concept of sharing had been retained, the content of the old and new versions of article 6 seemed to be the same; the deletion of the concept of a “shared natural resource” could thus be regarded as purely cosmetic. The Special Rapporteur might, however, have some substantive change in mind and some further clarification would therefore be appreciated. For his own part, he wondered whether the concept of a “shared natural resource” might not serve a useful purpose in certain cases. In that connection, he noted that there were two categories of special watercourse agreements: one relating to agreements for the management and administration of the watercourse, and the other to agreements for a particular development project. In the case of the latter category in particular, it might sometimes be useful to adopt the concept of a “shared natural resource” if the watercourse States concerned agreed to do so. Accordingly, without making any firm proposal, he would suggest that, rather than excluding the concept entirely, a provision along the following lines should be considered:

“Watercourse States parties to a special watercourse agreement may accept the concept of a shared natural resource for the purpose of that particular agreement to the extent that the proposed special watercourse agreement is applicable to a particular project or programme or to a particular use of that water resource.”

He would appreciate having the Special Rapporteur’s comments on that suggestion.

44. He noted that the Special Rapporteur had used the words “reasonable and equitable manner” in draft article 7, whereas, in his commentary (*ibid.*, para. 48), he had used the words “fair and equitable share”. That could suggest that the word “reasonable” and the word “fair” had almost the same meaning. While he could accept either the words “reasonable and equitable” or the words “fair and equitable” some further clarification regarding any difference in legal meaning between the word “reasonable” and the word “fair” would provide a basis for the interpretation of subsequent articles.

45. Doubts had also been expressed with regard to the word “optimum” in draft article 7. The fact that that term had been used in a number of legal instruments and, in particular, in fisheries agreements which referred to the “optimum annual catch” of fish provided some precedent for the concept and he was therefore prepared to accept it. He was not, however, very sure about the legal content of the term “good-neighbourly relations” and was inclined to regard it more as a political concept than as a legal concept. In that connection, he noted that draft article 4, paragraph 3, referred only to “good faith”. He would like to know whether there was any legal significance in the fact that different terms had been used in draft article 4, paragraph 3, and draft article 7.

*The meeting rose at 1.10 p.m.*

## 1857th MEETING

*Monday, 9 July 1984, at 3 p.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacteta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)**

[Agenda item 6]

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>3</sup> (continued)

1. Mr. OGISO, concluding the statement he had begun at the previous meeting, said that paragraph 1 (c) of draft article 8 laid down an extremely important criterion. Some years earlier, Japan had provided Laos with assistance in connection with the construction of a dam on the upper part of a tributary of the Mekong river which flowed through Laos. The construction of the dam had made it possible to furnish Thailand with electricity for which Thailand had paid the Lao Government. That payment had provided Laos with an important benefit in terms of its foreign exchange earnings, while Thailand had received a benefit in the form of electricity from Laos. That was an excellent example of the factor referred to in paragraph 1 (c).

2. Since some members had difficulty in agreeing to include a list of various relevant factors in the body of the article itself, he would have no objection to including such a list in the commentary. All the factors listed were, however, extremely useful and relevant for the elaboration of future watercourse agreements.

3. With regard to draft article 9, he wondered why the word "harm" was used, rather than "adverse effect", which appeared elsewhere in the draft. Specifically, he was concerned that, if the word "harm" was used, the downstream State might interpret it to mean that, in the event of harm resulting from the use of the water by the upper riparian State, the lower riparian State would have the right to request that the harm be stopped, notwithstanding any benefit it might derive from the use or activity in question. As that was presumably not the intention of the Special Rapporteur, the term "adverse effect" might be more appropriate.

4. Commenting on articles on which he had not previously had an opportunity to express his views, he wondered whether draft article 10, paragraph 2, should refer only to international organizations, and not also to third States. The possibility of a third State making a technological as well as a financial contribution to a particular use of the resources of an international river, if requested by the watercourse States concerned, was not precluded. Japan, for example, was supplying financial and technical assistance to the Mekong Committee in the form of technological expertise and equipment to measure water levels. As currently worded, paragraph 2 of draft article 10 could discourage such co-operation. He therefore suggested that a reference to assistance from third countries should be added to article 10.

5. With regard to draft articles 11 to 15, consultation and exchange of information were the most important aspects of the management and development of an international river. In his view, while a general provision concerning the obligation to notify should be included in the draft convention, the details of the procedure for no-

tification should be dealt with under an optional protocol or in optional clauses within the framework of the dispute-settlement procedure. Furthermore, even if the procedure envisaged under articles 11 to 15 were adopted, it would be advisable to embark on consultations immediately notification was made, to allow more time for consultation and exchange of views.

6. Lastly, with regard to article 28 *bis*, he wondered whether the reference to internal conflicts was appropriate in the context, and also whether the proper place for the article was not perhaps in the context of some other legal system, such as humanitarian law.

7. Chief AKINJIDE said it had rightly been observed that the Commission was dealing with a matter that was not only vital to life, but was life itself. That was particularly true in the developing countries, where a bucket of water could mean survival for one family for a whole week. The developed countries referred to water in millions of cubic tonnes, but in many parts of the developing world there was sometimes no rain for months on end, or even for a year. That was the background against which the problems involved had to be considered.

8. Although flowing water obeyed only physical laws, the uses to which it was put were determined by political, economic and social needs. The composition of, for example, the Danube Commission and the Mekong Committee was not based on any political ideology, the nations concerned having decided that their national interests were best served by co-operation.

9. While he endorsed the proposed draft articles in principle, he was concerned that they might conflict with the various agreements entered into by groups of countries. He appreciated that draft article 4 preserved existing agreements but, given the terms of draft articles 5 to 15, the possibility of such conflict was very real. There were currently 27 commissions in existence all over the world: 7 in Africa; 9 in South America; 2 in North America; 5 in Europe; and 4 in Asia. They had entered into approximately 100 agreements, some of which dated back as far as a century. In some instances, the rivers, lakes and waters with which they dealt were so numerous that they were simply referred to broadly as "boundary waters". All the agreements contained very comprehensive provisions; no two were the same. His fear, therefore, was that, if certain provisions in the draft proved to be inconsistent with those of agreements which had been in force for decades, or even centuries, the parties to those agreements might not sign the draft convention or, if they did, might not ratify it. Consequently, the Commission should endeavour to safeguard and protect agreements already entered into, leaving it to the parties concerned to enter into any further agreement needed in the light of their special needs and circumstances, and should avoid laying down detailed provisions governing procedure of the type contained in articles 8 and 10 to 15.

10. Mr. Ushakov (1853rd meeting) had raised the point that States which did not have rivers or estuaries might not be able to become parties to the future convention. In that connection, he drew attention to the fact that the

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

membership of the Central Commission for the Navigation of the Rhine included Belgium and the United Kingdom, neither of which of course were riparian States. That example would perhaps to some extent answer the point raised by Mr. Ushakov.

11. Furthermore, the European Economic Community was party to the International Commission for the Protection of the River Rhine against Pollution, and the United Kingdom, being a member of EEC, was likewise a member of that Commission, vicariously. It seemed, therefore, that not only non-riparian States, but also international organizations, should be able to become parties to the future convention.

12. He noted that the draft convention would deal with three elements: the watercourse itself, the water in the watercourse and, to take the point added by Mr. McCaffrey (1855th meeting), the benefits of the watercourse. There were, however, a number of areas in the world, such as the Sahel, where rivers were sometimes dry for a year or more at a time. Some were boundary rivers, and artesian wells, or boreholes, had been built along the river basin to provide water for grazing, drinking, or even for small factories. What, therefore, would be the position if a riparian State which had not contributed to the cost of an artesian well wished to make use of the water which it provided by, for instance, fishing in it or extracting the water? That might not be a problem in parts of the world such as Europe or North America, but it was a matter of vital importance in areas such as Africa.

13. Referring to draft article 9, he said that a number of agreements provided for reparation in the event of appreciable harm, in the form of, for example, a free share in electric power generated or financial compensation. Article 9 might thus conflict with such agreements by virtue of the maxim *volenti non fit injuria*.

14. Lastly, he said that his remarks were not to be construed as a criticism of the Special Rapporteur, whose work would provide the basis for an excellent convention. He suggested that the draft articles should be referred to the Drafting Committee.

15. Mr. THIAM said that a number of concepts, including that of the drainage basin, had been excluded from the draft articles rather quickly. For example, in draft article 1, the Special Rapporteur had retained only the "water" element to define the international watercourse, excluding any reference to the geographical area, which was, nevertheless, another highly important element. Water must be placed in the geographical and economic context of the river from which it came. The human element also played an important role. The Special Rapporteur appeared to have placed too much emphasis on questions of sovereignty and the international character of the watercourse, at the expense of regional considerations. If he had concerned himself more with the latter aspect, he would have realized the importance of the integrated basin concept. A number of agreements or conventions concerning the Niger, Nile or Senegal rivers placed less emphasis on conflicting interests and questions of sovereignty than on the pooling of

resources in the interests of regional development. While some large countries might not feel such a need for economic integration, the African countries had to capitalize on the possibilities of union afforded by rivers. It would thus be worth while stressing that point. In the region to which Senegal belonged, the parties to the 1972 Senegal River Agreement had gone beyond the provisions of the draft articles by setting up, among other things, an organization of a political, as well as an economic, character. The same had been true in the case of the Gambia river. Why, then, be satisfied with codifying international law when the prospect of progressive development presented itself? In preparing his draft articles, particularly articles 6 and 7, the Special Rapporteur had been more concerned with questions of sharing than with the idea of pooling.

16. The respect shown in the draft for a number of traditional principles of international law might, in practice, have dangerous consequences for the interests of the developing countries. Draft article 10, for example, stated in paragraph 1 that "co-operation shall be exercised on the basis of the equality... of all the watercourse States concerned". Was it not idealistic to assert the equality of States in an inegalitarian context? A river could pass through States which differed in size and in economic importance, and it was illusory to think of such States as of equal importance. It would be preferable to devise specific provisions for the protection of small States.

17. Reference was also made to the even more dangerous principle of freedom. Was a weak State free from the influence of a powerful neighbour? With regard to the notification procedure, for example, it was easy for a State having considerable financial resources and an advanced technology to confront a weaker State with a *de facto* situation. Moreover, the reparation envisaged, the provisions governing which were in fact not mandatory, would not always satisfy the injured State. In cases where the damage might be irreparable, the injured State should be able to initiate a suspension procedure. The existing provision gave the stronger State what amounted to an advantage, since an international watercourse State could quite easily be without the technical means necessary to evaluate a project communicated to it by another watercourse State, even if the stipulated time-limit were extended.

18. In conclusion, he expressed concern that too little account was taken of the developing countries, so that there was a danger that the balance sought might be achieved at their expense. Consequently, the approach to the draft should be reconsidered on the basis of more realistic criteria.

19. Sir Ian SINCLAIR, speaking on draft articles 1 to 9, said that he shared to some extent the reservations expressed by Mr. Reuter (1855th meeting). If there was to be a framework agreement, the principles and procedures which it laid down should be formulated with precision and should be capable of being applied effectively. He had the general impression that the draft suffered from the use of vague and imprecise terminology. It might well be that certain provisions should savour

more of “soft” than of “hard” law, but the Commission should at least ensure that what it was doing was entirely consistent and was not so vague as to amount to no more than a collection of pious *voeux*. He regretted to say that, from that point of view, the revised draft presented in the Special Rapporteur’s second report (A/CN.4/381) seemed to constitute a regression from the original draft.

20. He expressed some regret at the abandonment of the “system” approach in draft article 1. It had some value in indicating that, within the same watercourse system, there might be differing régimes governing distinct uses. He would not, however, stand in the way of the abandonment of the “system” approach if it would help to reconcile differing viewpoints.

21. He shared the misgivings voiced by other members at the disappearance from the draft of an indication of the types of hydrographic components that constituted an international watercourse. It was not sufficient simply to refer to “relevant” parts or components, despite the explanation given by the Special Rapporteur in his second report (*ibid.*, para. 25) and in his oral presentation (1831st meeting). Flexibility might be a valuable tool in seeking to overcome particular problems, but clarity was essential in what was supposed to be a basic article indicating what was meant by the expression “international watercourse”. The combined effect of paragraphs 1 and 2 of article 1, as formulated, only added to the confusion: for while paragraph 1 made it necessary to determine what were “relevant” parts or components, paragraph 2 provided that those components or parts, presumably whether “relevant” or not, which were not affected by, or did not affect, uses of the watercourse in another State should not be treated as being included in the watercourse. Also, he agreed with Mr. Quentin-Baxter (1856th meeting) that the abandonment of the system approach called for a more radical restructuring of draft articles 4 and 5.

22. His remarks on draft article 1 applied *mutatis mutandis* to draft article 3. He wondered whether draft article 4, paragraph 1, should not be deleted entirely, or at least replaced by something completely different. As drafted, it seemed in part to duplicate draft article 39 and in part to give some undefined higher status to the draft articles over agreements already concluded. The idea that the validity of special watercourse agreements might be open to challenge if the conditions specified for such agreements in paragraph 1 were not met had a mild savour of *jus cogens*. He did not think that anyone would seriously wish to assert that the proposed draft articles should be regarded as *jus cogens* from which watercourse States could not derogate by treaty. The most that article 4, paragraph 1, should perhaps do was to encourage watercourse States to enter into special watercourse agreements taking into account the principles and procedures set out in the draft articles and the special characteristics of the international watercourse concerned.

23. With regard to draft article 5, he said that, if the term “watercourse State” was relative, as it would appear to be from draft article 3 and paragraph 2 of draft article 1, then paragraph 1 was rendered more or less

meaningless. Like other speakers, he also had reservations about the phrase “to an appreciable extent” in paragraph 2, given the content of article 1, paragraph 2. As drafted, article 5, paragraph 2, would seem to leave out of account the position of watercourse States whose use of the waters of the watercourse might be affected, but not “to an appreciable extent”.

24. He had great difficulty with draft article 6 as reformulated. He did not blame the Special Rapporteur for having dropped the idea of a shared natural resource. However, the redraft was, in his view, open to serious misinterpretation. Again, it was necessary to bear in mind the definition of a watercourse State. If it was a State having parts or components which were affected by, or which themselves affected, uses of the watercourse in another State, what was the distinction between paragraphs 1 and 2? Was paragraph 1 intended to be more general? If so, it should not contain the expression “watercourse State”. Even if that interpretation were correct, however, there was a difference between “a reasonable and equitable share of the uses of the waters”, referred to in paragraph 1, and the obligation to “share in the use of the waters of the watercourse in a reasonable and equitable manner”, referred to in paragraph 2. The concept of sharing “in a reasonable and equitable manner” was more flexible than the concept of “a reasonable and equitable share”. Consequently, he doubted the need for paragraph 1, provided that paragraph 2 was retained. In any event, it was necessary to consider not only uses, but also benefits, in the article. Again, he agreed by and large that a reasonable and equitable result might be achieved by sharing benefits as well as particular uses. Reference should therefore be made to both “uses and benefits”.

25. He doubted whether draft article 7 said anything significant and considered that “optimum utilization” might not be a desirable objective if it was achieved at the expense of the conservation of the resource as a whole.

26. With regard to draft article 8, he could see some value in a non-exhaustive list of factors. It had rightly been said that, in the absence of rules capable of objective application—and the concept of acting “in a reasonable and equitable manner” was self-evidently a principle that lent itself to an infinite variety of interpretations, depending on the view of the State concerned—one was almost inevitably forced to a non-exhaustive indication of factors to be taken into account in the determination of reasonable and equitable use. While he did not object to the addition of the further factors suggested by Mr. Boutros Ghali (1856th meeting), he agreed with Mr. Quentin-Baxter (*ibid.*) that the list of factors could perhaps be relegated to an annex.

27. Referring to draft article 9, he could see that a simple rule prohibiting activities which might cause appreciable harm could inhibit the imaginative development of watercourses in the interests of all watercourse States. Any major project, such as the construction of a dam to produce electricity, was likely to have the potential to cause appreciable harm to downstream riparians. But the benefits of the project, if shared between the watercourse States concerned, could outweigh the

resultant harm to other uses of the waters. If the rule was to be retained, it should be made clear that the obligation to refrain from an activity that might cause appreciable harm was not applicable where a watercourse agreement or arrangement provided for the equitable apportionment of benefits resulting from that activity.

28. Lastly, he considered that it might make for speedier progress in the longer term if, rather than referring draft articles 1 to 9 to the Drafting Committee, the Special Rapporteur were asked to recast them in the light of the debate in the Commission.

29. Mr. DÍAZ GONZÁLEZ said that a topic as important as the one under consideration should not be debated hurriedly. Members of the Commission should have time to reflect on it and the opportunity to engage in a genuine exchange of views. The Commission could not embark on verbal marathons and take premature decisions which it would later have to reconsider. With the enlargement of the membership of the Commission, it naturally took longer for all members to express their views without undue haste. If the Commission wished to maintain its high reputation, it must sooner or later consider the question of the time to be allotted to consideration of the reports of special rapporteurs.

30. In his statement (1856th meeting), Mr. Quentin-Baxter had traced the history of the Commission's deliberations on the topic and, in doing so, had gone to the heart of the matter, namely the uncertainty and lack of coherence in the Commission's decisions on the content and wording of the draft. That situation was attributable not only to the difficulties inherent in the topic, but also to the fact that it had been dealt with by a succession of special rapporteurs. The reports which they had submitted to the Commission had reflected the individual experience and conceptions of each rapporteur. On the basis of the excellent work done by Mr. Schwebel, the previous Special Rapporteur, and following lengthy discussions and difficult negotiations, the Commission had arrived at a consensus on the elaboration of an initial set of draft articles,<sup>4</sup> to enable it to advance in its consideration of the topic on the basis of certain generally accepted guidelines.

31. After considering the first report of the current Special Rapporteur (A/CN.4/367), the Commission had been of the view that work on the topic should take a more concrete form. The reasons given by the Special Rapporteur in support of the amendments made by him in his second report (A/CN.4/381) demonstrated clearly the difficulties involved in the undertaking. Any attempt to please everyone deprived the draft of its legal content. From the points of view of drafting and the concepts which it contained, the draft resembled a General Assembly resolution rather than a legal instrument. In introducing his second report (1831st meeting), the Special Rapporteur had pointed out that the task entrusted to him was not of a purely legal character, but had political and economic connotations as well, so that any draft convention must take account of the political and economic factors. That conclusion was indisputable,

since any legal rule simply reflected the society in which it originated and which it was designed to regulate. However, it was important for legal rules to be expressed in legal terms and to indicate the basis of the rights and obligations which they set forth. It should be noted that the Commission, while it could not remain completely aloof from political and economic realities, had as its primary function the elaboration of legal rules, so that political and economic questions should be left to the General Assembly.

32. In his oral introduction of his second report, the Special Rapporteur had also stressed the need to strike the right balance in the draft articles between the interdependence of riparian States and their sovereign right to benefit from the natural resources within their territories. Accordingly, the Special Rapporteur had quite simply abandoned the concept of a shared natural resource, replacing it with legal formulations or legal standards such as the concepts of good-neighbourly relations, good faith, reasonable and equitable use, and appreciable harm. However, those were not legal concepts; they belonged rather in resolutions, declarations of principles or codes of conduct. Moreover, the Special Rapporteur had stated that the discussions in the Sixth Committee of the General Assembly had broadly confirmed the approach chosen by the Commission regarding the scope of the topic, which would call for the elaboration of a draft convention. He was under the impression that the Commission had not decided to prepare a draft convention, which would, in fact, not be in keeping with its practice. The approach chosen by the Commission, and confirmed by the Sixth Committee, had involved the elaboration of a draft framework agreement to facilitate the negotiation and conclusion of subsequent specific agreements.

33. While he agreed with Mr. Mahiou's observation (1854th meeting) that concepts which did not enable the work of the Commission to advance should be abandoned, such a step should not result in a total vacuum, as had happened in the case of the abandonment of the "shared natural resource" concept. Natural resources were situated within one territory rather than another because nature had put them there, and not as the result of a treaty or declaration. As a result of man-made territorial divisions, such as frontiers, natural resources were sometimes subject to the control of a number of sovereign States. However, the benefits of an international watercourse certainly did not stop at the frontiers which it crossed. The use of a watercourse and its waters was of the utmost importance for the development of the populations living within the area which it irrigated. Consequently, those populations should have the right to use it as a natural resource and the obligation to conserve it, particularly since their harmonious development, and sometimes even their survival, depended on it. That was the origin of the ideas of proportionality and priority of use.

34. A distinction should also be drawn between uses of water which entailed its total disappearance and those which did not. In any event, it could not be asserted, as the Special Rapporteur had done, that the shared natural

<sup>4</sup> See footnote 3 above.

resource concept, when applied to water, was without sufficient foundation. That concept was embodied in the Mar del Plata Action Plan (see A/CN.4/367, para. 34), and the PCIJ had alluded to it, without naming it specifically, in its judgment in 1929 in the *River Oder* case, which had been referred to by the Special Rapporteur (*ibid.*, para. 37). Furthermore, the 1972 United Nations Declaration on the Human Environment (Stockholm Declaration),<sup>5</sup> the 1982 Nairobi Declaration,<sup>6</sup> numerous United Nations resolutions and the Charter of Economic Rights and Duties of States<sup>7</sup> all contained references to shared natural resources. It was not possible, therefore, to set that concept aside and replace it by others, such as those which emphasized what was equitable, reasonable or fair.

35. On the initiative of the Special Rapporteur and contrary to the Commission's practice, it had been decided to regard as non-existent the first articles adopted by the Commission in first reading.<sup>8</sup> In addition, consideration was being given to removing from a number of articles the concepts which had been agreed after lengthy debate in the Commission, in the Drafting Committee and even in the General Assembly. In his first report, the current Special Rapporteur had submitted 39 draft articles which many members had regarded as forming a sound basis for a future draft convention. There was room for doubt, however, whether the Commission should or could prejudice the final form which its draft articles would take. Moreover, in his second report, the Special Rapporteur proposed substantive amendments to the draft articles. The 39 draft articles originally submitted were based on the reports of the previous Special Rapporteur which, in turn, were based on a philosophy and on concepts of which some had been accepted tacitly and others explicitly by the Commission. The Commission would therefore have to review that philosophy and those basic concepts. In any event, it would have to decide whether it wished to begin on a new basis, disregarding the achievements of 10 years of effort, and decide precisely what the General Assembly expected of it.

36. The Special Rapporteur also proposed abandoning the "international watercourse system" concept. That concept had been adopted provisionally by the Commission as a compromise solution which might be supplemented by a definition. It could not be claimed, as the Special Rapporteur had done, that it had met with considerable opposition. That view did not reflect the actual situation. He reserved the right to revert to the matter when the Commission came to discuss it. Under the circumstances, the draft articles should not be referred to the Drafting Committee until the Commission had reviewed its approach to the topic.

37. Turning to the draft articles under consideration, he said that the first difficulty to which they gave rise had

to do with their telegraphic style. In draft article 1, at the beginning of paragraph 2, the words "of the watercourse" should perhaps be replaced by "of a watercourse". Paragraph 3 of the article should begin with the words "International watercourses or their components which are apt to appear...". The draft article also failed to specify the nature of those components. In his commentary (A/CN.4/381, para. 30), the Special Rapporteur stated that ground water did not form part of an international watercourse, but was of a transboundary nature. However, ground water did indeed appear to form part of international watercourses, as evidenced by the existence of numerous major agreements on ground water, such as the Agreement concluded in 1973 between the United States of America and Mexico, which had implications for Mexican agriculture (see A/CN.4/373, footnote 57). Article 1, paragraph 4, merely gave a number of examples of watercourse components such as deltas, river mouths and other similar formations. Such components obviously differed from one watercourse to another. With regard to ground-water resources, the Special Rapporteur had stated that, in elaborating a watercourse convention, no attempt should be made

... to include such special resources under its general domain, nor should special provisions be included in such an instrument to regulate such specific resources. (A/CN.4/381, para. 30.)

Nevertheless, it would appear that the flow of an international river depended on the flow of ground-water deposits in the subsoil of a riparian State, in which case such ground water actually constituted a component of the river.

38. In Spanish, the title of draft article 3 should perhaps be amended to read: *Estados de un curso de agua*. In his commentary (*ibid.*, para. 33), the Special Rapporteur stated that he wished to make an amendment "in order to make it clear that no legal rules or principles could be deduced from this article". Why, then, include in a legal text a provision from which no legal rules or principles could be deduced? Moreover, at some point, it should be made clear what was meant in general by "components" or "parts" of an international watercourse.

39. Referring to draft article 4, he said that most international watercourses were already the subject of agreements, which must obviously be taken into account in preparing a draft framework agreement. However, paragraph 1 of article 4 appeared to suggest that the provisions of that article would apply to all watercourse agreements, whether concluded before or after the entry into force of the future convention. Some of those agreements were entirely satisfactory, so that it was difficult to see why the States which had concluded them should renounce them and accept the much more general provisions of the draft. In the first sentence of the Spanish version of paragraph 2, the word *especial* should be placed after *acuerdo* rather than after the word *agua*. In the second sentence, the word "riparian" should be inserted before the word "States". In general, there seemed to be a contradiction between the intention to draft a set of model rules and the wording of draft article 4.

40. As other members of the Commission had pointed

<sup>5</sup> See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

<sup>6</sup> See *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 25 (A/37/35)*, part one, annex II.

<sup>7</sup> General Assembly resolution 3281 (XXIX) of 12 December 1974.

<sup>8</sup> See footnote 3 above.

out, draft article 6 concerned the use of the waters of an international watercourse, rather than the use of the international watercourse itself. Paragraph 1 of that article should begin with the words “An international watercourse riparian State” and not “A watercourse State”. Furthermore, the word “reasonable” used in that same provision should be replaced by the word “fair”.

41. With regard to the drainage basin concept, account must be taken of the modern concept of human solidarity and priority must be accorded to populations whose survival, rather than simply their economic development, depended on certain uses of the waters of international watercourses.

42. In draft article 7, which also referred to the concepts of what was reasonable and equitable, the word “riparian” should be inserted before the word “States”. It also appeared obvious that, in order to be “developed”, the waters of an international watercourse must be “used and shared”. The mere fact that such waters lay within the territory of a riparian State indicated that they must be shared. Like several other draft articles, article 7 was couched in terms which were out of place in a legal instrument in that they expressed wishes or declarations of intent.

*The meeting rose at 5.55 p.m.*

## 1858th MEETING

*Tuesday, 10 July 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclata Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

State responsibility (A/CN.4/366 and Add.1, <sup>1</sup> A/CN.4/380, <sup>2</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf. Room Doc.5)

[Agenda item 2]

*Content, forms and degrees of international responsibility (part 2 of the draft articles)*<sup>3</sup>

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

## DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

### FIFTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 to 16<sup>4</sup>

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on the content, forms and degrees of international responsibility (A/CN.4/380), as well as draft articles 1 to 16 contained therein, which read:

#### *Article 1*

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

#### *Article 2*

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

#### *Article 3*

Without prejudice to the provisions of articles 4 and 12, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

#### *Article 4*

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

#### *Article 5*

For the purposes of the present articles, “injured State” means:

(a) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(b) if the internationally wrongful act constitutes a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(c) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(d) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(i) the obligation was stipulated in its favour; or

(ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or

(iii) the obligation was stipulated for the protection of collective interests of the States parties; or

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(e) if the internationally wrongful act constitutes an international crime, all other States.

<sup>4</sup> For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

*Article 6*

1. The injured State may require the State which has committed an internationally wrongful act to:

- (a) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and
- (b) apply such remedies as are provided for in its internal law; and
- (c) subject to article 7, re-establish the situation as it existed before the act; and
- (d) provide appropriate guarantees against repetition of the act.

2. To the extent that it is materially impossible to act in conformity with paragraph 1 (c), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

*Article 7*

If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State, within its jurisdiction, to aliens, whether natural or juridical persons, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

*Article 8*

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.

*Article 9*

1. Subject to articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its other obligations towards the State which has committed the internationally wrongful act.

2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.

*Article 10*

1. No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

2. Paragraph 1 does not apply to:

(a) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;

(b) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.

*Article 11*

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(a) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or

(b) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or

(c) such obligations are stipulated for the protection of individual persons irrespective of their nationality.

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (a) and (b) do not apply to the extent that such decision so determines.

*Article 12*

Articles 8 and 9 do not apply to the suspension of obligations:

(a) of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff;

(b) or any State by virtue of a peremptory norm of general international law.

*Article 13*

If the internationally wrongful act committed constitutes a manifest violation of obligations arising from a multilateral treaty, which destroys the object and purpose of that treaty as a whole, article 10 and article 11, paragraph 1 (a) and (b) and paragraph 2, do not apply.

*Article 14*

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

(a) not to recognize as legal the situation created by such crime; and

(b) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(c) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (a) and (b).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

*Article 15*

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.

*Article 16*

The provisions of the present articles shall not prejudice any question that may arise in regard to:

(a) the invalidity, termination and suspension of the operation of treaties;

(b) the rights of membership of an international organization;

(c) belligerent reprisals.

2. Mr. RIPHAGEN (Special Rapporteur), introducing his fifth report (A/CN.4/380), said that in all previous discussions and decisions of the Commission relating to the topic of State responsibility, it had been taken as an axiom that an internationally wrongful act created new legal relationships between States, i.e. new rights and obligations. Those new rights and obligations constituted the “legal consequences” of an internationally wrongful act, to be set out in part 2 of the draft articles on State responsibility. Draft article 1 of part 2 stated that axiom.

3. Draft article 2 stipulated the residual character of the provisions in part 2. Although the draft articles on State responsibility were intended to cover the legal consequences of any and every internationally wrongful act, whatever the source of the obligation breached and whatever the seriousness of its effects, due regard should be had for the possibility that States, when creating primary rights and obligations between themselves, might at the same time—or at some later moment before the breach occurred—determine the legal consequences, as between them, of the internationally wrongful act involved.

4. That possibility to deviate, however, was not without its limitations. While, in general, States could strengthen or weaken their rights and obligations as between themselves by providing for more or fewer legal consequences in respect of a breach of a primary obligation than what was set out in part 2, their freedom to do so was not unrestricted. Thus they could not, for example, deviate by agreement from the rule laid down in draft article 4 that the “legal consequences of an internationally wrongful act... are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security”. States could not, in relations between themselves, create an obligation so strong as to entail—in disregard of the Charter of the United Nations—a legal consequence which endangered the maintenance of international peace and security.

5. On the other hand, States could, in relations *inter se* and when creating rights and obligations between themselves, determine beforehand that they would not invoke some or all of the normal legal consequences of the breach of such obligations. That point could be illustrated by supposing that a convention had been concluded along the lines of the schematic outline prepared by the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/373, annex.) Provisions like those proposed in section 2, paragraph 8, and section 3, paragraph 4, of the schematic outline, to the effect that

Failure to take any step required by the rules contained in this section shall not in itself give rise to any right of action

would be perfectly valid as a deviation from the normal legal consequences.

6. It had to be noted, however, that even the weakening *inter se* of primary rights and obligations between States had its limitations. There existed, in his view, rules of *jus cogens* which obliged a State to react in a certain way to an internationally wrongful act of another State, not-

withstanding any arrangement between those States *inter se*, just as there were rules of *jus cogens* which obliged a State to refrain from acting in a certain way, notwithstanding the fact that an internationally wrongful act had been committed by another State.

7. At the previous session, the Commission had not reached any conclusion as to the desirability of including in the draft articles of part 2 a reference to the rules of *jus cogens* as limiting the entitlement of an injured State to react, by way of reciprocity or by way of reprisal, to an internationally wrongful act of another State, and as limiting the ability of States when creating primary rights and obligations as between themselves, to strengthen or weaken the normal legal consequences of a breach of such primary obligations.

8. As to the first point, he himself still felt that it was useful—although perhaps not absolutely essential—to refer to the limitation arising from a rule of *jus cogens*. It was reasonable to assume that a peremptory norm of general international law prohibiting certain conduct was peremptory to the extent of prohibiting such conduct even in response to an internationally wrongful act of another State—in particular an internationally wrongful act consisting of a breach of that same peremptory norm by another State. A peremptory norm of general international law would normally purport to safeguard the collective interest of the community of States or to ensure the protection of individual human beings as such, irrespective of their nationality. He drew attention in that regard to the provisions of draft article 11, paragraph 1. Specific reference to the rules of *jus cogens* was made in draft article 12, subparagraph (b), which specified that articles 8 and 9 (dealing with reciprocity and reprisals, respectively) did not apply to the suspension of obligations of any State by virtue of a peremptory norm of general international law.

9. The situation was somewhat different with regard to the second point, namely the deviation from the normal legal consequences by “other rules of international law relating specifically to the internationally wrongful act in question”, as referred to in draft article 2. Such “other rules” would normally—though not perhaps exclusively—be of a conventional nature, in which case it would be already clear from the provisions of the 1969 Vienna Convention on the Law of Treaties that a conventional rule of that kind could not derogate from a norm of *jus cogens*. However that might be, he had considered it appropriate to introduce into the opening proviso of draft article 2 a reference to article 12, subparagraph (b) of which dealt with *jus cogens*.

10. Draft article 3, which, like draft articles 1 and 2, had already been adopted provisionally by the Commission, dealt with “legal consequences” which did not constitute new rights and obligations of States. In that connection, it was necessary to refer to the commentary to draft article 3.<sup>5</sup> Two problems arose in respect of that article. The first was whether there was any need to include therein a saving clause as to the effects of article 4 concerning the provisions and procedures of the Charter

<sup>5</sup> See footnote 4 above.

of the United Nations relating to the maintenance of international peace and security, and also as to the effects of the possible article 12 concerning *jus cogens*. Actually, the Commission had already provisionally answered the first part of that question in the affirmative but had left the answer to the second part in abeyance. In view of that situation, he had kept the reference to both articles 4 and 12 in the opening proviso of draft article 3. Of course, it could be argued that, since the article dealt with the application of rules of customary international law, the whole proviso was redundant.

11. The second problem in relation to draft article 3 was of a more technical kind and arose in connection with a possible final article such as draft article 16, which would exclude a number of legal consequences from the ambit of the draft articles in part 2. Should such a final article be included, article 3 might become unnecessary.

12. Turning to the normal legal consequences, namely the new legal relationships between States, it seemed logical to state, from the outset, between which States the new legal relationships would arise—in other words, to determine the “injured State” which was entitled to require from the State in breach certain conduct (reparation). It was for that purpose that the new article 5 was now proposed. When thus defining the “injured State”, it was inevitable to refer to the character of the primary obligation which had been breached. Thus the first part of subparagraph (a) of draft article 5 dealt with the breach of a right arising from a customary rule of international law, such as the right to territorial integrity, in the context of the prohibition of the threat or use of force, or the right to respect of a State’s control of its internal affairs, in the context of the prohibition of intervention. There the injured State was the “State whose right has been infringed”. The second part of subparagraph (a) dealt with the case of “a right arising from a treaty provision for a third State”. The third State in question would be the injured State if that right was infringed. That provision was useful, in view of the divergence of views regarding the status of the third State.

13. Subparagraph (b) of draft article 5 dealt with a more controversial matter, namely “a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal”, in which case the injured State or States would be “the other State party or States parties to the dispute”. Some writers claimed that compliance with some judgments, at least those of the ICJ, constituted an obligation *erga omnes*, notwithstanding the usual rule that judgments were binding only on the parties to the dispute. Actually, Article 94 of the United Nations Charter seemed to suggest that all States Members of the United Nations had an interest in compliance with the decisions of the ICJ. On that point, he believed that everything depended on the subject-matter of the dispute, and he cited as an example the decision rendered by the ICJ in a very minor frontier dispute between Belgium and the Netherlands.<sup>6</sup>

<sup>6</sup> *Sovereignty over Certain Frontier Land*, Judgment of 20 June 1959, *I.C.J. Reports 1959*, p. 209.

In the hypothetical case of such a decision not being fulfilled, it was difficult to imagine any legal interest on the part of a third State in the execution of the decision. The rule set forth in subparagraph (b) thus appeared to be a sound one.

14. Subparagraph (c) related to bilateral treaties; in the event of breach by a State of an obligation arising from a bilateral treaty, the other State was clearly the injured State. Subparagraph (d) dealt with the more difficult case of multilateral treaties. In the event of breach by a State of an obligation arising from a multilateral treaty, every State party would not invariably be an injured State. Very often, a multilateral treaty was in the nature of a uniform rule for bilateral relations between specific States, such as the relationship between the coastal State and the flag-State in the law of the sea. There were, however, many kinds of multilateral treaties and it was necessary to determine which State was the injured State in each case. Subparagraph (d) (i)-(iv) set forth the various situations in which a State constituted the “injured State” in the event of the breach of a multilateral treaty. The second of those cases was taken from the provisions of the Vienna Convention on the Law of Treaties.

15. It was sometimes difficult to ascertain from the text of a multilateral treaty in favour of which State an obligation had been stipulated. That was the case, for example, with the rule in the conventions on the law of the sea which limited the right of the coastal State with regard to the drawing of straight baselines. The obligation not to draw baselines so as to cut off another State from the high seas—or from an economic zone—clearly affected not only another coastal State, but also third States, and flag-States in particular. The same would be true in regard to obligations arising from the rule governing straits which connected two parts of the high seas, or from treaty régimes governing inter-oceanic canals.

16. Subparagraph (e) related to international crimes; in that case, in the event of a breach by one State, all other States were injured States. The obligations in the matter were *erga omnes* and the provisions of subparagraph (e) were in conformity with the Commission’s decisions in part 1 of the draft.

17. With regard to draft article 6 and the following articles of the draft, he would not attempt a detailed introduction but would explain the general scheme of the provisions contained in them. The first point was that there was what he would call a “sliding scale” of responses to an internationally wrongful act, starting with reparation (draft articles 6 and 7) and going on to reciprocity (draft article 8) and reprisals (draft article 9). The specific question of self-defence was dealt with in draft article 15.

18. Draft article 7 dealt with the breach of an international obligation concerning the treatment of aliens. The provision had met with some criticism when proposed at an earlier stage,<sup>7</sup> but since no conclusion had been reached, he had kept it in the present draft. It provided

<sup>7</sup> See draft article 5 as submitted in the Special Rapporteur’s second report and considered by the Commission at its thirty-third session (*Yearbook ... 1981*, vol. II (Part Two), p. 144, footnote 627).

for *restitutio in integrum* for such breaches, but neither case-law nor legal writings afforded any decisive guidance on the subject.

19. Responses by way of reciprocity to internationally wrongful acts were subject to restrictions set forth in draft articles 11 and 12. A safety-valve was provided in draft article 13 in respect of the provisions of article 11.

20. As to reprisals, the first limitation was set forth in draft article 9, paragraph 2, upon the possibility of resorting to reprisals. It took the form of a rule of proportionality, or rather of the prohibition of manifest disproportionality. Another limitation upon the taking of reprisals arose from the existence of international procedures for peaceful settlement of disputes (draft article 10, paragraph 1). Draft articles 11 and 12 also set limitations upon the right of the injured State to react to an internationally wrongful act.

21. With regard to the seriousness of the internationally wrongful act, there was also a "sliding scale". Articles 6, 8 and 9 of the draft applied to all cases of internationally wrongful acts. Draft article 14 dealt with international crimes, in respect of which all the consequences of internationally wrongful acts applied; in addition, certain other consequences applied, which resulted from the rules accepted in the matter by the international community as a whole. Many different acts came under the heading of international crimes, but aggression should be singled out for special mention. The matter was governed by the relevant provisions of the Charter of the United Nations. Draft article 15 accordingly provided that an act of aggression entailed all the legal consequences of an international crime and, in addition, those arising from the Charter.

22. There were a number of unsettled points—both in State practice and in legal writings—with regard to particular internationally wrongful acts. He was inclined to view the rights and obligations under international law as forming three concentric régimes: first, the régime of aggression and self-defence, forming an outer circle; secondly, régimes relating to other internationally wrongful acts and the responses to them; thirdly, a régime of prevention and compensation in respect of acts not prohibited by international law. In between those régimes, it was possible to observe certain "twilight zones".

23. There was a relationship between part 2 of the draft and article 30 (Countermeasures in respect of an internationally wrongful act), article 34 (Self-defence) and possibly article 33 (State of necessity) of part 1 of the draft. All those articles were relevant to the question of reprisals—in particular those which might involve a limited use of armed force by a State in the territory of another State in protecting or rescuing its nationals held as a result of an internationally wrongful act. States had tried to justify such measures by invoking one or other of the following arguments: (a) the inherent right of self-defence; (b) the right of reprisal in response to an internationally wrongful act; or (c) something akin to a state of necessity, as a circumstance ruling out the wrongfulness of the injured State's reaction.

24. Learned writers had analysed the Security Council's practice in the matter and one of them had concluded that

... there is evidence to suggest that reprisals satisfying certain criteria of reasonableness may avoid condemnation by the Security Council even though the Council will maintain the general proposition that *all* armed reprisals are illegal.<sup>8</sup>

That conclusion, however, was far from being universally accepted. Incidentally, it should be noted that the judgment of the ICJ in the *Corfu Channel* case<sup>9</sup> had been cited both for and against the admissibility of armed reprisals in exceptional cases.

25. However that might be, the Commission could not be expected to solve that issue now. It had indeed abstained from doing so in connection with articles 30, 34 and 33 of part 1 of the draft. In any case, under the present draft article 12, subparagraph (b), there could be no suspension of the performance of an obligation by way of reprisal if the obligation resulted from a peremptory norm of general international law. If it was agreed that the prohibition of all forms of armed reprisals in all circumstances constituted such a norm, the point would be covered by the rule in subparagraph (b). But even if such a general prohibition was not admitted in all cases, reprisals still remained subject to the rule of proportionality set forth in draft article 9, paragraph 2: "... shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed."

26. The CHAIRMAN thanked the Special Rapporteur for his able introduction of the draft articles contained in his fifth report.

27. Sir Ian SINCLAIR said that he would like to know what specific reason had led the Special Rapporteur to propose subparagraph (a) of draft article 12. He was aware of the judgment of the ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*<sup>10</sup> but, even in that judgment, the Court had been careful not to categorize diplomatic immunities as being *jus cogens*.

28. Mr. RIPHAGEN (Special Rapporteur) said that he had included the provision in question because the ICJ had made it clear in that case that the way to react to an abuse of diplomatic or consular immunities was to break off diplomatic or consular relations or to declare a given person *persona non grata*. The judgment of the Court seemed to preclude the possibility of reacting to an abuse of diplomatic privileges by a breach of those privileges. Possibly, however, since subparagraphs (a) and (b) of draft article 12 dealt with different matters, it would be preferable to have two separate articles.

29. Mr. REUTER asked whether the Commission intended to follow its usual working method of considering the draft articles one by one and then deciding whether to refer them to the Drafting Committee.

<sup>8</sup> D. Bowett, "Reprisals involving recourse to armed force", *American Journal of International Law* (Washington, D.C.), vol. 66 (1972), p. 26.

<sup>9</sup> Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

<sup>10</sup> Judgment of 24 May 1980, *I.C.J. Reports 1980*, p. 3.

30. Referring to Sir Ian Sinclair's comments, he noted that, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, Iran had sought to justify the taking of hostages by claiming prior interference in its internal affairs. It was also possible to envisage a case in which a State suddenly decided substantially to curtail the privileges and immunities of a foreign embassy by suspending certain relations between that embassy and the sending State, but without going so far as to endanger the freedom and lives of members of the embassy. Could the sending State then react by taking similar measures? The ICJ had not had to deal with that question in the case in point, but the rules relating to privileges and immunities could certainly not be regarded as absolute peremptory norms. The Court had perhaps been unwise to refer, in that connection, to a "self-contained régime",<sup>11</sup> an expression which had been interpreted by some as meaning that, in response to the violation by a State of rules concerning privileges and immunities, the injured State could only break off diplomatic relations or declare certain persons *non grata*. He was of the view that, in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges and immunities. For instance, in the event of the violation of a unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the régime of privileges and immunities did not seem to be particularly self-contained.

31. He also wondered where was the borderline between the concepts of reciprocity and reprisal to which the Special Rapporteur referred. There might exist a grey area between those two concepts if the principle of *exceptio non adimpleti contractus* had been adopted by the Special Rapporteur; however, that principle had been eliminated, and rightly so, if only because of its highly conventional connotations. The Commission had decided that the rules to be drawn up would not be attached to the source of responsibility. With regard to the distinction between reciprocity and reprisals, it seemed that, in general, any reaction to the breach of a rule should, in the interests of international relations, deviate from that rule as little as possible. When a State failed to apply a particular rule to another State, the latter could simply refrain from applying the rule to the former. However, such strict reciprocity was not possible when the positions of the two States were not symmetrical, such as when a bilateral treaty on customs tariffs concerning unilateral imports of particular products was violated. A State could also react to the breach of an obligation by violating rules affiliated to the rule violated. That could be a natural affiliation which depended on the subject of those rules, or a legal affiliation. Some writers considered that reciprocity could apply only within the framework of an individual treaty or a number of treaties relating to the same subject. A reaction which related to obligations in another field constituted a reprisal.

32. Mr. RIPHAGEN (Special Rapporteur) said that, if

<sup>11</sup> *Ibid.*, p. 40, para. 86.

he had understood correctly, Mr. Reuter had raised the question whether a limitation of immunity by way of reciprocity would be admissible. While it was possible that, on the basis of reciprocity, the content of immunities might in certain cases be less than absolute, he did not think that that would apply under draft article 12, subparagraph (a), since the immunities to be accorded to diplomatic and consular missions and staff were the absolute minimum and a State could refuse to grant them only by breaking off diplomatic relations or by declaring somebody *persona non grata*.

33. With regard to the more difficult problem of the borderline between reciprocity and reprisals, what he had tried to reflect in draft article 8 was that reciprocity existed when the obligation involved was the same as, or a counterpart of, the obligation breached. There were many treaties, particularly bilateral ones, where performance by one party was very different from performance by the other but where both obligations were counterparts.

34. As for *exceptio non adimpleti contractus*, legally there was a difference between suspension of a treaty and non-performance of a treaty: in his view, State responsibility and the law of treaties could be distinguished by a reciprocal saving clause of the type incorporated in the Vienna Convention on the Law of Treaties and as proposed in draft article 16, subparagraph (a).

*The meeting rose at 11.45 a.m.*

## 1859th MEETING

*Wednesday, 11 July 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*later:* Mr. Julio BARBOZA

*Present:* Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**The law of the non-navigational uses of international watercourses (continued)\* (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)**

[Agenda item 6]

\* Resumed from the 1857th meeting.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>3</sup> (*continued*)

1. Mr. SUCHARITKUL expressed appreciation of the Special Rapporteur's endeavours to find a formula that would be acceptable to all riparian States. His first report (A/CN.4/367), which had embodied such fundamental concepts as shared natural resources and the drainage basin, had been well received by the Commission and the Sixth Committee of the General Assembly and it would be a great pity not to proceed on the basis of those concepts—all the more so since unanimity would not be achieved by disregarding the will of the majority.

2. The Commission's purpose was to find the right criteria for sharing the waters of watercourses. The signposts were there, but it had reached a crossroads and now had to decide which path to take. Buddha had taught that there were four basic elements essential to humanity: earth, fire, air and water. Water was an indispensable part of, and inseparable from, the human body. Without water there could be no life and no human civilization. Thailand's own early history provided an example of the vital importance of water. Its capital in the twelfth century, which had been sited on a river, had flourished for two centuries until that river had run dry. Then the capital had suffered pestilence and plague and had ultimately been destroyed.

3. The water with which the Commission was concerned was the fresh water that supported so many living things. When a river flowed through more than one country, it was only natural that its waters should be shared. Even the law of the jungle permitted animals to drink water without falling prey to one another; but human beings, who regarded themselves as superior to animals, had been unable to devise rules by which to share water. Consequently, water was not what it ought to have been—a shared natural resource.

4. The Commission was faced with a choice between the "drainage basin" concept and the "watercourse system" concept. He was prepared to accept either, or indeed simply the "watercourse", if that term were understood to cover either of the first two concepts.

5. The definition of the term "international watercourse" in draft article 1 was satisfactory, since it referred to watercourses "situated in two or more States" and thus covered boundary rivers. Such rivers, of which Thailand had a number, could not be excluded, since in addition to serving as political boundaries they had several other uses. The floating of timber could be regarded as either a navigational or a non-navigational use; teak wood, for example, being very heavy, had to be floated on a bamboo raft that was sometimes navigated by man. The most important non-navigational use of watercourses, however, was fishing, and he thought that should be brought out in draft articles 1 and 2. The definition should exclude such international waterways as

the Panama and Suez canals, which were not international watercourses for the purpose of the draft.

6. The general principles of the law on the topic would require further elaboration. He noted that whereas the principle of good faith was a general principle of law, that of good-neighbourly relations was part of what had been termed "soft" law. The General Assembly was studying the possibility of progressively developing that concept, which had been reinforced in the 1955 Bandung Declaration.

7. There seemed to be a tendency to view the upper riparian State as having the upper hand, although the opposite was true in many cases. For instance, many species of fish travelled upstream to spawn, and where there were dams some means of passage had to be provided, otherwise the upper riparian would have no fish. To think that the lower riparian was always at the mercy of the upper riparian was also to overlook tides and the ebb and flow of the waters.

8. In regard to draft article 10, on co-operation and management, it might well be asked which was the most fundamental need: sovereignty and territorial integrity, referred to in paragraph 1, or water, without which there could be no life. It was in answer to that question that the members of the Mekong Committee, which represented different ideologies, had recognized that co-operation, not only among riparian States, but among the whole international community, was the only way to proceed. Recent co-operative projects included the building of a bridge financed by Thailand and Japan, and of a dam to be financed by Japan, Democratic Kampuchea and other countries.

9. He hoped that the Commission would be able to formulate principles and criteria for sharing water, not just among upper and lower riparian States, but among all mankind.

*Mr. Barboza, Second Vice-Chairman, took the Chair.*

10. Mr. MALEK welcomed Mr. Kalinkin, who had succeeded Mr. Romanov as Director of the Codification Division and Secretary to the Commission.

11. In order to speed up the Commission's work, he would not object to draft articles 1 to 9 being referred to the Drafting Committee at the end of the discussion. Given authority to settle problems of substance, the Drafting Committee, assisted by the Special Rapporteur, could take account of the views which had emerged. It was very doubtful that the Sixth Committee of the General Assembly either wished to, or could, impose on the Commission the solutions it considered appropriate. Besides, to leave those draft articles in abeyance until the next session would be a waste of the Commission's time. A great many texts prepared by the Commission for generally accepted codification conventions had been adopted by vote at a time when the Commission had comprised only 15 members; in order to avoid postponing certain problems from one year to another, the Commission should not hesitate to take decisions by vote when necessary.

12. Although the problems before the Commission

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

were not particularly complicated, if not carefully studied and solved they could create dangerous situations all over the world. Mr. Boutros Ghali (1856th meeting) had been frank and courageous enough to draw the Commission's attention to the imminent danger of widespread armed conflict in Africa provoked by the threatening drought, in the absence of agreements ensuring rational sharing of the waters of that continent. At the Commission's previous session, he (Mr. Malek) had observed that the Middle East was under threat.<sup>4</sup> He then quoted from an article in the *International Herald Tribune* of 1 June 1984, entitled "Water: ancient source of tension", the following passage:

... Indeed, long after oil runs out, water is likely to cause wars ... and make and break empires and alliances in the region, as it has for thousands of years.

The constant struggle for the waters of the Jordan, Litani, Orontes, Yarmuk and other life-giving Middle East rivers, little understood outside the region, was a principal cause of the 1967 Arab-Israeli war and could help spark a new all-out conflict.

13. At the previous session, he had also stressed the political and legal importance of the topic under consideration for all countries, and had urged, in particular, the need to ensure that the draft articles would include provisions calculated to assist in the regulation of certain *de facto* situations which contributed to the insecurity of several regions that were short of water. He had said that the diversion of the waters or part of the waters of a watercourse should be declared unlawful.<sup>5</sup> He recognized that the wrongfulness of diversion could easily be deduced from the obligations stated in draft articles 6 to 9, namely the obligation to share and use the waters of a watercourse equitably and the obligation to refrain from any use which might cause appreciable harm to the rights or interests of other watercourse States. Nevertheless, he still believed that, in view of the importance of the law on the uses of international watercourses in relations between States, it was essential to mention that point expressly in the draft articles. The previous Special Rapporteur, in his third report, had suggested the possibility of devoting an article to the legality of diversion of water outside the international watercourses.<sup>6</sup>

14. The present Special Rapporteur had made a number of changes, both of substance and of form, to his first version of the draft articles, to take account of the views expressed in the Commission and in the Sixth Committee. As the discussion at the present session was nearing its end, he was sorry that the Commission did not appear to be in an encouraging position or at least to be better placed than at the end of the previous session. In 1983, the longer the discussion had continued, the more difficult it had been to overcome the obstacles faced; on all important points, the differences of opinion had seemed more and more irreconcilable. In 1980, before provisionally adopting the concept of an "international watercourse system", the Commission had successively considered the concepts of an international river,

an international watercourse, a hydrographic basin and an international drainage basin. It had not been possible to reach general agreement on any of those concepts. The notion of an international watercourse system had itself been seriously criticized by several members of the Commission at the previous session, whereas others had argued that, since it had already been provisionally adopted, to abandon it might compromise the future of the draft articles. The Commission also had to face other problems which were quite as difficult, such as that raised by the controversial notion of a "shared natural resource". Thus nothing had changed since.

15. As the present topic was being considered immediately after that of international liability for injurious consequences arising out of acts not prohibited by international law, the question inevitably arose whether the Commission was really examining two different matters. The similarity of object was quite striking. In both cases, the Commission was called upon to define the international obligations of States in the exercise of their sovereignty in their respective territories. In one case it was trying to determine the rules of international law which governed or should govern States, or at least guide them, in the use of international watercourses; in the other, it had to perform an identical task concerning other activities liable to cause harm beyond national frontiers. In both cases, the Commission was up against the same difficulties of principle inherent in the traditional concept of territorial sovereignty.

16. At the present stage in the development of international law it was still argued that States, which were sovereign in their respective territories, must have sovereign authority over the watercourses passing through those territories. There was thus a refusal to accept any notion which would limit the sovereign right of a State to decide how it would use watercourses passing through its territory. He did not know to what extent such ideas were, at the present time, a decisive factor in the formation of rules of international law. But there was no doubt that a rule of law could only be established as a result of reciprocal concessions and sacrifices freely agreed to, on the basis of solidarity, by the different and sometimes antagonistic subjects whose conduct it was intended to govern. In any event, the law on the uses of international watercourses comprised a certain number of mandatory rules which were rules of customary international law, affirmed by numerous international agreements, both bilateral and multilateral.

17. Draft articles 6 and 7 affirmed the incontestable right of every watercourse State to use the waters of an international watercourse in its territory. Nevertheless, that right could only be exercised within the limits imposed by international law. Draft articles 6 and 7 ruled out any arbitrary use of international watercourses. The Special Rapporteur had abandoned the idea of a "shared natural resource" in draft article 6, but had retained its spirit. The new version of the article made paragraph 1 unnecessary. The right of the State to a reasonable and equitable share of the uses of the waters of a watercourse in its territory was sufficiently emphasized by draft article 7, which specified how an international watercourse

<sup>4</sup> *Yearbook ... 1983*, vol. I, p. 229, 1794th meeting, paras. 1-2.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Yearbook ... 1982*, vol. II (Part One), p. 189, document A/CN.4/348, para. 513.

should be used, relying on concepts which were, for the most part, generally accepted in the practice of States, such as equity, good faith and good-neighbourly relations. The previous Special Rapporteur, in his third report, had dealt in detail with the concept of “equitable participation”; he had said that there might be no more widely accepted principle in the law of the non-navigational uses of international watercourses than that each system State was “entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters”.<sup>7</sup> The term “reasonable”, however, had not been used in the draft articles prepared at that time.

18. Although the notions of good faith and good-neighbourly relations did not correspond to precise legal concepts, they had been sufficiently used in treaties, case-law and doctrine, and were alluded to in the United Nations Charter and in several General Assembly resolutions. Nevertheless, he doubted whether draft article 7 should expressly mention such vague notions, which might affect its meaning and the limitations it imposed. He thought there would be no objection to omitting the criterion of reasonableness, which was already covered by the notion of equity. The Commission could also omit from the provision the concepts of good faith and good-neighbourly relations, which were developed in draft article 8, on the determination of reasonable and equitable use. Even if more simply formulated, draft article 7 would retain its significance. He proposed, for example, the following wording:

“The waters of an international watercourse shall be developed, used and shared by watercourse States in an equitable manner, in accordance with article 8, with a view to attaining ...”

19. Draft article 8, which explained article 7, had given rise to some useful suggestions, which should be drawn to the attention of the Drafting Committee.

20. Draft article 9 affirmed another fundamental rule of international law, which was that no watercourse State had the right to cause appreciable harm to the rights or interests of other watercourse States. In his third report, the previous Special Rapporteur had made a detailed study of that rule,<sup>8</sup> which should be taken into account in preparing the commentary to draft article 9, the terminology of which needed clarification.

21. In his view, draft article 9 was comparable to section 5 of the schematic outline prepared by Mr. Quentin-Baxter (A/CN.4/373, annex), which required a State liable to cause transboundary harm to take measures of prevention and, if that were impossible, measures of reparation, thus recognizing the lawful character of all transboundary harm, whatever its extent, provided that the acting State had done everything possible to avoid it. It was very difficult to see how the Commission could approve that proposition when, in dealing with the present topic, it was rightly called upon to affirm or confirm the wrongfulness of all “appreciable” harm of that kind. In view of the similarity of the topics entrusted to

Mr. Quentin-Baxter and Mr. Evensen, it would be surprising to see similar *de facto* situations governed by different rules. The Commission should not hesitate to adopt identical rules of law, having recourse if necessary to progressive development of international law. Since draft article 9 did not require absolutely strict application of the rule it stated, why not proceed in the same way with regard to international liability, on the understanding that the parties concerned would freely negotiate and conclude agreements regarding possible harm?

22. He noted that draft articles 1 and 4 had been the subject of very constructive suggestions, and in his opinion the Drafting Committee was in the best position to revise the texts of the articles in the light of the views expressed during the discussion. He reserved his position on any text on which he had not commented, in particular draft articles 13 and 28 *bis*.

23. Mr. LACLETA MUÑOZ said that on the whole he approved of the general structure of the draft submitted in the Special Rapporteur's second report (A/CN.4/381). He found it necessary, however, to comment on certain aspects of that structure with which he was not satisfied, in particular chapter III which, following chapter I containing the definitions, and chapter II on the rights and duties of States, constituted the outline of the framework agreement intended to facilitate co-operation between States. He wished to point out in that regard that co-operation and, ultimately, optimum utilization, which was more difficult to achieve, were one thing, and rights and duties were quite another; he would revert to that point later.

24. In his opinion, draft articles 11 to 14 would be better placed in chapter II than in chapter III, since their purpose was to establish an obligatory mechanism for determining possible derelictions of the duty of a watercourse State not to cause harm—a duty associated with certain uses of the watercourse. Moreover, the essential part of chapter II was based on the well-known principle of customary international law, *sic utere tuo*. That principle should be fully developed in chapter II.

25. He observed that the Spanish text of the draft articles raised problems of terminology, which sometimes reflected problems of substance, and appeared to be too closely modelled on the English version. For instance, the expression *acuerdo de curso de agua* was quite unacceptable, for it meant nothing. Besides the drafting problems which distorted the language, there were problems of definition due to the absence of a distinction between the use of water and the use of a watercourse. Even before defining an international watercourse, the Commission should try to clarify the idea of a watercourse as such. Did it consist only of the waters, or of the place they occupied as well as the waters? In any event, it was quite possible to distinguish between the use of a watercourse and the use of its waters. Navigation, for example, used the watercourse only, although it needed a certain depth of water, whereas timber-floating used the current. For navigation purposes, the watercourse was something static, the current being of no importance. That was an aspect of the draft which the Commission should study, in order to establish the difference between

<sup>7</sup> *Ibid.*, p. 75, para. 42.

<sup>8</sup> *Ibid.*, pp. 91 *et seq.*, paras. 111-156.

water-consuming uses and non-consuming uses. After that, the Commission could establish an order of priority for the different uses.

26. That research would make it possible to determine what should be understood by the expression "cause harm". The obligation not to cause harm was different from that of "optimum utilization", but in draft article 8, for example, the two notions were confused. It was already difficult enough to determine what was "appreciable harm", for in the strict sense, the obligation not to cause appreciable harm might mean that an international watercourse State could not change the watercourse in any way, at least so far as the quality and quantity of water was concerned. But that was not the meaning of the obligation; certain changes were justified and consequently permitted. The upstream State was naturally in a dominant position, although the Harmon doctrine of unlimited sovereignty, according to which a State had the unqualified right to utilize and dispose of the waters of an international river flowing through its territory, was now obsolete.<sup>9</sup> Without going to the other extreme of adopting the principle that the downstream State had an absolute right to the waters of the upstream State and that the latter must cause no harm, whether appreciable or not, the need of the upstream State to engage in certain activities must be accepted. But how was the legitimacy of any particular activity to be established? That was the essential problem to be solved in chapter II.

27. He was much concerned about the numerous references to such notions as "reasonable and equitable use"—what was reasonable being, in his view, equitable, and vice versa. Again, why emphasize the need to negotiate in good faith? Did that mean that States might negotiate in bad faith? Similarly, he feared that by speaking of "good-neighbourly relations", for instance—that was to say, by stating pious hopes in provisions of a legal character—the Commission might distort the law. In his opinion, the Commission's task was not to advise States, but to lay down rules and, if necessary, to specify the modalities for their application.

28. Reviewing draft articles 1 to 9, he observed first that the substitution in article 1 of the expression "international watercourse" for the expression "international watercourse system" had no consequence in practice. The definition proposed by the Special Rapporteur was flexible; it emphasized the essentials, namely changes in the quantity or quality of the waters of an international watercourse passing from the territory of one State into that of another. In practice, that definition would be awkward to apply, because the different uses of watercourses affected their various parts and components differently. Whereas some uses had lasting and far-reaching consequences which were felt beyond the frontier, even if it was very far from the point of use, others had purely local effects. In any case, the new expression proposed by the Special Rapporteur did not have the territorial connotations of the expressions "hydrographic basin" and "international watercourse system", which had been

criticized by many States and members of the Commission, including himself. He therefore approved of the use of the expression "international watercourse", which improved article 1, although that article needed further improvement as to drafting, at least in Spanish.

29. Draft article 2 should be retained because of the reminders it contained, particularly in paragraph 2. It was inevitable that there should be interaction between the uses of the waters of an international watercourse for navigation and its uses for other purposes.

30. The titles of draft articles 3 and 4 were not satisfactory, at least in Spanish. Perhaps it should be specified that article 3 referred to the "riparian" States of the watercourse. Article 3 was intended to define States in whose territory the waters of an international watercourse flowed. In his second report (*ibid.*, para. 30), the Special Rapporteur opposed the inclusion of ground water within the scope of the instrument being prepared. The drafting of article 3 could be improved by introducing the term "riparian States"; the problem of ground water could be dealt with in a separate article.

31. Paragraph 1 of draft article 4 would be better placed at the end of the draft, in a provision covering relations between the future convention and special agreements. Paragraph 2 could serve to establish the existence of agreements between riparian States. However, if those agreements very clearly defined the waters to which they applied, the paragraph would be unnecessary. The content of paragraph 3 seemed to be a mere declaration of intent.

32. Draft article 5, or at least paragraph 2 of that article, in fact belonged in chapter II, on the rights and duties of States. Under the terms of that provision, if a watercourse State concluded an agreement on certain uses of the watercourse and the implementation of that agreement might affect the use of the watercourse by another State, that other State had the right to participate in the negotiation of the agreement.

33. Draft articles 6 and 7 expressed the same idea and could be combined. The Special Rapporteur had been right to remove the concept of a "shared natural resource" from article 6 and replace it by that of a "reasonable and equitable share of the uses of the waters." That change would overcome many difficulties, without weakening the protection afforded to States in respect of the use of water as a natural resource passing from the territory of one State into that of another. The notion of "optimum utilization", referred to in article 7, was not appropriate. In the modern world it was illusory to believe that a riparian State of an international watercourse could have the right to demand optimum utilization of the watercourse, as if there were no frontiers. Referring to the experience of his own country, he observed that a plan for optimum utilization necessarily involved conflicting local, provincial and regional interests. To claim that there was a right or an obligation, at the international level, to co-operate with a view to attaining optimum utilization of an international watercourse would be quite fanciful.

34. The essential problem was determination of the

<sup>9</sup> *Ibid.*, p. 77, footnote 98.

harm which it was forbidden to cause. The expression “appreciable harm” was not sufficient. It was no doubt a step forward to consider, as the relevant articles seemed to do, that harm implied disturbance of the balance in respect of the reasonable and equitable sharing of the uses of an international watercourse. The idea of appreciable harm was too strict; it prohibited the upstream State from using an international watercourse in ways which might cause changes in the quantity or quality of the waters flowing into the territory of the downstream State.

35. Draft article 8 was of great importance, because it set out the factors to be taken into account in determining what uses were permitted. Subparagraphs (b), (d), (f) and (j) of paragraph 1 were particularly important. Subparagraph (c) merely referred back to the reasonable and equitable balance between the rights and interests of the States concerned, and could not provide a criterion. Subparagraphs (g) and (k) were similar and tended to confuse the question of co-operation, which was voluntary, with that of rights and duties.

36. The Commission’s task was not easy, and in some ways it resembled that of certain other bodies when they had had to find objective rules and criteria for the equitable delimitation of maritime space.

37. The CHAIRMAN, speaking as a member of the Commission, said that the doubts he had expressed at the previous session as to whether the concept of “optimum utilization” was appropriate<sup>10</sup> had not been dispelled. That idea seemed to imply the existence of a supranational authority which would decide what was optimum, having regard to what was reasonable and equitable. Not only did the observations of Mr. Lacleta Muñoz concerning the experience of his own country deserve consideration, but the example cited by Mr. McCaffrey (1855th meeting) suggested that a technically developed country could claim to play a greater role in the optimum utilization of an international watercourse.

38. Mr. EVENSEN (Special Rapporteur) said that the outline for a draft convention in the form of a framework agreement, together with the preliminary draft of 39 articles, submitted in his first report (A/CN.4/367, para. 65) had proved more or less acceptable to the Commission at its previous session and to the Sixth Committee of the General Assembly at its thirty-eighth session. The revised set of draft articles contained in the second report (A/CN.4/381) took account of the comments made during those discussions in the Commission and in the Sixth Committee in 1983. Before summing up the discussion on those revised draft articles, he wished to thank the Secretariat for its very useful working document (ILC (XXXVI)/Conf.Room Doc.4), and the members of the Commission for their concrete comments, which would be of great value in further work on the topic.

39. He would deal first with the general issues raised during the discussion, the first of which was the outline of the draft, to which he had made certain changes in his second report. Articles 27 and 29, originally in chapter

IV, had been transferred to chapter III as the new articles 15 *bis* and 15 *ter*, while a new article 28 *bis*, on the status of international watercourses in armed conflicts, had been introduced into chapter IV. In chapter V, dealing with the peaceful settlement of disputes, a new article 31 *bis* had been introduced, and the concept of compulsory conciliation had been incorporated into article 34. Those changes and adjustments did not appear to have raised any objections during the discussion. Mr. Lacleta Muñoz had, however, proposed certain changes in the outline to which he would give careful consideration.

40. The second general issue was the Commission’s decision at previous sessions to draft a “framework agreement”. Mr. Ushakov (1853rd meeting), whose position had remained unchanged since the introduction of the topic in 1976, had opposed a framework agreement and recommended that the Commission should draw up model rules; but that would mean deviating from the mandate given to the Commission by the General Assembly. The scope and form of the Commission’s task had been quite clear as early as 1979, when the previous Special Rapporteur, Mr. Schwebel, had stated in his first report that his task was to draw up a framework agreement.<sup>11</sup> He had stressed the uniqueness of every watercourse, adding:

In view of this diversity, the question arises whether it is possible to draft rules to deal with the uses of watercourses that will not be either so general as to be uncertain guides or so specific that they will be applicable to some but not to the full range of issues that may arise in an individual watercourse or ... may deal inappropriately with the particular facts. ...<sup>12</sup>

Precisely in order to meet the difficulties arising from that situation, the previous Special Rapporteur had proposed the method of drawing up a “framework treaty” as “a means of achieving a marriage of general principles and specific rules”<sup>13</sup>. He had mentioned as an example the Convention relating to the Development of Hydraulic Power Affecting more than One State (Geneva, 1923), which combined the statement of legal principles with the formulation of guidelines and recommendations.

41. In both his second and his third reports, the previous Special Rapporteur had noted the broad support received in the Sixth Committee by the “framework instrument” approach, and he himself, since taking up his duties as Special Rapporteur, had been able to note the general support in the Sixth Committee. Consequently, it would be a serious mistake at the present stage—after six reports had been submitted on the topic—to attempt to switch from the concept of a framework agreement to that of model rules. At the present late stage in the Commission’s work, he could not possibly recommend such a fundamental change in approach. Moreover, in the discussion at the present session, most members had supported a framework agreement, among them Mr. Al-Qaysi, Mr. Stravopoulos, Mr. Balanda, Mr. Ni, Mr. Mahiou and Mr. Ogiso.

<sup>10</sup> *Yearbook ... 1983*, vol. I, p. 228, 1793rd meeting, para. 26.

<sup>11</sup> *Yearbook ... 1979*, vol. II (Part One), pp. 165-166, document A/CN.4/320, paras. 86-91.

<sup>12</sup> *Ibid.*, p. 159, para. 65.

<sup>13</sup> *Ibid.*, p. 165, para. 86.

42. A more complicated question, which had been touched upon by a number of speakers, including Mr. Reuter, Mr. McCaffrey and Sir Ian Sinclair, was how to define the term "framework agreement". His own view was that there was no clear definition, and still less any binding definition of that term. Consequently, the Commission was free to approach its task in the way it considered most useful and most conducive to furthering the interests of the United Nations and of the world community as a whole. That would entail adopting certain basic principles, while at the same time encouraging the negotiation of specific agreements relating to particular watercourses or regions, to specific uses, to specific installations or to watercourse regulations. The general instrument drawn up should therefore also contain guidelines and recommendations capable of giving watercourse States inspiration and ideas on the content of such agreements. It was specially important to adopt principles, guidelines and recommendations on the necessary co-operation, on the joint management of international watercourses and on the peaceful settlement of disagreements and disputes. Moreover, it was essential to take the term "framework agreement" in a broad and flexible sense, at least in regard to the present topic.

43. That conception of the framework agreement had already been clearly reflected by the previous Special Rapporteur in his third report when he had stated that

... the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. ...<sup>14</sup>

As he himself saw it, that broad definition of a "framework agreement" commended itself particularly in regard to a multifaceted topic such as the present one.

44. The interesting comments made on specific articles had covered mainly those in chapters I and II of the draft, and there had been some reaction to the elimination of the concepts of a "watercourse system" and a "shared natural resource". He himself had considered those two concepts quite acceptable, but he had dropped them because, as he explained in his second report (A/CN.4/381, paras. 18 and 48), the discussions at the 1983 sessions of the Commission and of the Sixth Committee had shown that they might stand in the way of the search for a generally acceptable convention.

45. The debate at the present session had indicated that the deletion of those two concepts was generally acceptable, as had been shown by the comments of Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Jagota, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Ni, Mr. Njenga and Mr. Stavropoulos; and Mr. McCaffrey had said that he had no objection in principle. Mr. Ogiso had asked for an explanation on the subject, and he referred him to the relevant paragraphs of his second report (*ibid.*, paras. 11-18). Mr. Ogiso (1856th meeting, para. 43) had also suggested a formulation along the following lines:

"Watercourse States parties to a special watercourse agreement may accept the concept of a shared natural resource for the purpose of that agreement ...".

It would, of course, be open to watercourse States to include that concept in their special watercourse agreements without any provision on the subject being embodied in the draft convention. Moreover, the inclusion of such a provision in a general instrument would only lead to confusion.

46. As Mr. Calero Rodrigues had observed (1854th meeting), the purpose of article 6, paragraph 2, was to explain in more concrete language, without actually using the concept of a "shared natural resource", that the waters of an international watercourse constituted a resource which must be shared by the watercourse States concerned. He reminded members that the paragraph took its language directly from article 5, paragraph 1, as provisionally adopted by the Commission in 1980,<sup>15</sup> which read:

1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

His own proposal would therefore be to retain article 6, paragraph 2, with drafting improvements. Consideration would be given to the suggestion by Mr. McCaffrey that the words "the use of the waters" should be replaced by the words "the utilization of the waters".

47. Several speakers had suggested that article 7 was redundant and should be deleted, and he was prepared to accept that suggestion; it would have the added advantage of eliminating the reference to "optimum utilization", which had met with some opposition. He could not, however, accept the suggestion that all references to "sharing" should be removed from article 6, and from article 7 if retained. The whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by their very nature, postulated sharing in the utilization and benefits of the waters.

48. With regard to article 1, there had been some opposition to his suggestion that an enumeration of the various parts and components of a watercourse should be included. Some members had even expressed the fear that consideration of such an enumeration might reopen discussion of the drainage basin concept and thereby detract from the acceptability of the framework agreement. There could be no doubt that international watercourses had a wide variety of source components. The nature and types of those components, as well as their relevance, varied from watercourse to watercourse, from region to region and from use to use. That was why he had referred to the "relevant" parts or components. He still believed that an enumeration of them in the commentary to the article might be useful, but, in deference to the objections raised, he would, of course, be willing to omit it from the body of the article.

<sup>14</sup> *Yearbook ... 1982*, vol. II (Part One), p. 67, document A/CN.4/348, para. 2.

<sup>15</sup> See footnote 3 above.

49. In his second report, he had discussed the question of ground-water resources unrelated to any surface watercourse (A/CN.4/381, paras. 26-30). The best known example was the enormous water resources—often described as an underground ocean—deep beneath the Sahara. Another example was the underground geological formation in the border region between the State of Arizona in the United States of America and the State of Sonora in Mexico. He thanked members who had made observations on that question and reiterated his view that the Commission should not attempt to deal with independent ground-water resources in the draft. Nevertheless, the principles and rules laid down in a framework convention on the present topic could have a bearing on, or be applicable by analogy to, independent ground-water resources. Some members, such as Mr. Mahiou (1854th meeting), had supported that approach, but others appeared to favour the inclusion in the draft of a provision dealing with independent ground-water resources. If the majority of the Commission favoured that course, he would have no objection.

*The meeting rose at 1 p.m.*

## 1860th MEETING

*Thursday, 12 July 1984, at 10.10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/367,<sup>1</sup> A/CN.4/381,<sup>2</sup> A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4)**

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>3</sup>  
(concluded)

1. Mr. EVENSEN (Special Rapporteur), continuing his summing-up of the discussion on draft articles 1 to 9,

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

said that draft article 2, dealing with the scope of the articles, appeared to be generally acceptable. Its language had been drawn from article 1 as provisionally adopted by the Commission in 1980. It had been pointed out by Mr. Reuter (1855th meeting), however, that the wording “uses of international watercourses and of their waters” in article 2 was not consistent with the terminology used in other articles—such as articles 5, 6 and 7—which referred to the “use of the waters of an international watercourse”. Even article 2, paragraph 2, itself began with the words: “The use of the waters of international watercourses ...”.

2. To some extent, those differences of wording were justified, and had in fact been inherited from the articles provisionally adopted in 1980. Paragraph 1 of article 1 as adopted in 1980, for example, referred to “uses of international watercourse systems and of their waters”, while paragraph 2 of the same article spoke of “The use of the waters of international watercourse systems”. Article 3, paragraph 3, spoke of “the uses of an international watercourse system”, while article 5, paragraph 1, referred to “the use of waters of an international watercourse system”. Those discrepancies could, of course, be eliminated by the Drafting Committee. In that connection, the proposal by Mr. McCaffrey to introduce the formula “the utilization of the waters of an international watercourse” was useful, since the term “utilization” could prove more viable than “use” in that context.

3. Draft article 3, on the definition of watercourse States, appeared to be broadly acceptable to most members. Its wording was based on that of article 2 (System States) as adopted in 1980. The current formulation depended, of course, upon agreement to abandon the “system” concept. The word “relevant” qualifying components or parts was intended as a reference to draft article 1, paragraph 2. If there was any objection to it, it could easily be deleted. Also, the words “the present Convention” could, if so desired, be replaced by “the present articles”, until the nature of the instrument had been agreed upon.

4. Draft article 4 on watercourse agreements had given rise to serious reservations. Mr. Calero Rodrigues (1854th meeting) had proposed that paragraph 2 should become paragraph 1. A number of speakers had suggested the deletion of the qualifications contained in the first sentence of paragraph 1, a suggestion with which he concurred. It had also been suggested that draft article 4 should begin with a provision similar to that of article 3, paragraph 1, as provisionally adopted in 1980, which read:

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

Some speakers had, however, expressed reservations as to that formulation, which they found too inflexible; they also felt that it gave too much importance to the provisions of the current draft articles concerning special watercourse agreements. He himself found those comments justified and suggested that draft article 4, paragraph 1, might be redrafted along the following lines:

“1. A watercourse agreement is an agreement between two or more watercourse States concerning the utilization, management and administration of the waters of an international watercourse, international watercourses or parts thereof.”

Paragraph 2 would be similar to the text proposed in his second report, except that the word “should” would be replaced by “shall”.

5. With regard to draft article 5, he accepted the proposal by Mr. Al-Qaysi (1853rd meeting) to insert a reference to article 4, paragraph 2, after the words “project, programme or use”, in paragraph 2. In his view, both paragraphs 1 and 2 of draft article 5 should be retained. The fact that certain changes had been made in previous articles did not alter the basic reality that the various parts and components of a watercourse formed an entity as far as the utilization of the waters was concerned. The expression “to an appreciable extent” in article 5, paragraph 2, which had been criticized as vague by Mr. McCaffrey, had been used earlier in article 3, paragraph 2, and in article 4, paragraph 2, of the 1980 draft.

6. Turning to chapter II, he recalled that he had already dealt with the suggestions and comments relating to draft articles 6 and 7, including the proposal—which he found acceptable—to delete the latter article. He also accepted Mr. McCaffrey’s suggestion to replace the word “use” in article 6, paragraph 2, by “utilization”. There had also been considerable discussion of the expression “reasonable and equitable”, which had of course been taken from the Helsinki Rules adopted by the International Law Association in 1966.<sup>4</sup> It would be for the Drafting Committee to consider the various alternatives suggested.

7. Draft article 8 gave a non-exhaustive list of factors which could serve to determine what was a reasonable and equitable use. Most speakers had favoured the inclusion of such an article. Mr. Reuter had suggested that the various factors should be rearranged more systematically, while Mr. Calero Rodrigues had suggested that the relevant subparagraphs should be moved to the commentary. Some speakers had suggested additional factors for inclusion in the list. In reply to all of those suggestions, he wished to stress that he had relied largely on the enumeration contained in article V of the 1966 Helsinki Rules and in draft article 7 as submitted by the previous Special Rapporteur in his third report.<sup>5</sup>

8. With regard to the order in which the various factors had been placed in draft article 8, he had had no intention of establishing an order of priority. As to the structure of the article, he favoured the idea of combining subparagraphs (g) and (k) and of adding in subparagraph (a) a reference to the avoidance of unnecessary waste in the utilization of water. Regarding the proposals made for an express reference to the population factor, he felt that that point was already covered by the general ref-

erence in subparagraph (b) to “The special needs of the watercourse State concerned”. Three interesting additional factors had been suggested for inclusion in article 8 by Mr. Boutros Ghali (1853rd meeting), namely: (a) agreements already in existence; (b) technical factors regarding the quantity and quality of the waters concerned; (c) long-term estimates for the watercourse. Mr. Boutros Ghali, together with other members, had urged that the utilization of waters for human consumption should be emphasized. In his own opinion, it would also be advisable to add provisions on compensation in money or in kind for harm caused by particular works, installations or uses.

9. Opinions were divided on the wording of draft article 9. In particular, there had been some criticism of the expression “appreciable harm”. He had considered terms such as “substantial harm”, “serious harm” or “unacceptable harm” but had preferred “appreciable harm” because it had been adopted as the acceptable standard in articles 3 and 4 as provisionally adopted in 1980. The term “harm” also seemed preferable to “damage” or “injury”, which brought to mind the law of State responsibility. There might also be grounds for replacing the words “cause appreciable harm” by “adversely affect to an appreciable extent”. Lastly, the proposal made by Mr. McCaffrey to add, at the end of draft article 9, the expression “except as may be allowable under a determination for equitable participation for the international watercourse involved” was an interesting one.

10. The discussions had shown that there were wide differences of opinion on the action to be taken by the Commission. Mr. Calero Rodrigues had proposed that the articles in chapters I and II should be referred to the Drafting Committee at the end of the present discussion and that the Commission should concentrate on chapters III and IV at its next session and deal with the last two chapters of the draft in 1986. Other members had supported that proposal. In view of the existing divergences of opinion, he felt the need for assistance in redrafting articles 1 to 9 and, accordingly, hoped that the Drafting Committee would be able to take up those articles with a view to arriving at texts which could serve as a basis for the discussion of subsequent chapters of the draft.

11. The CHAIRMAN thanked the Special Rapporteur for his able summing-up of the discussion and suggested that draft articles 1 to 9 be referred to the Drafting Committee.

12. Mr. BARBOZA noted that the Special Rapporteur was in favour of deleting draft article 7, in view of the criticisms of the concepts of optimum utilization, good faith and good-neighbourly relations made by several members of the Commission. However, the first part of that article set forth a highly important principle which was the complement of the principle stated in article 6, paragraph 1. To renounce the principle stated in article 7, which approached the situation from the viewpoint of the community of riparian States, would be tantamount to emphasizing the utilization of the waters by the territorial State, with no mention of the idea of sharing. As it

<sup>4</sup> See 1831st meeting, footnote 4.

<sup>5</sup> *Yearbook ... 1982*, vol. II (Part One), p. 90, document A/CN.4/348, para. 106.

was essential to express that idea in the draft, he was firmly opposed to the deletion of draft article 7.

13. The Special Rapporteur had also come out in favour of eliminating the concept of good-neighbourly relations, which was referred to not only in draft article 7, but also in draft article 8, paragraph 2. In his earlier statement (1855th meeting), he himself had opposed the retention of that concept. The concept of a shared natural resource had been dropped because it created a legal superstructure from which principles not enunciated in the draft articles could be derived. However, good-neighbourly relations created another superstructure, and it was impossible to eliminate one without eliminating the other. It was one thing not to include the concept of a shared natural resource in the text, because of the opposition which it aroused, but it was quite another matter to assert that the principles which could be derived from it would not be applied, as if the superstructure created by the concept of good-neighbourliness had also been eliminated.

14. With regard to the question of the relativity of watercourse systems, both he and Sir Ian Sinclair (1857th meeting) had noted that, in the provisional working hypothesis adopted by the Commission, it was stated that

... to the extent that the uses of the waters of the system have an effect on one another, to that extent the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.<sup>6</sup>

Consequently, in a given case, a watercourse system could be considered as comprising a number of systems simultaneously, depending on whether it was considered from the point of view of pollution, hydraulic power or irrigation. He wondered whether such a conclusion could be drawn from the new wording of the draft, since article 1 referred not to uses in one part of a watercourse affecting uses in another part, but to the components affecting uses in another part of the watercourse. Could a flood system be considered to exist in the event of a flood occurring at a given point in the watercourse and affecting the uses of the waters by downstream States?

15. In the interest of expediting the discussion, there should be the fullest possible dialogue between members of the Commission and the Special Rapporteur. At the previous session, he had raised two questions which had not been referred to by the Special Rapporteur in his summary of the debate and which had been raised again at the current session, namely the question of optimum utilization, a concept which the Special Rapporteur was currently thinking of eliminating, and the question of the position of articles 11 to 14 in the draft, a concern which the Special Rapporteur now said he appreciated.

16. The CHAIRMAN pointed out that the Commission was at the present stage considering only the action to be taken on the formal proposal by the Special Rapporteur to refer draft articles 1 to 9 to the Drafting Committee.

17. Sir Ian SINCLAIR recalled that he had already expressed reservations (1857th meeting) as to whether draft

articles 1 to 9 should be referred to the Drafting Committee at the current stage. While he welcomed the conciliatory approach of the Special Rapporteur, it was unlikely that all the objections raised with regard to the draft articles submitted in the second report (A/CN.4/381) could be overcome. The articles provisionally adopted by the Commission in 1980 had constituted a coherent and consistent whole, based on the "system" concept. Now that that pillar had been removed, it was necessary to rethink all the provisions. However, he would not oppose the proposal to refer draft articles 1 to 9 to the Drafting Committee, on the understanding that the Special Rapporteur would cooperate in a collective effort to produce a more acceptable set of articles.

18. Mr. KOROMA supported the suggestion to refer draft articles 1 to 9 to the Drafting Committee but endorsed Mr. Barboza's plea for the retention of the first part of article 7, which was central to the topic.

19. Mr. DÍAZ GONZÁLEZ said that it was clear from Mr. Barboza's statement, if not from the debate itself, that the Commission was unable to achieve either a consensus or unanimity on the form and basic concepts of the draft. However, it was the Commission's responsibility to reach a decision on those two points. At least five speakers had questioned the wording of the articles under consideration. To refer those articles to the Drafting Committee would mean that the Commission approved them, which was not the case. As Sir Ian had pointed out, it was the philosophy of the draft which had changed, now that the foundations of the draft prepared on the basis of the reports of the previous Special Rapporteur were no longer the same. The Drafting Committee comprised only a small number of members of the Commission, and the Commission could not shift its responsibilities on to the Committee. While he was not really opposed to referring draft articles 1 to 9 to the Drafting Committee, he wished to make it clear that he disapproved of such a step, since it was important first to redefine the basis of the draft. It was not possible either simply to eliminate concepts which had been discussed at length and approved by the Commission, or to disregard the numerous observations made by members of the Commission regarding the wording of the draft articles.

20. Mr. McCAFFREY said that, as it was usually impossible to achieve unanimity, the Commission had to rely on consensus for the purpose of referring articles to the Drafting Committee. It thus had to defer to the judgment of the Special Rapporteur as to whether an article was ripe for referral. He did not object to draft articles 1 to 9 being referred to the Drafting Committee, on the understanding that draft article 7 was included. He shared the concern of Mr. Barboza regarding that article.

21. Mr. STAVROPOULOS urged that articles 1 to 9 should be referred to the Drafting Committee, so that the Commission itself could embark on a discussion of the subsequent articles. The points raised by Mr. Barboza would be taken into account by the Drafting Committee.

22. Mr. BALANDA said that the Commission was still uncertain as to what its methods of work should be. It

<sup>6</sup> See 1854th meeting, footnote 4.

must determine, first, the extent to which it was bound by the discussions which had taken place prior to the enlargement of its membership, and, secondly, the degree of maturity which a draft article should reach before being referred to the Drafting Committee, after consideration by the Commission. Could a special rapporteur modify, on the basis of the discussion in the Commission, texts which had already been approved? Should unanimity, or simply consensus, within the Commission be required before draft articles could be referred to the Drafting Committee? Since those fundamental questions threatened to impede the future work of the Commission, they should be taken up by the Enlarged Bureau or the Planning Committee.

23. In the case before the Commission, draft articles 1 to 9 as proposed in the second report of the Special Rapporteur (A/CN.4/381) were a faithful reflection of the discussions in the Commission and in the Sixth Committee of the General Assembly and, now that the Commission had considered them, it should follow its normal practice by referring them to the Drafting Committee. In any event, they would subsequently be referred back to the Commission.

24. Chief AKINJIDE also urged that draft articles 1 to 9 should be referred to the Drafting Committee—in whose work all members could now participate. Eight years had elapsed since the Commission had begun work on the topic, and it was essential to make some progress on it.

25. Mr. BARBOZA said that he would not oppose the referral of draft articles 1 to 9 to the Drafting Committee if such was the general wish of the Commission, particularly since he had himself proposed as much (1855th meeting). However, as the Drafting Committee was behind schedule and overloaded with work, it would probably not be able to consider those articles at the present session, and the decision to refer them could consequently be postponed until 1985. The Commission might also contemplate setting up a small *ad hoc* working group to reconcile differing points of view and improve the drafting of the articles. Such a group might be able to accomplish in a short time what would take much longer in the Drafting Committee.

26. Mr. REUTER said that he did not remember the Commission ever having refused to refer draft articles to the Drafting Committee at the suggestion of a special rapporteur. Such a referral could mean a number of things. In the case in question, the Commission would be temporarily abdicating its responsibility, not only because differences of view had emerged, but also because it had been unable to agree on a number of fundamental issues. It was important for members of the Commission to take the time to reflect on those issues before reaching a decision. He would not object to the referral of draft articles 1 to 9 to the Drafting Committee, on the understanding that the Commission must take decisions on a number of pending questions.

27. Mr. QUENTIN-BAXTER said that he would be a little reluctant to see the Drafting Committee saddled at the Commission's next session with consideration of matters that had been considered very inconclusively at

the current session. It might be that the nature of the Commission's work was changing radically with the Drafting Committee becoming a committee of the whole, since it had not proved possible to separate matters that should properly be considered in the Commission from those that should be considered in the Drafting Committee. If so, it was a rather serious matter. There were also about five questions of principle to which no answers had yet been found. In the circumstances, he would have no objection to referring the draft articles to the Drafting Committee, but if it were possible to respect the Commission's own procedures, possibly in the manner that Mr. Barboza had suggested, it would be better for the Commission and its work in the long run.

28. Mr. KOROMA agreed that referral of the draft articles to the Drafting Committee did not necessarily imply that they had been approved by the Commission, but simply meant that a more intensive discussion would ensue in the Drafting Committee. It would be quite unprecedented to reject a proposal by a special rapporteur that draft articles which had been considered in the Commission should be referred to the Drafting Committee. He therefore urged that the draft articles should be referred to the Drafting Committee.

29. The CHAIRMAN, speaking as a member of the Commission, said it would be premature at the present stage to decide whether or not to appoint a special group to consider draft articles 1 to 9. Such a possibility might, however, be envisaged at the beginning of the next session. He therefore suggested that the draft articles be referred to the Drafting Committee for consideration in the light of the discussion.

30. Mr. DÍAZ GONZÁLEZ recalled that it had been suggested that an *ad hoc* working group should be set up. Moreover, if a new special rapporteur were to be appointed, he might adopt a totally different approach to the draft articles.

31. Mr. FRANCIS said that, in his view, draft articles 1 to 9 should be referred to the Drafting Committee.

32. The CHAIRMAN suggested that draft articles 1 to 9—including draft article 7—be referred to the Drafting Committee for consideration in the light of the views expressed during the debate.

*It was so agreed.*

**State responsibility (continued)\* (A/CN.4/366 and Add.1,<sup>7</sup> A/CN.4/380, <sup>8</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf.Room Doc.5)**

[Agenda item 2]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)<sup>9</sup> (continued)***

\* Resumed from the 1858th meeting.

<sup>7</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>8</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>9</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 16<sup>10</sup> (*continued*)

33. Mr. REUTER said that, if he had correctly understood the reply given by the Special Rapporteur to one of the questions he had asked at the 1858th meeting, a reservation would be included, at the end of the draft, concerning all matters relating to the law of treaties. The Special Rapporteur had said that that would be a way of returning the compliment of the authors of the Vienna Convention on the Law of Treaties, which contained a reservation concerning all matters relating to responsibility. The Special Rapporteur had also stated that any matter concerning what was sometimes termed *exceptio non adimpleti contractus*—namely the right of a party to a treaty to suspend performance of its obligation in response to non-performance of an obligation by the other party—derived from the law of treaties and not from the law of responsibility. Accordingly, the Special Rapporteur felt no obligation to give special consideration to *exceptio non adimpleti contractus*, which was, moreover, widely referred to in his reports. While he himself had no objection to that approach, he wondered whether the exchange of courtesies between the authors of two sets of articles was a sound technique. It might perhaps be better to include the text of article 60 of the Vienna Convention itself in the draft, rather than refer to the law of treaties, since article 60 had, so to speak, set a limit to authorized reactions. Any violation of a treaty threatened the survival of that treaty, just as any violation of a custom threatened the survival of that custom. The idea in the Vienna Convention had been to safeguard treaty machinery as far as possible by virtue of the principles which had prompted the inclusion in that instrument of the concept of suspension, which, until then, had occupied only a minor place in international law and which the authors of the Vienna Convention had thus considerably developed. Only very serious violations jeopardized treaty machinery. In all other cases, the treaty machinery must continue to operate. Consequently, the Vienna Convention set a very definite limit.

34. From the standpoint of codification technique, the Commission faced a general problem. When it considered in succession two topics which, although separate, overlapped, it had to decide whether it should deal with the problem by making a simple reservation, as had been done in the Vienna Convention, or whether it should go a little further. The authors of the Vienna Convention had been right to express a reservation. However, in the case in question, it would be preferable to adopt another approach and to include the text of article 60 itself in order to be sure that, regardless of the form which the draft articles under consideration ultimately took, that rule would be included, since it set a limit to authorized reactions.

<sup>10</sup> For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp.42-43.

35. He also wondered whether the definitions given in draft article 5, which was of paramount importance, were completely independent of an assessment of the advantage of instituting legal proceedings, or whether there was some link between the substantive provisions of the draft article and the assessment by the ICJ of the advantage of instituting proceedings. It was quite clear that, if draft article 5 affected the advantage of instituting proceedings, the data which currently governed international justice would be profoundly transformed, particularly the voluntary nature of acceptance of the jurisdiction of the ICJ.

36. Sir Ian SINCLAIR wondered whether a phrase should not be included in draft article 11 to the effect that it was without prejudice to article 60 of the Vienna Convention on the Law of Treaties.

37. Also, he would like to know whether the Special Rapporteur conceived of draft article 7 as being *lex specialis* in relation to internationally wrongful acts constituting a breach of an international obligation concerning the treatment accorded by a State to aliens. He wondered whether there was not some inconsistency between paragraph 1 (b) of draft article 6 and draft article 22 of part 1 of the draft.

38. With regard to the last clause of paragraph 2 of draft article 6, and also of draft article 7, he noted that the Special Rapporteur, in his fifth report (A/CN.4/380, para. 3), had raised the question of the utility of dealing with subtopics such as the quantum of damages. The clause in question, however, in fact appeared to refer to the quantum of damages, and in somewhat rigid terms. Possibly some more flexible wording could be found, such as “corresponding to the injury suffered”. The clause also seemed to exclude exemplary damages.

39. Mr. RIPHAGEN (Special Rapporteur), replying to Mr. Reuter's question regarding draft article 16 (a), said he agreed entirely that every violation of a treaty threatened the very existence of that treaty. That was why the Vienna Convention on the Law of Treaties limited rather strictly the possibilities of considering a treaty as no longer in operation. The rule was that there had to be a material breach and it was stated in terms that implied a renunciation, in that the object and purpose of the treaty had to be destroyed. The authors of the Vienna Convention on the Law of Treaties had thus been concerned to ensure that the treaty remained in force so far as possible. Article 60 of the Vienna Convention was indeed relevant to the topic under consideration, but from a different angle. The Commission was concerned, not with the life of the treaty as such, but with the actions of a State which might be contrary to a treaty and which had been taken because that treaty had in fact been violated; hence questions of reciprocity and reprisal were involved. It was one thing for a party to a treaty to declare that, because of a material breach by the other party, it no longer regarded the treaty as valid, and another thing for the first party to violate the treaty itself. Although, in practice, the two often went together, from the abstract legal point of view, two different questions were involved. That was why he thought

it possible, in paragraph (a) of draft article 16, to return the compliment.

40. Furthermore, under the Vienna Convention on the Law of Treaties, all matters pertaining to the invalidity, termination and suspension of the operation of treaties were referred to a dispute-settlement procedure, and that was a matter which would have to be taken up in part 3 of the draft. The approach of article 60 of the Vienna Convention to limitations on the possibility of suspending the operation of treaties was also relevant to the cases with which the Commission was concerned, namely simple violations of obligations. The treaty under which an obligation was violated was often a multilateral treaty, and draft article 11, paragraph 1, which was very much inspired by article 60 of the Vienna Convention, dealt with the matter from the point of view of reciprocity or reprisal.

41. Referring to Sir Ian Sinclair's suggestion that the phrase "without prejudice to article 60 of the Vienna Convention on the Law of Treaties" be included in draft article 11, he said that he still felt it was possible to separate the two topics of treaties and State responsibility by a clause of the kind embodied in draft article 16 (a). However, if the Vienna Convention was not excluded under the terms of draft article 16 (a), the phrase suggested by Sir Ian would of course have to be included.

42. The questions posed by Mr. Reuter and Sir Ian Sinclair again raised the general point of the close interrelationship between primary and secondary norms of international law. In many cases, including the topic under consideration, it simply was not possible to maintain a clear distinction between the two. But once the question of the validity of a treaty was separated from the question of its performance, there remained a certain connection between the two elements which he had endeavoured to bring out in the draft.

43. Mr. Reuter had raised an important point concerning draft article 5 and the question whether and when there was an advantage in instituting proceedings. The simple answer was that the question would have to be dealt with in part 3 of the draft in the context of dispute settlement. In the past, the attitude of international courts as to whether there was an advantage in instituting proceedings had perhaps been somewhat influenced by the all-pervading idea of bilateralism in international relations. An element of progressive development of international law had emerged inasmuch as the Commission, and also the ICJ, had considered that certain violations of international obligations were violations *erga omnes*, whatever might be the precise meaning of that term. Accordingly, in the light of the Commission's discussion of article 19 of part 1 of the draft and of the decision of the ICJ in the *Barcelona Traction, Light and Power Company, Limited* case,<sup>11</sup> he had felt it necessary to include draft article 5 (b), although the action which an injured party could take in such a case would have to be dealt with in other parts of the draft.

44. Replying to questions raised by Sir Ian Sinclair, he said that he did indeed regard the provision embodied in draft article 7 as *lex specialis*, as was apparent from the reference to that article in paragraph 1 (c) of draft article 6. With regard to the relationship between draft article 6, paragraph 1 (b), and draft article 22 of part 1 of the draft, he said he had taken account of the view of some members that, where the remedies had not been exhausted, there could be no internationally wrongful act. That was why reference was no longer made to draft article 22. None the less, the question remained, in the sense that, apart from the rule of exhaustion of local remedies, there was a possible obligation of *restitutio in integrum stricto sensu* in regard to the rules relating to treatment of aliens. It was quite clear in his mind that, if it was possible for a State that had allegedly committed an internationally wrongful act in connection with the position of aliens to restore a person's rights, without any difficulty under its own internal law, it should do so. Impossibility, in that context, was not, of course, material impossibility, since theoretically a State could do anything it wished. There nevertheless remained a twilight zone, since many writers considered that it was not possible for a State, for instance, to repeal national legislation with retroactive effect although, theoretically, from the point of view of international law, it was always within the sovereign power of the State to do so. In a number of more recent arbitral proceedings dealing with the question of *restitutio in integrum* in cases of nationalization, however, quite different conclusions had been reached. His intention, therefore, was that draft article 7 should constitute *lex specialis*, and that draft article 6, paragraph 1 (b), and draft article 22 should have two entirely different objectives.

45. With regard to Sir Ian Sinclair's question regarding the last clause of paragraph 2 of draft article 6 and also of draft article 7, it was quite correct that he had stated in his report (A/CN.4/380, para. 3) that the draft did not deal with the quantum of damages, although that question could, of course, always be considered by the Commission. In his view, however, it was important at least to indicate what a State which committed an internationally wrongful act must do if, for material reasons, it was unable to restore the situation. Sir Ian had also pointed out that the same clause excluded exemplary damages. In that connection, he had already stated in an earlier report that, under modern international law, the idea of punishment of a State, if at all applicable, was reserved for very grave offences. The fate of post-war peace treaties was all too well known. In his view, therefore, it was not possible, in the present state of international law, to go further than the clause in question.

46. Lastly, since the possible inclusion of the text of article 60 of the Vienna Convention on the Law of Treaties would depend on the content of part 3 of the draft, he would suggest that a decision in that regard should be postponed until part 3 was taken up.

*The meeting rose at 1 p.m.*

<sup>11</sup> Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 3.

## 1861st MEETING

Friday, 13 July 1984, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Julio BARBOZA

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

State responsibility (*continued*) (A/CN.4/366 and Add.1,<sup>1</sup> A/CN.4/380,<sup>2</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf.Room Doc.5)

[Agenda item 2]

*Content, forms and degrees of international responsibility (part 2 of the draft articles)*<sup>3</sup> (*continued*)

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 16<sup>4</sup> (*continued*)

1. Mr. USHAKOV thanked the Special Rapporteur for his set of draft articles, which would facilitate the work of the Commission. Referring to draft article 5, which was fundamental since it defined the concept of "injured State", he said, first, that he had always advocated beginning part 2 of the draft articles with a chapter devoted to international crimes, which did not entail the same type of responsibility as did delicts. The Special Rapporteur, however, proposed dealing simultaneously with international crimes and international delicts. While that was a possible solution, it would be better to draw a distinction between those two categories of internationally wrongful act since, in any event, the Commission could not adopt the same approach to responsibility for crimes and responsibility for delicts.

2. Secondly, the draft articles under consideration were necessarily general in scope and were not intended to be a sort of penal code. Consequently, they must comprise rules which were general, but which had definite limits. Could the Commission refer in the draft to general international law as such? If so, exactly what rules would it invoke? In his view, rules of international

law on responsibility could be referred to only in exceptional cases.

3. Thirdly, it had always been his view that the draft on the content, forms and degrees of international responsibility should be approached from the standpoint of the injured State and should specify the possibilities open to it in the event of a delict. In that respect, he endorsed the approach which the Special Rapporteur seemed to be taking, namely that the responsibility of the author State was not engaged until the injured State so requested. In the case of delicts, it was sufficient to specify that the injured State was the State affected by an internationally wrongful act, since it would be virtually impossible to enumerate all the specific instances in which a State might be injured, short of re-examining part 1 of the draft on obligations. It was unnecessary, therefore, to give a detailed definition of the term "injured State", particularly in the case of bilateral relations, where the injured State could easily be distinguished from the State which had failed to perform its obligations. Nevertheless, a State party to a limited treaty could, by a breach of its obligations, affect all the other States parties. A case in point was the European Economic Community, which had been established by a limited treaty, the Treaty of Rome, any breach of which could adversely affect all the parties, although some States might be injured directly and others indirectly. But it would be absurd to attempt to cover all those possibilities in draft article 5.

4. The view of the Special Rapporteur that, if the internationally wrongful act constituted an international crime, all the other States were injured, was generally correct. However, without forgetting the existence of obligations *erga omnes*, he himself did not share the view that an international crime necessarily injured all States within the international community, since some of them would be injured directly, while others would not. Indeed, in some instances, no State was actually injured; it was rather the international community of States as such that was affected. In the case of armed aggression against a State, for example, the victim of the aggression was clearly injured, whereas the other States of the international community were not. In such cases, under contemporary international law, or more precisely the Charter of the United Nations, the responsibility of the author State towards the international community as a whole was entailed since, when a breach of international order occurred, it was the international community that was regarded as the injured party. When one State committed an act of genocide within its own territory, could another State be regarded as directly injured? Such could be the case if the victims were members of a minority represented in the latter State; otherwise the injured party could be considered to be the international community as such. The international community was almost invariably called on to react to an international crime, whereas a simple delict affected only bilateral relations. It was for those reasons that he felt a separate chapter should be devoted to international crimes.

5. Moreover, all international crimes might be regarded as detrimental to international peace and security. Consequently, the words "constituting a threat to, or breach

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

of, peace” should be appended to the term “international crime”. The Commission could specify the consequences of such a crime. Thus, in the chapter on international crimes, it should be made clear that it was not States, but the international community, that could be injured and could be called upon to take measures.

6. Referring to draft article 12, he wondered whether a State could take countermeasures. Obviously, that possibility existed. For example, if, in the case of a severance of diplomatic relations, accompanied by armed conflict, the State which had taken the initiative of breaking off diplomatic relations held the staff of the embassy of the other State hostage, the latter State could, without committing a breach of international law, take such coercive measures as preventing the diplomatic agents of the first State from leaving its territory. It was not entirely correct, therefore, to say that countermeasures did not exist in diplomatic law. However, that was a minor question. He reserved the right to speak again later on the draft articles to which he had not referred.

7. Mr. REUTER congratulated the Special Rapporteur on his fifth report (A/CN.4/380). However, the fact that the Commission had before it a number of draft articles did not mean that it had reached the final stage of its deliberations or that it should refer those articles to the Drafting Committee. His comments were therefore of a purely provisional nature.

8. He shared Mr. Ushakov's view that the question of international crimes was very important. However, although some examples of international crimes such as aggression and genocide came immediately to mind, the whole area was nevertheless still *terra incognita*. Consequently, in his view, it would be preferable for the Commission to adopt military tactics and to attack where it was in a position of strength by examining further the question of delicts. He did not object to the idea of dealing with delicts and crimes in the same article and considered that the Special Rapporteur had been right to defer the question of international crimes to the end of draft article 5. The general régime proposed for delicts would apply also to international crimes, subject to a number of derogations and additional provisions.

9. Draft article 4 called for little comment, since it already met with the approval of the Commission. He wondered, however, whether it was not possible to envisage the draft articles in a context other than that of the United Nations. The question was a serious one, since a number of States were not members of the United Nations and there was no overlooking the fact that States could take action outside the United Nations. It was also a serious matter to refer to the international community as such, since it could be identified with the United Nations, in which case it was necessary to determine whether the responsible body was the General Assembly or the Security Council.

10. In draft article 5, the Special Rapporteur had endeavoured to follow the guidelines laid down in part 1 of the draft. Injury was not a constituent element of responsibility and account had been taken only of legal, abstract injury resulting from any breach of an interna-

tional obligation. In general, he shared the view of the Special Rapporteur as expressed in draft article 5. However, with regard to paragraph (e), he wondered whether international crime was not a treaty concept. If the Commission was of the view that an international crime existed only if the act in question affected the international community as a whole, that would create a problem. For his part, he could not rule out, from the outset, the idea that there were international crimes which concerned the parties to a convention establishing the concept of international crime, but which did not concern other States. He could not subscribe to the idea that some treaties bound all States even if they were not parties to it. Nevertheless, if the Commission intended to take that position, he would help the majority to draft the relevant provision, despite the fact that he held a contrary view.

11. However, draft article 5 gave a somewhat descriptive definition of the term “injured State”. While he did not criticize the substantive solutions adopted, he felt that it might be necessary to redraft that provision. While the situation envisaged in paragraph (b) was fairly clear, was there not another factor to be taken into account, namely how to be sure in all cases of the relative authority of the *res judicata*? He recognized that that was a controversial question, however, and understood the caution exercised by the Special Rapporteur. Paragraph (c) presented no difficulty. However, in paragraph (a), the Special Rapporteur appeared to have in mind all customary rules, whether general or specific, provided that, by their nature, they created a subjective right which was in some way appropriate (unknown in common law). That was a special situation rather similar to that of the bilateral treaty. In other words, if the Special Rapporteur thought that some legal rules created subjective rights, would it not be advisable to draft a paragraph to that effect which did not distinguish between customary and written rules? He seemed to remember that, in the view of the Commission, the issues dealt with in a general manner in that part of the draft articles called for no distinction to be drawn on the basis of the source of the right, in which case there would be a small problem to solve, since the situation of a right *in favorem tertii*, which was also covered in paragraph (a), was merely a simple and indisputable example of an appropriate right. The Special Rapporteur was concerned, in that instance, with rights arising for a third State. In considering those questions in the course of its debates on the provisions which were to become articles 34 and 36 of the Vienna Convention on the Law of Treaties, the Commission had provided for the creation of rights for a category of States. Yet, however appropriate a right might seem when it was created for a single State, it could nevertheless lead to controversy when a group of States was involved. However, he would willingly endorse the view of the Special Rapporteur if he did not consider it necessary to go into detail.

12. Paragraph (d), which formed the core of draft article 5, contained a number of very specific concepts and others of a more general nature calling for clarification. In subparagraph (iii), for example, it was possible to speak of an “interest considered as collective in the view of the parties”, since the process of collectivization in-

volved an element of will. At a given moment, it was States which regarded a particular interest as genuinely collective. That had been so in the nineteenth century in the case of public health, and in the twentieth century in the case of the environment. A second factor was that of solidarity among States; some technical and material data gave rise to a community of interest.

13. While he found draft article 6 generally acceptable, the wording of paragraph 1 (b) might be reconsidered. Why was it necessary to apply remedies which existed? Moreover, if, in the situation described, it was the injured State which acted without invoking the harm suffered by its nationals, then the question of the exhaustion of the remedies provided for in its internal law did not arise. He was prepared to accept paragraph 1 (d) if it was intended to refer to international crimes; however, if it was meant to apply to delicts, it seemed excessive, and it might be preferable to call on the State which had committed an internationally wrongful act to remedy any situation which presented a danger. A State which had committed a delict and continued to maintain a situation likely to provoke a further delict was in an unlawful situation. In that respect, therefore, he objected to the use of the term “appropriate guarantees” with reference to delicts.

14. The distinction made in draft article 8 could have considerable effects, since draft article 10 provided for the limitation of the rights of the State in respect of draft article 9, but not of draft article 8. The Special Rapporteur (1858th meeting) had noted that draft article 8 referred essentially to reciprocity and that, in his view, the area of responsibility was defined by a direct link with the obligation that had been breached. The concept of a direct link should be clarified. The set of obligations enunciated in a treaty were formally and directly linked with one another by virtue of the very existence of the treaty. Common obligations were those found in a group of treaties linked by their scope and purpose. That was a useful concept when it was customary rules that were being dealt with. The situation became more difficult in the absence of formal elements. In the case of a State failing to observe a customary rule of commercial shipping in peacetime, for example, the injured State was entitled not to observe another customary rule of commercial shipping in peacetime. In such cases, there was a unity defined by the scope or object. If the Special Rapporteur found it difficult to clarify the wording, or if the Commission preferred to retain a general wording, the provision must be accompanied by a very full commentary.

15. Draft article 11 was generally acceptable, and his earlier observations on the term “collective interests” applied also to paragraph 1 (b). In paragraph 1 (a), the Special Rapporteur had intended to refer to treaties the breach of which by any of the parties jeopardized the scope and purpose of the treaty, or its performance by all the parties. For example, in the case of a treaty limiting fishing rights, with a view to protecting stocks, failure by one party to perform its obligations affected all the parties. In some cases, however, the obligations of States were not invariably symmetrical. It was possible to en-

visage a disarmament treaty imposing the obligation to disarm on one State only. Consequently, in paragraph 1 (a), the expression “one State party” should be replaced by “that State party”, in order not to overlook the possibility of either a violation by any State, or a violation by a State of its specific obligation, thereby affecting the other parties.

16. With regard to draft article 12 (a), he shared the view expressed by Mr. Ushakov. Draft article 9 should not apply to the situation referred to in paragraph (a). If his understanding of the decision rendered by the ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*<sup>5</sup> was correct, a set of obligations or régime applicable to embassies existed, so that when an ambassador interfered in the internal affairs of a State he could be declared *persona non grata*, but should not be subjected to a régime which was inconsistent not only with ambassadorial dignity, but also with the rights of the individual. The example given in paragraph (a) was highly important in that it demonstrated all the consequences of the régimes of reciprocity and reprisals. The Special Rapporteur had been right, moreover, to exclude the word “countermeasure” from his draft.

17. Draft article 12 (b) referred to the peremptory norms of general international law, otherwise known as *jus cogens*. Despite the reservations which he had frequently expressed regarding *jus cogens*, he personally believed in an international morality, the requirements of which went far beyond those of the law. The concept of *jus cogens* had been embodied in article 53 of the Vienna Convention on the Law of Treaties, but was only well known in respect of the nullity of treaties. However, treaties which could be considered null and void by virtue of *jus cogens* were very few. One example was a treaty concluded between the Vichy Government and the German Reich which had been deemed null and void by virtue of *jus cogens* by a war tribunal of the United States of America.

18. While the situation might be fairly clear in the law of treaties, such was not the case in the area of State responsibility. Reiterating arguments that had already been put forward in connection with nuclear arms, while at the same time not wishing to express the view of any Government, or even his personal opinion, he said that, if a peremptory norm existed which prohibited the use of nuclear weapons and was breached by a State, the injured State, if it possessed nuclear weapons, could not use them, in view of article 12 (b), which referred to draft articles 8 and 9. Again assuming the existence of a rule prohibiting the use of nuclear weapons, he wondered whether a State which was the victim of an act of aggression—such acts being prohibited—could react by using nuclear weapons. The answer to that question was negative or positive depending on whether draft article 8 was considered as applying to that situation or not. Would the obligation not to use nuclear weapons be considered as corresponding to, or directly linked with, the obligation not to commit an act of aggression? Other examples could be found in humanitarian law. For example, the

<sup>5</sup> See 1858th meeting, footnote 10.

1949 Geneva Conventions<sup>6</sup> prohibited reprisals in some cases, a prohibition which had the character of a *jus cogens* norm when applied to some forms of inhuman treatment, such as the act of shooting a prisoner of war, which constituted a crime not justified by the failure of the enemy to observe the rules. However, did *jus cogens* really impose obligations which were binding to varying degrees, independently of those quite elementary humanitarian rules?

19. While the Commission should not, of course, become involved in the area of the law of war, as he had pointed out at a previous meeting, it must nevertheless take account of the problems raised by the use of nuclear weapons in elaborating articles of the kind under consideration. It must also decide on the advisability of the safeguard clause concerning armed reprisals contained in draft article 16 (c). It would be unwise to venture into an area which cast doubt not only on the idea of deterrents, but also on the conducting of nuclear tests in the atmosphere, to the extent that the treaties prohibiting such tests constituted an example of *jus cogens*, as an eminent scholar had once stated. Draft article 16 should make it clear that the Commission reserved its position on the question of armed reprisals, and perhaps even on the law of war.

20. Draft article 13 raised the question of the total violation of a multilateral treaty destroying the object and purpose of that treaty as a whole, in which case articles 10 and 11 did not apply. An exception was made, however, in the case of article 11, paragraph 1 (c), whereby the injured State could not suspend the performance of its obligations when those obligations were stipulated for the protection of individual persons, irrespective of their nationality. While he agreed with the intention of the Special Rapporteur, he wondered whether the situation envisaged could really be described in terms of a violation which destroyed the object and purpose of the treaty, since, once the object and purpose of the treaty were destroyed, the treaty no longer existed. The implication was that the Special Rapporteur considered treaties designed to protect human rights as acquiring, upon their entry into force, a scope extending beyond the treaty framework. Once they had recognized given human rights in a multilateral treaty, States could no longer go back, at least after having committed a manifest violation of the obligations deriving from that treaty. Nor could he agree that the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water<sup>7</sup> was now the expression of a customary rule of *jus cogens*, binding on all States, since such did not correspond to the actual political situation, any more than he could agree that article 11, paragraph 1 (c), applied to the States parties to a multilateral treaty recognizing fundamental human rights, even if that treaty were to be destroyed. However, the draft should be made a little more explicit on that point.

21. Referring to draft article 14, he said that it appeared dangerous to base the concept of international

crime on factors which would not be measured in treaty terms. An international crime might exist only for one region of the world. For example, the African countries had felt it necessary to draft a convention on mercenaries,<sup>8</sup> a phenomenon which was not necessarily the same in other regions. Furthermore, even at the global level, it was rather difficult to dissociate the concept of international crime from a treaty. The question of aggression also raised many difficulties, since it was a crime of a special kind. Indeed, that was why the Special Rapporteur had dealt with aggression in a separate provision—draft article 15—which was actually only a “reminder”, since it did not go into the substance of the topic. On reading draft article 14, which referred to United Nations machinery, one thought first of the States which were not members of the United Nations. Should the principle be established, as had been done by the ICJ in its advisory opinion on Namibia,<sup>9</sup> that some effects of the United Nations Charter affected even non-member States? One of the judges who had attached dissenting opinions represented the culture and legal traditions of a country which had adopted a policy of neutrality. As shown by draft article 14, paragraph 2 (c), the Special Rapporteur had thought of neutral States, since the obligations which were created in the event of an international crime did not concern the carrying out of armed measures.

22. With regard to paragraph 3 of draft article 14, concerning the procedures provided for by the Charter, he wondered whether the wording should not be moderated. Admittedly, the Charter constituted a special régime, but it was still only a treaty, and it did not seem possible for the time being to go much further. When applied to the question of links between crimes and treaties, those various considerations gave rise to difficulties. For that reason, while he was able to acknowledge the existence of certain international crimes, he felt that the rules common to all such crimes had not yet been established. The Special Rapporteur had attempted to insert one such rule in draft article 5 (d). While he felt, like Mr. Ushakov, that some distinctions were called for, what concerned him in the crime hypothesis was that the Commission was in danger of preparing articles which fell within the purview of the draft Code of Offences against the Peace and Security of Mankind if it allowed itself to be drawn by aggression, and that, if it admitted other crimes, it must admit all of them, although what those crimes were or how they differed from one another was not yet known. Under internal criminal law, the drafting of general rules on crimes had taken place at the final stage of codification. However, there were still legal systems in which such codification had never taken place and where each crime was subject to a special régime. Consequently, while the question of international crimes should be borne in mind, any decision on it should be left to the last possible moment.

23. With regard to draft article 16, he wondered whe-

<sup>6</sup> United Nations, *Treaty Series*, vol. 75.

<sup>7</sup> *Ibid.*, vol. 480, p. 43.

<sup>8</sup> See 1816th meeting, footnote 15.

<sup>9</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

ther the reservation formulated in paragraph (b) should be expressed in such forceful terms, or whether it would not be sufficient to refer to the relevant rules of international organizations, a formula which had been adopted in many treaties.

*Mr. Barboza, Second Vice-Chairman, took the Chair.*

24. Mr. RIPHAGEN (Special Rapporteur) pointed out that the term “the rights of membership”, in paragraph (b) of draft article 16, did not mean *les droits de membre* of an international organization, but referred to such procedural matters as the right to expel a member for certain reasons or to suspend voting rights.

25. The term “belligerent reprisals”, in paragraph (c) of draft article 16, was also a technical term which was often used to cover what was permissible during a war. The question which arose was whether, if one State failed to comply with the rules laid down, for instance under the Hague or Geneva Conventions, the other State could do likewise. He had thought it better to leave the development of that kind of rule to the competent bodies. Presumably, however, in suggesting the words *tous les droits de la guerre*, Mr. Reuter had had in mind the Hague and Geneva Conventions. The point also had some relevance for the problem of nuclear weapons, which could not, however, be solved in the context of the draft.

*The meeting rose at 12.50 p.m.*

## 1862nd MEETING

*Monday, 16 July 1984, at 3.05 p.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)\***  
(A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE

ARTICLES 9 to 23

1. The CHAIRMAN invited the Chairman of the Drafting Committee to present the Committee's report

\* Resumed from the 1847th meeting.

(A/CN.4/L.378) on articles 9 to 27, and the texts of articles 10, 11, 13 to 17, 20, 21 and 23, paragraphs 2, 3 and 5, as adopted by the Committee.

2. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Committee had held its first meeting during the first week of the session. Of the 27 meetings already held, 19 had been devoted to the topic under consideration. It was thanks to the diligence, good will and hard work of Mr. Yankov, the Special Rapporteur, and all the members of the Drafting Committee that the Commission now had before it a large number of draft articles. The Drafting Committee had made the maximum use of the time available to it, and had thus been able to make up some of the Commission's arrears of work. It must be pointed out, however, that such intensive working had sometimes prevented members of the Committee—or at least the Chairman of the Committee himself—from studying as they deserved the other reports submitted to the Commission by its special rapporteurs and from making detailed statements on them.

3. The Drafting Committee had had before it draft articles 9 to 19, referred to it by the Commission at the previous session, and draft articles 20 to 35, referred to it at the present session. Of those 27 articles, it had been able to examine 19. The document before the Commission (A/CN.4/L.378) contained the recommendations and texts formulated by the Drafting Committee in respect of 18 articles, namely articles 9 to 22 and 24 to 27, originally submitted by the Special Rapporteur.<sup>1</sup> In the case of article 23, the Committee had adopted, subject to reservations by some members, paragraphs 2, 3 and 5; it had been unable to reach agreement on paragraphs 1 and 4, the texts of which had been placed in square brackets to show that they had not been adopted by the Committee, but remained as proposed by the Special Rapporteur. It would be for the Commission to decide what was to be done with those two paragraphs and with the article as a whole. The reduction in the number of articles was due to the fact that the Drafting Committee had deleted some and combined others. In so doing, it had taken account of comments made by members of the Commission in plenary meeting and by representatives in the Sixth Committee of the General Assembly concerning the need to simplify and rationalize the draft.

4. In so far as it was necessary, the Drafting Committee had also tried to harmonize the texts examined with the corresponding articles of the four conventions codifying diplomatic law.<sup>2</sup> Of course, it had sometimes been more

<sup>1</sup> These draft articles were considered by the Commission as follows:

(a) arts. 9-14, at the thirty-fourth session, see *Yearbook ... 1982*, vol. I, 1745th to 1747th meetings;

(b) arts. 15-19, at the thirty-fifth session, see *Yearbook ... 1983*, vol. I, 1774th and 1780th to 1783rd meetings;

(c) arts. 20-23, at the thirty-fifth session, *ibid.*, 1782nd to 1784th and 1799th meetings; and at the present session, see 1824th and 1825th meetings;

(d) arts. 24-27, at the present session, see 1826th to 1829th meetings.

<sup>2</sup> 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character.

appropriate to adopt the corresponding text of one of those conventions rather than that of another, and it had always been necessary to bear in mind the peculiarities of the status and situation of the diplomatic courier, which had sometimes made it necessary to adopt terminology and rules different from those of the said conventions. Moreover, harmonization had sometimes been necessary in only one of the three languages.

5. For the time being, each article had two numbers: the first was the number originally given by the Special Rapporteur and the second, which was placed in square brackets, was the new number resulting from deletions and merging of articles. It was the new numbers which would be used in the Commission's draft report. The old numbers had been retained at the present stage only to facilitate comparison with the texts originally submitted by the Special Rapporteur. It would also be necessary to adjust to the new numbering the references to subsequent articles made in article 13 and in article 8 provisionally adopted at the previous session.

6. Two drafting points of a general nature must be specially mentioned. First, in accordance with the decision taken at the previous session, the Drafting Committee had deleted the adjective "official" qualifying the "functions" of the courier in the texts submitted by the Special Rapporteur. Thus the texts of articles 15, 16, 17, 20 and 23 adopted by the Committee referred simply to the performance or exercise of "his functions". Secondly, for the sake of clarity, the Drafting Committee had decided to use, in most cases where reference was made to the receiving State and the transit State, the expression "the receiving State or, as the case may be, the transit State". That expression appeared in articles 15, 16, 17, 20, 21, 23, 24 and 25. In the Spanish text, the necessary precision was achieved by using the words *el Estado receptor y, en su caso, el Estado de tránsito*.

#### ARTICLE 9

7. During the examination of article 9 (Appointment of the same person by two or more States as a diplomatic courier)<sup>3</sup> members of the Drafting Committee had raised the question how that provision would operate, in particular if, as some members proposed, it was aligned with article 6 of the Vienna Convention on Diplomatic Relations, which provided that two or more States might accredit the same person as head of mission to another State, "unless objection is offered by the receiving State". The transposition of that provision to the case of a diplomatic courier appointed by two or more States had raised questions concerning the possibility that the transit State might object independently of the receiving State, and vice versa, and questions concerning the nationality of the diplomatic courier. Reference had been made to draft article 10, paragraph 3 (b), under which the receiving State could reserve the right to make the appointment of a diplomatic courier who was not a national of the sending State subject to its consent. And

<sup>3</sup> For the text submitted by the Special Rapporteur, see *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 189. See also footnote 1 (a) above.

since, under article 9, a diplomatic courier could at one and the same time perform functions for several States, it might be difficult to determine which was the competent sending State with respect to various provisions of the draft, in particular article 14, paragraph I, concerning the obligations of the sending State in the case of a diplomatic courier being declared *persona non grata* or not acceptable.

8. For those reasons and others, the Drafting Committee had decided that it would be more prudent not to provide for the exceptional case of a courier appointed by two or more States, but to mention the matter in the commentary to article 8, which had already been provisionally adopted. It would be pointed out in the commentary that, if multiple appointments were made, they would be subject, in particular, to articles 10 to 14 of the draft. It was therefore recommended that article 9 should not be included in the draft.

9. The CHAIRMAN said that, if there were no comments, he would take it that article 9 was deleted.

*Article 9 was deleted.*

#### ARTICLE 10 [9] (Nationality of the diplomatic courier)

10. Mr. MAHIU (Chairman of the Drafting Committee) presented the text of article 10 [9] as proposed by the Drafting Committee, which read as follows:

##### *Article 10 [9]. Nationality of the diplomatic courier*

1. The diplomatic courier should in principle be of the nationality of the sending State.

2. The diplomatic courier may not be appointed from among persons having the nationality of the receiving State except with the consent of that State, which may be withdrawn at any time.

3. The receiving State may reserve the right provided for in paragraph 2 of this article with regard to:

(a) nationals of the sending State who are permanent residents of the receiving State;

(b) nationals of a third State who are not also nationals of the sending State.

11. He said that the text of article 10 adopted by the Committee was almost the same as that submitted by the Special Rapporteur.<sup>4</sup> The title remained unchanged. The deletion of article 9 had made it necessary to delete paragraph 4 of the original article 10. Other changes had been made solely in order to bring the text into line with the corresponding articles of the conventions codifying diplomatic law. For example, paragraph 1 had been brought more closely into line with the corresponding paragraph of article 8 of the Vienna Convention on Diplomatic Relations. Thus the words "should, in principle, have the nationality of the sending State" had been replaced by the words "should in principle be of the nationality of the sending State".

12. The only change in paragraph 2, except for minor changes for alignment purposes, had been the deletion of the adjective "express". It had been noted that that adjective did not appear in the corresponding articles of three of the four conventions on diplomatic law. In par-

<sup>4</sup> *Ibid.*, footnote 190. See also footnote 1 (a) above.

ticular, it did not appear in article 10, paragraph 2, of the Convention on Special Missions, which, like the draft articles on the diplomatic courier, dealt with functions of a temporary nature. Some members had been concerned about the application to the case of the diplomatic courier of the last phrase of paragraph 2: “which may be withdrawn at any time”. The Drafting Committee had nevertheless considered that the phrase should be retained and that it should be explained in the commentary that the right to withdraw consent should not be abused in such a way as to obstruct the accomplishment of the courier’s mission once it had begun. In normal circumstances, withdrawal of consent should take place only before the beginning of a particular mission.

13. In paragraph 3, only a slight change had been made, which consisted in replacing the words “the same right under paragraph 2” by the words “the right provided for in paragraph 2 of this article”, in order to bring the wording into line with that of the corresponding article of the Convention on Special Missions.

14. Mr. KOROMA pointed out that the wording of article 10, paragraph 1, was bound to be influenced by the type of instrument that would emerge from the Commission’s work—a draft convention, model rules, or whatever it might be. In any case, he was not satisfied with the words “should in principle be”; he suggested that paragraph 1 be reworded to state simply that the diplomatic courier “should be” of the nationality of the sending State. In paragraph 2, he suggested that a comma be inserted after the words “of the receiving State”.

15. Mr. YANKOV (Special Rapporteur) explained that the language used in article 10 had been taken from article 8, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations. A great effort had been made to harmonize the texts of the articles with that of the existing conventions on diplomatic law, by using language taken from articles having similar subject-matter. The convention used as a model in that case—the 1961 Vienna Convention—enjoyed a very broad measure of support.

16. The CHAIRMAN said that, if there were no further comments, he would take it that article 10 [9] was provisionally adopted.

*Article 10 [9] was adopted.*

#### ARTICLE 11 [10] (Functions of the diplomatic courier)

17. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 11 [10] as proposed by the Drafting Committee, which read as follows:

##### *Article 11 [10]. Functions of the diplomatic courier*

The functions of the diplomatic courier consist in taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him.

18. He said that article 11 as submitted by the Special Rapporteur<sup>5</sup> had been simplified and shortened. First, the statement of the diplomatic courier’s functions had been

brought into line with the text of article 3, paragraph 1 (1). His functions now consisted in “taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him”. Secondly, it had been considered unnecessary to enumerate the various types of diplomatic bag in article 11, since article 3, paragraph 1 (2) gave a detailed definition of the “diplomatic bag”. Thirdly, the words “wherever situated” had been deleted as being unnecessary, because the words “at its destination” clearly showed that a specific place was prescribed for delivery of the diplomatic bag. The title remained unchanged.

19. The CHAIRMAN said that, if there were no comments, he would take it that article 11 [10] was provisionally adopted.

*Article 11 [10] was adopted.*

#### ARTICLE 12

20. Mr. MAHIOU (Chairman of the Drafting Committee) recalled that, during consideration of article 12 (Commencement of the functions of the diplomatic courier)<sup>6</sup> at the Commission’s thirty-fourth session,<sup>7</sup> a number of members had contested the need for that provision in the draft. The Drafting Committee had concluded that it was not necessary to specify when the courier’s functions began, since what was most important for the performance of his functions was the moment when his privileges and immunities began, which was the subject of article 28 of the draft, not the moment when his functions began, which might in fact be while he was still in the territory of the sending State or anywhere at all. The Drafting Committee therefore recommended that article 12 be deleted.

21. The CHAIRMAN said that, if there were no comments, he would take it that article 12 was deleted.

*Article 12 was deleted.*

#### ARTICLE 13 [11] (End of the functions of the diplomatic courier)

22. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 13 [11] as proposed by the Drafting Committee, which read as follows:

##### *Article 13 [11]. End of the functions of the diplomatic courier*

The functions of the diplomatic courier come to an end, *inter alia*, upon:

(a) notification by the sending State to the receiving State and, where necessary, to the transit State that the functions of the diplomatic courier have been terminated;

(b) notification by the receiving State to the sending State that, in accordance with article 14 [12], it refuses to recognize the person concerned as a diplomatic courier.

23. He said that, in addition to minor changes in the text and title of the provision, made for the purposes of alignment, article 13 contained some amendments to the text submitted by the Special Rapporteur.<sup>8</sup>

<sup>6</sup> *Ibid.*, footnote 192.

<sup>7</sup> See footnote 1 (a) above.

<sup>8</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 46, footnote 193. See also footnote 1 (a) above.

<sup>5</sup> *Ibid.*, footnote 191. See also footnote 1 (a) above.

24. Subparagraphs (a) and (d) of the original text had been deleted. Subparagraph (a) had provided for completion of the courier's task by delivery of the diplomatic bag to its final destination. It had been considered unnecessary to deal with that case, for, as in the case of article 12, what was important was the duration of the courier's privileges and immunities under article 28, which did not depend on the moment when he delivered the bag to its final destination. Subparagraph (d) of the original text had covered the case of the death of the diplomatic courier. That subparagraph had been withdrawn by the Special Rapporteur, who had considered that it was not appropriate, because the article was intended to determine how the courier's functions came to an end in law, not to state what was self-evident.

25. Consequently, the former subparagraph (b) had become subparagraph (a) of the text adopted by the Drafting Committee. That subparagraph provided that notification by the sending State that the functions of the diplomatic courier had been terminated should be given not only to the receiving State, but where necessary also to the transit State. The former subparagraph (c) had become subparagraph (b) of the new text. Its wording had been brought into line with that of paragraph 2 of article 14, to which it referred. No change had been made in that provision, although it was understood that refusal by the receiving State to recognize the official status of the diplomatic courier in accordance with article 14 could have effects only in the territory of the receiving State.

26. Mr. DÍAZ GONZÁLEZ said that, in the Spanish title of article 13, the first word *terminación* should be replaced by the word *fin* or *término*, which were more elegant.

27. If, as stated in article 11, the functions of the diplomatic courier consisted in "taking custody of, transporting and delivering at its destination the diplomatic bag entrusted to him", it was evident that they came to an end when the bag was delivered. Logically, article 13 should begin by stating that the functions of the diplomatic courier came to an end when the diplomatic bag was delivered to its destination, or better still "to the consignee". But it was obvious that the privileges and immunities of the diplomatic courier subsisted until he had left the territory of the receiving State or, as the case might be, the transit State.

28. It was true that, according to subparagraph (a) of article 13, the functions of the diplomatic courier could be brought to an end by notification by the sending State to the receiving State or the transit State, but in that case the courier must be a duly accredited diplomatic agent. As that was not normally the case, it would seem strange to start from that principle. Article 13 should therefore refer to the case in which the diplomatic courier's functions came to an end by delivery of the bag to the consignee, before dealing with cases in which the courier was assumed to be a permanently accredited diplomatic agent.

29. Sir Ian SINCLAIR said that the valid point raised by Mr. Díaz González should be taken up on second reading. He himself wished to draw attention to the links

between article 13, on the one hand, and articles 14 and 18, on the other. Unfortunately, the Drafting Committee had not yet been able to report on article 28, which dealt with the duration of privileges and immunities. He wished to stress, in particular, the close link between article 13, subparagraph (b), and article 14, paragraph 2. That latter paragraph, however, had been placed between square brackets and its retention, modification or deletion would depend on the Commission's decision on article 28.

30. Mr. FRANCIS said that the point raised by Mr. Díaz González was a very important one. On reflection, however, the possibility could not be ruled out that a sending State might terminate the appointment of a diplomatic courier even before the diplomatic bag had been delivered. The provision in subparagraph (a) of article 13 might therefore be useful.

31. Mr. KOROMA pointed out that there was an inconsistency in terminology in article 13. The title began: "End of the functions ..." and the opening sentence of the article stated that the functions of the diplomatic courier "come to an end...". Subparagraph (a), on the other hand, spoke of the functions of the courier having been "terminated". It was necessary to make the terminology consistent, and his own suggestion would be to replace the words "have been terminated" in subparagraph (a) by "have come to an end".

32. Mr. STAVROPOULOS said that the expression "come to an end" had been aptly used by the Special Rapporteur in the original article 13 to cover such situations as the completion of a courier's task and the death of the courier. The word "terminated" was more appropriate where the courier's functions were brought to an end by the action of the sending State or by his being declared *persona non grata*.

33. Mr. LACLETA MUÑOZ said he had the same difficulties as Mr. Díaz González, which he attributed to the structure of the draft as a whole. Those difficulties concerned not only articles 14 and 28, but also previous articles relating to the appointment of the diplomatic courier. In the first place, the appointment of a diplomatic courier was not notified to the receiving State and, secondly, the object of article 13 was to enable the diplomatic courier to continue to enjoy privileges and immunities in the receiving State after delivering one diplomatic bag and until he delivered another bag. That was the only reason for including such an article, since it was understood that the functions of the diplomatic courier normally came to an end when he delivered the bag. The Commission should consider both those problems in second reading.

34. In reply to a question by Mr. Malek, Mr. MAHIOU (Chairman of the Drafting Committee) suggested that the French text of article 13, subparagraph (b), should be brought into line with the English by replacing the words *cet Etat* by the word *il*.

35. Mr. YANKOV (Special Rapporteur) said that the point raised by Mr. Díaz González could perhaps be taken up later, in the light of other articles of the draft. The text he had originally submitted had contained a ref-

erence to the completion by the courier of his task of delivering the bag.

36. He also drew attention to the opening words of article 13: "The functions of the diplomatic courier come to an end, *inter alia*, upon: ...". Those words made it clear that the subparagraphs which followed contained only a non-exhaustive list of examples of the termination of functions. No reference was made to such obvious cases of termination as death or completion of mission.

37. The CHAIRMAN said that, subject to the objections placed on record, he took it that article 13 [11] was provisionally adopted, on the understanding that the commentary would contain an appropriate passage on the completion of the courier's task of delivering the bag at its destination and on other cases of termination of his functions, and that the position as to article 13 would be reviewed when the Commission had considered articles 14 and 28.

*It was so agreed.*

Article 13 [11] was adopted.

ARTICLE 14 [12] (The diplomatic courier declared *persona non grata* or not acceptable)

38. Mr. MAHIU (Chairman of the Drafting Committee) presented the text of article 14 [12] as proposed by the Drafting Committee, which read as follows:

*Article 14 [12]. The diplomatic courier declared persona non grata or not acceptable*

1. The receiving State may at any time, and without having to explain its decision, notify the sending State that the diplomatic courier is *persona non grata* or not acceptable. In any such case, the sending State shall, as appropriate, either recall the diplomatic courier or terminate his functions to be performed in the receiving State. A person may be declared *non grata* or not acceptable before arriving in the territory of the receiving State.

[2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a diplomatic courier.]

39. He said that a number of amendments had been made to article 14 as submitted by the Special Rapporteur.<sup>9</sup> In paragraph 1, minor drafting changes had been made in the first sentence in order to lighten the text—for instance, the deletion of the words "of the latter State"—and to bring it into line with the corresponding provisions of the conventions on diplomatic law.

40. In the second sentence, the Drafting Committee had followed the terms of article 9 of the Vienna Convention on Diplomatic Relations, also making it clear that, when a sending State terminated the functions of a courier, the only functions which came to an end were those which the courier was to perform in the receiving State. That change had been made to take account of the fact that the functions of the courier were not performed with respect to the receiving State. In reality, they concerned the missions, consular posts and so on, situated in the territory of the receiving State. The word

"terminate", without any explanatory qualification, might give the impression that the functions of the courier in general were finally brought to an end, which was not the intended meaning. The purpose of the restriction "to be performed in the receiving State" was to show that what was meant was termination of the performance, or intended performance, of the courier's functions only in the receiving State which had declared him *persona non grata* or not acceptable. That point should be mentioned in the commentary.

41. The third sentence of paragraph 1 was new, in that it had not been included in the text submitted by the Special Rapporteur. It corresponded, however, to the equivalent provisions of the Vienna Conventions of 1961 on diplomatic relations and of 1963 on consular relations and of the Convention on Special Missions. The text before the Commission was modelled on the provision in article 12 of the Convention on Special Missions. Although doubts had been expressed about the usefulness of that sentence, it had been considered more prudent to include it, for the sake of completeness and harmonization with the conventions in question.

42. For paragraph 2 of article 14, the Special Rapporteur had submitted a text providing that, when a diplomatic courier was declared *persona non grata* or not acceptable, the sending State should send another diplomatic courier to the receiving State. Taking account of the Commission's discussion on that paragraph at its thirty-fourth session,<sup>10</sup> the Drafting Committee had accepted the Special Rapporteur's proposal that it be deleted. The provision in the former paragraph 2 had been considered self-evident; it could be replaced by an appropriate passage in the commentary to the article.

43. The question had arisen, however, whether article 14 should not contain a provision corresponding to article 9, paragraph 2, of the 1961 Vienna Convention, which provided that, if the sending State refused or failed within a reasonable period to carry out its obligations under paragraph 1 of that article, the receiving State could refuse to recognize the person concerned as a member of the mission. It had been noted that article 12 of the Convention on Special Missions, which dealt with missions of a temporary character, also contained a provision along those lines. In addition, in subparagraph (c) of article 13 as submitted by the Special Rapporteur, which had now become subparagraph (b) of the text proposed by the Drafting Committee, it was provided that the receiving State should notify the sending State that, in accordance with article 14, it refused to recognize the official status of the diplomatic courier. On the other hand, there had been some doubt about the need to include such a provision at that point, since the paragraph in question in fact concerned the duration of privileges and immunities, which was dealt with in article 28.

44. Finally, it had been decided to introduce provisionally the new paragraph 2, which was based on a similar provision in article 9 of the 1961 Vienna Convention, and to revert to the matter when the Drafting Committee had examined article 28 and was in a position to appraise the

<sup>9</sup> *Ibid.*, footnote 194.

<sup>10</sup> See footnote 1 (a) above.

relationship between article 28 and article 14, paragraph 2. That paragraph should therefore be left in square brackets until article 28 had been examined. Lastly, the title of article 14 had been amended to make it correspond more precisely with the content of the article.

45. Mr. DÍAZ GONZÁLEZ observed that, like article 13, article 14 postulated the principle that the diplomatic courier was a permanently accredited diplomatic agent. That was clear from the first sentence of paragraph 1, according to which the receiving State could notify the sending State that the diplomatic courier was *persona non grata* or not acceptable. But the sending State which appointed a diplomatic courier was not required to obtain the agreement of the receiving State. Hence it was not until the diplomatic courier presented to the authorities of the receiving State an official document showing his status that the receiving State knew who had been appointed diplomatic courier. According to the second sentence of paragraph 1, the sending State terminated the "functions to be performed in the receiving State" of a diplomatic courier declared *persona non grata* or not acceptable. But since the functions of the diplomatic courier came to an end when he delivered the bag, it might well be asked what other functions the sending State terminated. Lastly, the third sentence of paragraph 1 stated that a person could be declared *non grata* or not acceptable before arriving in the territory of the receiving State, which was only possible if that State knew in advance who had been appointed diplomatic courier.

46. Mr. YANKOV (Special Rapporteur) replied that, in practice, cases did arise in which article 14 would be applicable. For example, where a visa was required for the courier, the authorities of the sending State had to apply for it well before his journey. The receiving State—or the transit State—would then have ample time to declare the courier *persona non grata*, by refusing to grant him a visa.

47. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt article 14 [12] provisionally, on the understanding that it would be reviewed in the light of the discussion on article 28.

*It was so agreed.*

*Article 14 [12] was adopted.*

#### ARTICLE 15 [13] (Facilities)

48. Mr. MAHIU (Chairman of the Drafting Committee) presented the text of article 15 [13] as proposed by the Drafting Committee, which read as follows:

##### *Article 15 [13]. Facilities*

1. The receiving State or, as the case may be, the transit State shall accord to the diplomatic courier the facilities necessary for the performance of his functions.

2. The receiving State or, as the case may be, the transit State shall, upon request and to the extent practicable, assist the diplomatic courier in obtaining temporary accommodation and in establishing contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated.

49. He pointed out that article 15, as submitted by the

Special Rapporteur,<sup>11</sup> had consisted of a single paragraph headed "General facilities", whereas the article adopted by the Drafting Committee comprised two paragraphs and was entitled "Facilities". The Committee had endeavoured to group together in a single article the matters dealt with by the Special Rapporteur in three separate articles, namely articles 15, 18<sup>12</sup> and 19.<sup>13</sup> Paragraph 1 of the new article under consideration corresponded to the article 15 submitted by the Special Rapporteur and paragraph 2 related to the questions formerly dealt with in articles 18 and 19.

50. In paragraph 1, the expression "the facilities required" had been replaced by "the facilities necessary", in accordance with a suggestion made at the Commission's previous session.<sup>14</sup> That amendment had been considered appropriate because of the status and tasks of the diplomatic courier and the functional approach which should be adopted in regard to the facilities granted to the courier. Some members of the Drafting Committee had expressed reservations, however, as to whether it was necessary or advisable to include in the draft a provision which seemed to them to be too vague and to go beyond existing law. Furthermore, the general obligation embodied in the conventions on diplomatic law to grant facilities to diplomatic agents, consular officials and others did not, according to them, extend to the diplomatic courier, who performed different functions and whose needs were different from those of the agents referred to in those conventions.

51. Paragraph 2 of article 15 replaced the provisions originally submitted by the Special Rapporteur in articles 18 and 19, entitled "Freedom of communication" and "Temporary accommodation", respectively. It had been considered that those two articles related to certain particular aspects of the general facilities to be accorded to the diplomatic courier under article 15. It had also been recalled that, during consideration of the topic in the Commission and in the Sixth Committee of the General Assembly, reference had been made to the need to consolidate and simplify the draft as much as possible. That was why the Drafting Committee had merged the three articles into one, under the title "Facilities".

52. Whereas the object of article 19 as submitted by the Special Rapporteur, which was to assist the courier in obtaining temporary accommodation, remained the same in the new paragraph 2 of article 15, the object of the former article 18 had been set out in greater detail. The original article 18 had referred to "the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1". The Drafting Committee had considered that it was access to the most important and the most commonly used means of communication, namely the "telecommunications network", which should be facilitated for the diplomatic courier. That particular had now been in-

<sup>11</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 48, footnote 202. See also footnote 1 (b) above.

<sup>12</sup> *Ibid.*, footnote 205.

<sup>13</sup> *Ibid.*, footnote 206.

<sup>14</sup> *Yearbook ... 1983*, vol. I, p. 154, 1781st meeting, para. 14 (Mr. Ni).

cluded in article 15. It had also been specified that the purpose of the assistance given to the courier was to enable him to establish contact through the telecommunications network with the sending State and its missions, consular posts or delegations, wherever situated. The expression “telecommunications network” should be understood to mean, in general, the telecommunications facilities normally accessible to the public, but could naturally include, in exceptional circumstances, any other telecommunications facilities that might be available.

53. It had been recognized that paragraph 2 was designed to cover exceptional situations in which the courier required assistance. Since it was difficult for the courier or his sending State to foresee such situations, and even more so for the receiving State or the transit State, the obligation to assist the courier to obtain temporary accommodation or to establish contact through the telecommunications network had been attenuated by the restrictive clause “upon request and to the extent practicable”. Thus the obligation stated in paragraph 2 was not intended to impose a heavy burden on the receiving State or the transit State. The assistance to the courier should be granted having regard to the special circumstances in which he was placed and to the situation obtaining in the receiving State or the transit State concerned.

54. Several members of the Drafting Committee had, however, expressed reservations about paragraph 2. They had questioned whether that paragraph still served any purpose after the insertion of the restrictive clause. They had also noted that paragraph 2 appeared to weaken the obligation to accord facilities, which was presented as a general obligation in paragraph 1. Moreover, if it was really intended to impose obligations on the receiving State or the transit State, those obligations would be too heavy and impossible to fulfil, since they would require those States to ensure the availability of temporary accommodation and means of telecommunication at all times and throughout their respective territories. The difficulties raised by the reference to temporary accommodation in article 15 were increased by the inclusion of article 21 on the inviolability of temporary accommodation.

55. Mr. McCaffrey said that he reserved his position on article 15. That article purported to impose on the receiving State and the transit State obligations which were very similar, both in nature and in content, to those incumbent on a receiving State in respect of diplomatic agents and diplomatic staff. He questioned the advisability of imposing such obligations in view of the paucity of legal precedents and the current mood in the world.

56. The formula used in paragraph 1 of article 15 was much too vague. It was difficult to see what obligations it imposed in regard to the facilities to be granted to the diplomatic courier. Those obligations took the form of obligations of result, which, in the circumstances, it would be very difficult for the receiving State or transit State to meet. The crucial provision of article 27 of the Vienna Convention on Diplomatic Relations, on the other hand, laid down only a negative obligation; the last sentence of

paragraph 5 of that article, dealing with the diplomatic courier, read: “He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.” It would be going much too far to place an affirmative obligation upon the receiving State and the transit State without any great support in existing law or practice.

57. Paragraph 2 of article 15 raised the question why certain particular facilities had been mentioned. It might be argued *a contrario* that other facilities were excluded. The diplomatic courier might, for example, require certain transport facilities and it was not desirable to exclude them by implication. Moreover, the language of paragraph 2 was unduly vague: the scope, nature and extent of the obligations which it purported to impose were very indefinite. Consequently, the paragraph was dangerous: States which, because of their geographical position, acted as transit States to a large number of diplomatic couriers would surely object to its provisions.

58. Sir Ian SINCLAIR said that he, too, reserved his position on article 15, especially paragraph 2, for reasons similar to those stated by Mr. McCaffrey. He asked that his reservation be recorded in the report on the work of the session.

59. The CHAIRMAN said that the reservations entered by Mr. McCaffrey and Sir Ian Sinclair would be duly recorded. If there were no further comments, he would take it that the Commission agreed to adopt article 15 [13] provisionally.

*It was so agreed.*

*Article 15 [13] was adopted.*

ARTICLE 16 [14] (Entry into the territory of the receiving State or the transit State)

60. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 16 [14] as proposed by the Drafting Committee, which read as follows:

*Article 16 [14]. Entry into the territory of the receiving State or the transit State*

1. The receiving State or, as the case may be, the transit State shall permit the diplomatic courier to enter its territory in the performance of his functions.

2. Visas, where required, shall be granted by the receiving State or the transit State to the diplomatic courier as promptly as possible.

61. He said that, apart from a few drafting amendments, the title and text of the article proposed by the Drafting Committee were practically the same as those of article 16 as submitted by the Special Rapporteur.<sup>15</sup> The main purpose of the amendments had been to bring the text into line with that of article 79 of the 1975 Vienna Convention on the Representation of States. The Drafting Committee had also considered it advisable to include the words “where required” after the word “visas”. It had been understood that the article was of a general nature and did not, of course, imply the obligation to grant a visa to any particular courier. Article 16 should be understood subject to the provisions of article 14.

<sup>15</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 49, footnote 203. See also footnote 1 (b) above.

62. Mr. LACLETA MUÑOZ suggested that it might be advisable, at a later stage, to combine articles 14 and 16.

63. The CHAIRMAN said that, if there were no further comments, he would take it that article 16 [14] was provisionally adopted.

*Article 16 [14] was adopted.*

ARTICLE 17 [15] (Freedom of movement)

64. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 17 [15] as proposed by the Drafting Committee, which read as follows:

*Article 17 [15]. Freedom of movement*

**Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving State or, as the case may be, the transit State shall ensure to the diplomatic courier such freedom of movement and travel in its territory as is necessary for the performance of his functions.**

65. He said that the text of article 17 had been brought into line with that of article 27 of the Convention on Special Missions, but the title remained unchanged. In the text submitted by the Special Rapporteur,<sup>16</sup> the words "shall ensure freedom of movement" might have given the impression that excessive obligations, which would be difficult or impossible to fulfil, were being imposed on the receiving State and the transit State. The Committee had therefore followed the terms of article 27 of the Convention on Special Missions, which provided for "such freedom of movement and travel... as is necessary for the performance of the functions" in question.

66. In addition, the Committee had thought it preferable not to retain the last phrase of the original text "or when returning to the sending State". Those words might have led to certain conclusions regarding the interpretation of the expression "for the performance of his functions". The Committee had therefore thought it more prudent to avoid any such complication in the text of the article and to mention the matter in the commentary.

67. The CHAIRMAN said that, if there were no comments, he would take it that article 17 [15] was provisionally adopted.

*Article 17 [15] was adopted.*

ARTICLES 18 and 19

68. Mr. MAHIOU (Chairman of the Drafting Committee) recalled that articles 18 and 19 had been combined with article 15 (see para. 49 above).

ARTICLE 20 [16] (Personal protection and inviolability)

69. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 20 [16] as proposed by the Drafting Committee, which read as follows:

*Article 20 [16]. Personal protection and inviolability*

**The diplomatic courier shall be protected by the receiving State or, as the case may be, by the transit State in the performance of his func-**

**tions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.**

70. He said that the text of article 20 as submitted by the Special Rapporteur<sup>17</sup> had consisted of two paragraphs and had been based on article 29 of the 1961 Vienna Convention on Diplomatic Relations. During the discussion in the Commission (1824th meeting), however, the importance of article 27, paragraph 5, of that Convention had been emphasized, because it made special provision for the case of the diplomatic courier, whereas its article 29 applied to diplomatic agents. In view of that factor and of others, such as the situation when the diplomatic courier had the nationality of the receiving State, the Drafting Committee had decided to reproduce in article 20 the terms of article 27, paragraph 5, of the 1961 Vienna Convention.

71. Paragraph 2 of the original text had thus become unnecessary, though its object could be mentioned in the commentary in connection with the protection which, under the new formulation, the receiving State and the transit State were required to give the courier in the performance of his functions. Thus the article presented to the Commission consisted of a single paragraph reproducing a provision of the 1961 Vienna Convention dealing specifically with the diplomatic courier. The title had been amended to show that the article covered not only inviolability, but also personal protection.

72. The CHAIRMAN said that, if there were no comments, he would take it that article 20 [16] was provisionally adopted.

*Article 20 [16] was adopted.*

ARTICLE 21 [17] (Inviolability of temporary accommodation)

73. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 21 [17] as proposed by the Drafting Committee, which read as follows:

*Article 21 [17]. Inviolability of temporary accommodation*

1. **The temporary accommodation of the diplomatic courier shall be inviolable. The agents of the receiving State or, as the case may be, of the transit State may not enter the temporary accommodation, except with the consent of the diplomatic courier. Such consent may, however, be assumed in case of fire or other disaster requiring prompt protective action.**

2. **The diplomatic courier shall, to the extent practicable, inform the authorities of the receiving State or the transit State of the location of his temporary accommodation.**

3. **The temporary accommodation of the diplomatic courier shall not be subject to inspection or search, unless there are serious grounds for believing that there are in it articles the possession, import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. Such inspection or search shall be conducted only in the presence of the diplomatic courier and on condition that the inspection or search be effected without infringing the inviolability of the person of the diplomatic courier or the inviolability of the diplomatic bag carried by him and will not cause unreasonable delays or impediments to the delivery of the diplomatic bag.**

74. He said that, after a very long discussion, the Com-

<sup>16</sup> *Ibid.*, footnote 204. See also footnote I (b) above.

<sup>17</sup> See 1824th meeting, para. 22. See also footnote I (c) above.

mittee had arrived at a formulation which had not won the approval of all members for all its paragraphs. Some members had expressed reservations on the first sentence of paragraph 1, while others had expressed reservations on paragraph 3.

75. The first two sentences of paragraph 1 reproduced the text submitted by the Special Rapporteur,<sup>18</sup> with minor drafting changes to harmonize the text with that of the corresponding provisions of the relevant conventions on diplomatic law. A third sentence had been added, which was modelled on article 31 of the 1963 Vienna Convention on Consular Relations, stating that consent might be assumed in case of fire or other disaster requiring prompt protective action. That clause had been considered necessary because the temporary accommodation of a courier might be in a hotel or other residential building, regarding which it was in the general interest not to provide for absolute inviolability.

76. Some members of the Committee had expressed reservations on the first sentence of paragraph 1. They had considered it unnecessary, because the courier was normally housed in premises placed at his disposal by the sending State, which in most cases were already inviolable by virtue of one of the existing conventions on diplomatic law. Moreover, a provision prescribing inviolability in the unusual case of hotel accommodation seemed somewhat unreasonable, unjustified and impossible to apply, since a receiving State could not be expected to know the whereabouts of a courier, who normally stayed only briefly in its territory. According to that view, the main consideration was the inviolability of the diplomatic bag, which was the subject of article 36. To be justified, any inviolability of the courier's temporary accommodation must depend on the presence of the diplomatic bag.

77. It had been argued, however, that it was only right to give the courier's accommodation the same inviolability as that granted under the 1961 Vienna Convention on Diplomatic Relations not only to diplomatic agents, but also to members of the administrative and technical staff of a diplomatic mission. Inviolability of the temporary accommodation was a natural extension of the personal inviolability granted to the courier under article 20 of the draft. It had in fact been granted to delegations by article 59 of the 1975 Vienna Convention on the Representation of States and was a necessary condition for the performance of the courier's functions. Finally, due account had been taken of the interests of the receiving State by adding to paragraph 1 a third sentence concerning assumed consent in case of fire or other disaster and by the introduction of a new paragraph 2.

78. Paragraph 2 of article 21 as submitted by the Special Rapporteur had imposed the duty to take appropriate measures to protect the temporary accommodation of the diplomatic courier from intrusion. After the revision of article 20 on personal protection and inviolability, and of paragraph 1 of article 21, it had been considered unnecessary to retain such a provision in the article, although the matter could be mentioned in the commentary at the appropriate point. The new para-

graph 2 was modelled on article 47, paragraph 1 (e), of the 1975 Vienna Convention, concerning notification of the location of the premises of the delegation and of private accommodation. That provision was intended to facilitate fulfilment by the receiving State or the transit State of the obligations stated in paragraph 1. It had been recognized that the location of the courier's temporary accommodation might not be known to the authorities of the receiving State or the transit State; paragraph 2 thus provided that the diplomatic courier should, to the extent practicable, inform the authorities of the location of his temporary accommodation. According to one member of the Drafting Committee, however, the new paragraph 2 was unnecessary and would be impossible to apply.

79. Paragraph 3 of article 21 was based on the text submitted by the Special Rapporteur. Some drafting amendments had been made to bring it into line with the corresponding provisions of the relevant conventions, in particular article 36 of the 1961 Vienna Convention. Other drafting changes had been made in the interests of clarity and precision. A new element introduced was that of the possession of articles prohibited by the law or controlled by the quarantine regulations of the receiving State or the transit State. It had been considered useful to add that element in order to take account of the national law of some countries.

80. One member of the Committee had nevertheless expressed reservations, because he considered that paragraph 3 unnecessarily and unjustifiably weakened the inviolability of the temporary accommodation provided for in paragraph 1. Since the courier was in any case subject to inspection of his personal effects on entering and leaving the territory of the receiving State or the transit State, that provision was not necessary. Moreover, the matter was already the subject of a general provision in article 5 of the draft and could be treated along the lines of article 41, paragraph 3, of the 1961 Vienna Convention.

81. The members of the Drafting Committee had nevertheless considered that paragraph 3 was useful or even indispensable in that, by moderating the provisions on inviolability in paragraph 1, it established a balance. Paragraph 3 showed that the provision in paragraph 1 was not absolute, but admitted of exceptions; the inviolability of the courier's temporary accommodation provided for in the article as a whole was thus restricted and conditional. The title of the article remained unchanged.

82. Sir Ian SINCLAIR said that he doubted the need to accord inviolability to the temporary accommodation of the diplomatic courier, since the courier would normally be temporarily housed in the premises of another member of the diplomatic mission of the sending State in the receiving State, which would already be inviolable. Alternatively, he would be lodged in a hotel room, and it would be a quite unnecessary complication to accord temporary inviolability to a hotel room occupied by a diplomatic courier for one or two nights, the exact location of which might not be known to the receiving State or the sending State. Despite the attempts made to alleviate that doubt, the basic principle expressed in the first two

<sup>18</sup> *Idem.*

sentences of article 21, paragraph 1, remained, and he therefore entered a reservation on the article as a whole.

83. Mr. McCAFFREY, associating himself with Sir Ian Sinclair's remarks, noted that the title of the document containing the text of the article proposed by the Drafting Committee (A/CN.4/L.378) referred to articles "adopted" by the Drafting Committee; that could be misleading, since serious reservations about article 21 had been made in the Committee.

84. The notion of the inviolability of temporary accommodation raised the question of what exactly was expected of the receiving State and the transit State. Caution should be exercised in adding further to the obligations States already had under article 15, paragraph 2, and article 20, since they could react by maintaining that that was going beyond what was necessary to ensure freedom of communication. He therefore agreed that it was impractical to seek to ensure the inviolability of temporary accommodation and that such inviolability could, in any event, apply only when the diplomatic bag was present.

85. Lastly, although article 59 of the 1975 Vienna Convention on the Representation of States did provide for such an obligation, it had been adopted as part of a compromise which involved the non-inviolability of the premises of the delegation. For those reasons he, too, entered a reservation on article 21.

86. Mr. USHAKOV said that he had already expressed his opposition to paragraph 3 in the Drafting Committee. In his view, the provision had no practical application, since it was only when the diplomatic courier was entering or leaving the territory of a State that it could be established whether he was carrying articles whose import or export was prohibited. It could not be expected that there would be an inspection or search at the courier's place of residence to check whether he had such articles.

87. Mr. DÍAZ GONZÁLEZ also expressed reservations as to the usefulness of article 21, which called for a number of comments. First of all, what was meant by "temporary accommodation"? The diplomatic courier was usually lodged in premises which already enjoyed diplomatic immunity. If he stayed in a hotel, a motel or a pension, or with a friend, was it his room that would be considered inviolable or the whole building? There was also the question of how long "temporary" could be. Did the inviolability of the accommodation begin from the time when the hotel reservation was made? And why should a search be made in the temporary accommodation of the courier? Would the State be required to protect the courier's future accommodation before he even arrived, for fear that a bomb might be planted there, for instance? Those numerous questions led him to think that article 21 was unnecessary.

88. Mr. QUENTIN-BAXTER said that his doubts were of much the same kind as those expressed by Sir Ian Sinclair, Mr. McCaffrey and Mr. Díaz González. He wished to reiterate, however, that the problems which might arise in the context not only of article 21, but also of other articles, in regard to the receiving State, were in-

initely greater in regard to the transit State. The draft said little about the transit State, but there had been intimations during the debate that there was a slightly stricter conception of it as a State that was ordinarily traversed by couriers or bags on their way from the sending State to the receiving State. Paragraph 2 of article 4, however, provided in effect that the transit State was bound by whatever rules the receiving State chose to apply, and thus placed a rather large obligation upon a State which might not even know that a person who appeared in its territory was a diplomatic courier and had no easy method of applying a *renvoi* to discover what were the rules of the receiving State in regard to the bag. A receiving State at least had opportunities of identifying the courier. He therefore considered it essential to examine such difficult cases more and more with reference to the transit State as well as the receiving State.

89. Mr. REUTER associated himself with the reservations expressed by Sir Ian Sinclair. He considered article 21 unnecessary and dangerous.

90. The CHAIRMAN said that, if there were no further comments, he would take it that article 21 [17] was provisionally adopted, subject to the reservations expressed.

*It was so agreed.*

*Article 21 [17] was adopted.*

#### ARTICLE 22

91. Mr. MAHIOU (Chairman of the Drafting Committee) said that, on the recommendation of the Special Rapporteur, the Drafting Committee had decided to delete article 22 (Inviolability of the means of transport),<sup>19</sup> which had not received sufficient support during the general debate. The provision on "inviolability of the means of transport" dealt with a situation so rare that it did not justify a separate article. It had been agreed, however, that the matter could be mentioned in the commentary to one of the articles, and that it would be for the Special Rapporteur to propose an appropriate formulation and where it should be inserted. The Drafting Committee recommended that article 22 should not be retained in the draft.

92. The CHAIRMAN said that, if there were no comments, he would take it that article 22 was deleted.

*Article 22 was deleted.*

#### ARTICLE 23 [18] (Immunity from jurisdiction)

93. Mr. MAHIOU (Chairman of the Drafting Committee) presented the text of article 23 [18] as proposed by the Drafting Committee, which read as follows:

##### *Article 23 [18]. Immunity from jurisdiction*

[1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.]

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

<sup>19</sup> *Idem.*

This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

[4. The diplomatic courier is not obliged to give evidence as a witness.]

5. Any immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

94. He said that the Committee had discussed article 23 as submitted by the Special Rapporteur<sup>20</sup> at some length, but had been unable to reach a conclusion. As he had pointed out in his opening remarks, the Committee had managed to adopt paragraphs 2, 3 and 5 of the article, subject to reservations by some members on those paragraphs and on the article as a whole. It had not been possible to adopt paragraphs 1 and 4, owing to marked and irreconcilable differences of opinion. The Committee had therefore decided, with regret, to place paragraphs 1 and 4 of the original text in square brackets. He would briefly explain the differences of opinion which had made that necessary and the reservations entered. It would then be for the Commission to decide what was to be done.

95. In the text presented to the Commission, paragraph 5 corresponded to paragraph 6 of the original text, and the former paragraph 5 had been incorporated in the new paragraph 2.

96. With regard to paragraph 1, there had been an animated discussion in the Drafting Committee on the necessity and advisability of including such a provision in the draft. Some members had raised strong objections to that paragraph; in their opinion, article 20, which provided that the diplomatic courier "shall not be liable to any form of arrest or detention", made it unnecessary. Total immunity from criminal jurisdiction was simply not necessary to the courier for the performance of his functions. The fact that the administrative and technical staff of an embassy enjoyed such immunity under the 1961 Vienna Convention on Diplomatic Relations was irrelevant, since such staff remained in the host State for long periods and might have acquired confidential information concerning the sending State. That did not apply to the diplomatic courier. Lastly, it had been argued that it was unnecessary to include such a provision and that its presence would only reduce the chances of general acceptance of the draft by Governments, some of which, as a result of recent events, were not inclined to receive favourably any new rules giving the courier such total immunity from jurisdiction as was accorded to diplomatic and other staff.

97. An opposite position had been just as strongly held, according to which it was necessary and only right to include paragraph 1. According to the holders of that view,

it was unthinkable to give the courier, who was an agent of the sending State, a lesser immunity than that enjoyed by members of the family of diplomatic agents and the administrative and technical staff of embassies. Article 20 was not sufficient to give the courier the necessary protection against the annoyances and disturbances in the performance of his functions which might result from criminal proceedings against him. In fact, it was precisely by reason of his relatively short stay in the receiving State or the transit State, and the need to perform his duties promptly, that the courier required immunity from criminal jurisdiction. Abuses were extremely rare in practice, and it would be wrong to take advantage of the adoption of rules relating to the diplomatic courier to call in question the provisions contained in the existing conventions on diplomatic law.

98. In view of those irreconcilable positions, the Drafting Committee had considered that the Commission should decide the fate of paragraph 1.

99. Paragraph 2 comprised two sentences. The first, apart from a few minor drafting changes, was the same as the paragraph 2 submitted by the Special Rapporteur. Some members of the Committee had expressed doubts about the need to include the first sentence. In their opinion, the courier stayed for such a short time that he would not, in practice, be subject to the civil and administrative jurisdiction of the receiving State or the transit State. Most members of the Committee, on the other hand, considered that the inclusion of the first sentence of paragraph 2 was only logical, in view of the preceding provision in paragraph 1 and the similar provisions contained in the conventions on diplomatic law. It had also been observed that a courier *ad hoc* and a courier having the nationality of the receiving State would need a provision of that kind. One member had said that, since the sentence in question had little practical effect and was inoffensive in itself, it could be retained. Another had said that it would have been preferable to follow the wording of article 37, paragraph 2, of the 1961 Vienna Convention.

100. The second sentence of paragraph 2 concerned a matter dealt with by the Special Rapporteur in paragraph 5 of the text he had submitted, namely an action for damages arising from an accident caused by a vehicle the use of which might have involved the liability of the courier. For the formulation of that sentence, the Drafting Committee had been guided by article 60, paragraph 4, of the 1975 Vienna Convention on the Representation of States. Certain changes had been made, however, to take account of the special situation of the diplomatic courier, including the brevity of his stay in the receiving State or the transit State. Thus it had been decided that it was not necessary to mention a "vessel or aircraft" and that the words "used or owned by the persons in question", appearing in article 60 of the 1975 Vienna Convention, should be replaced by the words "the use of which may have involved the liability of the courier". The object of the new wording was to indicate, in a neutral way, the link between the courier and the vehicle which had caused the accident. The matter would come under internal law on liability for accidents caused by motor vehicles. It was the internal law of the receiving State or the transit State which would

<sup>20</sup> *Idem.*

determine the liability of the courier in the light of the circumstances, which would be discussed in the commentary.

101. The relationship between the first and second sentences of paragraph 2 had also been the subject of disagreement in the Drafting Committee. The second sentence had been drafted so as not to prejudge, one way or the other, the various possible interpretations of the relationship. What the Committee had had mainly in mind was the need to protect the victim of a traffic accident who was not at fault, and his right to a remedy.

102. Paragraph 3 of article 23 had been slightly amended to bring the text into line with that of the corresponding provisions of the conventions on diplomatic law. Some members of the Committee had considered the paragraph unnecessary, because it was based on what they considered to be the mistaken theory that, in practice, the courier would be subject to the civil and administrative jurisdiction of the receiving State or the transit State. They had also expressed reservations about the inclusion in the text of a reference to the inviolability of the courier's temporary accommodation.

103. Paragraph 4, which appeared between square brackets, had been left in the form proposed by the Special Rapporteur, since the Committee had been unable to reach agreement on it. Some members of the Committee had opposed that paragraph because it dealt with a purely hypothetical case, was too rigidly drafted and, by implication, contradicted the second sentence of paragraph 2, according to which the courier was not immune from civil and administrative jurisdiction in the case of an accident of the kind referred to in that provision. Other members of the Committee, however, had considered the provision useful, appropriate and fully justified, having regard to the provisions of the conventions on diplomatic law. Lastly, some members thought that paragraph 4 would be more widely acceptable if it was confined, like paragraph 2, to acts connected with the performance of the courier's functions. As in the case of paragraph 1, it was for the Commission to decide what was to be done about paragraph 4.

104. The new paragraph 5 reproduced paragraph 6 of article 23 as submitted by the Special Rapporteur. The Drafting Committee had decided that, in view of the special situation of the courier, it would be wiser to model the text, except in the Spanish version, on article 60, paragraph 5, of the 1975 Vienna Convention, and to say "Any immunity ... does not exempt". Although paragraph 5 had been considered unnecessary by some members, the Drafting Committee had included it in article 23 for the sake of harmony with the corresponding provisions of the conventions on diplomatic law and in order to avoid the argument *a contrario*.

105. Lastly, for the reasons already indicated in connection with individual paragraphs, some members of the Committee had considered that article 23 as a whole was unnecessary and had no place in the draft. He suggested that the Commission should examine article 23 paragraph by paragraph, possibly beginning with the most controversial paragraphs, namely paragraphs 1 and 4.

*The meeting rose at 6 p.m.*

## 1863rd MEETING

*Tuesday, 17 July 1984, at 10.05 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

### Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

#### DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

#### ARTICLE 23 [18] (Immunity from jurisdiction) (*continued*)

1. The CHAIRMAN invited the Commission to consider article 23 [18]<sup>1</sup> paragraph by paragraph.

##### *Paragraph 1*

2. Mr. OGISO said that the idea of according immunity from criminal jurisdiction to the diplomatic courier had no support in national legislation, firmly established State practice or judicial decisions. The one isolated case before a Hong Kong court, referred to in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4, para. 127), seemed to indicate that immunity of the diplomatic courier from criminal jurisdiction was not an established custom of international law.

3. At the Commission's 1783rd meeting, the Special Rapporteur had said that his approach in drafting article 23 had been a "strictly functional" one.<sup>2</sup> Given that, under draft article 20, the diplomatic courier was not to be liable to any form of arrest or detention, the functional necessity of providing for him to have immunity from criminal jurisdiction seemed doubtful. Accordingly he was unable to agree to the argument by the Special Rapporteur that at least the same privileges and immunities should be accorded to the diplomatic courier as were accorded to the administrative and technical staff of a diplomatic mission.

4. His position was borne out by two facts related by the Special Rapporteur in his fourth report (*ibid.*, para. 50): first, an amendment introduced at the United Nations Conference on Diplomatic Intercourse and Immunities, with a view to providing that the diplomatic courier should enjoy personal inviolability to the same

<sup>1</sup> For the text, see 1862nd meeting, para. 93.

<sup>2</sup> *Yearbook ... 1983*, vol. I, p. 166, para. 33.

extent as a member of the administrative and technical staff of a diplomatic mission, had not been adopted by the Committee of the Whole; and secondly, an amendment introduced by Switzerland and France, to the effect that the diplomatic courier should be protected by the receiving State only in the performance of his functions, was reflected in paragraph 5 of article 27 of the 1961 Vienna Convention on Diplomatic Relations.

5. Immunity from criminal jurisdiction could have serious implications when the crime committed was of a serious nature, such as drug trafficking or smuggling of arms and explosives for use by terrorists. To introduce a provision, over and above that contained in article 20, giving the diplomatic courier immunity from criminal jurisdiction might have the effect of reducing the deterrents against the kind of crimes that had been witnessed recently. If arms were smuggled into a country for the purpose of assassinating important persons in the receiving State or killing innocent civilians, and if a diplomatic courier was suspected in that connection, it would hardly be acceptable to say that the receiving State could do nothing about it.

6. Paragraph 1 of article 23 could constitute an obstacle for certain countries, including Japan, when it came to adopting the draft convention. In general, any exception to the criminal law had to be provided for under the relevant criminal code; failing that, the exception would have to be interpreted as overriding an established customary rule of international law. In the present case there was no such established rule of international law, and it would be difficult to find judicial authority for holding that it was part of established law. For all those reasons, he was strongly opposed to the inclusion of paragraph 1 of article 23.

7. Sir Ian SINCLAIR said that there was a clear division in the Commission on what was functionally necessary in paragraph 1 of article 23. While the last phrase of article 20 stated that the authorities in the receiving State could not arrest or detain a diplomatic courier and so prevent him from discharging his functions, it did not necessarily follow that freedom from arrest or detention should also involve freedom from the criminal jurisdiction of the receiving or transit State. Much had been made of the equation between the diplomatic courier and the administrative and technical staff of a diplomatic mission, but they really could not be equated because of their differing functions and because administrative and technical staff were resident in the receiving State for a considerable period of time.

8. He had already referred (1845th meeting) to the fact that in the United Kingdom there had been 546 cases over the previous 10 years in which persons enjoying diplomatic privileges and immunities were strongly suspected of having committed serious crimes. That was an indication of the scale of the abuses of immunity. The Special Rapporteur had pointed out that none of those 546 cases had involved a diplomatic courier; but, if so, it was an indication that precisely because the diplomatic courier was present in the receiving State for such a short time there was very little opportunity for him to engage in activities of such a nature.

9. The whole question revolved around the acceptability of what the Commission was endeavouring to do, in which connection paragraph 1 would be highly significant. The United Kingdom Government would have little prospect of gaining the necessary parliamentary approval for the draft articles if it were included.

10. Lastly, while he attached the utmost importance to consensus in the Commission, he believed that, in view of the clear division among its members, it was confronted with one of the rare occasions when it would have to decide the matter by a vote.

11. Mr. NI, paying tribute to the Chairman of the Drafting Committee for his work, said that the diplomatic courier, though not a senior official, had an important function to perform, for which he should be provided with the appropriate protection and facilities. The granting of immunity from criminal jurisdiction would not mean that he was beyond the reach of the law. It would, however, be anomalous if members of the administrative and technical staff of a diplomatic mission, and also members of their families, enjoyed immunity from criminal jurisdiction while the diplomatic courier, who had to travel all over the world and carry the diplomatic bag with its important and often secret contents, did not.

12. The numerous instances of abuses, including the recent somewhat bizarre violations of diplomatic privileges and immunities, were to be deplored and the resentment which they aroused was perfectly understandable. The desire to do something about them was entirely legitimate, and the extent of diplomatic privileges and immunities could be considered in a broader context and at the government level in the appropriate forums. However, in the absence of information to show that most crimes protected by diplomatic immunity were committed by diplomatic couriers, it would be inadvisable to seize on the immunities granted to couriers as the source of all possible abuses and to divest the courier of the immunity generally granted in accordance with most of the codification conventions. Possibly more information was needed, but, for the time being, he would have no objection to the removal of the brackets around paragraph 1 of article 23.

13. Mr. USHAKOV said that, in his view, the arguments put forward against paragraph 1 were not justified. Under article 37 of the Vienna Convention on Diplomatic Relations and the relevant provisions of other conventions, the families of the administrative and technical staff of a mission enjoyed immunity from criminal jurisdiction as well as the members themselves, although they did not perform any official function. They had been given immunity from criminal jurisdiction so that they could not be used to put pressure on the administrative and technical staff. Human nature being what it was, no provision could guarantee that such immunity would not be abused, but it should not be concluded that, for example, all ministers were wrongdoers just because one minister committed abuses. He therefore considered paragraph 1 and article 23 as a whole to be necessary.

14. Mr. McCAFFREY said that, in his view, paragraph 1 of article 23 was neither desirable nor necessary. There was little support for it in State practice, and the one case that bore on the article had gone the other way. Furthermore, given the provisions of article 20, which was very similar to paragraph 5 of article 27 of the Vienna Convention on Diplomatic Relations, paragraph 1 of draft article 23 was largely superfluous: in view of the nature of the diplomatic courier's functions, it was difficult to envisage a situation in which immunity from criminal jurisdiction would be necessary in addition to immunity from arrest and detention. Immunity from criminal jurisdiction was therefore not functionally necessary.

15. The situation of a diplomatic courier was not analogous to that of the administrative and technical staff of a diplomatic mission, not only because of the latter's length of stay in the receiving State, but also because pressure could be exerted on them through their families. In any event, the courier was seldom privy to confidential information unless he was an *ad hoc* courier, in which case he enjoyed the immunities conferred upon him by virtue of his diplomatic status.

16. The legislative initiatives that were being introduced in some countries, including the United States of America, with a view to ascertaining whether diplomatic privileges and immunities should be reduced were a response to the abuses witnessed in recent months. In the light of the current public mood about diplomatic immunities in general, the Commission should be on very sure ground before it extended or appeared to extend existing diplomatic immunities. In his view, paragraph 1 of article 23 would do precisely that, since there was no basis for any such provision in any of the codification conventions. If it were none the less decided to introduce such a measure of immunity, it would also be necessary to make an exception in the case of grave crimes along the lines of article 41 of the Vienna Convention on Consular Relations.

17. Lastly, the Commission owed it to the General Assembly to report its conclusions on items of critical importance with great care and accuracy. In the present case, that would be well nigh impossible unless a roll of the positions of the various members of the Commission were taken, and he therefore supported Sir Ian Sinclair's suggestion that in the exceptional circumstances with which the Commission was faced it would perhaps be necessary to reflect the positions of members by a vote.

18. Chief AKINJIDE said that, in determining its stand on paragraph 1 of article 23, the Commission should bear in mind that its terms of reference were to promote the progressive development of international law. Mention had been made of earlier conventions, with reference to the technical and administrative staff of a diplomatic mission, but some of those conventions dated back 20 years and had been drawn up in the light of the circumstances that had prevailed then. He doubted whether they would now enjoy the same support as they had had then. If the Commission wished to promote the progressive development of international law, it must

take account not only of those circumstances, but also of the practice of States.

19. He wondered why the matter had not been covered in any of the previous conventions, although it might, of course, have been thought that the problem of possible abuses by the diplomatic courier should be left to bilateral arrangements or State practice. Normally, diplomats were assumed to abide by the law of the host country, and if a person who enjoyed diplomatic immunity deliberately broke the law of the receiving or transit State, he was declared *persona non grata* and sent back to his own country. While such practice might have been adequate in earlier times, he had serious doubts whether nowadays such a person ought simply to be declared *persona non grata* and in effect allowed to get off scot-free. That attitude would simply encourage crime.

20. In arriving at its decisions, the Commission should also heed world opinion. Those who called for the inclusion of paragraph 1 of article 23 in the draft should bear in mind the position of those countries whose laws had been deliberately and flagrantly broken. He therefore proposed that paragraph 1 should be deleted or, if it were retained, that States should be able, at their discretion, to bring criminal proceedings against any diplomatic courier who deliberately broke the law of the land.

21. Mr. BALANDA said that, when members of the Commission expressed the fear that there would be abuses, they were simply recognizing the sad state of international society today. He had already had occasion (1845th meeting) to deplore the decline in morality among both individuals and States, which no longer had as much credibility as before. While recognizing the impossibility of avoiding abuses, however, he was in favour of retaining paragraph 1 of article 23.

22. First of all, the paragraph was functional in nature. Throughout the draft articles, the Commission had taken precisely such a functional approach. In the present case, the diplomatic courier's status as an official agent meant that he should be given full protection. In addition, even though the diplomatic courier was not to be equated with the administrative and technical staff of missions, the fact that the families of such staff enjoyed immunity from criminal jurisdiction was an argument in favour of granting the same immunity to the diplomatic courier.

23. Secondly, there was a question of logic. Paragraph 1 of article 31 of the Convention on Special Missions was practically identical with paragraph 1 of the article under consideration. A person undertaking a special mission for a very short period was in a situation similar to that of the diplomatic courier, and such a person enjoyed immunity from criminal jurisdiction. The Commission ought to observe a certain logic in its work of codification. Immunity from jurisdiction could hardly be accepted in one case and refused in a similar one. What was more, if, in article 20, the Commission was going to make the diplomatic courier immune from arrest and detention—measures the host State would have to take before it could exercise its jurisdiction—why not recognize immunity from criminal jurisdiction at the next stage in the procedure?

24. Mr. LACLETA MUÑOZ said that he was in favour of retaining paragraph 1 of article 23 for very simple reasons, and above all because of article 20. If the diplomatic courier was not to be liable to arrest or detention, what was the point of making him subject to the criminal jurisdiction of the host State? When there could be no question of enforcing a rule, it was better to grant the privilege of exemption from that rule. The inviolability recognized in article 20 gave rise to many privileges, but should above all result in immunity from criminal jurisdiction. What would be the consequences of retaining paragraph 1 rather than deleting it? The only difference would be that a diplomatic courier accused of having committed an act for which he could be brought before the local courts would not be able to return either privately or as a diplomatic courier to the host State, which could refuse him admission. The difference was thus not so important. However, to avoid the need for a vote, he would suggest that immunity from criminal jurisdiction should be limited to acts performed by the diplomatic courier in the exercise of his functions, in the strict sense of the word. Thus, once the diplomatic courier had delivered the diplomatic bag to its destination, he would no longer have immunity from criminal jurisdiction.

25. Mr. EL RASHEED MOHAMED AHMED said that it was generally agreed that immunity should be accorded to the diplomatic courier to enable him to carry out his functions. Sometimes, however, a courier might be a national of the receiving State, and in such a case he very much doubted whether it would be logical to accord immunity simply because he was carrying the diplomatic bag of another State. He had no objection to following the functional immunity approach, but he considered that any extension of the personal immunity of the diplomatic courier from criminal jurisdiction would be unpopular and hence unacceptable.

26. Mr. KOROMA said that, while the events that had taken place in London recently were abhorrent to all, it was important not to be swayed by mass feeling. To contend that the diplomatic bag should be done away with because it was abused was an emotional argument, not a reasoned one. The granting of immunity from criminal jurisdiction was not for the greater glory of the courier but to enable him to perform his functions. The number of offences committed by diplomatic couriers over the years was far fewer than the number of violations of diplomatic immunity that had recently come to light. If the immunity of the diplomatic courier was restricted, he would be prevented from performing his duties efficiently, and that was the only reason for retaining paragraph 1 of article 23. It was a matter of functional necessity. It would be unfortunate if the Commission were forced into a vote on such an important matter, particularly since, in his view, the immunity of the diplomatic courier from criminal jurisdiction formed part of customary law.

27. Mr. FRANCIS said that he would speak only on the procedural question. He felt that it would be wrong to force a vote on the issue of paragraph 1 at the present stage of first reading. He would urge the Commission to

allow itself more time and to give the Sixth Committee of the General Assembly an opportunity to express its views. There were precedents for the provisional adoption by the Commission of texts in square brackets and their submission in that form to the General Assembly. Nothing would be lost by keeping paragraph 1 of article 23 between square brackets for the time being.

28. The CHAIRMAN said that he understood Mr. Francis to have submitted a motion for deferment of the decision on paragraph 1.

29. Mr. THIAM warned members of the Commission against the danger of being too much swayed by recent events and losing their objectivity in the process. He supported the suggestion by Mr. Francis. While a vote did represent a possible way out when positions seemed irreconcilable, it had its drawbacks. There was nothing to rule out the possibility of ultimately arriving at some area of agreement. Furthermore, a vote meant taking a definite position, and often entailed reservations, which were always unfortunate. Every effort should therefore be made to find a solution, particularly since the Commission was giving the draft articles their first reading, and since the Sixth Committee's consideration of legal questions with political implications could place those questions in a new light. In the circumstances, he thought it would be premature to state his own view on the provision under consideration.

30. Mr. STAVROPOULOS asked the Special Rapporteur whether the purpose of paragraph 1 of article 23 was to protect the diplomatic courier or the diplomatic bag.

31. Mr. MAHIU was not surprised that article 23 was giving rise to lengthy discussion in the Commission, considering that the Drafting Committee had devoted six meetings to it out of a total of 19. It might seem that members of the Commission would have to divide for or against the principle stated in paragraph 1 of that article, but there was in fact a whole background that had to be taken into account. Whether it was a matter, as Mr. Stavropoulos had said, of distinguishing between protection of the diplomatic bag and protection of the diplomatic courier, or, as Mr. McCaffrey had suggested, of making an exception along the lines of the Vienna Convention on Consular Relations, there seemed to be more to the situation than the arguments for or against the principle in paragraph 1 might lead one to believe. Personally, he was in favour of the paragraph, but doubted whether it should be put to the vote at the present stage, particularly since recent events might lead members of the Commission to be too categorical in their positions. He therefore supported the views put forward by Mr. Francis and Mr. Thiam.

32. Mr. RAZAFINDRALAMBO noted that all the arguments advanced during the debate had already been put forward in the Drafting Committee, and even in the Commission before article 23 had been referred to the Committee. The views expressed by third world members had been completely objective: although it was mainly the great Powers that made use of diplomatic couriers, some of those members had endorsed the principle stated

in paragraph 1 of article 23. As to the arguments put forward in favour of that principle, it was worth noting that the debate had been more concerned with the abuses that might be committed by the diplomatic courier than with those which the police or prosecuting authorities in the receiving State or the transit State might commit. Plainly, the principle forbidding the arrest or detention of a diplomatic courier stated in article 20 did not prevent the competent authorities of the receiving or transit State from bringing proceedings, particularly in systems where prosecution and the exercise of jurisdiction were clearly separate. Hence it could not be concluded from that principle that immunity from criminal jurisdiction was of no importance. Although he was in favour of such immunity, he had adopted a compromise position both in plenary (1825th meeting) and in the Drafting Committee: he could agree to the principle stated in paragraph 1 of article 23 being qualified so that it applied only to acts committed by the diplomatic courier in the exercise of his functions. As Mr. Francis had proposed, the Commission could refer the problem raised by paragraph 1 of article 23 to the Sixth Committee.

33. Mr. DÍAZ GONZÁLEZ said the debate showed that the Commission ought not to refer draft articles to the Drafting Committee before deciding on their content. As had been the case with other articles, article 23 was now giving rise to a substantive debate for the third time. The whole problem lay in the fact that the Commission was trying to make the diplomatic courier a super-ambassador who would be better protected and enjoy greater privileges and immunities than a permanent diplomatic agent. As Mr. Stavropoulos had pointed out, what really had to be protected was the diplomatic bag and free communication between the sending and receiving States. The fact that the diplomatic bag was being transported by this or that vehicle—and the diplomatic courier was in the end a means of transport like any other—did not entitle that vehicle to privileges and immunities. The diplomatic courier, moreover, was only relatively comparable to members of the administrative and technical staff of a mission, since he did not normally travel with his family. He was not comparable to a permanent agent either, because his functions were by definition temporary. Any analogy with a special mission was also inapplicable because the dispatch of such a mission by a State implied the consent of the receiving State. The authorities of the receiving State thus knew the composition of a special mission before it arrived in their territory, whereas they did not know the identity of a diplomatic courier until he arrived at the frontier.

34. With regard to the idea of a vote, it was a procedure that should be adopted only as a last resort. Mr. Francis's proposal therefore seemed to him logical and acceptable, on the understanding that the Commission could not refer article 23 to the Sixth Committee without giving some explanations on the profound differences between its members. A compromise was not out of the question, but would be hard to achieve.

35. Mr. QUENTIN-BAXTER said that, if paragraph 1 were to be put to the vote, he would have to vote against

it, for the reasons already given by other speakers. He would do so, however, without any satisfaction at all, since that paragraph constituted only one element among many in a draft which the Commission was striving to get into balance. If paragraph 1 were to become the subject of one of the Commission's rare votes, that would give it disproportionate prominence.

36. He had great sympathy for Mr. Francis's motives in endeavouring to find a way out of the present difficulty but felt that the solution proposed by him was perhaps not the best one. In any case, it would be very curious for the Commission to take a vote on a paragraph of article 23 before having discussed all the parts of that article. He could not recall any occasion—either in the Commission on Human Rights or in the Third or Sixth Committees of the General Assembly—in which that had been done. Of course, it was quite common for a text to be voted on paragraph by paragraph, but the Commission should discuss the rest of the article first, in order to see how the various members stood in relation to the whole article. That would not prejudice in any way the right to vote on each paragraph separately.

37. Perhaps, after a full discussion, the Commission might decide to hold back article 23 rather than send it to the General Assembly with a qualified blessing. There were many precedents for sending articles to the General Assembly out of sequence, and it had also become a normal practice for the Commission to send to the General Assembly drafts on which no decision had been taken at all. Nothing would be lost by adopting that course. The Commission's report would give full particulars of the debate for the benefit of the General Assembly and the Sixth Committee. Moreover, since consideration of the draft was not to be completed at the present session, no loss of time was involved.

38. Mr. REUTER said that he would not oppose any of the suggestions put forward, even the idea of a vote, which would at least have the advantage of yielding a clear result. If he felt obliged to state his position, it was because those members who had been against the idea of a vote had stated theirs, and also because members of the Drafting Committee had been asked to give their views. Personally, he was against paragraph 1, considering it pointless. He had never taken the view that article 20 referred only to a preliminary phase of the proceedings or any other action. He interpreted it extensively.

39. If everyone came out in favour of Mr. Lacleta Muñoz's suggestion that the diplomatic courier's immunity from criminal jurisdiction should be limited to acts performed in the strict exercise of his functions, he would not oppose it, although the distinction between such acts and other acts performed by the diplomatic courier was scarcely valid, inasmuch as all acts not concerned with protecting the diplomatic bag from outside interference and delivering it to its destination would come in the latter category. When all was said and done, such a compromise solution would be ambiguous.

40. Logic had been invoked as an argument in support of paragraph 1 of article 23. The basis for that logic had been well put by Mr. Díaz González: although the

diplomatic courier did not have the status of a diplomat, he was treated as equivalent. From that standpoint, paragraph 1 of article 23 was obviously logical. But there was another logic, deriving from the existence of four conventions on diplomatic law, two of which had come into force. Some speakers had even said that it was because abuses could not be prevented that the privileges and immunities should be extended, an argument which he could not accept. He could agree to a compromise, but hoped the day would never come when it would be proposed to extend immunity from criminal jurisdiction to the diplomatic courier's family, on the grounds that they might be subjected to pressure.

41. From the outset, he had argued in favour of texts which took into account the difference, first, between the receiving State and the transit State and, secondly, between the diplomatic bag, regarded as the essential element, and the diplomatic courier, regarded as subsidiary. The Commission had preferred another logic, to which he would bow, but which now prevented him from agreeing to paragraph 1 of article 23.

42. Mr. MALEK said that he had been wrong on an earlier occasion to support the idea of a vote. He now realized that it would be very difficult for him to take a position on the present issue. He therefore supported Mr. Francis's proposal.

43. Chief AKINJIDE opposed the idea of passing on the problem to the Sixth Committee of the General Assembly, without any conclusion having been reached by the Commission. The outcome could well be to destroy all the valuable work done by the Special Rapporteur on the present topic, simply because of the controversy over paragraph 1 of article 23. For his part, he was convinced that, if paragraph 1 of article 23 were included in the draft, the effect would be to deter a great many States from ratifying the final instrument. For that reason, he favoured the views expressed by Mr. Reuter and Mr. Quentin-Baxter, which would have the effect of setting the matter aside for the time being, thereby providing an opportunity to arrive at a compromise.

44. Mr. RIPHAGEN said that, if a vote was taken on paragraph 1 of article 23, he would have to vote against it. He believed, however, that there was still room for compromise. The best course would therefore be to refer article 23 back to the Drafting Committee, in the hope that it might come up with a solution by the next session.

45. Sir Ian SINCLAIR said that paragraph 1 was not the only controversial element in article 23. Paragraph 4 had also had to be placed between square brackets, and several members had expressed reservations on parts of paragraphs 2, 3 and 5 as well. Some members had even suggested the deletion of article 23 altogether. In the circumstances, he suggested that the Commission should not at the present stage adopt any part of article 23, but should set aside the whole of the article. The text would be reproduced in the Commission's report with the statement that it would examine it again in 1985 in the light of the discussion in the Sixth Committee. If that course of action were adopted, the article would not necessarily go back to the Drafting Committee.

46. Mr. McCAFFREY joined those speakers who had supported the idea of exercising some restraint with regard to paragraph 1, or indeed the whole of article 23, so as to avoid a vote if possible. Action on the article should be postponed because it was not ripe even for provisional adoption. In the mean time, the Special Rapporteur might well put forward a compromise which would result in a generally acceptable text. In conclusion, he supported the suggestion to delay a decision on the whole of article 23, on the understanding that the debate would be fully recorded in the Commission's report to the General Assembly.

47. Mr. STAVROPOULOS said it would not serve any useful purpose to refer article 23 to the Sixth Committee. The result would only be a report to the effect that a number of delegations had supported paragraph 1 and that a number of other delegations had opposed it; that customary formula would not give the Commission much guidance. He favoured setting aside article 23 until the next session.

48. The CHAIRMAN, speaking as a member of the Commission, said that the Commission should perhaps examine whether there was any likelihood of the diplomatic courier being defined as a diplomatic agent. It was worth noting that, in a matter of civil and administrative jurisdiction, paragraph 2 of article 23 gave only functional immunity to the diplomatic courier. No immunity *ratione personae* existed in those matters. With regard to criminal jurisdiction, however, paragraph 1 of the article purported to give the courier an immunity *ratione personae*. Lastly, there was an important difference between a diplomatic courier and a member of a diplomatic mission. The courier was not appointed for a fixed period of time, like a member of a mission. He was constantly entering a particular country and leaving it, completing one mission at a time.

*The meeting rose at 1.05 p.m.*

## 1864th MEETING

*Wednesday, 18 July 1984, at 10 a.m.*

*Chairman:* Mr. Sompong SUCHARITKUL

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

**Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)**  
(A/CN.4/L.378, ILC (XXXVI)/Conf. Room Doc.3)

[Agenda item 4]

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

ARTICLES 23 (*concluded*) to 27

ARTICLE 23 [18] (Immunity from jurisdiction) (*concluded*)

1. The CHAIRMAN invited the Commission to continue its discussion of article 23 [18]<sup>1</sup> proposed by the Drafting Committee.

2. Mr. YANKOV (Special Rapporteur) said that the questions raised in regard to article 23, paragraph 1, belonged in three main areas. The first was that of the nature and significance of the functions of the diplomatic courier, and his legal status. Some members had suggested that the draft articles tended to confer on the diplomatic courier a status comparable with, or even higher than, that of a diplomatic agent. For his part, he had always been careful not to draw any analogy between the status of the courier and that of any established category of diplomatic staff. He had merely drawn attention in his reports to certain similarities of functions. The main consideration was that the diplomatic courier was an official of the sending State, entrusted with its official communications. Of course, the diplomatic courier had no representative functions such as those exercised by a diplomatic agent; but he was entrusted with a confidential mission on behalf of the sending State, and he performed a task which was absolutely indispensable for the normal operation of diplomatic communications.

3. In past centuries, the professional courier had been known as the messenger of his sovereign. His tasks had included the transmission of oral messages, but in view of the technical development of communications, it had not been found necessary to refer to oral messages in the draft articles.

4. The regulations enacted by the Swiss Federal Government before 1961 listed four categories of diplomatic staff. The fourth category, mentioned by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4, para. 61), comprised persons who did not have diplomatic rank, but nevertheless enjoyed diplomatic privileges and immunities, and the diplomatic courier had been placed in that category. It should be noted that that decision could not have been affected by the entry into force of the 1961 Vienna Convention on Diplomatic Relations.

5. One of the characteristic features of the diplomatic courier's functions was that he stayed only a short time in the receiving or transit State; his activity there was comparatively limited, and so were his legal relations, but that did not necessarily mean that he should have less legal protection than a member of a mission or delegation. The duration of his stay did not affect either the nature of the courier's mission or the need for proper legal protection and adequate facilities for safe and speedy delivery of the diplomatic bag. Hence the need to grant him inviolability and jurisdictional immunities. The courier

needed that protection even more than a member of a diplomatic mission, who was backed by all the resources of the mission, which had the visible protection of the flag above it.

6. The diplomatic courier was often faced with unexpected problems which he had to solve by himself, without any assistance from the sending State or its missions abroad. In his fourth report, he had recalled the discussions at the 1963 United Nations Conference on Consular Relations regarding the scope of facilities, exemptions and immunities to be accorded to the consular courier (*ibid.*, para. 53). There had been a Japanese proposal that the consular courier should be treated on a par with consular officers, with all the limitations of their status. That proposal had not been accepted by the Conference, which had adopted instead a United Kingdom proposal to treat the consular courier in the same way as a diplomatic courier, giving him complete inviolability, not the limited measure of inviolability granted to consular officers. Since 1963, an impressive number of bilateral consular conventions had included clauses conferring on the consular courier the same status as a diplomatic courier.

7. The immunity from arrest or detention provided for in article 20 was, of course, separate from the immunity from criminal jurisdiction provided for in article 23, paragraph 1. There was, however, a connection between the two provisions, in that the violation of any of those immunities would have the effect of impeding the freedom of communication of the sending State. In fact, a violation of the immunity from criminal jurisdiction could constitute an even greater impediment than arrest or detention. A diplomatic courier was often entrusted with the delivery of bags at two or three capitals in succession; if, at the first stop, he was delayed by having to appear in court, he would be unable to deliver the remaining diplomatic bags on time.

8. The nature and scope of the immunities of the diplomatic courier, including immunity from criminal jurisdiction, had to be considered in the light of the sending State's sovereign right to official communication. They had also to be viewed as legal protection of that function of the State which was exercised through the diplomatic bag entrusted to the courier.

9. The second area touched on by the questions raised during the discussion was that of the existing law on the subject. It was, of course, the task of the Commission to fill any gaps in the existing law and to promote its progressive development. An examination of general State practice before 1961, and the studies he had carried out with the aid of the Secretariat, had shown that the rule of inviolability, with all its consequences—including immunity from criminal jurisdiction—formed part of traditional international law. In 1893, a French diplomatic courier had been arrested for 24 hours in Spain; following a protest by France, Spain had apologized and the officer responsible for the arrest had been dismissed (*ibid.*, para. 64). The literature on the subject provided many other examples of that kind. Since 1961, the Vienna Convention on Diplomatic Relations had provided, in article 27, paragraph 5, for the

<sup>1</sup> For the text, see 1862nd meeting, para. 93.

complete personal inviolability of the diplomatic courier.

10. There were very few relevant judicial decisions. Indeed, everything showed that diplomatic couriers were particularly careful to avoid anything which might lead to their being delayed in the performance of their duties. Reference had been made during the discussion to reports in the British press of the numerous cases in recent years of alleged offences by persons enjoying diplomatic immunity; it was very significant that not a single one of those cases had concerned a diplomatic courier. The information received from Governments (A/CN.4/379 and Add.1) had also shown that there were no reported cases of any diplomatic courier being involved in criminal proceedings. In any case, it was the Commission's duty to examine the problem dispassionately, without being unduly impressed by transient events that were being over-dramatized by public opinion. To sum up the position, it could be said that practice so far might be interpreted as providing legal protection to the diplomatic courier, including inviolability and the immunities necessary for the performance of his functions.

11. The third group of questions raised during the discussion concerned the issue whether legal protection was given to the bag or to the courier. Some members had even suggested that only the bag was protected. As he saw it, however, it was not possible to dissociate the diplomatic bag from the courier who carried it.

12. It had been asserted that once the diplomatic courier had delivered the bag, his task was completed and he required no further protection. Yet in practice, the diplomatic courier, after delivering one bag, usually picked up another for delivery on his onward journey in another capital, or on his return journey in the sending State. Other situations could also arise. A diplomatic courier who had delivered a bag in Bern might have to travel to Geneva to pick up a bag there. It would be unacceptable to suggest that he should be deprived of legal protection on his journey from Bern to Geneva because he was not carrying a bag between those two cities. The only reasonable system was to give the diplomatic courier the same protection until he returned to the sending State. Those remarks applied, of course, to the ordinary courier, not to the courier *ad hoc*. In that connection, it was worth recalling the provisions of article 5, provisionally adopted by the Commission, on the duty of a diplomatic courier to respect the laws and regulations of the receiving State and the transit State. That article was particularly important for the prevention of abuses, and in an international community which respected the rule of law it was not a mere declaration of good intentions.

13. In an attempt to arrive at a compromise formula, it had been suggested that the diplomatic courier's immunity from criminal jurisdiction should be limited to the scope of his official functions. Another suggestion had been that grave crimes should be excluded from the operation of the immunity. But neither of those suggestions was practicable. The application of such limitations would require judicial investigation of the nature of the act of which the courier was accused. Limitations of that kind had been considered in other contexts and had al-

ways had to be discarded: immunity from criminal jurisdiction had accordingly always been specified in unrestricted terms.

14. Speaking as a number of the Commission, he expressed the hope that an article along the lines of article 23 could be referred to the General Assembly for consideration. It would be most unfortunate if no provision on immunity from jurisdiction was put before the Assembly: the Commission would be leaving a serious gap in the draft articles. The fact that the Commission was divided on the subject of the content of article 23 made it all the more necessary for the matter to be considered by the Sixth Committee of the General Assembly. The Commission's report should, of course, contain a full account of the discussion.

15. Mr. STAVROPOULOS said that he was not satisfied with the suggestion that a diplomatic courier should enjoy immunity from criminal jurisdiction when he had completed his task and was no longer carrying a diplomatic bag. If that proposition were accepted, it could mean granting immunity from jurisdiction to a diplomatic courier who, after delivering a diplomatic bag, took a consignment of prohibited drugs to another city where he was due to collect another bag.

16. The CHAIRMAN noted that those members who had asked for a vote on paragraph 1 of article 23 were no longer pressing for a vote. It had been generally agreed that the Commission and the Sixth Committee of the General Assembly should be allowed more time to consider the important provisions in paragraph 1. The Commission's report should indicate that it had not been possible to adopt the paragraph, and should also contain a very detailed account of the discussion.

17. Mr. DÍAZ GONZÁLEZ said he was willing to accept the Special Rapporteur's recommendation, but would like to know exactly what was to be referred to the General Assembly. Normally, the Commission referred to the Assembly the draft articles it had adopted provisionally. In the present case, it should not refer draft article 23 to the Assembly, but inform it that the article had been the subject of a substantive discussion in the Commission, which had been unable to agree on how to state the principle of immunity from criminal jurisdiction. It should be noted, however, that in doing so the Commission would be admitting that, on a specific point, it had been unable to perform the task which the General Assembly had entrusted to it.

18. Sir Ian SINCLAIR said that the Commission should try to reach a practical solution which would accommodate all the divided views. He suggested that the Commission's report to the General Assembly should indicate that, after consideration of article 23, a text had been proposed by the Drafting Committee; that text would be given in a footnote. The Commission's report would indicate that there had been a lengthy debate on paragraph 1 of article 23, in the course of which reference had been made to other paragraphs of that article. Lastly, it would state that the Commission had been unable to reach a final conclusion with regard to the acceptance of any part of article 23 and

that it would consider the article further at its next session.

19. Mr. FRANCIS said that he would have no objection to including article 23 in a footnote. It was important, however, to refer a complete text of the article to the General Assembly, together with a full account of the Commission's debate thereon.

20. Mr. REUTER said he seemed to remember that, when the Commission had transmitted to the General Assembly, after consideration on first reading, the draft articles on treaties concluded between States and international organizations or between international organizations, it had not confined itself to inserting a footnote containing the text of article 36 *bis*, which had been strongly criticized in the Commission.<sup>2</sup> If that was so, he proposed that the Commission should treat the draft article under consideration in the same way. Before taking a final decision on article 23, the Commission should perhaps quickly consider paragraphs 2 to 5.

21. Mr. USHAKOV said that, when the Commission had been in a similar situation before, its practice had been to place the contested provisions in square brackets and to indicate in a footnote that a decision would be taken on them later.

22. The CHAIRMAN suggested that draft article 23 should be referred to the General Assembly in the form in which it had been adopted by the Drafting Committee, together with a detailed account of the Commission's discussion.

*It was so agreed.*

ARTICLE 24 [19] (Exemption from personal examination, customs duties and inspection)

23. Mr. MAHIQU (Chairman of the Drafting Committee) presented the text of article 24 [19] as proposed by the Drafting Committee, which read as follows:

*Article 24 [19]. Exemption from personal examination, customs duties and inspection*

1. The diplomatic courier shall be exempt from personal examination.

2. 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 entry of articles for the personal use of the diplomatic courier imported in his personal baggage and shall grant exemption from all customs duties, taxes and related charges on such articles other than charges levied for specific services rendered.

3. The personal baggage of the diplomatic courier shall be exempt from inspection, unless there are serious grounds for believing that it contains articles not for the personal use of the diplomatic courier or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the receiving State or, as the case may be, of the transit State. Such inspection shall be conducted only in the presence of the diplomatic courier.

24. He said that the Committee had tried to propose a text which took account of the various objections and suggestions made during the consideration in plenary of

the text submitted by the Special Rapporteur.<sup>3</sup> The title of the article remained unchanged.

25. In paragraph 1, the phrase "including examination carried out at a distance by means of electronic or other mechanical devices" had been deleted, as the Special Rapporteur had suggested (1829th meeting) after the discussion in plenary. Thus paragraph 1 provided only that the diplomatic courier would be exempt from personal examination.

26. In paragraph 2, a few minor drafting changes had been made to bring the text into line with that of the corresponding provisions of the relevant conventions on diplomatic law. Two other changes required special mention. First, the Committee had considered it desirable to limit the exemption provided for in paragraph 2 to articles for the personal use of the diplomatic courier imported in his personal baggage. That formula was used in article 65 of the 1975 Vienna Convention on the Representation of States and had been considered appropriate for the diplomatic courier, who did not usually need exemption from customs duties, taxes and related charges on articles other than those carried in his personal baggage. Secondly, the Committee had thought it unnecessary to follow the text of the relevant conventions in regard to "charges for storage, cartage and similar services". Such charges would have to be taken into consideration in the case of a long stay in the receiving State or the transit State, but they hardly concerned the diplomatic courier, who did not normally have to pay them during his brief stay in the State concerned. It had been considered preferable to use the simple formula "charges levied for specific services rendered", which covered the incidental expenses the courier might have to meet.

27. Paragraph 3 had been modelled on article 36 of the 1961 Vienna Convention on Diplomatic Relations. Another change that should be mentioned was the introduction of the phrase "articles not for the personal use of the diplomatic courier", which had been preferred to the wording originally proposed, "articles not covered by the exemptions referred to in paragraph 2 of this article".

28. Mr. DÍAZ GONZÁLEZ, referring to paragraph 2 of article 24, said that in Spanish the expression *que promulguen* ("may adopt") gave the impression that, in each case, the receiving State or the transit State was required to enact laws or regulations. Yet that should not be the object of the provision; it should be made clear that the reference was to laws and regulations that were *vigentes* ("in force"). He appreciated that the expression *que promulguen* had been used in other codification conventions on diplomatic and consular law, but nevertheless believed that if a mistake had been made it should not be repeated.

29. Mr. YANKOV (Special Rapporteur) said that the language of draft article 24 had been aligned with that of article 36 of the Vienna Convention on Diplomatic Relations, article 50 of the Vienna Convention on Consular

<sup>2</sup> See *Yearbook ... 1979*, vol. II (Part Two), p. 144.

<sup>3</sup> See 1826th meeting, para. 1. See also 1862nd meeting, footnote 1 (d).

Relations, article 35 of the Convention on Special Missions and article 35 of the Vienna Convention on the Representation of States. He would therefore suggest that the phrase “such laws and regulations as it may adopt” should be retained, though it could perhaps be explained in the commentary that it referred to laws and regulations in force at the time.

30. Mr. MAHIU (Chairman of the Drafting Committee) said that Mr. Díaz González had put his finger on a problem which had caused the Drafting Committee constant concern. It had indeed wondered what to do when faced with a provision which appeared in a codification convention, and must therefore act as a guide for the Committee, but which was not drafted satisfactorily. The Committee had taken the view that it was better to leave the wording of the earlier provision unchanged; otherwise the new wording might give rise to discussions about its interpretation.

31. Chief AKINJIDE said that, in his view, “such laws and regulations as it may adopt” and “such laws and regulations as may be in force” meant much the same thing. Since all the codification conventions used the former phrase, he would suggest that it be retained.

32. Mr. DÍAZ GONZÁLEZ urged the necessity of amending the Spanish text of paragraph 2 in order not to refer to the future, but to the past. The words to which he had objected could be replaced by *promulgados*. It would be remembered that in the past the Drafting Committee had not adopted the wording of a provision which offered a precedent when the wording itself was unsatisfactory.

33. Mr. McCAFFREY said that, so far as the English text was concerned, the phrase in question could be interpreted to refer to laws and regulations that were either currently in force or might enter into force in the future. However, the point raised by Mr. Díaz González concerned a number of different articles which had already been adopted. He therefore suggested that at the present stage the Commission should take note of the point and decide to consider on second reading whether the policy of adhering as closely as possible to the codification conventions should be changed.

*It was so agreed.*

34. Mr. RIPHAGEN asked whether, under the terms of paragraph 1 of draft article 24, the diplomatic courier would be subjected to personal examination if an electronic device through which he had to pass prior to boarding an aircraft was triggered. It was unlikely that the courier would be allowed to board the aircraft if, in that case, he did not undergo such an examination. He would also like to know what was covered by the term “personal baggage” in paragraph 3.

35. Mr. YANKOV (Special Rapporteur) said his original proposal had been that the diplomatic courier and the bag should be exempt from any examination of that kind, and in practice the diplomatic bag had not usually been subject to such scrutiny. However, it seemed that the practical solution would be to settle the matter on the spot; if a diplomatic courier had serious reason to believe

that an examination of that type would affect the content of the diplomatic bag or his personal inviolability, he could always decide not to board the aircraft. He did not think, however, that it was possible to elaborate any further on the provision in question.

36. So far as personal baggage was concerned, the diplomatic courier was required to comply with the local laws and regulations in force. However, under draft article 20, the diplomatic courier enjoyed personal inviolability and was entitled to the protection of the receiving and transit States in the performance of his functions, and that had been interpreted to mean that those States should take appropriate measures to prevent any infringement of the courier’s freedom or dignity.

37. The CHAIRMAN said that, if there were no further comments, he would take it that article 24 [19] was provisionally adopted.

*Article 24 [19] was adopted.*

ARTICLE 25 [20] (Exemption from dues and taxes)

38. Mr. MAHIU (Chairman of the Drafting Committee) presented the text of article 25 [20] as proposed by the Drafting Committee, which read as follows:

*Article 25 [20]. Exemption from dues and taxes*

**The diplomatic courier shall, in the performance of his functions, be exempt in the receiving State or, as the case may be, in the transit State from all those dues and taxes, national, regional or municipal, for which he might otherwise be liable, except for indirect taxes of a kind which are normally incorporated in the price of goods or services and charges levied for specific services rendered.**

39. He said that, in the form in which it was being submitted to the Commission and in keeping with the new proposal made by the Special Rapporteur in the Committee, article 25 [20] differed from the original text<sup>4</sup> and somewhat modified its scope, although the title remained unchanged. In order to make it clear that exemption from dues and taxes must relate to the functions of the courier, the Committee had added the words “in the performance of his functions”, thus making it even more unlikely that the courier would ever need to be exempt from “personal or real” taxes, to which a person was usually liable only after a stay of some time that was normally longer than the courier’s. For that reason, the words “personal or real” had been deleted.

40. Similarly, the Committee had taken the view that, so far as exemption from dues and taxes was concerned, the case of the courier was quite different from that of diplomatic agents, consular officials and members of permanent missions, who would be liable to certain dues and taxes in view of the length of their stay. Normally, however, the courier would not be liable to them because he spent little time in the territory of the receiving or transit State. It had therefore been deemed advisable to specify that the exemption from dues and taxes applied only to those to which he might otherwise be liable. The

<sup>4</sup> *Idem.*

dues and taxes in question would be mentioned in greater detail in the commentary and would include, in particular, hotel and airport taxes. Some members of the Drafting Committee had questioned the need to include an article on the matters covered by article 25 and had expressed reservations regarding the text adopted by the Committee.

41. In addition, the Committee had retained the exceptions to exemption from dues and taxes proposed by the Special Rapporteur in the original text. Lastly, the Committee had taken note of the Special Rapporteur's intention to draft at a later stage a supplementary article concerning the situation of a courier of the nationality of the receiving State or the transit State or a courier who was permanently resident therein and, in particular, was not exempt from the dues and taxes mentioned in article 25.

42. Sir Ian SINCLAIR said that if article 25 were interpreted as being confined to exemption from hotel or airport taxes it would be acceptable; if it went beyond that, problems could arise. He asked for his reservation to be reflected in the report of the Commission.

43. Mr. McCAFFREY associated himself with Sir Ian Sinclair's remarks and also asked for his reservation to be reflected in the Commission's report.

44. Mr. DÍAZ GONZÁLEZ pointed out that the word "all" before the words "those dues and taxes" was redundant in view of the phrase "for which he might otherwise be liable", which could well be deleted. However, he would not press that point.

45. Mr. KOROMA said that a little more thought should be given to how the provision would operate in practice. In his experience, a diplomatic passport or identification card was not always sufficient to gain exemption from such dues and taxes and, in many cases, an additional tax exemption card was required.

46. Mr. YANKOV (Special Rapporteur) said that the requirements obviously varied from country to country and article 25 should therefore be understood to apply subject to local legislation. The practical aspects of the matter could, however, perhaps be considered when the Commission came to its second reading of the draft.

47. The CHAIRMAN said that, if there were no further comments, he would take it that article 25 [20] was provisionally adopted, subject to the reservations expressed.

*It was so agreed.*

*Article 25 [20] was adopted.*

#### ARTICLE 26

48. Mr. MAHIU (Chairman of the Drafting Committee) said that the Drafting Committee had not recommended any text for article 26 (Exemption from personal and public services) submitted originally by the Special Rapporteur.<sup>5</sup> In the Committee, the Special Rapporteur

had proposed that article 26 should be deleted since, as many members of the Commission had pointed out in plenary, it related to an unlikely eventuality and was covered by other articles in the draft. A suitable note in the commentary should suffice.

49. The CHAIRMAN said that, if there were no comments, he would take it that article 26 was deleted.

*Article 26 was deleted.*

#### ARTICLE 27

50. Mr. MAHIU (Chairman of the Drafting Committee) recalled that, at the 1829th meeting, the Special Rapporteur had said he was prepared to delete article 27 (Exemption from social security provisions), for the same reasons as applied in the case of article 26. The Drafting Committee had accepted that proposal and had therefore refrained from submitting a text for article 27 submitted originally by the Special Rapporteur,<sup>6</sup> taking the view that a note could be inserted at a suitable place in the commentary.

51. The CHAIRMAN said that, if there were no comments, he would take it that article 27 was deleted.

*Article 27 was deleted.*

52. Mr. MAHIU (Chairman of the Drafting Committee), concluding his report on the work of the Drafting Committee, said it should be noted, with reference to Mr. McCaffrey's remarks (1862nd meeting) regarding article 21, that the article had been discussed at length, although less than article 23, and that, out of a total of 10 members in the Drafting Committee, three had expressed reservations regarding paragraph 1 and one regarding paragraph 3. Consequently, like the other articles, article 21 had been adopted by the Drafting Committee in the light of the reservations expressed by the members concerned. He hoped that those clarifications would dispel any misunderstanding about article 21.

53. Finally, he thanked the members of the Drafting Committee, who would be right to claim that he had taken advantage of their good will and patience; he also wished to express his gratitude to the Special Rapporteur, whose willingness, initiatives and endeavours had facilitated the Committee's task, and also to the members of the secretariat who had participated in the work of the Committee.

54. Mr. McCAFFREY explained that his point regarding article 21 was that it was difficult to say that a majority in the Drafting Committee supported the whole of the article when some members had supported paragraph 1 but rejected paragraph 3, while others had supported paragraph 3 but rejected paragraph 1.

55. The CHAIRMAN thanked the Drafting Committee, whose objectivity was to be commended, and paid tribute to its Chairman for his tireless efforts.

*The meeting rose at 1 p.m.*

<sup>5</sup> *Idem.*

<sup>6</sup> *Idem.*

## 1865th MEETING

Wednesday, 18 July 1984, at 3.05 p.m.

Chairman: Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (*continued*)\* (A/CN.4/366 and Add.1,<sup>1</sup> A/CN.4/380, <sup>2</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf. Room Doc.5)

[Agenda item 2]

*Content, forms and degrees of international responsibility (part 2 of the draft articles)*<sup>3</sup>(*continued*)

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 16<sup>4</sup> (*continued*)

1. Sir Ian SINCLAIR said that the Special Rapporteur was to be congratulated most warmly and sincerely on his fifth report (A/CN.4/380), which represented a major step forward by enabling the Commission to focus the discussion on concrete formulations rather than on abstract notions. The way now seemed to be open for the Commission to make substantial progress on the topic within a measurable time-scale.

2. He was grateful to the Special Rapporteur for the replies to his earlier questions (1860th meeting) and for the moment intended to confine himself largely to certain issues arising in connection with draft articles 5 to 9. He had only one query regarding article 5 (*a*) and that was of a technical nature. Since the Vienna Convention on the Law of Treaties was in a number of respects declaratory of existing customary rules, the reference to “a right arising from a treaty provision for a third State” was perhaps redundant. The Drafting Committee might be requested to look into the matter. He was equally grateful for the explanation of subparagraph (*b*) given by the Special Rapporteur in his oral presentation (1858th meeting); he agreed that, in view of the disclaimer contained in Article 59 of the Statute of the ICJ and the corresponding provisions invariably included in arbitration agree-

ments, it would be difficult to assert the *erga omnes* character of each and every judgment of the ICJ or of an arbitration tribunal.

3. Article 5 (*c*) stated an apparently self-evident proposition. Subparagraph (*d*) presented a number of problems, most of which were technical in nature but none the less difficult to resolve. More particularly, the scope of the case provided for in subparagraph (*d*) (iii) was not entirely clear. If a warship of State A arrested a vessel of State B on the high seas, both States being parties to a multilateral convention explicitly prohibiting such an act, was State C, also a party to the convention, to be considered as an injured State within the meaning of the draft and with all the consequences that followed, including those set out in articles 6, 8 and 9? Much could depend on the seriousness of the internationally wrongful act and the extent to which the breach of the obligation might create an expectation or anxiety on the part of State C that State A might commit further serious breaches of the obligation stipulated. In any case, it seemed clear that State B was the directly injured State and State C only an incidentally injured State. That fact must surely entail some consequences, at least as far as article 6 was concerned. He could not see how States B and C could be placed on the same footing with regard to an eventual claim for reparation. Even if articles 8 and 9 could be invoked by any State party to a multilateral treaty when the obligation breached had been stipulated for the protection of collective interests of the States parties, should it not be the directly injured State alone that was entitled to invoke article 6, paragraph 1, and to pursue a claim for reparation under article 6, paragraph 2? In other words, might it not be necessary to draw a further distinction, at least for the purposes of article 6, between an injured State as defined in article 5 and a directly injured State entitled to invoke article 6?

4. The problems that arose in connection with subparagraph (*d*)(iv) were somewhat similar in nature. The interest which every State party had in the performance by its other treaty partners of obligations stipulated for the protection of individual persons, irrespective of their nationality, was not at issue. The question was whether, in the event of a breach of such an obligation by a State party, every other State party to the treaty was entitled to exercise the rights accorded to the “injured State” under article 6, article 8 and article 9 as qualified by article 11, paragraph 1 (*c*). In that connection, he referred to the explanation of the distinction between “parallel obligations” and “reciprocal obligations”, and of the treaty-law consequences to be drawn from that distinction, by Sir Gerald Fitzmaurice.<sup>5</sup> In his fifth report (A/CN.4/380, para. 3), the Special Rapporteur pointed out that he had not addressed such topics as the quantum of damages or the so-called nationality of claims. Yet the rule of nationality of claims clearly became a highly relevant consideration if the “injured State” was defined as in the case dealt with in subparagraph (*d*)(iv) of article 5, since

\* Resumed from the 1861st meeting.

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

<sup>5</sup> G. Fitzmaurice, “The general principles of international law considered from the standpoint of the rule of law”, *Recueil des cours de l'Académie de droit international de La Haye, 1957-II* (Leyden, Sijthoff, 1958), vol. 92, pp. 125-126.

the phrase “irrespective of their nationality” would seem to deny any such rule in the case of a breach of an obligation stipulated in a multilateral treaty for the protection of individual persons. The matter seemed to call for further explanation.

5. His reservations regarding article 5 (e) were much greater. In the debate on the same topic at the previous session, he had expressed serious doubts about the proposition that all other States could be regarded as “injured States” when the internationally wrongful act constituted an international crime.<sup>6</sup> Article 6, as he understood it, set forth the legal consequences of an internationally wrongful act in the context of the *bilateral* relationship between the author State and the State which was the direct victim of the injury. Indeed, article 6 made sense in that context, but very little sense in any other. For example, if State A, bordering on the Mediterranean, was the author of an international crime in the sense of article 19 of part 1 of the draft by committing a serious breach of a binding international obligation prohibiting massive pollution of the seas, and if Mediterranean States B and C suffered enormous damage to their coastlines and to their tourist industries as a result, was it seriously to be supposed that, in those circumstances, State D, a land-locked State on another continent, had the same entitlement to pursue a claim for reparation under article 6, paragraph 2, as had States B and C? If that was the combined effect of article 5 (e) and article 6, paragraph 2, it was one he simply could not accept. His doubts related essentially to the concept that all other States could be said to be “injured States” for the purposes of the application of article 6, paragraph 2, in the case of the commission of an international crime. The question whether, in such circumstances, all other States could be considered to be “injured States” for the purposes of the application of article 6, paragraph 1, and articles 8 and 9 was a much more open one. In general—and there he shared to some extent the views expressed earlier by Mr. Ushakov (1861st meeting)—it would be desirable to institute a self-contained régime for international crimes, with perhaps a distinction between the legal consequences for the victims of such crimes and the legal consequences for other States.

6. As to article 6, he accepted the Special Rapporteur’s answer (1860th meeting) to an earlier question about the relationship between article 6, paragraph 1 (b), and article 22 of part 1 of the draft, but remained somewhat uneasy about the unqualified and apparently inflexible rule proposed in article 6, paragraph 2. In some instances, the monetary value of re-establishing the situation as it had existed before the breach might exceed the injury suffered by the victim State. In other instances, it might fall short of the injury suffered, and in yet other instances the monetary value might be more or less unquantifiable. The Drafting Committee might consider the matter and see whether a more flexible wording could be found.

7. By and large he agreed with the Special Rapporteur’s proposals so far as articles 8 and 9 were concerned and,

in particular, favoured the formulation of the manifest disproportionality test in article 9, paragraph 2; a negative test of that nature was more easily applicable than a positive one.

8. The expression “interim measures of protection” at the beginning of article 10, paragraph 2 (a), was perhaps somewhat infelicitous, since international lawyers normally used it to describe measures indicated by the ICJ or an arbitration tribunal; an alternative formula might perhaps be found by the Drafting Committee. While he experienced no particular difficulties regarding the substance of article 11, the formulation would have to be carefully considered to avoid any inconsistency between that article and article 60 of the Vienna Convention on the Law of Treaties. As Mr. Reuter had indicated (1861st meeting), article 13 also had to be considered in that context.

9. He still had reservations (1858th meeting) about the need for article 12 as it was now formulated. Subparagraph (a) appeared at first sight to be too broad, given the operation of the principle of reciprocity in diplomatic law acknowledged to some extent in article 47 of the 1961 Vienna Convention on Diplomatic Relations and in the corresponding articles of the other conventions codifying diplomatic law. He remained unconvinced that what was said in paragraphs 84-87 of the judgment by the ICJ in the case concerning *United States Diplomatic and Consular Staff in Tehran*<sup>7</sup> warranted so wide an exclusion as that formulated in article 12 (a). For reasons similar to those already stated by Mr. Reuter (1861st meeting), he also had hesitations about article 12 (b) and, pending a more detailed explanation by the Special Rapporteur, wished to reserve his position on the necessity for a provision of that kind. He would comment on articles 14 to 16 at a later stage.

10. In conclusion, he emphasized that the points he had raised should in no way be interpreted as criticism of the Special Rapporteur. Indeed, he believed that the submission of the draft articles contained in the fifth report marked a truly significant advance in the Commission’s work on the difficult and challenging topic of State responsibility.

11. Mr. QUENTIN-BAXTER said that the submission of the draft articles under consideration was a major event in the life of the Commission. It would be unfortunate indeed if the late stage in the session at which the topic was being considered and the pressure of other work were to prevent the Commission as a body from acknowledging such a breakthrough. He did not feel sufficiently well prepared to contribute to the debate at a technical level, but proposed to make some comments of a more general nature and, first of all, quickly to trace the topic’s antecedents.

12. The topic of State responsibility had been with the Commission almost throughout its 35 years of existence. The history of post-war developments in the codification and progressive development of the law would be incomplete without a record of the advances and checks

<sup>6</sup> *Yearbook ... 1983*, vol. I, p. 130, 1777th meeting, para. 28.

<sup>7</sup> See 1858th meeting, footnote 10.

which had occurred in the treatment of such a vast subject. In his view, the difficulties involved in the codification and progressive development of international law stemmed from two main causes. The first was insufficiently rigorous thinking and the second was cerebral insensitivity to demands so deeply felt that to ignore them was foolish. The development of international law depended on achieving a balance between those factors. Undoubtedly, because of the failure to strike such a balance, the Commission had in its early days suffered a major check in the topic of State responsibility in relation to the treatment of aliens. The resulting disruption had led to a redefinition of the topic of State responsibility and the decision to treat it as a set of secondary rules, leaving aside the question of primary rules so far as was possible. That decision, in turn, had in due course led to the Commission's treatment of part 1 of the topic of State responsibility under the guidance of the then Special Rapporteur, Mr. Ago.

13. In 1976, the adoption on first reading of article 19 of part 1 of the draft had caused another shock—a shock not strong enough to prevent the completion of the first reading of the draft, but sufficient to delay the second reading and to leave the present Special Rapporteur with a serious problem on his hands. The difficulty regarding article 19 of part 1 had hardly come a surprise, for the Commission had said again and again that there would be different régimes of responsibility and different grades of obligations. The very use of the term “international crime”, however, was enough to create a certain sense of unease. Both the Special Rapporteur and the other members of the Commission still suffered from the fact that the precise meaning of that term was not known. The States which had been most disturbed by the unanimous adoption of article 19 had been the first to suppose that it carried implications of penal responsibility that would affect not only individuals, but States as well. That interpretation by representatives of the States most opposed to article 19 seemed to have contributed towards making their prediction come true in the long term. The prolonged uncertainty regarding part 1 of the draft on State responsibility was surely an element in the problems now arising in connection with the draft Code of Offences against the Peace and Security of Mankind. For the developing States, the issue had assumed an almost symbolic significance. Whether or not the historical reconstruction he had attempted was accurate, he felt that the Special Rapporteur's proposals could not be wholly dissociated from the very grave questions which had arisen in connection with the topic of State responsibility over a period of more than 30 years.

14. The Special Rapporteur, loyal to his task, the Commission and the international community, as well as to the provisions of part 1 adopted on first reading, had presented in his fifth report (A/CN.4/380) a most interesting construction of the meaning of an “injured State”. The way in which the Commission decided to deal with that definition, and more particularly with draft article 5 (e), might have enormous implications for various other aspects of its work, as well as for the general climate of its deliberations. Like other members, he wondered whether the subparagraph in question was

subtle and flexible enough to avoid the unprofitable impasses into which the Commission had drifted over the years. In spite of the guidance given in article 19 of part 1 of the draft, it was still not altogether clear what constituted an international crime. For example, it would hardly be correct to say that every massive disaster occurring in consequence of an activity by a State was an international crime. If it were recognized that the action must contain an element of deliberate, callous defiance of the international community's rules, the concept that an internationally wrongful act might constitute a crime would be a little easier to accept.

15. He was inclined to agree with Sir Ian Sinclair that a distinction might have to be drawn between the régime concerning injured States and that of third States; indeed, the Commission might go even further and consider the question of obligations *erga omnes* separately from the notion of crime. In principle, he believed that it was best to begin with simple matters and then move on to larger and more difficult issues, but that would hardly be a viable course in the present context. The Special Rapporteur was right to present in article 5 the whole spectrum of obligations for the purposes of identifying the injured State, and the Commission should at least begin to think about all the unstated possibilities implicit in the article. He hoped that everything possible would be done to ensure a thorough discussion of the topic at the Commission's next session.

16. Lastly, with reference to draft article 7, he recalled that, when the Commission had considered article 22 of part 1, also relating to the treatment of aliens, there had never been complete agreement as to whether a provision of that kind had a proper place in a general code dealing with secondary rules. He was uncertain about the relationship between draft article 7 of part 2 and article 22 of part 1, but tended to carry his doubts about the advisability of article 22 over to draft article 7. The construction of draft article 7, which, as it were, began from the point at which article 22 of part 1 had failed, was also open to doubt. There was a case for considering whether the Commission wanted to include in its draft on State responsibility a specific article dealing with only one particular branch—and one of the oldest branches—of international law on a subject which, unhappily, had caused a good deal of dissatisfaction to the newer members of the international community.

17. Mr. NI noted that the Special Rapporteur, in admirably thorough and precise work that was a great contribution to a gigantic scheme envisioned but hitherto seldom ventured on, had now decided to include in the set of draft articles the legal consequences of international crimes, including the crime of aggression. It was a significant step forward in consonance with a general trend of thought in the Commission that sought to give concrete expression in a legal instrument to the condemnation of international crimes, particularly aggression, which was the most heinous crime against international peace and security. There was no contradiction with the Charter of the United Nations or with the prohibition of the crime of aggression in other international instruments or codification endeavours, including

the drafting of a code of offences against the peace and security of mankind, currently under way in the Commission. It had been said during earlier debates that the Charter and international law would be strengthened rather than weakened by codification of the present topic. On the other hand, care should be taken to avoid discrepancies with other international instruments in terms of scope and content. In the case of aggression, the draft articles should take into account the relevant provisions of the Charter relating to the institutionalization of a system of collective restraints as well as its other provisions. Care must also be exercised in dealing with the delicate question of reprisals as a response to internationally wrongful acts, so as to avoid any escalation of conflict.

18. The draft articles were skilfully framed in a logical sequence, but every article must be given an appropriate title at an early stage for the coherence of the whole. Another point was the positioning of articles 14 and 15, on international crimes and the crime of aggression. Indeed, the act of aggression ranked first in the 1954 draft Code of Offences against the Peace and Security of Mankind,<sup>8</sup> and also appeared in the first principle of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>9</sup> Similarly, in draft article 19 of part 1 of the draft, international crimes preceded international delicts. It had been said that, for practical reasons, the Special Rapporteur should start with the legal consequences of international delicts, which would be easier to define. However, the Special Rapporteur had stated in his fifth report (A/CN.4/380, para. 7) that another order might well be envisaged, and it could thus be hoped that articles on the most serious question would precede those on the simpler question of international delicts in bilateral relations. Such an order might well have a useful political impact. In addition, the articles on the legal consequences of internationally wrongful acts should not serve as guidelines or model rules. He firmly believed that the three parts of the draft should together form a law-making convention.

19. Draft article 5 classified injured States in five subparagraphs. Subparagraph (a) appeared to contain two distinct types of rights for the injured State, the first being based on a customary rule of international law and the second on a treaty provision. For the sake of clarity, it would perhaps be desirable to split the subparagraph into two. Subparagraphs (b) and (c) seemed quite clear, but subparagraph (d) was complex, categorizing several types of injured States under a multilateral treaty. In subparagraph (d) (i), the language did not seem precise, since the term "in its favour" might be open to different interpretations. The expression "a party specially affected by the breach", used in article 60, paragraph 2 (b), of the Vienna Convention on the Law of Treaties, was open to the same objection. Hence the wording should be considered further. Again, the shade of difference between subparagraph (d) (ii) and (iii) needed clarification.

<sup>8</sup> See 1816th meeting, para. 1.

<sup>9</sup> General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

When the collective interests of the States parties were affected, it followed that exercise of their rights or performance of their obligations would also be affected thereby. But when the breach affected the exercise of the rights or the performance of the obligations of all other States parties, was there necessarily a collective interest or interests? It might be asked whether the term "collective interest" indicated that it was an indivisible whole. In view of the *erga omnes* character of an international crime, the present formulation of subparagraph (e) was perhaps appropriate, but it should be clearly stated whether the words "all other States" referred to all other States of the international community or all other States parties to a multilateral convention or to the constituent instrument of an international organization.

20. Draft article 6, dealing with reparation, created new obligations for the State committing an internationally wrongful act and new rights for the injured State. The requirement in paragraph 1 (a) to "discontinue the act" was appropriate, but the remainder of the text merely conveyed the idea of *restitutio in integrum*, which was covered by the provision in paragraph 1 (c). As had been said in the case concerning the *Factory at Chorzów (Merits)*,<sup>10</sup> such restitution, as the basic form of reparation, would necessarily wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed. When restitution in kind was not possible, the injured State might require payment of a sum of money corresponding to the value of a re-establishment of the situation, and provision for monetary compensation was therefore made in paragraph 2. Besides restitution and compensation, a third requirement, that of satisfaction, was sometimes attached. There were a number of means of satisfaction, such as the presentation of official regrets, punishment of guilty officials, and even a salute of the flag of the injured State by a mission of expiation. Some means were particularly humiliating to the State which had committed the internationally wrongful act and therefore harmful to future relations between States. Hence the Special Rapporteur had rightly chosen the one which figured in paragraph 1 (d), namely to "provide appropriate guarantees against repetition of the act". Draft article 7 dealt with a question which could be covered by some drafting changes in article 6 and hence a separate provision was not required.

21. Draft articles 8 and 9 provided for the injured party's entitlement to react by suspending the performance of its obligations towards the author State. In the case of article 8, non-performance of the obligation by the injured State by way of reciprocity was limited to those obligations which corresponded to or were directly connected with the obligation breached, while in article 9, non-performance by way of reprisal could extend to, but apparently was not limited to, the injured State's other obligations towards the author State. If that interpretation of the Special Rapporteur's intention was correct, then the word "other" in article 9, paragraph 1, might well be deleted. The difference between non-performance by

<sup>10</sup> *Judgment No. 13, 1928, P.C.I.J., Series A, No. 17.*

way of reciprocity and non-performance by way of reprisal was that, in the latter case, the injured State must first exhaust the available remedies, described in draft article 10 as the international procedures for peaceful settlement of the dispute, and furthermore the exercise of the right of reprisal should not be manifestly disproportional to the seriousness of the internationally wrongful act committed. Such distinctions were well conceived, but the cross-reference at the end of article 10, paragraph 1, should perhaps read: "in order to exercise its right mentioned in article 6".

22. The Special Rapporteur had been cautious in providing in articles 9 and 10 for restraints on the taking of measures of reprisal, and similarly prudent in formulating draft articles 11 and 12. Article 11 set out the conditions under which the injured State was not entitled to suspend the performance of its obligations to the author State when such obligations were stipulated in a multilateral treaty, and article 12 precluded the right to suspend performance of obligations such as diplomatic and consular immunities and obligations incumbent upon any State by virtue of a peremptory norm of general international law. In his fourth report (A/CN.4/366 and Add.1, para. 127), the Special Rapporteur had pointed out that the State injured by the abuse of diplomatic privileges and immunities had at all times available to it the measures of a declaration of *persona non grata* and the severance of diplomatic relations, which removed the need for determining other legal consequences. In article 12 (b), the Special Rapporteur seemed to have in mind the parallel obligations to respect human rights in the case of armed conflict, perhaps on the assumption that, if violations of diplomatic laws and laws of war could result in the suspension by the other party of performance of any obligations, the consequences would be uncontrollable. The intention was to avoid any escalation of the conflict.

23. Draft article 13 stated the extreme case in which the internationally wrongful act in violation of treaty obligations destroyed the object and purpose of the treaty as a whole. In that event, the restraining requirements in article 10, paragraph 1, and article 11, paragraph 1 (a) and (b), did not apply. In his fourth report (*ibid.*, para. 109), the Special Rapporteur had said that, in such a case, the matter lay beyond reprisals and dispute settlement as a means to obtain a return to legitimacy. Such gross violation should permit immediate action, but one question still remained: who was to determine on the spot whether the act in question destroyed the object and purpose of the treaty and how pressing was the need to take action? Article 13 did not provide a procedure for taking immediate action under such circumstances nor did it state whether a collective decision, as envisaged in article 11, paragraph 2, was necessary where such a procedure had been established in a multilateral treaty. That matter would require further reflection.

24. Draft article 14 was the crux of the present set of articles, but its importance was rivalled by the difficulty in formulating appropriate provisions, for extreme caution should be exercised in order not to tamper with the Charter of the United Nations and other rules of interna-

tional law. The provisions should complement and strengthen them in a way that conformed to the requirements of the contemporary situation. The Special Rapporteur had structured article 14 in accordance with the four elements of special legal consequences common to all international crimes:<sup>11</sup> paragraph 1 was framed to make the commission of an international crime the concern of the whole of the international community, while paragraph 2 embodied a formula of collective sanctions in three subparagraphs. Paragraph 2 (a) set forth an obligation not to recognize as legal the situation created by the crime. That principle was at least 50 years old and was an effective means of preventing the worsening of the existing situation, but mere non-recognition in abstract terms was sometimes not sufficient. For example, in the ICJ advisory opinion of 21 June 1971 in the case of the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*,<sup>12</sup> which had not been treated as a case of international crime, it was pointed out that certain categories of actions, which were listed in the opinion, might imply a recognition that South Africa's presence in Namibia was legal. For other States Members of the United Nations it was said that the obligation was to refrain from lending any support or any form of assistance to South Africa concerning its occupation of Namibia. Paragraph 2 (b) went on to stipulate that no aid or assistance should be rendered to the State which had committed the crime, and paragraph 2 (c) brought in the element of solidarity under the United Nations system, as envisaged in Article 41 of the Charter, by requiring joint action.

25. After the legal consequences of an international crime had been defined, the text of article 15, on the legal consequences of the crime of aggression, would be easier to formulate. The present wording already contained two elements: all the legal consequences of an international crime, as provided in article 14, and the Charter of the United Nations, mainly Chapter VII. Article 5, paragraph 3, of the Definition of Aggression<sup>13</sup> specified that no territorial acquisition or special advantage resulting from aggression should be recognized as lawful. A similar provision was to be found in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>14</sup> There was no specific provision in the Charter concerning non-recognition of territorial acquisition resulting from aggression, although such was the natural consequence of its Article 2, paragraph 4. In the draft under consideration, article 14, paragraph 2 (a), merely provided for the non-recognition as legal of the "situation" created by the international crime, something which was too general. Accordingly, article 15, which dealt specifically with the act of

<sup>11</sup> See in that connection the Special Rapporteur's commentary to draft article 6 as submitted in his third report (*Yearbook ... 1982*, vol. II (Part One), pp. 48-50, document A/CN.4/354 and Add.1 and 2, para. 150).

<sup>12</sup> *I.C.J. Reports 1971*, p. 16.

<sup>13</sup> General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

<sup>14</sup> See footnote 9 above.

aggression, should contain a special provision on the non-recognition of territorial acquisition or special advantage resulting from aggression.

26. Draft article 16 was in the nature of a safeguard clause. Presumably, it was not intended to be exhaustive, as there might be other matters which were not to be prejudged by the provisions of the present articles on State responsibility. In that case, he suggested that the words “*inter alia*” or “among others” should be inserted after the word “prejudge” in the opening clause of that article.

27. Mr. JACOVIDES said that State responsibility was a complex and difficult topic, full of potential pitfalls but also full of opportunities. He believed that, with the Special Rapporteur’s excellent fifth report (A/CN.4/380), the Commission could rightly choose to remain in the mainstream of public international law, which attached great importance to international public order and obligations *erga omnes*. The Special Rapporteur had given due weight to the concept of *jus cogens*, the notion of an international crime, for which the Commission could take considerable credit by having adopted article 19 of part 1 of the draft, and particularly to the legal consequences of aggression. Proper attention was also paid to the more conventional and traditional aspects of State responsibility.

28. There might be room for improvement in the drafting and arrangement of the articles. For example, he agreed with Mr. Ni that each subject dealt with in the set of draft articles should have an appellation. Moreover, in the case of article 5 (c) and (d), the term “an obligation under” a treaty would be preferable to “an obligation imposed by” a treaty. He also agreed with the suggestion that article 5 (e) should be recast, so long as it retained the principle that an international crime constituted a wrongful act against all members of the international community.

29. Both as a member of the Commission and as a representative of his country in the Sixth Committee of the General Assembly, he would object to any attempt to delete or drastically alter draft article 14. Paragraph 1 was a logical corollary to recognition of the concept of international crimes, among which aggression was indisputably the prime example. Paragraph 2 lay at the core of the draft articles, for it stipulated that an international crime committed by a State entailed an obligation for every other State; paragraphs 3 and 4 were equally logical and necessary.

30. He fully concurred with the tenor of draft article 15, but Mr. Ni’s suggestion that it should include a provision on non-recognition of territorial acquisition or special advantage resulting from aggression deserved careful consideration. In brief, although flexibility in terms of wording or other matters of debate was possible in order to reach general agreement, the principle of recognizing in the draft articles the effect of the United Nations Charter, *jus cogens* and an international crime could not be compromised, downgraded or eliminated. International public policy and legal order were concepts which had fully emerged in public international law. They helped small and weak States against the arrogance of power. The Commission, in its new and enlarged form, could do no less than safeguard them.

31. It was not his custom to waste the Commission’s time on subjects which lent themselves to more political forums, but he asked its indulgence to refer to his country’s tragic situation on the tenth anniversary of its invasion and occupation by Turkey. Fundamental rules of international customary and conventional law had been grossly violated with impunity, and legally binding United Nations resolutions had been ignored by the occupying power. All members of the Commission were well aware of the limitations of a forum such as theirs, yet they should not shirk their responsibility to make a contribution, through the topic of State responsibility, to remedying internationally wrongful acts and punishing international crimes for the sake, not only of Cyprus, but of other small countries suffering as a result of foreign aggression and interference.

*The meeting rose at 5.55 p.m.*

## 1866th MEETING

*Thursday, 19 July 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclata Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**State responsibility (continued) (A/CN.4/366 and Add.1,<sup>1</sup> A/CN.4/380,<sup>2</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf.Room Doc.5)**

[Agenda item 2]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)<sup>3</sup> (continued)***

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (continued)

ARTICLES 1 to 16<sup>4</sup> (continued)

1. Mr. OGISO expressed appreciation to the Special Rapporteur for his fifth report (A/CN.4/380) and oral

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

presentation (1858th meeting). The definition of the term “injured State” in draft article 5, in his view, presupposed that an internationally wrongful act had been committed by another State. However, it was extremely difficult to establish that an act of a State was wrongful. For example, when an act of aggression was committed by a permanent member of the Security Council, or even by a State which was not a permanent member of the Security Council, it was fairly rare for the Security Council to hold that the act in question was wrongful. Again, in the case of an alleged breach of an obligation under a bilateral treaty, the alleged author State did not normally agree that its act had been wrongful. Assuming, therefore, that his interpretation of draft article 5 was correct, the Commission should provide for cases where, even though manifest injury had been done to a State, it was not possible to establish in law that an internationally wrongful act had been committed and, hence, that the State which had suffered the injury was an injured State within the meaning of draft article 5. Even if draft article 5 offered the only logical definition of an injured State, some formula should still be devised to minimize any adverse effects that might ensue if the injured State could not be identified under the terms of draft article 5.

2. Also, he wondered whether the Special Rapporteur had considered the possibility that the injured State might be entitled, in the event of manifest injury, to exercise, on a provisional basis, some of the rights provided for under subsequent articles. For example, a State could be regarded as an injured State under draft article 5 on a provisional basis if, in connection with a peaceful settlement procedure, the court delivered a decision to that effect; if the court subsequently delivered a decision to the effect that the State should no longer be regarded as an injured State under draft article 5, its provisional status as such would cease. He doubted whether there was any such theory in international law or any such practice in international custom; nevertheless, in view of the practical possibilities, the matter could perhaps be considered within the context of State responsibility. What he had in mind was entirely different from an interim measure, since it was not a measure ordered by an international court or by any other peaceful settlement organ.

3. By the same token, he wondered whether an injured State could require the State which had committed an internationally wrongful act to comply, again on a provisional basis, with the terms of paragraph 1 (a) of draft article 6. He raised the point in view of the current political situation and of the historical precedents in the Security Council. The Special Rapporteur might feel that it was a matter that fell outside the scope of his topic but, if it had not already been discussed at some earlier stage, it would be useful to know the Special Rapporteur’s reaction. Consideration could also be given to whether the rights provided for under draft articles 8, 9 and 10 could be applied, on a provisional basis, in favour of an injured State.

4. He would like to know why draft article 6, paragraph 1 (d), had been formulated in terms of what the injured State could require of the State that had committed

an internationally wrongful act, rather than in terms of the obligations of the latter State. Perhaps the Special Rapporteur thought that, unless the injured State requested that something should be done, it might not be necessary for the author State to take action; if that was so, the provision was correctly drafted. None the less, he still wondered whether it sufficed to provide simply for what the injured State might require without specifying that the author State also had certain obligations. Moreover, he did not altogether understand what was meant by “guarantees” in paragraph 1 (d), or what the legal consequences of such guarantees would be. If the author State which gave the guarantees repeated the wrongful act, what would be the legal effects of such repetition? If they were the same with or without guarantees, the guarantees had no real significance.

5. The fact that subparagraphs (a) to (d) of paragraph 1 of draft article 6 were connected by the conjunction “and” meant that the injured State could require the author State to comply with all the requirements set forth in those subparagraphs. He wondered, however, whether there was any case in which compliance by the author State with only one of those requirements would suffice.

6. Draft article 6, paragraph 1 (c), was based on the concept of *restitutio in integrum stricto sensu*, which was a traditional principle of international law and, in most countries, a basic rule of municipal law. However, to apply it in negotiations for reparation for injury or for a wrongful act, for instance, could complicate matters. In his view, *restitutio in integrum stricto sensu* should be more of a general objective than a specific criterion whereby the author State was required to remedy a given situation. He would like to know, however, whether the Special Rapporteur had considered the possibility of placing the provision in question in the opening clause of paragraph 1. The same remark applied to draft article 7, which also referred to the re-establishment of a situation.

7. Draft article 9 allowed for reprisals, on condition that they were not manifestly disproportional to the seriousness of the internationally wrongful act, and subject to the other conditions stipulated in draft articles 10 and 11. Under draft article 13, if the internationally wrongful act destroyed the object and purpose of a multilateral treaty, draft article 10 and draft article 11, paragraph 1 (a) and (b) and paragraph 2, did not apply. That could be interpreted as meaning that there was no limitation on the right to take reprisals, save that they must not be manifestly disproportional. If a country belonging to NATO or to the Warsaw Pact declared its neutrality, such an act would be a manifest violation of the treaty in question and could be regarded as destroying its whole object and purpose. In such a case, the declaration of neutrality would become an internationally wrongful act, and the other parties to the treaty could resort to reprisals on condition that such reprisals were not manifestly disproportional. He noted, however, that, under draft article 10, the procedures for peaceful settlement had to be exhausted before reprisals could be taken. If article 10 did not apply to the case he had cited, by virtue of the application of article 13, reprisals could be taken without any move to resort to an international procedure for the

peaceful settlement of disputes. In the circumstances, it would seem preferable to omit the reference to article 10 from article 13 so that, in the examples cited, the obligation to exhaust the international procedures for the peaceful settlement of disputes before reprisals were taken would remain. He had intentionally chosen a rather extreme case as an example to underline the gravity of the matter.

8. Taking another example, he said that, if a State party violated the provisions of a multilateral treaty for environmental protection by contaminating the environment and such an act was deemed to destroy the object and purpose of the treaty as a whole, was it proper that the other parties to the treaty should be allowed to take reprisals in the form of similar action to contaminate the environment, subject only to the condition that the reprisals were not manifestly disproportional? That would be a rather difficult conclusion to draw from the practical, if not the legal, point of view. He therefore considered that, even in such cases, the peaceful settlement procedure should be exhausted before the right to take reprisals was exercised.

9. He noted from the Special Rapporteur's fourth report (A/CN.4/366 and Add.1) that fault on the part of the author State was required before the right to take reprisals could be exercised. He did not altogether understand the legal import of the fault concept, however, since reprisals might be taken in respect of an internationally wrongful act, which could be committed with or without fault.

10. With regard to the question of treaty violations, he noted that, under the Vienna Convention on the Law of Treaties, the other party could terminate the treaty only in the case of a material breach. He therefore wondered why the limitation imposed by the word "material" had been omitted from the draft. He also wondered why the requirement under article 60, paragraph 2, of the Vienna Convention, to the effect that the unanimous agreement of the other parties to a multilateral treaty had to be obtained before the operation of the treaty could be suspended, was not reflected in the draft.

11. Draft article 12 (b) raised a rather important point of substance. As formulated, and in the absence of any explanation as to what constituted a peremptory norm of international law, it could create ambiguity in regard to the interpretation of the convention as a whole. It was rather difficult to understand the provision without knowing what exactly was the content of *jus cogens*. For example, was the prohibition of armed reprisals regarded as *jus cogens*? He raised the question in view of the reference to belligerent reprisals in draft article 16 (c), and wondered whether draft article 12 could not be improved.

12. Mr. MALEK, noting that, in his fifth report (A/CN.4/380, para. 2), the Special Rapporteur stated that the commentaries to the draft articles contained in the report would be submitted at a later stage, said that it would be easier to understand the draft articles if they were accompanied by the appropriate commentaries, although the information contained in previous reports was useful.

13. Draft article 5 (e) was well thought out; it was difficult to see the need to resort to the use of abstract concepts to express what was stated clearly and without ambiguity in that article. The term "international community as a whole" which had been referred to and which derived from draft article 19 of part 1 of the draft, did not appear to have any precise legal meaning. Mr. Reuter (1861st meeting) had raised a number of very pertinent questions in that regard. While it was, of course, important to make it clear in the commentary that the international community as a whole was injured by an internationally wrongful act constituting an international crime, nevertheless, in the text of the provision itself, reference could be made only to entities recognized by international law as representing the international community as a whole, namely States, the immediate subjects of international law. Although, under the terms of draft article 5 (e), all States other than the author State or States were considered as injured by an internationally wrongful act regarded as an international crime, they obviously did not have exactly the same rights and obligations as the State or States directly or primarily injured, which was why draft article 14 stipulating the rights and obligations of every State other than the author of an international crime was so important.

14. Draft article 14 embodied the three paragraphs of draft article 6 submitted in the third report,<sup>5</sup> together with a new paragraph 1, which was presumably intended as a response to the concerns expressed in the Commission and in the Sixth Committee of the General Assembly, but whose scope and usefulness were not immediately apparent. It suggested that the specific legal consequences of an international crime would be limited to "such rights and obligations as are determined by the applicable rules accepted by the international community as a whole", thereby excluding those provided for in paragraph 2, which would be absurd. A remedy might be to insert the words "by paragraph 2 of this article and" after the word "determined". He wondered why draft article 15, which also dealt with the legal consequences of an international crime, could not be incorporated into draft article 14 and why it was drafted in terms which were different from those of draft article 14, paragraph 1, although it apparently expressed the same idea. After all, the rights and obligations referred to in those two provisions did not appear to have different sources.

15. Draft article 14, paragraph 2, was absolutely essential, as part 2 of the draft on State responsibility must contain provisions which organized international cooperation on a rational basis in the event of an international crime. Although draft article 14 was admittedly not entirely satisfactory, it contained the basic elements for the effective organization of a collective response to a particularly serious international crime. During the consideration of those provisions at the thirty-fourth session, he had wondered why mutual assistance between States in the event of an international crime should be limited to the performance of the obligations listed in

<sup>5</sup> See 1865th meeting, footnote 11.

draft article 6, paragraph 1 (a) and (b).<sup>6</sup> It would be advisable to draft subparagraph (c) so as to include any other obligations not currently covered without mentioning them specifically. He wondered whether draft article 14 provided for the obligation to extend aid and assistance to the injured State. If not, or if it did so only implicitly, it should be amended to stipulate that obligation, or at least to state clearly that it could not be disregarded.

16. In paragraph (6) of the commentary to draft article 6<sup>7</sup>—which had become draft article 14—it was stated that the notion of international crime appeared to imply that each individual State had at least an obligation—implying a right—not to act in such a way as to condone such crime. In paragraph (1) of that commentary, it was also stated that mutual assistance between States other than the author State was essential when the fundamental interests of the international community as a whole had been violated. In the commentary to draft article 1, adopted at the previous session,<sup>8</sup> the Commission gave an indication of the legal consequences which should be covered, namely new obligations of the author State and new rights of other States and, in certain cases of internationally wrongful acts, the obligation to react to the act in question. In short, regardless of its shortcomings, draft article 14 made it clear that an international crime had consequences for all States and created individual and collective obligations for them. Unfortunately, the draft article contained a paragraph—paragraph 2—which weakened considerably the obligations provided for, given the weakness of the collective security system to which it referred. He wondered, moreover, whether that paragraph did not duplicate draft article 4, in which case it should be deleted.

17. It was well known that the rules concerning the individual and collective performance by States of their peace-keeping and international security obligations were ineffectual. However, there was nothing in the Charter of the United Nations to prevent States from applying other rules to achieve the same end. There was no provision of the Charter which conferred the right or imposed the obligation on States, particularly States which assumed a special responsibility in that regard, to refuse or withhold assistance to a State or group of individuals who were the victims of international crimes threatening them with total and imminent destruction. Nothing in the Charter prohibited the use of elementary intervention procedures to safeguard human life, such as so-called humanitarian intervention whereby States exerted pressure on another State to induce it to discontinue arbitrary practices in respect of individuals under its control. Although the procedure itself was not ideal, it was nevertheless praiseworthy, in view of the disturbing apathy of the international community towards the crimes against the peace and security of mankind committed with impunity in some areas of the world. In the autumn of 1983, the Secretary-General of the United Na-

tions had declared himself to be deeply saddened by the failure of the Security Council to adopt a resolution designed to put an end to a tragedy comprising a series of atrocities. The question of Lebanon constituted a classic example of attempts—futile, of course—in the form of a series of concerted criminal plans, to destroy one of the most developed and democratic of States, as such, without provoking the international co-operation which could resolve the issue. The argument put to the Security Council had been that the situation was one of civil war and therefore did not fall within the competence of the Council. Never had a situation of that type been so misrepresented or been made so deliberately confused in order to conceal the legal consequences which it should entail.

18. Legally, the Security Council, and even the General Assembly, were invested with powers which made them responsible in the event of any threat to collective security, wherever it occurred. Any dispute or situation of internal order—in many cases with international repercussions—likely to jeopardize peace indisputably fell within their competence. The prerogatives of the Security Council were unlimited. It could and must preserve peace against all possible threats by taking measures ranging from a simple recommendation to effective action. Any challenge to its competence in such matters was entirely without legal foundation. The Security Council could be involved in any situation regardless of whether it represented a threat to international peace, since the Charter empowered it to be the first and final judge as to its own competence.

19. The situation in Lebanon could in no way be compared to a civil war. The Lebanese Government controlled only 10 to 20 per cent of the national territory, the remainder of which was under the active control of foreign armed forces, whose influence was felt heavily in that portion of that territory not under their political control. In addition, Lebanon, which was a small country, was not privileged as far as resources were concerned. In recent years, it had been the scene of thousands of explosions, the combined force of which was thought to be equal to that of the atomic bomb dropped on Hiroshima in 1945. The war had produced the most formidable concentration of warships off the coast of Lebanon since the Second World War.

20. In any internal conflict, the parties to the conflict all pursued a legitimate end, namely the general interest of the country (whatever their respective conceptions of that interest might be). They never deliberately set out to destroy the country. Lebanon, however, had been under that constant threat for 10 years. Nevertheless, sooner or later it would succeed in extricating itself from its predicament, as the United Kingdom had done in the Nazi era. The situation in Lebanon was distressing and shocking given the gravity of the international crimes perpetrated there, in full view of a frequently indifferent and unconcerned international community; for neither the United Nations, nor States individually or collectively, had reacted or been able to react effectively. Initiatives for collective reaction had simply served to touch off the powder-keg. In addition to that already

<sup>6</sup> *Yearbook ... 1982*, vol. I, p. 207, 1732nd meeting, para. 9.

<sup>7</sup> See 1865th meeting, footnote 11.

<sup>8</sup> See footnote 4 above.

dangerous situation for Lebanon and the region, another situation had developed which was even more dangerous, by virtue of its potentially world-wide implications. Never had the existing collective security system proved to be so ineffectual. The reason was that it was defective. For their part, States reacted, or decided to react, only when prompted by their own interests; hence the importance of clear rules for the organization of solidarity, such as those envisaged in draft article 14.

21. The fact that draft article 14 was devoted to international crime in general and draft article 15 to the crime of aggression could give the impression that different rules applied in each case. There appeared to be only two reasons for adopting that approach. First, the crime of aggression would be at the top of the hierarchy of the most serious international crimes; secondly, it would be governed by the Charter of the United Nations, or by other texts deriving therefrom. But those reasons were not valid, since an international crime other than the crime of aggression—a crime against humanity such as genocide, for example—could assume a much more serious character than an act of aggression, such as the dispatch of an armed group by one State into the territory of another State. Moreover, an international crime other than the crime of aggression could jeopardize international peace and security, thereby bringing the Charter of the United Nations into operation.

22. The sole purpose of draft article 15 was undoubtedly to specify the legal consequences of an act of aggression. For the reasons given in his fourth report (A/CN.4/366 and Add.1), the Special Rapporteur had not intended, at the time of drafting the report, to deal with the legal consequences of aggression in the draft articles. As the Special Rapporteur stated in his fifth report (A/CN.4/380, para. 6), it was because “the majority of the Commission apparently is of the opinion that aggression and self-defence are matters falling within the scope of the topic of State responsibility” that draft article 15 had been prepared. In his own view, that article did not meet the concerns expressed in the Commission and served no purpose whatsoever. The victims of an act of aggression would certainly not be better protected by such a text than they currently were by their accession to the Charter. When the Commission had considered draft article 6 as submitted by the Special Rapporteur in his third report, he had wondered why that article made no mention of the

... most basic, important and natural ... consequence of an international crime such as an act of aggression, namely the universally recognized natural right of self-defence ...<sup>9</sup>

He was still puzzled by that question and wondered whether it would not be possible to include, at least in the commentary to article 15, a list of examples of rights and obligations arising out of a crime of aggression in accordance with the Charter of the United Nations and texts deriving therefrom, such as relevant Security Council resolutions.

23. Mr. McCaffrey said that, as explained by the

Special Rapporteur, draft articles 5 to 9 could be divided into four “chapters”: article 5 defining the “injured State”; articles 6 and 7 dealing with reparation; article 8 on reciprocity; and article 9 dealing with reprisals. In his fourth report, the Special Rapporteur had outlined the new rights and obligations of the injured State as follows:

... (a) to claim reparation; (b) to suspend the performance of its obligation towards the author State, which corresponds to or is directly connected with the obligation breached; (c) after exhaustion of the international legal remedies available, to suspend, by way of reprisal, the performance of its other obligations towards the author State ... (A/CN.4/366 and Add.1, para. 123.)

The Commission should concentrate its energies on completing the articles relating to those most fundamental and well-accepted principles, which constituted the heart of part 2 of the draft on State responsibility. The more complex the draft became and the more it attempted to create different kinds of responsibility, the more the Commission’s work would be delayed by the uncertainties involved. The Commission should focus its attention on its traditional task of distilling, from the practice of States and from generally accepted principles, a set of draft articles which would strengthen the law of State responsibility; the introduction of novel concepts would simply dilute it.

24. Referring to draft article 5, which defined the term “injured State”, he noted that, in his fourth report, the Special Rapporteur had stated:

... In the long run every State has an interest in the observance of any rule of international law, including the rule of *pacta sunt servanda*. But this by no means authorizes—let alone obliges—every State to demand the performance by every other State of its international obligations, let alone to take countermeasures in case of non-performance of those obligations. ... (*Ibid.*, para. 113.)

The question accordingly arose of how to devise a workable and reasonably restricted definition of the “injured State”. In his fourth report, the Special Rapporteur had suggested the following definition:

The injured State is: (a) the State whose right under a customary rule of international law is infringed by the breach; or (b) if the breach is a breach of an obligation imposed by a treaty, the State party to that treaty, if it is established that the obligation was stipulated in its favour; or (c) if the breach is a breach of an obligation under a judgment or other binding decision in settlement of a dispute by an international institution, the State party to the dispute. ... (*Ibid.*, para. 123.)

The enumeration in draft article 5, however, appeared to go considerably beyond that definition.

25. The significance of the definition of the injured State was that it determined which States were entitled to the remedies set out in articles 6 to 9. In that connection, it was instructive to refer once again to the Special Rapporteur’s fourth report, in which it was stated:

... The main rule seems to be that only the State whose sovereign right under general international law has been infringed, or which is a party to a treaty stipulating in its favour the obligation breached, is entitled to claim reparation, to invoke reciprocity, to suspend active governmental co-operation or to take reprisals. (*Ibid.*, para. 114, *in fine.*)

The Special Rapporteur had gone on immediately to state:

<sup>9</sup> *Yearbook ... 1982*, vol. I, p. 207, 1732nd meeting, para. 10.

Exceptions to this main rule are implied by the United Nations Charter, by the notion of international crimes and by other objective régimes. Indeed, it is precisely because, within such an objective régime, i.e. in respect of the obligations flowing from that régime, a breach cannot be adequately redressed by the bilateral means just mentioned, that collective measures are required for its enforcement ... (*Ibid.*, para. 115.)

26. It had by now become clear that the main rule was going to give rise to fewer problems than the exceptions. Thus he himself had less difficulty with those provisions of draft article 5 which fell within the main rule—namely subparagraphs (a), (b), (c) and (d) (i) and (ii)—than with the exceptions to be found in subparagraph (d) (iii) and (iv) and subparagraph (e).

27. With regard to subparagraph (a), he doubted the wisdom of combining the question of the third State with a provision relating to customary rules of international law. If a provision on the third State was to be included at all, it should be combined with those on bilateral and multilateral treaties. Such a provision might not be necessary, however, since the matter was already covered by article 36 (Treaties providing for rights for third States) of the Vienna Convention on the Law of Treaties, which probably reflected a generally accepted rule of customary international law.

28. With regard to subparagraph (b) and the suggestion by some writers that the obligation to comply with a judgment of the ICJ constituted an obligation *erga omnes*, he agreed with the Special Rapporteur (1858th meeting) that that proposition was not true of all judgments. Everything depended on the nature and the subject-matter of the dispute and on the form of the judgment. The rule contained in subparagraph (b) accordingly represented the only sound position. Any interest of States not parties to the dispute must arise by virtue of some independent principle contained in draft article 5. He had no difficulty with subparagraphs (c) or (d) (i) and (ii), although he recognized that, as indicated by the Special Rapporteur, it was often difficult in practice to determine whether a given obligation was “stipulated in favour” of a particular State. With respect to subparagraph (d) (iii) and (iv), however, he shared the doubts expressed by Sir Ian Sinclair (1865th meeting) as to whether all the parties to a multilateral treaty could really be said to be equally affected by a breach of that treaty. In most instances, that would actually not be the case; accordingly, not all the States parties should have the right to invoke the remedies set forth in draft articles 6, 8 and 9. The difficulty might perhaps be overcome by defining precisely what was meant by the “collective interests of the States parties”, so that the operation of the provision in subparagraph (d) (iii) would be limited to cases in which all the parties to the multilateral treaty really did suffer direct and identifiable injury because of the breach.

29. An even greater difficulty arose in connection with subparagraph (e), probably due to the novelty and vague nature of the concept of an international crime committed by a State. The attempt to engraft on the generally accepted principles of State responsibility the novel con-

cept of the international criminal responsibility of the State was bound to delay progress on the topic, and could ultimately result in its demise.

30. Although he had grave doubts regarding the existence of an international criminal responsibility of States and would reserve his position on the question, he would examine the effect of the relevant provisions in part 1 in conjunction with the articles proposed by the Special Rapporteur for part 2. Under article 19 of part 1 of the draft, an international crime, by definition, affected the interests of the international community as a whole. It would therefore seem to be for the international community to define what constituted international crimes and possibly even to determine whether, in a particular case, such a crime had been committed. As Mr. Ogiso had rightly pointed out, in practice it was difficult to determine whether an internationally wrongful act had been committed, let alone an international crime. Without part 3 of the draft for the determination of crimes, parts 1 and 2 would be of little practical value and might even exacerbate international tensions.

31. The same point could be made with regard to other draft articles, such as article 13; it would be difficult to get States to agree on what acts constituted “manifest” violations of treaty obligations which destroyed the “object and purpose of that treaty as a whole”. The provisions of draft article 13 constituted an accurate statement of the law but were of doubtful practical utility, in that they could provide a pretext for bypassing the moderating procedures of draft articles 10 and 11.

32. In his fourth report (A/CN.4/366 and Add.1, para. 59), the Special Rapporteur had drawn attention to a common element of international crimes in that they constituted offences *erga omnes*. It would therefore seem that, under draft article 14, every State individually had the right to demand relief under draft articles 6, 8 and 9. The Special Rapporteur had, however, indicated another common element of those crimes, namely “that the organized international community, i.e. the United Nations, has jurisdiction over the situation” (*ibid.*, para. 60). It was therefore not possible for each individual State to take action, unless specifically authorized to do so by the United Nations. Indeed, the Special Rapporteur had stated:

... As remarked above, it would hardly seem likely that States would accept the international crime régime and the *jus cogens* régime as objective régimes, in the sense used in the present report, without collective machinery for the implementation of those régimes, including machinery for the compulsory settlement of disputes. ... (*Ibid.*, para. 116.)

That proposition was unassailable. It suggested that international crimes constituted internationally wrongful acts to which States could react collectively, but not individually. Accordingly, in draft article 14, paragraph 2, the words “every other State” should be replaced by “all other States”.

33. The main problem, however, was that the proposed draft articles did not make sufficiently clear provision for collective machinery for the implementation of the provisions relating to international crimes. Draft article

14, and especially its paragraph 3, made the right of the injured State—as well as the rights of all other States—subject only to the provisions of the United Nations Charter relating to the maintenance of international peace and security. Nothing was said as to whether the procedures set forth in part 3 had to be utilized to determine whether the act amounted to an international crime. All those critical issues had to be clarified with great precision if the provisions on international crimes were to have any meaning and were to contribute to the maintenance of a minimum world order, instead of providing further excuses for endangering that order.

34. Turning to draft articles 6 to 9, he urged that greater flexibility should be introduced into the provisions of draft article 6, paragraph 2, and draft article 7, relating to the formula for determining the appropriate amount of monetary compensation. He reserved his position with regard to paragraph 1 (b) of draft article 6. Also, he would appreciate further clarification by the Special Rapporteur regarding the authority for that provision and the situations to which it would apply. The same was true with regard to paragraph 1 (d); would the guarantee to be given consist solely of a written commitment or perhaps also of action?

35. He broadly agreed with the principles contained in draft articles 7 to 9, including the negative formulation of the principle of proportionality, for which there was support in case-law, for example the decisions in the *Case concerning the Air Service Agreement* and the *Naulilaa* case, mentioned by the Special Rapporteur in his fourth report (*ibid.*, footnotes 61 and 68).

36. He would revert to the responses permitted by draft articles 6 to 9 when considering the limitations imposed on those responses by draft articles 11 and 12. Lastly, he did not share the Special Rapporteur's conceptual approach to part 2 and did not believe that, with regard to aggression, States other than the aggressor and the victim State had the right to invoke the remedies provided under draft articles 6, 8 and 9.

*The meeting rose at 1.10 p.m.*

## 1867th MEETING

*Friday, 20 July 1984, at 10 a.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

**State responsibility (concluded) (A/CN.4/366 and Add.1,<sup>1</sup> A/CN.4/380,<sup>2</sup> A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf. Room Doc.5)**

[Agenda item 2]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)*<sup>3</sup> (concluded)**

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR (concluded)

ARTICLES 1 to 16<sup>4</sup> (concluded)

1. Mr. BALANDA said that the Special Rapporteur's presentation of a set of draft articles afforded a better grasp of the matters discussed at previous sessions of the Commission. The fifth report (A/CN.4/380) was not always easy to read, not only because the subject-matter was abstract, but also because the articles were not accompanied by commentaries, thus requiring the reader to refer to other texts. Moreover, the articles should be numbered in sequence throughout the draft.

2. In part 2 of the draft, the Special Rapporteur intended to deal first with internationally wrongful acts in general and then move on to international crimes. While it might appear logical to move from the general to the particular, it was none the less essential to consider international crimes in depth. The matter was not only a delicate one but called for clarification of a number of related issues, such as threats to use force, and more particularly threats to resort to aggression. In the draft Code of Offences against the Peace and Security of Mankind adopted by the Commission in 1954,<sup>5</sup> any threat to resort to an act of aggression was deemed an international crime. Indeed, under that draft code, some preparatory acts such as the preparation of the employment of armed force were considered as actual offences committed against the peace and security of mankind. Again, in the case of self-defence as a response to an act of aggression, it could well be asked whether the use of armed force was absolutely prohibited.

3. The consequences of the various categories of international crimes must be clearly determined. For example, the legal consequences of aggression were not quite the same as those of *apartheid* or genocide, and the Special Rapporteur would not be able to ignore such issues when he came to examine international crimes from the standpoint of article 19 of part 1 of the draft.

4. If an agreement was required for certain acts to be regarded as international crimes, as some members appeared to believe, such crimes could possibly entail con-

<sup>1</sup> Reproduced in *Yearbook ... 1983*, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook ... 1984*, vol. II (Part One).

<sup>3</sup> Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

<sup>4</sup> For the texts, see 1858th meeting, para. 1. For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.

<sup>5</sup> See 1816th meeting, para. 1.

sequences quite different from those proposed by the Special Rapporteur. Some people might question the existence of a universal conscience, but a universal conscience did exist and had emerged more particularly in the world-wide condemnation of the major war criminals prosecuted by the Allies after the Second World War. Nor was there any doubt that a universal conscience had clearly condemned acts of genocide well before the Convention on the Prevention and Punishment of the Crime of Genocide had been adopted in 1948.<sup>6</sup> The Special Rapporteur drew a distinction between agreements creating universal objective régimes and those creating regional objective régimes. If a group concluded an agreement establishing a regional objective régime, a particular act might be considered by the group as an international crime under the agreement, but it would not necessarily be viewed in the same way by the rest of the international community. Hence the *erga omnes* effect which the Special Rapporteur had pin-pointed in international crimes in general, like the obligation to extend co-operation and display solidarity, would not operate. Accordingly, it was essential not to disregard *jus cogens*.

4. In the matter of reprisals, the Special Rapporteur had not established a very clear boundary between reprisals by way of self-defence and reprisals in general. It followed from article 9 that proportionality applied only in the event of reprisals, but it should also apply in the exercise of self-defence. Another question was whether the injured State alone was entitled to resort to reprisals. In that regard, the Special Rapporteur had pointed out that, under an objective régime and as a result of the duty of solidarity, other States could also exercise a number of rights. But was the right to take reprisals a personal right? Did each State participating in an objective régime under a multilateral treaty have an independent right which it alone could exercise, or could the legal entity established by the treaty also exercise the right to take reprisals in the event of an act of aggression against one of the parties? Furthermore, was it not possible to respond to an international crime by resorting to armed reprisals?

6. A number of notions employed by the Special Rapporteur in his various reports called for clarification. In what way were the closely related notions of reprisals, conservatory measures, self-help and reciprocity to be differentiated? In his fourth report (A/CN.4/366 and Add.1, para. 109), the Special Rapporteur had said that, in extreme cases, reciprocity could merge with state of necessity and fundamental change of circumstances. If that was so, it would also be necessary to shed light on the allied notions of reprisals, retortion and self-help. In the same report (*ibid.*, para. 87), the Special Rapporteur had maintained that the use of reprisals always remained under international control. However, it seemed difficult to assert that international control was required in cases other than armed reprisals. As to the protection of human rights in armed conflicts, the Special Rapporteur had averred that, if reprisals were permitted, it was because the State interest involved prevailed over humanitarian considerations (*ibid.*, para. 88); yet the opinion he

expressed subsequently (*ibid.*, para. 89) seemed to contradict that affirmation. In discussing the question of the environment, the Special Rapporteur had referred to the notion of a "shared resource" (*ibid.*, para. 90), which was perfectly acceptable; but for his own part he wondered which State was the injured State in the event of a breach of the rules. Could measures be taken only by the immediately neighbouring States or by any State in the international community? The Special Rapporteur had said that specific reprisals could be excluded even where no extra-State interests were involved, a typical example being that of diplomatic immunities (*ibid.*, para. 91). Personally, he considered, as did Mr. Ushakov and Mr. Reuter (1861st meeting), that reprisals could be taken against members of a diplomatic mission, but that their privileges and immunities must be respected.

7. In the fourth report (A/CN.4/366 and Add.1, para. 100), the Special Rapporteur stated that the presence of a collective interest in objective régimes should imply collective decision-making machinery with regard to reprisals constituting a breach of obligations under that régime. Was it to be inferred that the absence of such machinery would remove the possibility of taking reprisals? Similarly, was there not a contradiction between the Special Rapporteur's opinion concerning the inadmissibility of reprisals constituting a breach of an obligation under an objective régime (*ibid.*, para. 99) and the point of view that reprisals should be the outcome of a collective decision (*ibid.*, para. 100)? In principle, he endorsed the rule set forth by the Special Rapporteur (*ibid.*, para. 103), but considered that it was difficult to apply, for reprisals would not be admissible when the State which intended to take them had other means of performance or peaceful settlement of disputes available to it. That State would have to display great perceptiveness in seeking other peaceful means, but it might well find itself in an emergency situation that called for an immediate reaction.

8. In the case of international crimes, he wondered, with reference to draft article 5, who would be the beneficiary of reparations and whether equivalent reparation was possible. Simply on realistic grounds, he expressed serious doubts about effective application of the duty of solidarity to be observed by the members of the international community. *Apartheid* had already been declared an international crime, but true solidarity on the part of the whole of the international community, even in the context of the United Nations, was difficult to conceive. Hence the practical utility of the duty of solidarity laid down in the draft was questionable.

9. In draft article 1, the words "committed by" should be replaced by "attributable to", for a State which committed an internationally wrongful act might well have been manipulated; in that case, it was the instigator that should be held responsible, not the State which had seemingly engaged in the wrongful act. Moreover, before trying to specify in draft article 5 which State was the injured State, it would be better to identify the author State, something that did not seem to have been done in the Commission's previous work. Generally speaking, article 5 could be condensed. Rather than consider each

<sup>6</sup> United Nations, *Treaty Series*, vol. 78, p. 277.

and every instance in which a State was deemed to be injured, at the risk of overlooking some possibilities, the Commission could define the injured State as the State which had suffered material or moral prejudice as a result of an internationally wrongful act attributable to another State. As to article 5 (a), relating to an infringement of a State's right, it could also be said that an infringement of a State's interest made that State an injured State.

10. Similarly, draft article 6 could be made shorter, the essential point being to ensure the possibility of demanding reparation, which could take various forms. Paragraph 1 (a) could be confined to nothing more than "discontinue the act". Paragraph 1 (b) did not seem to be particularly justified; and paragraph 1 (d) was difficult to apply, since it could well lead to mere declarations of intent. The conditional form had no place in paragraph 2, the latter part of which should read: "to the value of the cost of restoring the earlier situation". Draft article 7 was not warranted and, in that regard, he endorsed the views expressed by Mr. Quentin-Baxter (1865th meeting).

11. The only difference between draft articles 8 and 9 seemed to be that the rule of proportionality applied in the case of reprisals but not in that of reciprocity. Throughout the fourth report, and in article 9 in particular, the rule of proportionality was viewed *post factum*; yet if it was to be effective, and if States were to measure the right amount of reaction on their part, the rule should be applied beforehand, something which would not fail to raise difficulties.

12. Another point was whether the rule laid down in draft article 10, paragraph 1, would apply in all circumstances, even in instances in which a State had been the victim of an international crime and regardless of the nature of the internationally wrongful act. In the case of interim measures of protection, referred to in paragraph 2 (a), he wondered whether a State could itself take such measures or whether they should not be left to the competence of an international tribunal. The injured State would then take measures of self-help.

13. Draft article 12 (a) seemed too restrictive and the reference to immunities should be replaced by a reference to "protection", a term which covered both the immunities and the privileges enjoyed by diplomatic and consular personnel. Furthermore, the article should be extended to cover the personnel of special missions.

14. In the French text of draft article 14, paragraph 1, the words *ressortant des règles* should be replaced by *ressortissant aux règles*. The main question in connection with draft article 15 was that of assimilating a threat to use armed force to an actual act of aggression. Indeed, the Special Rapporteur appeared to accord special status to aggression. Despite the importance of that crime, it should be regarded as being covered by article 5 (e).

15. Mr. LACLETA MUÑOZ, confining his remarks to draft articles 5 and 9, said that the term *delito* ("crime") in the Spanish text of article 5 (e) and articles 14 and 15 was not only a problem of translation, but a conceptual problem which had already been resolved by the Com-

mission when it had prepared article 19 of part 1 of the draft. In article 19, the Commission had drawn a distinction between the notions of *delito* ("delict") and *crimen* ("crime"): hence those terms should be used in a consistent fashion. Since Spanish law did not normally distinguish between *crimen* and *delito* but between *delito* and *falta*, the stronger of those terms, namely *delito*, had been used in the Spanish text of the present set of articles. But it was not in keeping with the terminology used by the Commission and should be replaced by *crimen*.

16. If part 2 was to be consistent with part 1 of the draft, the consequences of the distinction made by the Commission should be observed. However, like other members, particularly Mr. McCaffrey (1866th meeting), he had some reservations regarding the concept of an international crime. The fact that the international community qualified certain international acts as international crimes, that it was seeking to draft a code on some of them and that it was endeavouring to determine the legal consequences of such crimes signified progress only if machinery for collective action was available. It was essential to ensure that it was not the injured State alone that determined whether an international crime had been committed and who was responsible. In that regard, part 3 of the draft would be of the utmost importance. Since the Second World War, the international community had made great headway in codifying and developing international law, but not in applying it, despite Article 33 of the Charter of the United Nations.

17. Draft article 5 (a) caused no difficulty, except for the comments regarding "a right arising from a treaty provision for a third State", but the reference to "State party" in subparagraph (d) did raise a problem. Did it cover one State party or all the States parties? Subparagraph (d) (i) obviously related to one State party, but it might be necessary to specify that the subsequent cases involved a State party directly affected by the breach of an obligation imposed by a multilateral treaty. When the internationally wrongful act affected the collective interests of all the States parties, the response should be collective. Moreover, the article should indicate what those collective interests were.

18. Draft article 6, as a whole, related to the options available to the injured State, but paragraph 1 (b), which dealt with the exhaustion of internal remedies, was not entirely satisfactory. That provision should be drafted very precisely, for it had already been maintained on one occasion, as a result of an attack against an embassy, that the requirement of the exhaustion of internal remedies had to be fulfilled. Indeed, paragraph 1 (b) would be better placed in article 7. The terms of paragraph 2 of draft article 6 should be more flexible.

19. Draft articles 7 to 9 posed little difficulty. The Special Rapporteur drew a useful distinction between reciprocity and reprisals, but the idea of the injured State suspending the performance of some of its obligations might give rise to erroneous interpretations. The Special Rapporteur had sought to indicate that, where the injured State suspended performance of its obligations by way of reciprocity, it was committing a wrongful act for

which it was responsible, but that the act must be in keeping with the obligation breached; a requirement of that kind was not demanded where the injured State took the same measure by way of reprisals. That distinction should be brought out even further.

20. Mr. RIPHAGEN (Special Rapporteur), summing up the discussion, said it had shown that the general structure of the draft was broadly acceptable to the Commission. With regard to the sequence of the articles, some members had suggested that the draft should commence with the provision dealing with the legal consequences of international crimes. Of course, any sequence was technically possible, and the problem was simply one of drafting. His own feeling, however, was that it was preferable to retain the present order once the idea was accepted that an international crime entailed all the consequences of an internationally wrongful act and also certain additional consequences.

21. A number of speakers, including Mr. McCaffrey (1866th meeting) and Mr. Laclea Muñoz, had suggested that the topic should be confined to the traditional rules of State responsibility, whereas others had been in favour of dealing with the subjects of international crimes and *jus cogens*. In addition, the idea had been advanced of devoting a special chapter to international crimes, together with a “self-contained régime” for such crimes. It seemed more suitable to deal with that matter at a later stage. Moreover, a self-contained régime would be more appropriate in the case of consequences not only additional to, but also lesser than those of the normal régime of State responsibility.

22. At the present stage, he could only say that some reparation was obviously required for the State directly victim of an international crime. Articles 6, 8 and 9 would then apply, as in the case of any other internationally wrongful act, but certainly no one would suggest that damages should be paid to each and every State.

23. If article 19 of part 1 of the draft was taken as the starting-point, then under that article itself the issue involved was the protection of the fundamental interests of the international community as a whole. On that basis, all States were affected by the international crime, but that did not necessarily mean that all States were injured to the same extent. Article 5 had to be taken as a whole and it was necessary to bear in mind that the State whose rights had been infringed was already covered by subparagraph (a) as the direct victim State. Subparagraph (e) merely said that, by definition, all States were affected by an international crime, and the consequences of the crime were dealt with in articles 14 and 15, both of which made reference to certain collective procedures which had to be followed.

24. Again, with regard to the structure of the draft, some members had stressed the importance of taking into account the contents of part 3 before arriving at a decision on part 2. Mr. Ogiso (*ibid.*) had pointed out that part 3 would indicate how to establish legally what constituted an internationally wrongful act, an international crime and an injured State. In his own fourth report (A/CN.4/366 and Add.1, para. 45) he had suggested

that the Commission should give consideration to part 3 in order to ascertain the consequences not only of part 2 but also of part 1. However, the majority view had been that the Commission should refrain from embarking on a consideration of part 3 until it had dealt with part 2. If part 2 remained in its present form, it would be left to the injured State, at least in the first instance, to establish whether an internationally wrongful act had been committed. The Commission could, of course, deal with part 2 without part 3, yet it was clear that many States would be reluctant to accept part 2 by itself.

25. Attention should be drawn to the provisions of article 10 on the need to exhaust international procedures for peaceful settlement. That requirement was laid down only with respect to reprisals, which were governed by article 9, but it presupposed that such procedures were available. In that case, except in the situations governed by article 10, paragraph 2, the injured State could not proceed to take reprisals until it had exhausted the international procedures for peaceful settlement of the dispute.

26. Numerous comments, many of a drafting nature, had been made on article 5. Mr. Balanda and Mr. Ushakov (1861st meeting) had suggested that the concept of “injured State” should be replaced by a more flexible formula, such as: “The State against which the internationally wrongful act has been committed”. A general formula of that kind would be unsuitable because it was too vague and, in view of the great variety of primary rules involved, it would allow too much latitude. The determination of what constituted an “injured State” was essential in order to determine the legal consequences of the international wrongful act. Article 5 was therefore a key article. Most of the criticism had been of subparagraph (e), which related to international crimes but did not preclude application of some of the other subparagraphs. Furthermore, it had to be read in conjunction with articles 14 and 15.

27. Recognition that the fundamental interests of the international community as a whole were at stake, and a desire to act against an international crime, pointed to a clear need for some organization. Hence the reference in articles 14 and 15 to United Nations procedures. Doubts had been expressed about the existence of an international community as a whole, at least as an effective instrument for taking collective action. There was some validity in that point, but it had to be realized that, at the present time, the world must make do with the existing structures, namely the United Nations. The provisions of article 14 did not preclude more effective organization of the international community to deal with international crimes at some time in the future.

28. Article 5 (e), by referring to “all other States” as being injured States in connection with international crimes, did not mean that all those States were injured to the same degree or that each of them could take any action it saw fit. On the contrary, certain collective procedures had to be followed. For that reason, article 15 specifically referred to the rights and obligations arising from the United Nations Charter, a reference that obviously included Article 51 of the Charter, which spoke

of "the inherent right of individual or collective self-defence if an armed attack occurs". Article 51 of the Charter recognized, in the case of an armed attack by one State against another, not only the right of individual self-defence, but also that of collective self-defence—without specifying how the collective right was to be exercised. Perhaps at some stage thought would have to be given to the possibility of establishing distinctions between all those "other States" according to their relations *inter se*. On the basis of article 19 of part 1 of the draft, however, it was not yet possible to draw any such distinctions. Article 19 classified the degrees of internationally wrongful acts by speaking of "serious breaches" and "essential obligations", something that would have to be taken into account in dealing with the consequences of internationally wrongful acts within the meaning of article 19.

29. Criticism had been levelled at the reference in article 5 (a) to a right arising from a treaty provision for a third State. He had no strong feelings in that regard; the right in question did not, of course, necessarily arise for the third State from a customary rule of international law. Mr. Reuter (1861st meeting) had mentioned article 36 of the Vienna Convention on the Law of Treaties, which referred to a right for a third State arising from a provision of a treaty which accorded that right either to the third State itself or "to a group of States to which it belongs". In the latter case, however, the provision would still give rise to a right for the individual third State, and not for the group of States as such. Mr. Balanda had suggested that reference should be made in article 5 (a) not only to the rights, but also to the interests of the injured State. For his own part, he would question the wisdom of adding the expression "interests", which was an extremely vague term.

30. Greater difficulties had been raised in regard to article 5 (d), but most of them could be dealt with by the Drafting Committee. Mr. Lacleta Muñoz had asked whether the term "a State party", in subparagraph (d), in fact meant "any" State party. In that context, the term "a State party" should be retained if subparagraph (d) (i) to (iv) were retained, because the distinction between a particular State party and all the States parties to the multilateral treaty was significant. Subparagraph (d) (i) had been criticized as being somewhat vague. Subparagraph (d) (ii) had been taken from the Vienna Convention on the Law of Treaties; it referred to a factual situation, namely the fact that a breach of an obligation by one State necessarily affected the exercise of the rights and obligations of the other States parties. In the matter of "collective interests", referred to in subparagraph (d) (iii), it was difficult to determine whether a particular State was injured by the breach. Accordingly, all the States parties were mentioned as injured States. With regard to subparagraph (d) (iv), dealing with the protection of individual persons, it had been suggested that specific mention should be made of human rights. However, human rights were not all alike, for some were of such a fundamental character that they could in no circumstances be violated, whereas others could sometimes be placed under restrictions. If the point at issue involved a fundamental human right for everybody regard-

less of nationality, the injured State could not be determined on the basis of nationality. All other States parties to the treaty therefore had to deal with the matter. Sir Ian Sinclair (1865th meeting) had referred to the special régimes on human rights, but that question was covered by the saving clause in article 2.

31. Article 6, dealing with reparation, had been said to be too detailed, but it was useful to enumerate the matters covered by the notion of reparation. With regard to paragraph 1, he stressed that discontinuance of the wrongful act, referred to in subparagraph (a), was not the same as the re-establishment of the pre-existing situation, mentioned in subparagraph (c). Paragraph 1 (b) had given rise to much comment, more particularly on its alleged relationship with article 22 of part 1 of the draft, dealing with the exhaustion of local remedies by an alien. In actual fact, there was no connection whatsoever between the two provisions and he suggested that it might be better to alter the wording of subparagraph (b) so as to speak of the application of "measures", instead of "remedies", of internal law that the injured State could demand. For example, if an embassy was attacked, the injured State could ask the receiving State to apprehend and try the culprits. Paragraph 1 (d) had led to discussion of what constituted "appropriate guarantees" against repetition of the wrongful act. Mr. Reuter (1861st meeting) had given a good example: if a country had enacted legislation which gave rise to an internationally wrongful act, an injured State would request modification of that legislation, so as to rule out the possibility of recurrence of the act.

32. Regarding article 7, some members might take the view that there was no difference between an internationally wrongful act in the treatment of aliens and other internationally wrongful acts, and that in both cases there should be *restitutio in integrum*. For his part, he did not believe that was the present state of international law. Mr. Quentin-Baxter (1865th meeting) had also suggested deletion of the article because it was too specialized. Personally, he would like to see the matter discussed further.

33. In connection with articles 8 and 9, the question had been raised of the difference between reciprocity and reprisals. He had formulated article 8 on reciprocity in terms that were as narrow as possible, precisely because it did not have the same safeguards as reprisals. Reciprocity meant action consisting of non-performance by the injured State of obligations under the same rule as that breached by the internationally wrongful act, or a rule directly connected therewith. Reciprocity could be invoked at any time and without any limitation. Article 9 related to reprisals, taken in the narrow sense of a measure intended to bring pressure to bear on the other State in order to make it fulfil its obligations. Reprisals had to be applied subject to the rule of proportionality. Mr. Balanda had asked why the rule of proportionality should not apply to reciprocity as well. Actually, the element of proportionality was implicit in the concept of reciprocity and there was no need for a provision against manifest disproportionality in article 8. Mr. Ni (*ibid.*) had inquired whether article 9 excluded article 8. As Spe-

cial Rapporteur, he had endeavoured to draw a distinction between reciprocity and reprisal. Measures of reciprocity were subject to exceptions, but article 9 dealt with obligations other than reciprocal obligations and provided for a special régime.

34. He agreed that the term “interim measures of protection”, in article 10, paragraph 2 (a), could give rise to misunderstanding. Some other term could, however, easily be found. The point was that, in the circumstances envisaged, a State could not wait until a judgment or order had been delivered under the relevant international procedure for peaceful settlement of the dispute and it therefore had to take what was, literally, an interim measure of protection. The intent of the provision was clear from the proviso, which read “until a competent international court or tribunal ... has decided on the admissibility of such interim measures of protection”. It had also been suggested that article 10 should not apply in the case of reciprocity. If reciprocity and reprisal were sharply differentiated, it seemed that reciprocity could be applied even in the absence of a decision by an international court or tribunal. Reciprocity was an immediate reaction of a limited kind, whereas reprisal sought to influence the attitude of the State that had committed the internationally wrongful act by means of a measure that would otherwise itself be an internationally wrongful act.

35. Reference had been made to the relationship between article 11 and the Vienna Convention on the Law of Treaties. In fact, two different points were involved. Whereas the Vienna Convention dealt with the life of the treaty as such and with treaty obligations proper, the draft dealt with the performance of such obligations. That was why it was not possible to follow exactly the same formula as that contained in the Vienna Convention. Also, as Mr. Ogiso (1866th meeting) had rightly pointed out in connection with article 11, paragraph 2, the Vienna Convention provided for a special procedure. Accordingly, where there was a procedure of collective decisions for the purpose of enforcement of the obligations, as provided for under article 11, that procedure should be followed first. In the same context, it should not be forgotten that the Vienna Convention, when dealing with *exceptio non adimpleti contractus*, referred to a material breach, which had been defined very narrowly. It was indeed for that reason that the draft mentioned the legal consequences of an internationally wrongful act. Thus a State had to react to an internationally wrongful act, including non-fulfilment of an obligation under a treaty, even if a material breach, in the very narrow sense of the Vienna Convention, was not involved. It was necessary to be quite clear that, no matter how article 11 was formulated, the two situations were not the same.

36. Article 12 (a) had been the subject of some criticism, and some members took the view that, in the field of diplomatic law as well, measures of reciprocity and even reprisals were possible, provided some matters were left intact. That was why the article spoke of the “immunities to be accorded”, signifying the minimum immunities that could not be infringed even by way of reciprocity. That, at any rate, was how he interpreted the

relevant judgment of the ICJ. It was also why he had not mentioned facilities, which were, after all, the support that the receiving State gave to the sending State. Nevertheless, the exact wording of subparagraph (a) could be reconsidered by the Drafting Committee.

37. He agreed that the term “a peremptory norm of general international law”, in article 12 (b), was a little vague. It had been introduced in the Vienna Convention on the Law of Treaties and the same kind of definition as the one contained in the Vienna Convention could perhaps be incorporated in the draft. It was not possible, however, simply to disregard peremptory norms of general international law.

38. Article 13, again, was not formulated in the same way as the relevant provisions of the Vienna Convention on the Law of Treaties. What he had in mind were cases of manifest violation of a treaty which were not just contrary to the treaty but destroyed its whole object and purpose. In the event of such a grave occurrence, the whole system provided for under the treaty would collapse and it would not be possible to adopt the limitations provided for under earlier articles. Once again, fundamental human rights had to be taken into account in much the same way as in the Vienna Convention, although the Convention did so by means of a formula which had in mind the norms of law more than fundamental human rights themselves. In that context, it must be realized that real fundamental rights could not be infringed even as a measure of reprisal and even in the case of a manifest violation of a treaty.

39. The question of who would decide whether a manifest violation had occurred would be dealt with in part 3 of the draft. It had been suggested that, in the event of a manifest violation within the meaning of article 13, the available international procedure for peaceful settlement of the dispute should none the less be followed. He wondered, however, whether the victim State or States could wait for the lengthy procedures that international settlement of disputes inevitably entailed.

40. One question had been about the necessity for two separate articles, namely articles 14 and 15, on international crime and acts of aggression. In the first place, an international crime, which included an act of aggression, was in itself an internationally wrongful act and, as such, had been dealt with in existing treaties, and in particular in the Charter of the United Nations. Whether or not the system of the Charter was considered to be efficient, the draft was bound to make reference to it. Secondly, in the case of aggression, a right of self-defence existed and was recognized by all. As pointed out in the commentary to part 1 of the draft, in the case of self-defence against aggression, the question of proportionality should not be unduly emphasized.<sup>7</sup> It would be difficult, for instance, to apply the principle of proportionality in a grave case of aggression against the territorial integrity of another State. When it came to the other international crimes, however, self-defence, in the strict sense of the term, would not generally seem to be applicable. In his view,

<sup>7</sup> *Yearbook ... 1980*, vol. II (Part One), p. 69, document A/CN.4/318/Add.5-7, para. 121.

therefore, there was every reason to treat international crimes and acts of aggression in separate articles. Mr. Balanda had suggested that the provision in regard to aggression should be amplified, in particular by a reference to a threat of the use of force or to preparatory acts. That, however, would be entering further into the realm of primary rules than was strictly necessary for the topic. Moreover, the Definition of Aggression was fairly explicit and he did not think that the Commission could go much beyond that.

41. Mr. Balanda had also mentioned the possibility of regional systems of *jus cogens* or regional law on international crimes. Special régimes would be allowed under article 2, but he did not think such a course would be possible in the case of international crimes, within the meaning of article 19 of part 1 of the draft, which would appear to refer only to universal régimes.

42. The possibility of fuller, or alternative, wording for article 14, paragraph 3, had been suggested and it was, of course, a matter for discussion. However, reference by analogy was being made to the United Nations Charter procedures. It was perhaps going too far at the current stage in international relations, but he would point out that article 14, paragraph 1, which spoke of the "applicable rules accepted by the international community as a whole", was to be viewed as a window on the future development of the international community as a whole.

43. It had been affirmed that article 16 was not exhaustive but, in his view, it could not be anything but exhaustive; otherwise, the other articles would make no sense. The intention was that article 16 should exclude from the draft a number of questions not directly related to the rights and obligations of States *inter se*, as well as some questions which it would be better to leave to other bodies to develop.

44. Mr. Balanda's remark regarding article 1 should be dealt with on second reading, since that article had already been provisionally adopted by the Commission. The same was true of articles 27 and 28 of part 1 of the draft. He had not perhaps responded to all the questions raised, but assured members that he would endeavour to reflect in the relevant part of the Commission's report all the views expressed during the debate.

45. Mr. REUTER said he would like to know whether the Special Rapporteur wished to refer the draft articles to the Drafting Committee and would also like to learn the views of other members of the Commission in that regard.

46. Mr. USHAKOV said that, in principle, he was not opposed to referral to the Drafting Committee of the articles which had been discussed. In the present instance, however, not all members had spoken on the draft articles, or some members, like himself, had commented on only some of them because of lack of time. Moreover, the Special Rapporteur might like to modify the articles in his next report so as to take account of the views expressed during the debate. For that reason, it might be useful to revert to consideration of the draft articles at the following session, before referring them to the Drafting Committee.

47. Mr. LACLETA MUÑOZ, supported by Mr. McCAFFREY, suggested that the Commission should refer to the Drafting Committee only articles 5 to 9, for they were the ones on which most of the comments had been made.

48. Mr. THIAM said that the discussion had obviously not come to an end, since a number of members, in a spirit of co-operation, had not spoken on the topic. He would have some reservations about referring the draft articles to the Drafting Committee, for he wished to express his views on some of them.

49. Mr. MAHIOU said he shared the view of Mr. Thiam, since he too had not taken part in the discussion, first because he had not wished to delay the Commission's work still more, and secondly because his duties in the Drafting Committee had prevented him from examining them in detail. If the articles were to be referred to the Drafting Committee, he would reserve the right to comment on them at the following session.

50. Mr. FRANCIS, supported by Sir Ian SINCLAIR and Mr. OGISO, suggested that articles 5 and 6, at least, should be referred to the Drafting Committee.

51. Mr. QUENTIN-BAXTER said that he could agree to that suggestion, on the understanding that the topic of State responsibility would be the first item taken up at the next session.

52. Mr. RIPHAGEN (Special Rapporteur) said he believed the correct course would be to refer articles 5 and 6 to the Drafting Committee, but any member who had not had an opportunity to speak on them would be able to do so at the next session.

53. The CHAIRMAN suggested, in the light of the comments made, that the Commission should refer articles 5 and 6 to the Drafting Committee, on the understanding that at its thirty-seventh session the topic of State responsibility would be taken up at an early stage and that comments on articles 5 and 6 would be allowed.

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 1868th MEETING

*Friday, 20 July 1984, at 3.30 p.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Korama, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitul, Mr. Ushakov.

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**Jurisdictional immunities of States and their property**  
(continued) \* (A/CN.4/L.379)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY  
THE DRAFTING COMMITTEE

ARTICLES 13, 14 and 16

1. Mr. MAHIU (Chairman of the Drafting Committee) said that, before introducing the draft articles on jurisdictional immunities of States and their property recommended by the Drafting Committee to the Commission for provisional adoption (A/CN.4/L.379), he wished to indicate briefly the status of the Committee's work on the draft articles referred to it on various topics.

2. The workload of the Drafting Committee had been particularly heavy at the preceding sessions of the Commission, and owing to lack of time it had been unable to consider, at a given session, all the draft articles referred to it. Of the 27 draft articles before it at the current session on the topic of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, it still had eight to consider. It had considered all five draft articles referred to it on the topic of jurisdictional immunities of States and their property, although it had left aside some of them, including articles 6 and 11, which were to be taken up at the appropriate time, after consideration of part III of the draft articles had been completed.

3. The Drafting Committee had been unable to consider the nine draft articles on the law of the non-navigational uses of international watercourses which had been referred to it only recently. The draft articles on the topic of State responsibility left pending in the Committee at the previous session of the Commission had been withdrawn by the Special Rapporteur and two of the new draft articles submitted by him in his fifth report (A/CN.4/380) had been referred to the Drafting Committee at the 1867th meeting.

4. Thus the Drafting Committee, which had taken the unprecedented step of holding its first meeting during the first week of the current session, had held a total of 28 meetings, at which it had considered 24 draft articles on two topics. It still had before it 19 draft articles; eight on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, nine on the law of the non-navigational uses of international watercourses and two on State responsibility.

5. With regard to the draft articles on jurisdictional immunities of States and their property, he wished to thank the Special Rapporteur and all members of the Drafting Committee for their tireless efforts in the consideration of the topic. The Special Rapporteur had again displayed remarkable ingenuity by continuously providing the Committee with new texts, revised to take account of the preoccupations expressed by members of the Commission or the Committee itself.

6. In all five draft articles which it had considered, namely articles 13, 14, 16, 17 and 18, the Drafting Committee had included the introductory phrase "unless otherwise agreed between the States concerned", as an indication of the residual nature of the various rules set forth. However, the Committee recommended that, on second reading, the Commission should consider whether a more general, separate provision should be prepared to avoid repetition of the phrase in the various articles.

ARTICLE 13 (Contracts of employment)

7. The Drafting Committee proposed the following text for article 13:

*Article 13. Contracts of employment*

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;

(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;

(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;

(d) the employee is a national of the employer State at the time the proceeding is instituted;

(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

8. The Drafting Committee had had before it not only the original version of draft article 13 as submitted by the Special Rapporteur in his fifth report (A/CN.4/363 and Add.1),<sup>1</sup> but also the revised text of that article submitted to the Committee by the Special Rapporteur at the previous session of the Commission<sup>2</sup> and reproduced in document ILC (XXXVI)/Conf.Room Doc.1. The basic thrust of the article had been retained, although a number of drafting changes had been made in the interests of clarity.

9. The wording of paragraph 1 of article 13 had been based on that of article 15, provisionally adopted by the Commission.<sup>3</sup> The words "considered to have consented to the exercise of jurisdiction", which had appeared in the revised text of article 13, had been replaced by "cannot be invoked". In addition, drawing on both the original text and the revised version of article 13 submitted by the Special Rapporteur, paragraph 1 stipulated that the

<sup>1</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 18, footnote 54. For the discussion of draft article 13 at the thirty-fifth session of the Commission, see *Yearbook ... 1983*, vol. I, pp. 49 *et seq.*, 1763rd to 1766th meetings and 1767th meeting, paras. 1-8.

<sup>2</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 58.

<sup>3</sup> See 1833rd meeting, footnote 4 (k).

\* Resumed from the 1841st meeting.

subject-matter related to “a contract of employment between the State and an individual for services performed or to be performed”. The application of the rule was thus subject to two conditions; first, the employee must have been recruited in the other State and, secondly, he must be covered by any social security provisions in force in that other State. Those qualifications had been added in the light of the comments made during the debate in the Commission and were intended to highlight the necessary link or contact between the employee and the State before whose courts the action was brought. It should be noted, however, that the reference to “social security provisions which may be in force” had been made flexible to take account, first, of the fact that, under the internal labour legislation of some States, an employee might be required to join a social security scheme, while in other States such coverage might be optional, and, secondly, of the provisions of article 33 of the 1961 Vienna Convention on Diplomatic Relations.

10. In paragraph 2, the five subparagraphs proposed by the Special Rapporteur in his revised version of the article had been retained. In subparagraph (a), the Committee had considered it preferable to refer to the “employee” rather than to the “individual” and to make it clear that he had been “recruited to perform services associated with” the exercise of governmental authority, on the grounds that it would give rise to confusion if the words “appointed under the administrative law of the employer State” were used, as States had different practices, procedures and regulations regarding appointments and recruitment. The reference to “services associated with the exercise of governmental authority” was intended to convey a broader criterion than that originally proposed, since the text should cover lower ranking employees who, while not being formally entrusted to perform functions in the exercise of the employer State’s governmental authority, nevertheless performed services which, in one way or another, involved, or were “associated with”, the exercise of governmental authority. The matter related to an employer State having given the employee a measure of trust in respect of certain aspects of the exercise of governmental authority.

11. Subparagraph (b) had been redrafted to indicate clearly that a State would be immune in a proceeding that was intended to force an employer State to recruit, reinstate or renew the contract of employment of an individual. However, the subparagraph did not relate to a proceeding whose purpose was to obtain monetary compensation or damages for breach of contract or for acts of an employer State alleged to be in violation of the local labour laws or regulations.

12. Subparagraphs (c) and (d) remained basically the same as those proposed by the Special Rapporteur in his revised text. Their order had simply been reversed to reflect the logical sequence of the events provided for in the two subparagraphs. Subparagraph (d) provided immunity for the employer State, in addition to that provided in subparagraph (c). There was no need to refer in subparagraph (c) to the possibility of the

employee and the employer State reaching some other agreement, since subparagraph (e) provided for just such an eventuality by stipulating that the rule of non-exemption from jurisdiction set out in paragraph 1 did not apply if the employee and the employer State had otherwise agreed in writing. Nevertheless, the Drafting Committee had shared the Special Rapporteur’s view that such a provision did not mean that the parties to the contract were completely free. Often, for reasons of public policy, States conferred on their courts exclusive jurisdiction in some matters, regardless of any clauses that might have been written into contracts with a view to precluding such jurisdiction. Accordingly, subparagraph (e) contained a final clause covering that point. In the revised version of that subparagraph, the Special Rapporteur had referred to the “subordinate rank of the employee”, but the Committee had taken the view that that consideration was not relevant and had thus deleted it from the text proposed to the Commission. Finally, the title of article 13 proposed by the Drafting Committee remained the same as that proposed by the Special Rapporteur.

13. In conclusion, he pointed out that some members of the Drafting Committee, himself among them, had expressed reservations with regard to the article as a whole, which they considered to be unnecessary and even counter-productive, in that it might discourage foreign States from recruiting employees in the State of the forum and from placing them under the social security provisions in force in that State. Furthermore, in the view of one member of the Committee, the basic criterion governing the application of the rule of non-immunity set out in paragraph 1 should be whether the employee was a national or permanent resident of the State of the forum at the time when the contract was concluded. The member in question had prepared and distributed to the Committee a version of article 13 reflecting that position.

14. Mr. USHAKOV said that, as a confirmed believer in the jurisdictional immunities of States, he was opposed, on principle, to almost all the articles proposed by the Drafting Committee. He also had serious doubts regarding the wording of article 13, which concerned the competence of the courts of the forum State in matters involving contracts of employment concluded between employer States and individuals. According to the text of the article, that competence extended to individuals who were nationals or permanent residents of the forum State. That raised numerous questions.

15. First, was the court to apply the law of the employer State or that of the forum State? If the applicable law was that of the employer State, why would the case be brought before a court of the forum State rather than of the employer State? If the applicable law was that of the forum State, why did the article provide for two different régimes for a single category of employees, depending on whether they were nationals of the employer State or of the forum State? Secondly, where the applicable law was that of the forum State, it was because it was considered more favourable to the employee in question than the law of the employer State. However,

what evidence was there that that assumption, rather than the contrary, was valid? Thirdly, proceedings would be instituted against the State, and not against a State enterprise. Finally, proceedings were very costly, and a State against which a proceeding was brought would incur unnecessary expenditures.

16. Mr. KOROMA said that the universally recognized rule was that a State was immune from jurisdiction unless it consented to waive immunity. The Commission must be careful not to allow the exception to that rule to replace the rule itself. In spite of the efforts made by the Special Rapporteur to reconcile divergent views, the Commission was far from achieving a consensus on draft article 13. His own position was that the draft article challenged the rule whereby States were immune from the jurisdiction of other States and that, if it were adopted, there would be the possibility that States might on occasion be dragged into court proceedings. Apart from the costs involved, no State would care to find itself in that position. Finally, since not every State had the type of social security system to which the text referred, the article would apply to only a limited number of States. While he would not object to the provisional adoption of the draft article by the Commission, he hoped that further endeavours would be made to find a formula that satisfied all points of view.

17. Mr. NI regretted that he found himself unable to agree with the thought behind article 13 and considered that it should not have a place in the draft articles. He had on previous occasions, both in the Commission and in the Drafting Committee, stated his reasons for taking that position. He was grateful to the Special Rapporteur for the effort he had made in reshaping the draft article by removing the notion of presumed consent. Nevertheless, exceptions were still exceptions and would reduce the principle of the sovereign immunity of States to an expression of nominal value. In fact, the text under consideration appeared to present a more restrictive view than the restrictive practice in certain States, inasmuch as it provided for the possibility of directly disallowing jurisdictional immunity without even requiring the consent of the State proceeded against. However, he would remain flexible and would not object to the provisional adoption of draft article 13, if the Commission so decided, in the hope that there was still time for further reflection, reconsideration and readjustment before it was made final. He requested that his observations should be fully reflected in the report of the Commission.

18. Mr. McCaffrey supported article 13 as a necessary element in the draft articles in the light of the approach adopted by the Commission, namely not to endeavour to include broad and general principles concerning exceptions, but rather to identify specific areas in which State practice had recognized such exceptions and to give them thorough consideration. He wished to reserve his position on paragraph 2 (b), which was perhaps too broadly drafted. The Chairman of the Drafting Committee had explained that the intention was not to preclude an action for damages for failure to hire or rehire, but to preclude an attempt to coerce a State into rehiring an individual employee. Perhaps the text could be amended on second

reading to reflect that intent more accurately. It was true that not all States that took a so-called functional or restrictive approach to questions of sovereign immunity had special provisions of the kind contained in the draft articles, but most of those that did not, including his own country, handled such matters under the broader heading of trading and commercial activities. However, as the Special Rapporteur had noted on several occasions, the Commission had not taken the broader approach.

19. Chief AKINJIDE expressed serious concern with regard to draft article 13. He recalled that the United States of America had enacted the *Foreign Sovereign Immunities Act of 1976*, which restricted the immunity of States in a number of matters, particularly in commercial transactions. With the *State Immunity Act 1978*, the United Kingdom had perpetrated considerable demolition work in respect of immunities. Since that time, the interpretation of the two Acts had been expansive and elastic in the national courts. To that legislation, the Commission was proposing to add articles 13, 16 and 18. It must be aware that, in so doing, it was progressively diminishing and demolishing the immunity of States. The countries most affected by the provisions of the draft articles would be the developing countries. For example, insurance policies on goods imported into developing countries were usually taken out in Europe or the United States. When such goods were lost, the insurance companies refused to pay. When his own country had enacted that all goods must be insured within the country, they had started to vanish in a mysterious way and the local insurers had been saddled with enormous claims far outstripping their ability to pay. If the draft articles were adopted, the resources and interests of the developing countries would be seriously jeopardized.

20. He associated himself with the view expressed by previous speakers that draft article 13, although very ingeniously worded, was not in the interests of the community of nations. Many foreign embassies in developing countries recruited hardly any local staff, since they could afford to bring out their own nationals to work for them. However, the embassies of developing countries in the developed countries had to recruit local staff, and the effect of article 13 would be to make many foreign Governments objects of ridicule.

21. Mr. MAHIU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that, in endeavouring, quite rightly, to protect the legitimate rights of employees—although in practice the cases envisaged would be few—draft article 13 would achieve a paradoxical result, in that it would encourage States to avoid any contentious situation simply by refusing to recruit local personnel, whether they were nationals or permanent residents of the forum State. The resulting detrimental effect on the local employment situation could present problems, particularly in forum States with high rates of unemployment. However, in a spirit of compromise, he had not opposed the adoption of draft article 13 by the Drafting Committee.

22. Mr. BALANDA shared the view expressed by Mr. Mahiou. The protection afforded to States under the provisions of draft article 13, paragraph 2 (a), was not

sufficient to safeguard the interests of countries, particularly developing countries, since it concerned only "services associated with the exercise of governmental authority". The situation referred to by Chief Akinjide was very real, and the Commission should proceed on the basis of realities. The current trend among developed countries was to assign to their diplomatic missions in developing countries staff recruited within their own territories, thus bypassing the local labour force. Unfortunately the converse was not true, since developing countries did not have sufficient means to send their nationals to work in their missions abroad. In practice, it was only the developing countries that would be affected by the provision of paragraph 1, regarding which he had grave reservations.

23. The CHAIRMAN, speaking as a member of the Commission, said that he appreciated the Special Rapporteur's efforts to make draft article 13 as flexible as possible. However, for reasons he had previously stated,<sup>4</sup> and as a matter of principle as far as the nature and scope of State immunity was concerned, he wished to associate himself with the reservations already expressed by most of the previous speakers on that draft article. While it was true that the phrase "unless otherwise agreed between the States concerned" had been introduced in paragraph 1, and that paragraph 2 (a) also contained a limitation, the end result of the article would nevertheless be a significant restriction of State immunities. His second objection was that the application of that article would do more harm than good, even as far as local employees of foreign employer States were concerned.

24. Speaking as Chairman, he said that if there were no further comments, he would take it that, with the reservations stated, the Commission wished provisionally to adopt draft article 13.

*It was so agreed.*

*Article 13 was adopted.*

#### ARTICLE 14 (Personal injuries and damage to property)

25. Mr. MAHIYOU (Chairman of the Drafting Committee) said that the Committee proposed the following text for article 14:

##### *Article 14. Personal injuries and damage to property*

Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of the courts of another State in respect of proceedings which relate to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred wholly or partly in the territory of the State of the forum, and if the author of the act or omission was present in that territory at the time of the act or omission.

26. As in the case of article 13, the Drafting Committee had had before it both the original version of article 14 submitted by the Special Rapporteur in his fifth report

<sup>4</sup> See *Yearbook ... 1983*, vol. I, pp. 70-71, 1766th meeting, paras. 8-11.

(A/CN.4/363 and Add.1)<sup>5</sup> and the revised version submitted by the Special Rapporteur at the previous session of the Commission,<sup>6</sup> and reproduced in document ILC (XXXVI)/Conf. Room Doc.1.

27. The wording of the draft article had been based on that of articles 8, 9 and 10, provisionally adopted by the Commission,<sup>7</sup> and thus contained no reference to "consent" to jurisdiction. Other minor drafting changes had been made in the interests of clarity. The structure of the draft article followed very closely the original text submitted by the Special Rapporteur in his fifth report, which had been simpler than the revised version submitted at the previous session. The Committee had decided, for example, to exclude references to a State's organs, agencies, instrumentalities, etc., and to a State's maintaining offices, establishing premises or engaging in certain transport activities. Such matters could be dealt with in the commentary.

28. In order to highlight the relationship between the act or omission and the foreign State, the Drafting Committee had added the words "which is alleged to be attributable to the State". Of course, the question of attribution was distinct from that of immunity, in that it related to merits, and would be determined in due course in accordance with local law. In addition, the Committee had accepted the wording proposed by the Special Rapporteur in his revised version of the article, to the effect that the death, injury or damage must have occurred wholly or partly in the territory of the forum State. The double requirement that the act or omission must have occurred in the territory of the forum State, and that the author of such act or omission must have been present in that territory at the time of the act or omission, had been maintained, in order to show clearly that injuries or damage resulting from extraterritorial acts or omissions did not fall within the scope of the draft article.

29. In his revised version of article 14, the Special Rapporteur had proposed a paragraph 2 which provided that paragraph 1 was without prejudice to rights and obligations regulated by agreements specifying or limiting the extent of liabilities or compensation. The Drafting Committee had been of the view that that matter related to the broader question of the effects produced by article 14 and other articles on provisions concerning the jurisdictional immunities of States as contained in international bilateral and multilateral agreements on special matters or fields, such as agreements of the status of forces. Accordingly, the Committee had agreed not to include a paragraph along the lines suggested by the Special Rapporteur, on the understanding that he would prepare a more general provision for possible inclusion in the final provisions of the draft. The title had not been changed, except in the French version. One member of the Drafting Committee had opposed draft article 14 as unnecessary and incomprehensible.

<sup>5</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 19, footnote 55. For the discussion of draft article 14 at the thirty-fifth session of the Commission, see *Yearbook ... 1983*, vol. I, pp. 75 *et seq.*, 1767th meeting, paras. 9 *et seq.*, and 1768th to 1770th meetings.

<sup>6</sup> See *Yearbook ... 1983*, vol. II (Part Two), p. 20, footnote 59.

<sup>7</sup> See 1833rd meeting, footnote 4 (f) and (g).

30. Mr. USHAKOV said that he, too, was opposed on principle to article 14. First, the words “unless otherwise agreed between the States concerned” were not as innocent as they seemed. Politically and legally, they meant that States must agree on the jurisdictional immunity of the foreign State, thereby completely reversing the very principle of jurisdictional immunities of States by quite simply establishing the principle of the jurisdictional non-immunity of States. The phrase in question should also be deleted from all the other articles submitted. Secondly, the text did not specify under what legislation or system of law the act or omission was to be allegedly attributable to the State. If it was to be so considered under international law, it would be the international responsibility of the States that would come into play, and the question of competent courts would be raised. If the applicable law was to be the internal law of the forum State, it was difficult to see how it could establish rules attributing an act or omission to a foreign State. Moreover, why should a court consider the question of attribution? Such a procedure would be contrary to the very logic of the law as such. Thirdly, if an act or omission was attributed to a State, it would still be necessary to determine the author. The author would, of course, be the State; but, under the provision of the proposed article itself, the author of the act or omission must also be present in the territory of the forum State at the time of the act or omission. Would the author then be an individual? How would that be possible if the act or omission had already been attributed? The text of draft article 14 reduced to nothing the principle of the sovereign immunity of States and was absolutely incomprehensible.

31. Mr. NI said that the observations he had made in connection with draft article 13 applied also to draft article 14 and to the other draft articles before the Commission.

32. Mr. KOROMA said that most of the points he had advanced in respect of draft article 13 applied also to draft article 14. When the draft article had first been considered by the Commission, he had argued, in common with other members, that the matters covered by it were best dealt with extrajudicially and had suggested the possibility of excluding it.<sup>8</sup> He maintained that position.

33. The text of draft article 14 lent itself to many interpretations. For example, the phrase “in respect of proceedings which relate to compensation” could be interpreted to mean that, even when the parties agreed on the method of settlement or on the compensation to be paid, if that compensation was not eventually paid the State could be taken to court at the decision of the plaintiff. Similarly, the phrase “act or omission which is alleged to be attributable to the State” could mean that, if the plaintiff submitted a claim and there was a counter-claim by the defendant, the plaintiff could answer it by asserting that the act could not be attributed to the State, but was a personal matter. The text would have to be considered more carefully to avoid the possibility of such interpretations, which he knew were not intended. However, his fundamental point was that such matters would be

more appropriately settled between the States themselves than through judicial means. He was happy to report that his country, when recently involved in such a case, had adopted that view.

34. Mr. RAZAFINDRALAMBO expressed his appreciation to the Chairman of the Drafting Committee for his objective and extremely clear presentation of the articles currently before the Commission and to the Special Rapporteur for the flexibility and competence which he had shown. While he subscribed to the principle of the exception to jurisdictional immunities of States provided for in article 14, he shared the reservations expressed by Mr. Ushakov regarding the wording proposed by the Drafting Committee. The original reference to a State’s organs, agencies and instrumentalities acting in the exercise of governmental authority and engaging State responsibility had been deleted. However, the authors of the injurious act or omission were persons acting on behalf of those organs, agencies and instrumentalities, and thus of the State itself. It was through them that the State was presumed responsible for the injury and was brought before a court of the forum State.

35. As far as the substance was concerned, he pointed out that the internal law of many States ensured the protection of victims by providing that, in cases of bodily injury, the forum State was subject to the jurisdiction of the ordinary courts, whereas as a general rule such was not the case. That was the principle which, in article 14, had rightly been extended to cover the foreign State. Indeed, there was no reason to accord more favourable treatment to the foreign State than to the forum State in cases of bodily injury resulting, for example, from traffic accidents.

36. The CHAIRMAN, speaking as a member of the Commission, said he had a number of reservations on draft article 14, for the basic reasons he had already explained in connection with draft article 13. Apart from the matter of principle, he agreed with Mr. Koroma that, in the cases covered by the article, the better remedy lay in a practical settlement between the two States concerned, without prejudice to the principle of immunity.

37. Speaking as Chairman, he said that, if there were no further comments, he would take it that, with the comments and reservations duly recorded, the Commission wished provisionally to adopt draft article 14.

*It was so agreed.*

*Article 14 was adopted.*

ARTICLE 16 (Patents, trade marks and intellectual or industrial property)

38. Mr. MAHIU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 16:

*Article 16. Patents, trade marks and intellectual or industrial property*

*Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:*

*(a) the determination of any right of the State in a patent, industrial*

<sup>8</sup> See *Yearbook ... 1983*, vol. I, p. 73, 1766th meeting, para. 28.

design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

39. Article 16 as submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2)<sup>9</sup> had been maintained in substance in the new version proposed by the Drafting Committee, but had been restructured along the lines suggested during the debate in the Commission. As a result, the two paragraphs contained in the Special Rapporteur's original text had been combined by merging subparagraphs (a) and (b) of the original paragraphs 1 and 2 and adopting a common *chapeau* to cover both.

40. In subparagraph (a), the Drafting Committee had preferred to use the words "the determination of any right of the State", rather than the possibly more restrictive expression "the determination of the right to use". The new wording also made it unnecessary to refer to the State as "the owner or applicant". The phrase "the determination of any right of the State", which would be explained in the commentary to the article, should be understood broadly, since the right of a State in a patent, for example, could be determined incidentally in the context of a court's ruling regarding the right of others claiming the same or a similar right in the same patent.

41. The enumeration of various forms of intellectual or industrial property had been shortened somewhat by the deletion of "service mark" and "plant breeders' right", and the phrase "or any other similar form of intellectual or industrial property" had been added to make it clear that the list was not exhaustive. As the commentary would explain, the new wording covered not only the two forms that had been deleted, but also new forms of intellectual or industrial property as they were developed, such as computer software.

42. The Special Rapporteur had included in the original text a phrase indicating the types of legal protection afforded those various forms of intellectual or industrial property, and had referred specifically to property that had been "registered, deposited or applied for or is otherwise protected". Taking into account the comments made in the Commission and the complexities involved in attempting to reflect varying domestic laws which afforded legal protection to the various forms of property involved, the Drafting Committee had agreed on a general formulation which, it thought, could cover the various types of legal protection afforded under internal law, thus dispensing with the original enumeration. The words "a measure" were meant to imply some specific measure of legal protection, such as the measures specified in the original text. The phrase "in the State of the forum" had been used instead of "in another State", to make it even clearer that the right of the foreign State in

question related to various forms of intellectual and industrial property which had been afforded a measure of legal protection in the State of the forum.

43. In subparagraph (b), the words "attributable to", in the original text, had been deleted in the light of comments made in the Commission. In addition, the new structure of the draft article had enabled the Drafting Committee to abbreviate the wording by referring to "the right mentioned in subparagraph (a) above", instead of repeating the enumeration of the various forms of intellectual or industrial property involved. As in subparagraph (a), the Committee had used the expression "State of the forum" rather than "that other State", to emphasize that the alleged infringement by the foreign State of a right owned by a third person must occur in the territory of the State of the forum which had protected that right. As a result, the State of the forum could give effect only in its own territory to the protection which it had itself afforded to the right of a third person allegedly infringed in the territory of the State of the forum by a foreign State.

44. Finally, some members of the Drafting Committee had maintained the objections or reservations expressed during the debate in the Commission on paragraph 2 of article 16 as originally proposed. In their view, the paragraph had been prejudicial to the interests and development of developing countries, so that it was highly dangerous to include such a provision in the draft. In that connection, he recalled that, in the Commission's debate, concern had been voiced that article 16 might be interpreted as allowing the courts of one State to sit in judgment on the effects of the nationalization, by another State, of certain forms of intellectual or industrial property. It had been recognized that that concern was real, but that in fact it also related to the tenor of other articles of the draft.

45. The Drafting Committee had agreed with the Special Rapporteur that the entire question of the extraterritorial effects of nationalization might be dealt with in article 11,<sup>10</sup> concerning the scope of the draft articles, which had been referred to the Drafting Committee but which the Committee would take up only at a later stage, after all the other articles of part III of the draft had been examined. The proposal of the Special Rapporteur had been the addition of a second paragraph to draft article 11 indicating that nothing in the articles of part III would prejudice the question of the extraterritorial effects of nationalization by a State of property situated within its territory when such act was performed in the exercise of sovereign authority and in accordance with its internal laws. It was hoped that such a general formulation would take account of the concern expressed in the Commission on that matter. The commentary to article 16 would of course refer to that understanding concerning draft article 11. The Drafting Committee had also amended the title of the article to correspond to the new wording of the text.

46. Finally, some members of the Drafting Committee

<sup>9</sup> For the text submitted by the Special Rapporteur and the discussion thereon in the Commission at the current session, see 1837rd to 1837th meetings and 1838th meeting, paras. 1-24.

<sup>10</sup> See *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; for the revised text, *ibid.*, p. 99, footnote 237.

had opposed draft article 16 because of its implications and the risks it entailed, in particular with regard to third world countries, which were greatly concerned about the transfer of technology needed to assist their economic development.

47. Mr. USHAKOV said that he could accept subparagraph (a) of draft article 16, since it was an extension of article 15, provisionally adopted by the Commission.<sup>11</sup> However, as he had already explained in the Commission (1834th and 1835th meetings), he was opposed to subparagraph (b) because of its pro-imperialist character. The third parties whose rights were referred to in that subparagraph were actually multinational corporations which were being protected against developing countries.

48. Chief AKINJIDE said that the very serious misgivings which he had expressed (1834th meeting) about draft article 16 persisted in respect of the text proposed by the Drafting Committee. If the draft article were adopted by the Commission, three quarters of the world's developing countries would have the greatest difficulty in accepting the draft. To take the copyright aspect alone, a country such as his own, where foreign textbooks and other books whose copyright was held by foreign companies were very widely used, would be very seriously disadvantaged by the provisions of both subparagraphs (a) and (b). Until he knew the precise nature of the proposed protective clause to be incorporated in draft article 11, he would be unable to accept draft article 16. Accordingly, he suggested that consideration of that text should be suspended pending the adoption of a decision on draft article 11.

49. Mr. BALANDA said that, until the new wording of draft article 11 had been decided, he wished to reserve his position on draft article 16, subparagraph (b), in view of its consequences for the interests of developing countries. He endorsed the observations made by Chief Akinjide.

50. Mr. RAZAFINDRALAMBO recalled that he had already explained his position (1836th meeting) on draft article 16 and expressed his opposition to the principle set forth therein, particularly in paragraph 2 of the original text. The possibility of adding a second paragraph to draft article 11, on the other hand, was tempting. Like Chief Akinjide, he considered, however, that it would be advisable to reserve any decision on draft article 16 until the new draft article 11 to be proposed by the Drafting Committee had been considered. Even if article 11 were to contain a safeguard clause regarding the effects of nationalization, article 16, and in particular subparagraph (b), would unquestionably present a danger to developing countries. Consequently he agreed with Mr. Ushakov that that provision would not be favourably received by third world countries.

51. Mr. KOROMA said that he had been absent from the earlier discussion on draft article 16 in the Commission and had thus been unable to emphasize the very serious implications of the article, which seemed to him to

run counter to the Lima Declaration<sup>12</sup> and other important documents representing the wishes of the international community at large. He very much doubted whether the article as it stood would be acceptable to the General Assembly. However, the adoption of an adequate safeguard clause elsewhere in the draft articles might change the situation, and he therefore supported Chief Akinjide's proposal that consideration of draft article 16 should be deferred pending a decision on draft article 11.

52. Mr. McCAFFREY said that he hoped the Commission would not shelve draft article 16, which it had amply considered and which had been substantially revised after full and intensive consideration in the Drafting Committee. In order to meet the concern expressed in connection not only with article 16 but also with other parts of the draft, the Special Rapporteur had suggested the inclusion of a general safeguard clause, to be incorporated in article 11, to the effect that nothing in the articles of part III was to prejudice the question of the extraterritorial effects of nationalization. While it was of course important to see the language of article 11, the substance of article 16 would not be affected thereby, so that to defer action on article 16 pending the adoption of article 11 would serve no purpose. The fears expressed by some members of the Commission should be allayed by the wording of article 16 itself. To take the example of copyright mentioned by Chief Akinjide, nothing in article 16 would affect a country's right to copy books copyrighted in other countries, or generally to pursue its own policies with regard to intellectual or industrial property. He found it difficult to believe that anyone would argue that a State had the right to sell with impunity, in the territory of another State, goods subject to copyright or other protection in that territory.

53. Mr. REUTER said that he understood the reservations of some members of the Commission regarding articles that were presented as compromise solutions. Those reservations called for three comments. First, while he could have understood perfectly the rejection of draft article 16 in its entirety, it was difficult to see, particularly from the point of view of the developing countries, why subparagraph (a) should be acceptable and subparagraph (b) should not. If a State did not accept the principle of industrial or intellectual property within its territory, that was its sovereign right. As he understood it, if the existence of freedom in some States was accepted, the freedom of a State to institute protection of intellectual and industrial property must be respected, and it must also be accepted that such protection would be based on the law of that State. However, if the provisions of subparagraph (b) were not accepted, the State concerned would be prohibited from observing or ensuring observance in its territory of the rules concerning its intellectual property, and therefore prohibited from initiating actions for infringement of copyright; in other words, a State was to be compelled to accept, for the benefit of other States, the freedom to infringe

<sup>11</sup> See 1833rd meeting, footnote 4 (k).

<sup>12</sup> Lima Declaration and Plan of Action on Industrial Development and Co-operation, adopted by the Second General Conference of UNIDO, 12-26 March 1975 (ID/CONF.3/31, chap. IV).

legislation which, under subparagraph (a), it was entitled to establish. For that reason, he did not understand the distinction between subparagraph (a) and subparagraph (b) of draft article 16. The developing countries had rightly called for transfers of technology under special conditions. Consequently he did not understand why, while accepting that a State should ensure observance of its legislation within its territory as it saw fit, an exception should be established and it should not therefore be possible to institute actions for infringement when such legislation was infringed. Why ask for transfers of technology under such circumstances?

54. Secondly, he was firmly opposed to the proposal that consideration of draft article 16 should be postponed. The problem of extraterritorial effect was admittedly a difficult one, but it was quite different from that presented in the draft article.

55. Thirdly, the problem for the Commission was to determine whether it could arrive at a compromise formula between two perfectly legitimate conceptions of the principle of the jurisdictional immunity of States: on the one hand, a conception of personal immunity, namely that the State was the State and enjoyed immunity in all its actions; on the other hand, a functional conception of immunity, which he himself advocated. In the view of some members of the Commission, including himself, there was no established rule of public international law which currently served as a basis for the general principle of the personal immunity of the State. However, if all the articles pertaining to exceptions were to be eliminated, the members in question would obviously never accept articles embodying a general principle of the personal immunity of the State, since all the articles that would be eliminated provided for a number of exceptions to such personal immunity. That was another reason why he supported draft article 16. While he respected the views of those who supported the application of the theory of personal immunity, which was so simple and so radical that the final draft would contain very few articles, it was nevertheless necessary to determine whether there was a way of arriving at a compromise formula. That was the point at issue in the articles under consideration and in subsequent articles.

56. Mr. MAHIU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he had reservations regarding draft article 16, despite the changes made by the Drafting Committee. First, the draft article was too broad in scope and could thus give rise to controversy. It seemed to strengthen the existing rules on patents, trade marks and other intellectual or industrial property, whereas the developing countries were in fact asking that those rules should be adapted to take greater account of their rights, interests and development needs.

57. Secondly, such an article could be included in the draft only if, among other things, its wording were revised in order to contain its scope within clearly defined limits. It was important to prevent the courts of the forum State, in dealing with questions of intellectual or industrial property, i.e. questions of a commercial nature, from ruling on other matters pertaining to acts of

sovereignty. Some courts were inclined to broaden their areas of competence to related matters and, in dealing with commercial disputes, to pronounce on action by the public authorities—for example through measures of expropriation and nationalization—in connection with the acquisition of patents or other rights. In view of the possible addition of a second paragraph to draft article 11, the Commission might be better advised to take up the suggestion of Chief Akinjide and temporarily to postpone the adoption of draft article 16 until it had decided on the content of draft article 11.

58. Mr. OGISO said that, although draft article 16 had been discussed extensively in the Commission as well as in the Drafting Committee, it appeared that some misunderstandings still existed on two points. First, reference had been made in the earlier discussion (1834th meeting, para. 12) to the development history of a certain country whose products had been famous for their cheapness in the past, but which were now synonymous with high quality, and it had been asserted that, if at the beginning of its modernization, the country concerned had had a law on patents, such progress would not have been achieved. If the country referred to was Japan, he wished to say that, as a matter of historical fact, when Japan had embarked upon the process of modernization some 100 years earlier, one of the first steps of the new Japanese Government at the time had been to establish a patent law, in order to show that Japan's legal system was as modern as the systems of Western countries.

59. Secondly, in his country's experience, patent law did not operate to the disadvantage of developing countries. Japan had two methods of co-operating with developing countries with a view to assisting their further economic development. It either provided economic assistance through governmental organizations, or it promoted private investment by encouraging Japanese private industries to co-operate with industries in developing countries. Such encouragement could not be successful unless the recipient developing countries gave proper protection to the technology and capital invested in those countries. Economic co-operation at the private level had yielded remarkable results in a number of developing countries. He believed, therefore, that a law on the protection of intellectual or industrial property would enhance economic development rather than stand in its way. Conversely, co-operation at the private level would be damaged by the absence of a provision such as that incorporated in subparagraph (b) of draft article 16; indeed, far from being advantageous to the developing countries, the absence of such a provision might favour developed countries, particularly those whose industries were mainly State controlled.

60. Mr. LACLETA MUÑOZ said that he had no objection to the wording of draft article 16. Moreover, he did not see how that article, referring as it did to the jurisdictional immunity of States, could affect copyrights in developing countries or the transfer of technology to those countries, since, in the absence of any protection of intellectual property in a State, the article in question would have no effect within the territory of that State.

61. He did not understand the objection raised to subparagraph (a) regarding, for example, copyright for school textbooks, since in normal circumstances such copyrights were seldom the property of a State. In any event, a State wishing to enjoy freedom from copyright could so provide in its internal law. It simply had to decline to accept any international obligation in that regard, as it was entitled to do.

62. With regard to subparagraph (b), he supported whole-heartedly the observation made by Mr. Reuter. Rejection of that subparagraph would simply be tantamount to conceding that, within the territory of another State, a foreign State had the privilege of using a right belonging to a third person and protected by the internal law of that other State. The question of the extraterritorial effect of nationalization, which was also raised by other articles, could and must be dealt with by other bodies.

63. Mr. SUCHARITKUL (Special Rapporteur) said that subparagraph (a) of article 16 could hardly give rise to any serious objection, since a State was surely entitled to determine its rights as it wished.

64. With regard to subparagraph (b) whose operation was of course confined to the territory of the State of the forum, he agreed with the views expressed by Mr. Ogiso. A developing country, which was a sovereign State like any other, could pursue its own policies within its own frontiers and even expect some recognition of the extraterritorial effects of those policies. However, it could not expect the law of another State not to be respected in the territory of that other State. As Mr. Ogiso had pointed out, the provision in subparagraph (b), far from being to the disadvantage of developing countries, could actually operate to their benefit.

65. With regard to the procedure to be adopted, he pointed out that the safeguard clause to be added to draft article 11 was intended to allay misgivings in connection not only with draft article 16 but also with draft article 15. It would expedite matters if the Commission were provisionally to adopt draft article 16 as proposed by the Drafting Committee, on the understanding that a clause along the lines indicated by the Chairman of the Drafting Committee (see para. 45 above) would be included in draft article 11, or at another place to be finally decided by the Commission.

66. Chief AKINJIDE thanked the Special Rapporteur for his explanation, which merely reinforced his contention that to adopt draft article 16 subject to the adoption of draft article 11, before the text of article 11 had been accepted by the Drafting Committee, would be to put the cart before the horse. He was not convinced by the arguments advanced to prove that article 16 would not operate against the interests of developing countries, and stood by his proposal that adoption of draft article 16 should be deferred.

67. Mr. McCAFFREY said that he still could not understand Chief Akinjide's objection. Nothing in draft article 16 was inconsistent with a Government's wish not to enter into a patent or copyright convention. Such a convention might in fact affect a country's ability to

pursue its own policies with regard to the protection of intellectual or industrial property, but article 16 certainly did not do so. With regard to the proposal that consideration of draft article 16 should be deferred pending the adoption of draft article 11, he thought that, in order to make progress, it was sometimes necessary to assume that a particular problem would eventually be resolved to the Commission's satisfaction. That had been the case in connection with article 6 of the draft articles under consideration,<sup>13</sup> in connection with the note concerning a tentative understanding of the term "international watercourse system",<sup>14</sup> in connection with the draft articles on the law of the non-navigational uses of international watercourses, and also, at the previous session, in connection with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. In each of those instances, the Commission had acted on the Special Rapporteur's assurance that a provision designed to allay the concern of certain members would eventually be proposed and acted upon. To defer consideration of article 16 would, in his view, be dangerous and counter-productive. He appealed to members not to oppose a decision being taken on draft article 16, bearing in mind that the decision, taken on first reading, would be only provisional.

68. Mr. KOROMA said that, in response to Mr. McCaffrey's appeal and in the light of the Commission's previous methods of work, he would not insist upon deferring the decision on draft article 16. He hoped, however, that the Special Rapporteur would take account of the extent of the opposition to the article in the Commission. In his view, article 16 largely nullified article 5 of the draft, on which the Commission had worked so hard. He shared the view of Chief Akinjide, and he continued to consider that adoption of the article would indirectly imply acceptance of the WIPO conventions.

69. Mr. USHAKOV said that, in view of the serious reservations expressed with regard to article 16, it would be logical to adopt the same procedure as in the case of article 23 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (see 1864th meeting, para. 22), and to place article 16 in square brackets.

70. Mr. McCAFFREY remarked that, unlike draft article 16 under consideration, article 23 of the draft on the status of the diplomatic courier had not been approved by the Drafting Committee.

71. Mr. USHAKOV pointed out that he had not been the only member of the Commission to oppose draft article 16.

72. Chief AKINJIDE said he saw no difference between the situation regarding draft article 16 and that concerning draft article 23. Moreover, he failed to see why the text of the proposed amendment to draft article 11 (see para. 45 above) was not yet before the Commission.

73. The CHAIRMAN noted that there was a real di-

<sup>13</sup> See 1833rd meeting, footnote 4 (e).

<sup>14</sup> See *Yearbook ... 1980*, vol. II (Part Two), p. 108, para. 90.

vergence of views both on the substance of article 16 and on the procedure to be adopted in its respect. He was reluctant to put the matter to the vote, and suggested that it should be left open until the next meeting.

74. Mr. REUTER proposed that, since the Commission was divided, the matter should be put to a vote in order to save time. The differences of view could then be reflected in the report.

75. The CHAIRMAN said that a vote could not be taken because the Commission lacked a quorum.

76. Mr. KOROMA said that, his very great admiration and respect for Mr. Reuter notwithstanding, he deprecated the practice of asking for a vote. He did not believe that a vote in the existing context would advance the work of the Commission, and was in favour of endeavouring to find a compromise solution.

77. The CHAIRMAN suggested that consideration of the text proposed by the Drafting Committee for article 16 should be continued at the next meeting.

*It was so agreed.*

*The meeting rose at 6.05 p.m.*

## 1869th MEETING

*Monday, 23 July 1984, at 3.05 p.m.*

*Chairman:* Mr. Alexander YANKOV

*Present:* Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

### **Jurisdictional immunities of States and their property** *(concluded)* (A/CN.4/L.379, A/CN.4/L.381)

[Agenda item 3]

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

ARTICLES 16 *(concluded)*, 17 and 18

#### **ARTICLE 16 (Patents, trade marks and intellectual or industrial property) *(concluded)***

1. The CHAIRMAN recalled that, at the 1868th meeting, some members of the Commission had suggested that the adoption of article 16 proposed by the Drafting Committee (A/CN.4/L.379) should be deferred pending a decision on paragraph 2 of draft article 11. It would appear that those members were now prepared to agree to the provisional adoption of article 16, on the understanding that the text of paragraph 2 of article 11 as proposed

by the Special Rapporteur (A/CN.4/L.381) would be referred to the Drafting Committee for consideration.

2. Mr. USHAKOV said that, although he was opposed to subparagraph (b), he had not asked for a vote on the draft article or for a final decision in the matter, since the article was being discussed on first reading and the text would necessarily have to be put to the vote on second reading. He asked that his views be reflected in the commentary, so that the Commission could be apprised of them at the outset of the thirty-seventh session, as the summary records of the meetings were due to be published in official form only in two years' time. Subparagraph (b) should have been placed between square brackets, a practice already followed by the Commission, even on first reading, for a particular draft article or a part of one. Lastly, it was regrettable that some draft articles, such as article 14, had been provisionally adopted. In his view, article 14 was totally unacceptable, both from the legal standpoint and from that of the prestige of the Commission, and would have been better deleted.

3. Mr. KOROMA said that he had serious reservations about draft article 16, but would not oppose its provisional adoption, on the understanding that reservations and comments would be taken into account when the article came to be re-examined. In his view, article 16 transcended the issue of nationalization, and article 11 provided only a partial response to the queries raised.

4. The CHAIRMAN said he would take it that the Commission agreed to the provisional adoption of draft article 16, on the understanding that all the reservations and comments made during the discussion would be duly reflected in the summary records of the meetings, in the report of the Commission and, so far as possible, in the commentary. In addition, paragraph 2 of draft article 11 as proposed by the Special Rapporteur (A/CN.4/L.381) would be referred to the Drafting Committee, with a view to meeting the concern of some members regarding the extraterritorial effects of nationalization.

*It was so agreed.*

*Article 16 was adopted.*

#### **ARTICLE 17 (Fiscal matters)**

5. Mr. MAHIOU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 17:

##### *Article 17. Fiscal matters*

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State in a proceeding relating to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

As had been suggested during the discussion in plenary, the text of article 17 had been considerably simplified compared with the text originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2).<sup>1</sup>

<sup>1</sup> For the text submitted by the Special Rapporteur and the discussion thereon in the Commission at the current session, see 1833rd to 1837th meetings and 1838th meeting, paras. 1-24.

6. The Drafting Committee had decided that it was better not to list the various types of duties, taxes or other similar charges in the body of the article. In its view, it was impossible to draw up an exhaustive list, and even a non-exhaustive list would mean entering into detail in a branch of internal law that was complex and liable to change. The matter would be dealt with in the commentary. Accordingly, the general form of wording, “fiscal obligations... such as duties, taxes or other similar charges”, had been used. Furthermore, since the rule involved the application of internal law, and particularly fiscal regulations that might or might not impose various fiscal obligations on a foreign State, it had been thought appropriate to refer to “fiscal obligations for which it may be liable under the law of the State of the forum”. The members of the Committee all recognized that the question of “fiscal immunity” was quite distinct from that of “jurisdictional immunities”.

7. Lastly, the Committee had decided not to retain paragraph 2 of article 17 as originally submitted by the Special Rapporteur. Although it recognized the importance of the subject-matter, it had taken the view that all matters pertaining to questions such as seizure, attachment or measures of execution could more appropriately be dealt with in the next part of the draft articles, which would deal specifically with those questions and which the Special Rapporteur would introduce at a later session of the Commission. In line with the new wording of the article, the title had been amended to read “Fiscal matters”.

8. One member of the Committee had expressed reservations about article 17, judging it to be unnecessary, since it was designed to cater for situations or problems that would not arise in practice and were a pure figment of the imagination. In any case, States were subject to the fiscal obligations for which they might be liable under the law of the State of the forum. In the event of a dispute, the plaintiff in the proceedings would invariably be the foreign State and hence, under other articles of the draft, would not be exempt from the jurisdiction. Moreover, the whole question was one of comity and reciprocity as between the States concerned, and any request for privileges should be viewed in that context. Disputes about the existence of such privileges would be settled at the international level between the States concerned and had nothing to do with jurisdictional immunities.

9. Mr. USHAKOV said that he was utterly opposed to article 17, which was pointless. Its only justification was that it would apparently enable the revenue authorities of the State of the forum to institute legal proceedings for payment of a particular duty, tax or charge. The law of a State should of course apply to everybody, including foreign States, but it seemed in the case in point that the true purpose of the article was to undermine at all costs the jurisdictional immunity of States, to the benefit of transnational corporations, and hence to the detriment of young States. The jurisdictional immunity of States was the counterpart to their sovereignty and sovereign equality. To undermine the jurisdictional immunity of

States was at one and the same time to undermine their independence and sovereign equality.

10. Mr. NI said that, as he had already had occasion to point out (1835th meeting), he could not agree to the draft articles now before the Commission, because they were contrary to the principle of the sovereign equality of States. Article 17, however, raised a particular point in that it referred to “obligations for which [the State] may be liable”. His question was: liable to whom? In the case envisaged, the plaintiff was the forum State and the defendant was another State, but he was firmly of the opinion that a State could not be made subject to the jurisdiction of the municipal courts of the forum State. He had no intention of speaking again on points that he had already raised both in the Commission and in the Drafting Committee.

11. Mr. KOROMA said that his position was similar to that of Mr. Ushakov and Mr. Ni. He was opposed to article 17 but would not object to its adoption on a provisional basis.

12. Chief AKINJIDE, expressing agreement with Mr. Koroma and Mr. Ni, said that article 17 was totally unacceptable. Indeed, the draft article should have been couched in exactly opposite terms, so as to establish the basic premise that a State enjoyed immunity unless otherwise agreed between the two countries concerned. It might well prove difficult to win acceptance for a convention which, figuratively speaking, was gradually stripping the roof from the house of State immunity; in that sense, the Commission’s work could perhaps be characterized as one of demolition rather than construction.

13. Mr. DÍAZ GONZÁLEZ said that, as he had been absent from the 1868th meeting and therefore unable to comment on article 16, he wished to endorse the reservations voiced by Mr. Koroma in regard to that article. As to article 17, he fully supported the remarks made by the four preceding speakers and therefore wished to enter an express reservation in its regard.

14. The CHAIRMAN, speaking as a member of the Commission, said that, whenever any aspect of the jurisdictional immunities of States was considered, new restrictions were introduced. As a result, the principle of State immunity was gradually being whittled away and thus deprived of its force.

15. Speaking as Chairman, he said he would take it that, due account being taken of the reservations expressed, the Commission wished to adopt draft article 17 provisionally.

*It was so agreed.*

*Article 17 was adopted.*

ARTICLE 18 (Participation in companies or other collective bodies)

16. Mr. MAHIU (Chairman of the Drafting Committee) said that the Drafting Committee proposed the following text for article 18:

*Article 18. Participation in companies  
or other collective bodies*

1. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to its participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

The Drafting Committee had endeavoured to formulate article 18, submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2),<sup>2</sup> in more general terms, so as to take account of the various kinds of legal persons and forms of association under different legal systems.

17. In paragraph 1, the expression "shareholdings" had been deleted, for it was implicit in the case of an incorporated body, and would not apply in the case of other collective bodies. The Committee had also decided that there was no need to refer to "the determination of its rights and obligations" and that a general reference to "a proceeding relating to its participation" would suffice.

18. During the debate in the Drafting Committee, it had become clear that the nature of the collective bodies covered by the article varied considerably from one legal system to another. For instance, the legal entity termed an "unincorporated body" in English had no equivalent in French. In order to overcome the virtually insurmountable difficulties of transposing terms and concepts specific to a particular language and legal system, the Committee had sought to arrive at a more general form of wording and to find an expression that would command sufficiently broad acceptance to cover the various types of legal persons and forms of association under the various legal systems. The phrase that had been used in French was *dans une société ou un groupement ayant ou non la personnalité juridique*, which corresponded in the English text to the phrase "in a company or other collective body, whether incorporated or unincorporated". The possibility had been raised of substituting the expression *entité commerciale* for *groupement* in the French text.

19. Similar difficulties had arisen with regard to the designation of the parties to a legal proceeding, which again inevitably involved the different kinds of collective bodies. That was why the Committee had formulated the opening part of paragraph 1 in more concise terms, providing in English: "a proceeding concerning the relationship between the State and the body or the other participants therein", and in French: *une procédure ... concernant les rapports sociétaires*.

20. It was immediately apparent that the two language versions did not correspond literally. However, the Drafting Committee believed that, in legal and conceptual terms, they corresponded in substance. In an area of such complexity, where legal systems differed in terminology and in the kinds of legal persons to be taken into consideration, the aim should be to ensure that the language versions corresponded in meaning and intent rather than to seek a word-for-word or strictly literal rendering. However, the Committee was conscious of the pitfalls involved in reflecting certain legal concepts that varied or differed from one language and one legal system to another. Its attention had often been drawn to the difficulties to which that gave rise in Russian, Spanish, Chinese or Arabic, difficulties which, in the case of draft article 18, were particularly evident.

21. The Drafting Committee trusted that, on second reading, the differences in terminology would be re-examined in order to achieve greater harmony between the various language versions in both terminology and concepts, with due regard to the need to render the requisite meaning faithfully in each of the languages. However, one member of the Drafting Committee had not approved of the approach adopted and had taken the view that the various language versions should be much closer to one another and that significant differences in interpretation would undoubtedly arise if the language versions differed to the extent envisaged, which would remove any likelihood of a uniform or effective application of the article.

22. The wording of paragraph 1 (a) had been brought into line with the new terminology, the word "participants" being substituted for "members". Also, in accordance with a suggestion made at the 1838th meeting (para. 20), the words "or international organizations" had been added. The English text of paragraph 1 (b) was identical to that submitted by the Special Rapporteur, but in the French and Spanish texts the words *soit contrôlée à partir de cet Etat* and *sea controlada desde ese Estado* had been replaced by *ait le siège de sa direction... dans cet Etat* and *tenga la sede de su dirección ... en ese Estado*, respectively. That amendment had been introduced to reflect the desired meaning more accurately in those languages.

23. Paragraph 2 was the same in substance as the text originally proposed, with only one slight change at the end of the paragraph to take account of the new terminology used in paragraph 1. The commentary would indicate that the agreement in writing between the parties provided for in paragraph 2 could not run counter to the wishes of the States concerned in the event of an agreement between them, as provided for in the opening clause of paragraph 1. In that case, too, consideration would have to be given to the form and placement of the standard clause safeguarding the freedom of States to contract, which read: "Unless otherwise agreed between the States concerned". The title had been amended to take account of the rewording of the article.

24. Lastly, one member of the Drafting Committee had voiced opposition to the adoption of the draft article in its new version. In his view, apart from the dangers posed

<sup>2</sup> See footnote 1 above.

by the marked discrepancy between the various language versions, the new formulation referred to concepts that were specific to certain legal systems and were incomprehensible when removed from the context of those systems; as now set forth, the article did not provide for an effective rule of general application.

25. Mr. USHAKOV said that he was opposed to draft article 18 because of differences in substance, not terminology, between the English and French versions. In addition, the article contained several enigmas. For instance, to whom was it supposed to apply? It referred to participation “in a company or other collective body”, but what was meant by “collective body”? Did it mean an international organization? The French version was even more complicated. The word *groupement* had a political connotation, but what it did it mean in law? Another enigma lay in the words *ayant ou non la personnalité juridique*. Under Soviet law, civil proceedings could be brought against an entity only if it had legal personality.

26. In reference to paragraph 1 (a), he would cite the case of UPU, whose members were States and Non-Self-Governing Territories. Accordingly, under the terms of article 18, UPU could be the subject of a civil action in any State whatsoever. But the question was, how could the article be applied?

27. The term *rappports sociétaires*, in paragraph 1, was a further source of complication, particularly since it was rendered in English by an expression far removed from it (“relationship between the State and the body or the other participants therein”). Furthermore, the first part of paragraph 1, when read in conjunction with subparagraph (b), was contrary to internal law and private international law, since the question of place of control or principal place of business depended on the activities of the company, and not on the *rappports sociétaires*.

28. In his view, such difficulties stemmed from the fact that, in its haste to adopt any text that would undermine the principle of the sovereign immunity of States, the Drafting Committee had spent only a few hours on those draft articles, whereas it had devoted several meetings to article 23 of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

29. Sir Ian Sinclair said that, in substance, he endorsed draft article 18. He did not altogether concede Mr. Ushakov’s point that it contained a series of enigmas. Admittedly, a problem arose as to how to express in general terms a concept that might not be found in all legal systems. The reason why the Drafting Committee had adopted the terms “collective body”, in English, and *groupement*, in French, was that there simply was no other legal equivalent. Admittedly, the terminology was not ideal and the article would require close examination on second reading. In substance, however, it met a felt need to provide for a rule of immunity. Mr. Ushakov had also said that the article could cover bodies such as UPU. Surely, however, Mr. Ushakov was overlooking the phrase “Unless otherwise agreed between the States concerned”? If an agreement conferred immunity upon

members of UPU, that agreement would apply to the exclusion of article 18. As to Mr. Ushakov’s point regarding the distinction between “relationship” and *rappports sociétaires*, in his own view the two terms corresponded in substance.

30. Mr. BALANDA said that the word *groupement* (“collective body”) was a sociological and political term rather than a legal one. He proposed that it should be replaced, in the title, by the expression *entité commerciale* (“commercial entity”) and, in the body of the draft article, by *entité* (“entity”). However, he had no objection to the substance of the article.

31. Chief AKINJIDE said that, while he was not opposed to article 18 in principle, it posed a virtually insoluble problem. The problem stemmed from the fact that there were three sets of competing interests to be reconciled: those of States where the economy was privately controlled; those of States where it was State controlled; and those of developing countries where, in many respects, the economy was not controlled by the State. One problem, for instance, was that, under article 18, central banks would not enjoy immunity; it was those banks, however, rather than private banks, which, in developing and certain other countries, opened letters of credit. It was important for the Commission to be clear about what it was accepting—which, as far as commercial transactions were concerned, was in effect what was embodied in the relevant legislation of the United States of America and the United Kingdom of 1976 and 1978, respectively.

32. Mr. MAHIOU (Chairman of the Drafting Committee), speaking as a member of the Commission, said that he had no objection to the substance of article 18. In so far as a State engaged in commercial operations, it could expect to be sued or to have to sue in order to protect its interests. However, while the first criterion set forth in paragraph 1 (b) (incorporation of the company under the law of the State of the forum) was clear, the second (establishment of the place of control or of the principal place of business in that State) was much less so and might well give rise to difficulty. On that point, therefore, he reserved his position.

33. Since legal systems varied from country to country, the Drafting Committee had naturally had difficulty in finding equivalent terms. However, he supported Mr. Balanda’s proposal that the word *groupement* should be replaced by *entité commerciale*, which had the merit of already having been used in other draft articles and of introducing an additional concept, at least in French.

34. Mr. LACLETA MUÑOZ said that he had some doubts about the terminology, but appreciated that the Commission would have an opportunity to reconsider the matter. However, the application of article 18 should not be confined solely to commercial entities: for instance, non-commercial entities that owned movable and immovable property should not be excluded from the draft articles.

35. The CHAIRMAN suggested that the Commission should adopt draft article 18 provisionally, on the under-

standing that the comments made regarding terminology would be referred to the Drafting Committee.

*It was so agreed.*

*Article 18 was adopted.*

36. Mr. FRANCIS said that he would like it to be reflected in the summary record of the meeting that, although he had not entered any reservation in regard to the provisional adoption of the draft articles on jurisdictional immunities of States and their property, he reserved the right to comment on them at an appropriate point in the future.

37. Mr. MAHIU (Chairman of the Drafting Committee) expressed appreciation of the co-operation he had received from members of the Drafting Committee, even when additional meetings had proved necessary. He also thanked the members of the Secretariat who had assisted the Drafting Committee in its work.

38. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and all members of the Committee for their co-operation.

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

[Agenda item 10]

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

39. The CHAIRMAN invited Mr. Nemoto, Observer for the Asian-African Legal Consultative Committee, to address the Commission.

40. Mr. NEMOTO (Observer for the Asian-African Legal Consultative Committee) said that the official relations between the Commission and the Asian-African Legal Consultative Committee had grown and strengthened over the period of more than two decades since they had first been established. It was gratifying to note the enormous progress the Commission had made in regard to certain items on its agenda, and in particular on two topics of special interest to the Asian-African region: jurisdictional immunities of States and their property and the law of the non-navigational uses of international watercourses.

41. With regard to State immunity, many Governments in the Asian-African region were deeply concerned about the recent legislation enacted in the United States of America and some other countries. At a meeting of legal advisers held at United Nations Headquarters in November 1983, the view had been expressed that the aim of the Commission should be to settle the law on the subject authoritatively, with a view to achieving a uniform approach in the application of State immunity. One of the recommendations made was that reciprocity should be the guiding principle and that the Commission might perhaps be requested to consider including a provision to that effect in the draft articles on jurisdictional immunities of States and their property.

42. The work of the Asian-African Legal Consultative Committee on the non-navigational uses of international watercourses had been suspended in 1973 following the Commission's decision to take up the subject. However, at its most recent session, in Tokyo, the Committee had decided to resume consideration of the topic in the light of the Commission's work. It was therefore gratified to note that the Special Rapporteur for the topic, Mr. Evensen, had submitted his second report (A/CN.4/381), containing a complete set of draft articles.

43. The meeting of legal advisers in November 1983 had also considered the Commission's report on its thirty-fifth session, submitted to the General Assembly. In their own report, the legal advisers had concluded that, rather than debate each and every topic dealt with in the Commission's report, it would be desirable for the Sixth Committee to concentrate on those issues on which a debate would provide the Commission with guidance regarding the approach to be adopted or would promote detailed consideration at the final stage of the Commission's work on a particular topic. They had also thought that it would be useful if the Commission, in its report, could give some indication of the topics that required discussion in the Sixth Committee.

44. Referring to the current programme of work of the Asian-African Legal Consultative Committee, he said that the law of the sea, and in particular the provisions of the 1982 United Nations Convention on the Law of the Sea,<sup>3</sup> remained a priority. The Committee was participating in the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea, and had presented a paper at the second session of the Preparatory Commission, held in Kingston, Jamaica, in March 1983, on preparations for the exploration and exploitation of the reserved areas. It was also studying the question of delimitation of maritime zones under the United Nations Convention on the Law of the Sea, the legal framework for optimum utilization of the resources of the exclusive economic zone, and the rights and interests of land-locked States. It was likewise pursuing its consultations with various United Nations agencies concerning economic, scientific and technical co-operation in the use of the Indian Ocean.

45. The Committee's work on promotion and protection of investments was virtually finalized. It had taken up that topic, along with a number of other matters connected with economic co-operation, following a suggestion made at the Ministerial Meeting on Regional Co-operation in Industry held in Kuala Lumpur, Malaysia, in 1980. The Committee had also been closely involved in aspects of the legal work of UNCTAD and had been actively participating in UNCITRAL. In particular, it had jointly sponsored with UNCITRAL a seminar on commercial arbitration in March 1984 and was planning another joint seminar in November 1984 to consider, *inter alia*, a suitable framework for trading in South-East Asia and the Pacific. Two other seminars on international economic co-operation were planned.

<sup>3</sup> See *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122.

\* Resumed from the 1849th meeting.

46. The Committee's studies were continuing on such matters as the status and treatment of refugees, mutual co-operation in judicial assistance and the role of the ICJ in settling disputes. Another topic of considerable interest that would probably be taken up at the Committee's next session related to the concept of a peace zone in international law and to the framework of that zone.

47. In conclusion, he trusted that the Commission would participate at the Committee's next session, to be held in Kathmandu, Nepal, in February 1985.

48. The CHAIRMAN thanked the Observer for the Asian-African Legal Consultative Committee for his statement, and expressed the Commission's appreciation of the very fruitful relations which the two bodies had enjoyed for more than two decades. He asked the Observer to convey to the members of the Committee the Commission's earnest hope that those relations would be maintained.

STATEMENT BY THE OBSERVER FOR THE ARAB  
COMMISSION FOR INTERNATIONAL LAW

49. The CHAIRMAN welcomed Mr. Ennaifer, Observer for the Arab Commission for International Law, and invited him to address the Commission.

50. Mr. ENNAIFER (Observer for the Arab Commission for International Law), referring to the mutual co-operation and support existing between the Commission he represented and the International Law Commission, said that the co-operation between the two bodies was reflected in the annual participation by an observer for the Arab Commission for International Law in part of the work of the International Law Commission. In an effort to render such co-operation more effective and dynamic, the Council of Ministers of the League of Arab States, at its session in 1984, had once again invited the organs of the general secretariat of the League, as well as of the Arab Commission for International Law, to co-operate closely with the International Law Commission. The mutual support of the two bodies was evident from the fact that the Arab Commission was pursuing objectives similar to those of the International Law Commission, although at the regional level in the Arab world. He wished the International Law Commission every success in the performance of its tasks.

51. The CHAIRMAN thanked the Observer for the Arab Commission for International Law for his statement and expressed his best wishes for the success of that Commission in its endeavours to promote international law and the rule of law in international relations. It could rest assured of the readiness of the International Law Commission to continue the whole-hearted co-operation that had been established between the two bodies.

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

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

CHAPTER I. *Organization of the session* (A/CN.4/L.370)

*Chapter I of the draft report was adopted.*

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (A/CN.4/L.371 and Add.1)

A. *Introduction* (A/CN.4/L.371)

Paragraphs 1 to 13

*Paragraphs 1 to 13 were adopted.*

Paragraph 14

53. Sir Ian SINCLAIR proposed that, in the second sentence of paragraph 14, the words "during the present, thirty-fifth, session" should be amended to read: "during its thirty-fifth session".

*It was so agreed.*

*Paragraph 14, as amended, was adopted.*

Paragraphs 15 and 16.

*Paragraphs 15 and 16 were adopted.*

Paragraph 17

54. Sir Ian SINCLAIR pointed out that a correction should be made to the English and French versions of the first sentence of paragraph 17. The reference in parentheses at the end of the sentence should read: "(see paragraph 15 above)", as correctly indicated in the Spanish version.

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

Paragraph 18

55. Sir Ian SINCLAIR pointed out that, in the first sentence, the words "at its thirty-fifth session" should be replaced by "on its thirty-fifth session". In the third sentence, the words "can be attributed" should be replaced by "could be attributed".

*It was so agreed.*

*Paragraph 18, as amended, was adopted.*

Paragraph 19

*Paragraph 19 was adopted.*

*Section A, as amended, was adopted.*

B. *Consideration of the topic at the present session* (A/CN.4/L.371 and Add.1)

Paragraphs 20 to 22 (A/CN.4/L.371)

Paragraph 20

*Paragraph 20 was adopted.*

Paragraph 21

56. Mr. McCaffrey suggested that, at the end of the penultimate sentence, the words "serious damages" should be amended to read "serious damage", the reference being to serious damage to the environment.

*It was so agreed.*

57. Mr. LACLETA MUÑOZ, referring to the remark made by Mr. McCaffrey, pointed out that the term used in the Spanish version was not *daños* but *atentados*, which was preferable.

58. The CHAIRMAN noted that the term used in the French version was *atteintes*.

*Paragraph 21, as amended, was adopted.*

Paragraph 22

*Paragraph 22 was adopted.*

Paragraphs 23 to 55 (A/CN.4/L.371/Add.1)

Paragraph 23

59. Sir Ian SINCLAIR proposed that, in the third sentence, the fourth word, "does", should be replaced by "did". At the end of the fifth sentence, the words "the State's international responsibility" should be replaced by the wording of the title of the topic: "State responsibility". Lastly, in the concluding sentence, the words "of the problem" should be deleted.

*It was so agreed.*

60. Mr. LACLETA MUÑOZ said that, in the Spanish text, in two places in paragraph 23 and in several other places throughout the chapter, the words *responsabilidad penal* should be replaced by *responsabilidad criminal*.

*It was so agreed.*

*Paragraph 23, as amended, was adopted.*

Paragraph 24

61. Mr. FRANCIS said that subsection II, on the content *ratione materiae* of the draft code and the first stage of the Commission's work on the draft (paras. 24-31), did not reflect the understanding reached with the Special Rapporteur by Mr. Jagota, some African members of the Commission and himself. As recalled in the first sentence of paragraph 24, the General Assembly, by its resolution 38/132, had given the Commission a twofold mandate: first, to elaborate an introduction and, secondly, to draw up a list of offences. He could not accept the suggestion, in paragraph 24 and the following paragraphs, that the Commission should disregard the first part of its mandate. The report should indicate that at least one member considered that the Commission should have placed before the General Assembly an introduction summarizing the general principles of international criminal law.

62. The CHAIRMAN drew attention to item 2 of paragraph 55, in subsection IV (Conclusions). Presumably Mr. Francis was proposing that the report should record his view that the Commission should have dealt with that introduction at the current session.

63. Mr. THIAM (Special Rapporteur) said that, at the initiative of Mr. Francis, a meeting between African and Asian members had in fact been held, but that no agreement of any kind had been reached. Even had there been agreement among the members in question, he wondered what weight it would have carried with the Commission as a whole. Moreover, a special rapporteur was required to report to the Commission, not to regional groupings.

64. Sir Ian SINCLAIR suggested that the difficulty could be overcome by deleting from paragraph 24 the concluding words of the second sentence, "and that a question of method obliges it, at the present stage, to begin by preparing a list of international crimes and to take up the drafting of the introduction as a second step". The sentence would thus end with the words "for their elaboration", and a further sentence would be inserted on the following lines: "Some members expressed the view that the preparation of an introduction should proceed in parallel with the elaboration of the list of offences".

65. Mr. FRANCIS thanked Sir Ian Sinclair for a constructive proposal that satisfied him in part. He none the less considered that his views should be reflected in the report.

66. The CHAIRMAN suggested that Mr. Francis should submit in writing the form of words he wished to include in the report.

*The meeting rose at 6 p.m.*

## 1870th MEETING

*Tuesday, 24 July 1984, at 10 a.m.*

*Chairman: Mr. Alexander YANKOV*

*Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.*

### **Draft report of the Commission on the work of its thirty-sixth session (continued)**

**CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (continued) (A/CN.4/L.371 and Add.1)**

**B. Consideration of the topic at the present session (continued) (A/CN.4/L.371 and Add.1)**

Paragraphs 23 to 55 (continued) (A/CN.4/L.371/Add.1)

Paragraph 24 (continued) and paragraph 25

1. The CHAIRMAN invited the Commission to consider the following text proposed by Mr. Francis:

"[Some members however were of the view] that even a preliminary outline of the introduction was essential at the present stage of the Commission's work. It would at least comply, in spirit, with the mandate laid down by General Assembly resolution 38/132. Besides, it would elicit from the Sixth Committee comments of the representatives of Governments, which would assist the Commission in its future work on the topic.

“The outline should include, *inter alia*, a concise definition of crimes against the peace and security of mankind (and examples of such definition had been suggested by some speakers) and a statement of principles, in regard to the content of which the following were among observations also made by some speakers: the notion of individual criminal responsibility should be one of the basic principles of the code; offences against the peace and security of mankind constituted international crimes whose prosecution was a universal duty; the non-applicability of statutory limitation in respect of crimes committed by individuals; criminal responsibility might be attributed to States, although they could not as such be subject to any international criminal jurisdiction; the need to draw further upon the Nürnberg Principles in the preparation of the introduction.

“The above-mentioned approach would be consistent with the Commission’s decision ‘that the deductive method should be closely combined with the inductive method’, a decision that had been overwhelmingly endorsed by representatives in the Sixth Committee during the thirty-eighth session of the General Assembly.”

2. As far as paragraph 24 was concerned, the Commission still had before it Sir Ian Sinclair’s proposal (1869th meeting) that the latter part of the second sentence be deleted and that a new sentence be added, reading: “None the less, some members of the Commission expressed the view that the preparation of an introduction should proceed in parallel with the elaboration of the list of offences.”

3. Sir Ian SINCLAIR said that his own proposal was strictly confined to paragraph 24. The one submitted by Mr. Francis was much broader and involved the redrafting of paragraph 25 as well. In the circumstances, it would be desirable to discuss paragraph 25 first.

4. Mr. FRANCIS pointed out that his proposed text was based on the views expressed in the Commission not only by himself but also by other members. The opening words had been placed between square brackets because, for his part, he had no objection to the proposal by Sir Ian Sinclair, which would improve paragraph 24.

5. Sir Ian SINCLAIR said that, in principle, he could accept the text proposed by Mr. Francis to replace paragraph 25, the wording of which was not altogether satisfactory, particularly with regard to the references to the deductive method and the inductive method. However, in the opening phrase of the second paragraph of the proposal by Mr. Francis, the words “a concise definition of crimes against the peace and security of mankind” should be replaced by: “more precise criteria for identifying or defining crimes against the peace and security of mankind”. Also, the words in parentheses in the same paragraph, namely “and examples of such definition”, should be replaced by “and examples of such criteria”.

6. Lastly, in the first sentence of the first paragraph, the words “the introduction was essential” should be replaced by “the introduction was desirable”, a change

that would avoid placing undue emphasis on the division of opinion in the Commission.

7. Mr. USHAKOV said he wished to make it clear that he was not among the members who had proposed objective criteria, since he believed that no criteria of that kind existed for identifying crimes against the peace and security of mankind. Crimes against the peace and security of mankind could only be those recognized as such by the international community.

8. The CHAIRMAN proposed that a small group, consisting of the Special Rapporteur, Mr. Francis, Mr. Reuter and Sir Ian Sinclair, should be set up to prepare an agreed text, either to be inserted between paragraphs 24 and 25, or to replace paragraph 25.

9. Mr. THIAM (Special Rapporteur) said that the criteria proposed by the members of the Commission were set forth in paragraph 25. The text now proposed was not confined to an expression of the views of Mr. Francis; it also sought to reflect the views of other members, a task that fell to the Special Rapporteur. Paragraph 25 in its existing form in fact conveyed the numerous ideas expressed in the course of the debate and it showed that the majority of the Commission was in favour of the inductive method.

10. Mr. FRANCIS said that he would adopt a flexible approach to the question of the wording of his proposal. He could not, however, accept the statement by the Special Rapporteur. He was fully entitled to refer to the views expressed in the Commission not only by himself but also by other members. In actual fact, the text he had submitted was based on a paper by Mr. Jagota and it reflected the understanding reached with the Special Rapporteur at the time.

11. Mr. McCAFFREY said he supported the procedure proposed by the Chairman.

12. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt his proposal to set up an informal group and defer consideration of paragraphs 24 and 25 until the group had reported back to the Commission.

*It was so agreed.*

Paragraph 26

13. Mr. LACLETA MUÑOZ noted that the term “crimes” had been rendered in the Spanish version of paragraphs 25 and 26 and subsequent paragraphs by its normal Spanish equivalent, *delitos*, but that the term *crímenes* had been used in paragraph 24. In view of the difficulty of arriving at complete uniformity, he suggested that, in the Spanish version, a footnote should be appended to paragraph 24 drawing attention to that problem of translation.

*Paragraph 26 was adopted on that understanding.*

Paragraph 27

14. Mr. NI proposed that the words “whereas every violation of a human right is not an offence”, in the second sentence, should be amended to read: “whereas not every violation of a human right is an offence”.

15. The CHAIRMAN noted that Mr. Ni's proposal was fully satisfactory in English, but might cause difficulties in the other language versions. However, that point could be dealt with by the translation services.

*It was so agreed.*

*Paragraph 27, as amended, was adopted.*

Paragraph 28

16. Mr. McCaffrey pointed out that the opening words, "The Commission took the view", might give a false impression of unanimity. Some form of language should be used to indicate that that had not been the case.

17. Sir Ian Sinclair suggested that the phrase should be altered to read: "Most members of the Commission took the view". A reference to the minority view was contained in paragraph 25, which the Commission had not yet adopted.

18. Mr. Ushakov pointed out that, in the past, the Commission had always avoided the use of terms such as "majority" and "minority". In the absence of a vote, and since not all members were present at every one of the Commission's meetings, those terms were inappropriate.

19. The CHAIRMAN said that the words in question could perhaps be altered to read: "The view was expressed that".

20. Chief Akinjide said that the Commission should take care not to set what might prove to be a dangerous precedent. The Commission took its decisions by consensus, and a consensus decision was not simply a decision by a majority. Where a consensus emerged, it became the view of the Commission as a whole.

21. The CHAIRMAN said that, if the words "most members of the Commission" were used, it would also be necessary to present the views of the minority.

22. Mr. Mahiou proposed that the words "no general rules", in the first sentence, should be changed to "not all general rules". The Commission's view had been that it was not possible to deduce all the general rules common to the different offences, but some members had considered that some such rules could be deduced at the current stage.

23. Mr. McCaffrey supported the proposal made by Mr. Mahiou.

24. Mr. Malek proposed that the words "as formulated by the Commission" should be inserted in the penultimate sentence, after the words "principle IV of the Judgment of the Nürnberg International Military Tribunal", in order to avoid giving the impression that the principle had been numbered by the Tribunal itself.

*Paragraph 28 was adopted with the amendments proposed by Sir Ian Sinclair, Mr. Mahiou and Mr. Malek.*

Paragraph 29

*Paragraph 29 was adopted.*

Paragraph 30

25. Mr. NI pointed out that the list given in parentheses in the first sentence, after the words "international instruments", namely "(conventions, resolutions, declarations)", was not exhaustive, since there were other types of international instruments, such as charters, covenants and protocols. He proposed the insertion of a comma followed by "etc." after the word "declarations".

*It was so agreed.*

26. Mr. Malek proposed the deletion of the word "international", before the word "crimes", in the first sentence. Serious breaches of international law were not defined as "international crimes" in the relevant international instruments; they were simply defined as "crimes", and were international because they were covered by international instruments.

27. Mr. OGISO suggested that the words "which define these acts as international crimes", in the first sentence, should be replaced by "the violation of which would constitute international crimes".

28. Mr. Mahiou said that, in all logic, it would be difficult to delete the word "international" before "crimes" in the first sentence. The problem raised by Mr. Malek lay chiefly in the fact that the international instruments in question did not really "define" the relevant crimes as "international". He suggested that the word "define" should be replaced by "regard".

29. Mr. Thiam (Special Rapporteur) accepted Mr. Mahiou's suggestion.

*Paragraph 30, as amended, was adopted.*

Paragraph 31

30. Mr. Malek proposed that the words "offences recognized since 1954" should be replaced by "offences not covered by the 1954 draft code". The wording as it stood could give the impression that the offences in question had not existed in 1954, which was not the case. For example, the taking of hostages had already been an offence in 1954, but an express decision had been taken not to include it in the draft code.

*It was so agreed.*

*Paragraph 31, as amended, was adopted.*

Paragraph 32

31. Mr. NI pointed out an inconsistency between paragraph 32 and the paragraphs that followed. Paragraph 32 listed three categories of crimes, but those categories were not treated in the proper order in the subsequent paragraphs.

32. Mr. Evensen proposed that paragraph 32 should be amended so as to reverse the order of the second and third categories.

*It was so agreed.*

*Paragraph 32, as amended, was adopted.*

Paragraph 33

*Paragraph 33 was adopted.*

## Paragraph 34

33. Mr. OGISO proposed the insertion, after the second sentence, of a new sentence reading: 'It was also observed that paragraph (8), on annexation of foreign territory, should be reworded along the lines of paragraph (a) of article 3 of the same Definition.'

*It was so agreed.*

34. Mr. OGISO further proposed the insertion, before the last sentence of the paragraph, of a new sentence reading: 'In relation to paragraph (7), it was pointed out that, since disarmament agreements were often concluded by a limited number of participants, the question might arise whether acts contrary to such agreements committed by non-participants would also be regarded as offences.'

*It was so agreed.*

35. Mr. McCAFFREY, referring to the last sentence of the paragraph, proposed that the words *inter alia* should be inserted between 'left much to be desired,' and 'because'.

*It was so agreed.*

*Paragraph 34, as amended, was adopted.*

## Paragraphs 35 to 37.

*Paragraphs 35 to 37 were adopted.*

## Paragraph 38

36. Mr. THIAM (Special Rapporteur) submitted the following text to replace the first three sentences of paragraph 38, the final sentence remaining unchanged: 'Lastly, paragraph (13) of article 2 covers *conspiracy, direct incitement to commit any of the offences defined in the code, complicity and attempts*. These offences will be examined by the Commission in due course. For the reasons given earlier, it is difficult to discuss offences which are often related to main offences without having previously studied the offences to which they are related.'

*Paragraph 38, as amended, was adopted.*

## Paragraph 39

37. Mr. OGISO said that the last part of the first sentence, reading 'that the offences it proposed should be retained', was too categorical. A more flexible formulation would be preferable, such as 'should be retained, subject to review, taking account of the views expressed by the members of the Commission as well as of the Sixth Committee'. He would like to know the Special Rapporteur's attitude to that suggestion.

38. Mr. THIAM (Special Rapporteur) said it must be clearly understood that the Commission had decided to retain the offences included in the 1954 draft code. If Mr. Ogiso's proposal amounted to a statement that some of those offences had not been retained, it would constitute a departure from what had been agreed upon. Too flexible a formula would reopen the whole question.

39. Mr. OGISO said that he did not wish to press his point.

*Paragraph 39 was adopted.*

## Title of part two of the list of offences

40. Mr. THIAM (Special Rapporteur) said that the title of part two of the list of offences should be amended to read: 'Part Two. Offences covered since the 1954 draft code and the relevant instruments'.

*The title of part two of the list, as amended, was adopted.*

## Paragraph 40

41. Mr. NI proposed the addition of a comma and the abbreviation 'etc.' after the word 'declarations', appearing in parentheses in the first sentence of the introduction to paragraph 40.

*It was so agreed.*

42. Mr. KOROMA proposed that the order of the words 'resolutions, declarations', appearing in parentheses in the same sentence, should be reversed. The same change would apply to the first sentence of paragraph 30. Moreover, the instruments set forth in paragraph 40 should be listed in chronological order.

*It was so agreed.*

43. Following a comment by Mr. OGISO, the CHAIRMAN suggested the insertion, in the second sentence of the introduction to paragraph 40, of the words 'listed by the Special Rapporteur' after the word 'instruments'.

*It was so agreed.*

*Paragraph 40, as amended, was adopted.*

## Paragraph 41

44. Sir Ian SINCLAIR suggested that the second sentence should be altered to read: 'In the light of these instruments, it would seem possible to draw up a list of offences not covered by the 1954 draft code. It will, however, be necessary to make a choice between a *minimum content* and a *maximum content* of the code to be drafted.'

*It was so agreed.*

*Paragraph 41, as amended, was adopted.*

## Paragraph 42

45. Sir Ian SINCLAIR, referring to the first sentence, pointed out that it was incorrect to say that General Assembly resolution 1514 (XV) of 14 December 1960 had been 'adopted unanimously'. The United Kingdom, for example, had abstained in the vote on the resolution. The sentence should be amended to read: 'The condemnation of colonialism derives initially from the General Assembly resolution of 14 December 1960.'

46. In the third sentence, the words 'it would be better to use the wording of article 19' should be replaced by 'it would be better to use wording possibly modelled on article 19'; and at the end of the sentence, the words 'or the expression 'denial of the right of self-determination' ' should be deleted.

47. Mr. THIAM (Special Rapporteur) said that the

amendment proposed by Sir Ian Sinclair to the first sentence was acceptable. As for the third sentence, the phrase beginning "it would be better" was couched in the conditional mood and was hence sufficiently dubitative. Moreover, he believed it desirable to retain the words "denial of the right of self-determination".

48. Sir Ian SINCLAIR said that he would not insist on the deletion of the words "denial of the right of self-determination", or on the retention of the word "possibly", in the amendment he had proposed for the third sentence of the paragraph.

49. Mr. KOROMA said that the words "condemnation of colonialism", at the beginning of the paragraph, had a political connotation. It would therefore be preferable to speak of the "illegality of colonialism", which would also better reflect the intended meaning. However, he supported Sir Ian Sinclair's revised amendment to the third sentence, namely "wording modelled on article 19".

50. Mr. THIAM (Special Rapporteur) said he accepted the amendment proposed by Sir Ian Sinclair to the second part of the third sentence, as revised by Sir Ian Sinclair.

51. Mr. DÍAZ GONZÁLEZ pointed out that colonialism was unlawful not because General Assembly resolution 1514 (XV) had declared it to be so, but because it was unlawful *ab initio*. The General Assembly resolution merely acknowledged its unlawful character. Hence it was difficult to say that the unlawfulness of colonialism "derives" from the General Assembly resolution.

52. Sir Ian SINCLAIR said that General Assembly resolution 1514 (XV) in fact amounted to a general condemnation of colonialism in all its forms. Possibly, therefore, the words "in all its forms" could be inserted after "condemnation of colonialism", in the first sentence.

53. Mr. KOROMA proposed that the first sentence of the paragraph should be amended to read: "Colonialism was declared illegal by resolution 1514, adopted by the General Assembly on 14 December 1960."

54. Mr. BALANDA said that it would be better to speak of "condemnation" of colonialism, a term more in keeping with General Assembly resolution 1514 (XV).

55. Chief AKINJIDE said that Mr. Koroma's point regarding the illegality of colonialism was well taken. He would suggest, however, that the word "again" should be inserted at an appropriate point in the first sentence of the paragraph.

56. Mr. DÍAZ GONZÁLEZ said he would have no objection to leaving paragraph 42 unchanged. If, however, the word "initially" were to be introduced in the first sentence, as proposed by Sir Ian Sinclair, it might suggest that colonialism had not been unlawful before the adoption of the relevant resolution—an absurdity which he for one could not accept.

57. Mr. KOROMA said that the statement that the condemnation of colonialism derived from General Assembly resolution 1514 (XV) was not factually correct.

He therefore maintained his proposal, either as originally worded or as amended by Chief Akinjide.

58. Sir Ian SINCLAIR said he was fully prepared to withdraw his proposal that the word "initially" be inserted in the first sentence of the paragraph, if it created a problem. He would none the less suggest that the first sentence be redrafted, as a simple statement of fact, to read: "General Assembly resolution 1514 (XV) of 14 December 1960 condemned colonialism in all its forms and manifestations."

*It was so agreed.*

*Paragraph 42, as amended, was adopted.*

*The meeting rose at 1.05 p.m.*

## 1871st MEETING

*Wednesday, 25 July 1984, at 10 a.m.*

*Chairman: Mr. Alexander YANKOV*

*Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.*

### **Draft report of the Commission on the work of its thirty-sixth session (continued)**

**CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (concluded) (A/CN.4/L.371 and Add.1)**

**B. Consideration of the topic at the present session (concluded) (A/CN.4/L.371 and Add.1)**

Paragraphs 23 to 55 (concluded) (A/CN.4/L.371/Add.1)

Paragraph 43

1. Mr. McCAFFREY proposed the insertion, in the sixth sentence, of the words "many members believed that" between the words "Nevertheless" and "*apartheid*". Moreover, in the penultimate sentence, the words "as *jus cogens*" should be deleted.

2. Sir Ian SINCLAIR said that another solution to the problem posed by the penultimate sentence of the paragraph would be to replace the words "does not deprive" by "did not, in their view, deprive".

3. Mr. MAHIOU, supported by Chief AKINJIDE, welcomed Mr. McCaffrey's suggestion concerning the sixth sentence, but thought it would be preferable to say "most members believed that". Sir Ian Sinclair's suggestion was also acceptable and the penultimate sentence could be reworded: "From their point of view, the fact that some States had not acceded to the Convention on *Apartheid* did not deprive it of its force as *jus cogens*".

4. Mr. THIAM (Special Rapporteur) said that he too thought the wording "From their point of view" was preferable. Moreover, if it was not deemed possible to aver that the Commission was unanimous in regarding *apartheid* as a crime, the least that could be done was to speak in the sixth sentence of "most members".

5. Mr. USHAKOV said it was essential to refrain from speaking of a majority. He preferred the expression "many members" to "most members".

6. After a brief exchange of views in which Chief AKINJIDE, Mr. FRANCIS and Mr. McCAFFREY took part, the CHAIRMAN suggested that, in the sixth sentence, the words "most members believed that" should be inserted between the words "Nevertheless" and "*apartheid*". He further suggested that Mr. Mahiou's second proposal concerning the penultimate sentence should be adopted.

*It was so agreed.*

7. Mr. KOROMA, referring to the first sentence, proposed that the words "the crime of" should be inserted between "condemning" and "*apartheid*".

*It was so agreed.*

*Paragraph 43, as amended, was adopted.*

Paragraph 44

*Paragraph 44 was adopted.*

Paragraph 45

8. Mr. OGISO proposed the addition of the following sentence at the end of the paragraph: "Some members were of the view that, unless international agreements for prohibition of atomic weapons were reached within the framework of general disarmament, it was premature to conclude that the use of atomic weapons was an offence."

*It was so agreed.*

*Paragraph 45, as amended, was adopted.*

Paragraph 46

*Paragraph 46 was adopted.*

Paragraph 47

9. Mr. BALANDA proposed that the words "—at least the first use—of such weapons of mass destruction", at the end of the second sentence, should be replaced by "—at least in the case of a State that made the first use—of such weapons of mass destruction".

*It was so agreed.*

*Paragraph 47, as amended, was adopted.*

Paragraph 48

10. Mr. McCAFFREY, referring to the second sentence, proposed that the phrase "recognizes serious damage to the environment as an international crime" should be replaced by "recognizes that, under certain conditions, causing serious damage to the environment may be considered as an international crime".

*It was so agreed.*

11. Mr. BALANDA proposed that the first sentence should be replaced by: "The problem of the *environment* had also been considered."

12. Sir Ian SINCLAIR said that the words "should lead", in the fifth sentence, should be replaced by "might lead".

13. Mr. THIAM (Special Rapporteur), while not insisting on the retention of the initial wording, pointed out that the use of the conditional in the French original should meet Sir Ian Sinclair's concern.

*The amendment proposed by Sir Ian Sinclair was adopted.*

*Paragraph 48, as amended, was adopted.*

Paragraph 49

14. Mr. BALANDA proposed the deletion, in the penultimate sentence, of the words "the crime of" before "mercenarism", since mercenarism was not yet regarded as a crime.

*It was so agreed.*

*Paragraph 49, as amended, was adopted.*

Paragraph 50

15. Mr. BALANDA proposed, in order to bring the language of the report into line with that of the relevant conventions, that the words "country to which they are accredited", at the end of the second sentence, should be replaced by "State to which they are accredited".

*It was so agreed.*

*Paragraph 50, as amended, was adopted.*

Paragraph 51

16. Mr. OGISO said he did not think that the statement contained in the last sentence of the paragraph had actually been agreed on. Hence it would be better to delete that sentence.

17. Mr. MAHIOU, supported by Mr. DÍAZ GONZÁLEZ and Mr. RAZAFINDRALAMBO, urged retention of the final sentence of the paragraph, although the wording might be recast in order to take account of divergences of view.

18. Chief AKINJIDE said that he too favoured retention of the sentence, either as drafted or possibly in a slightly amended form.

19. Sir Ian SINCLAIR proposed that the sentence should read: "Opinion in the Commission was divided on whether it would be desirable to include economic aggression as a separate offence in the draft."

20. Mr. DÍAZ GONZÁLEZ said he could not agree to Sir Ian Sinclair's proposal. It would be better to say that the members of the Commission had taken different views on the matter.

21. Mr. THIAM (Special Rapporteur) suggested that the existing text of the last sentence should be retained, to be followed by a new sentence reading: "However,

some members expressed reservations about the advisability of including the concept of economic aggression in the draft.”

22. Mr. McCAFFREY said that that would not convey an accurate picture of the position in the Commission.

23. Mr. USHAKOV said that it was not a serious matter, and merely involved a preliminary issue. The Commission would not fail to deal with it in depth when specific articles were proposed at a later stage.

24. Sir Ian SINCLAIR proposed that, in order to overcome the difficulties, the final sentence should be amended to read: “All in all, there was a body of opinion in the Commission that was not opposed to condemning economic aggression, provided that a suitable definition and terminology could be found.” That would then be followed by the sentence proposed by the Special Rapporteur.

*It was so agreed.*

*Paragraph 51, as amended, was adopted.*

Paragraphs 52 to 54

*Paragraphs 52 to 54 were adopted.*

Paragraph 55

*Subparagraph 1*

25. Mr. USHAKOV said that the formulation of subparagraph 1 was somewhat strange. It would be better to replace the words “the Commission recommends to the General Assembly” by “the Commission intends”.

*It was so agreed.*

26. Mr. LACLETA MUÑOZ recalled his comments on the Spanish version of paragraph 23 (1869th meeting) and said that, in the Spanish version of subparagraph 1 of paragraph 55, the expression *responsabilidad penal internacional* should be replaced by *responsabilidad criminal internacional*.

*It was so agreed.*

*Subparagraph 1, as amended, was adopted.*

*Subparagraph 2*

27. Mr. FRANCIS said that he was completely opposed to the subparagraph, in view of the terms of General Assembly resolution 38/132, by which the Commission was invited to elaborate an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session. In particular, he was unable to agree to the implied abandonment of the inductive and deductive methods adopted by the Commission and recommended to the General Assembly.

28. Mr. McCAFFREY proposed that the expression “the list of offences” should be replaced by “a tentative list of offences” or by “a provisional list of offences” and that, at the end of the subparagraph, the phrase “relating to offences against the peace and security of mankind”, or some similar wording, should be added.

29. As to Mr. Francis’s point, possibly a form of wording could be found to indicate that the Commission

should draw up a tentative list of offences while formulating the introduction; the Commission would thus not be tied down to an established order of procedure.

30. Mr. USHAKOV suggested that the formulation “the Commission recommends to the General Assembly ... that the Commission should begin” should be replaced by “the Commission ... intends to begin”, as in subparagraph 1.

31. Mr. MAHIU supported the changes proposed by Mr. McCaffrey, which introduced useful elements of precision. Moreover, to allay the concern of Mr. Francis, the second part of the sentence could be made more flexible by saying: “... intends ... to begin by drawing up a provisional list of offences while bearing in mind the drafting of an introduction ...”

32. Mr. FRANCIS said he was grateful for those suggestions but, in his view, if the General Assembly asked the Commission to do something, the Commission should do it. The idea that it was impossible, even at the current early stage, to abide by the spirit of General Assembly resolution 38/132 was totally unacceptable, and he would like his view to be reflected in the records.

33. The CHAIRMAN, speaking as a member of the Commission, said that, while he agreed in principle with Mr. Francis, General Assembly resolution 38/132, as he read it, did not stipulate any given order of work, but invited the Commission to consider the two aspects of the matter, namely the list of offences and an introduction containing general principles. It was important to respect the Special Rapporteur’s method of work and not to tie his hands. Possibly Mr. Mahiou’s proposal could be reworded to convey the idea that the Commission would consider the general introduction while working on the list of offences.

34. Mr. EVENSEN suggested that, in order to achieve complete equality between the two elements involved, the last part of the subparagraph could be redrafted to read: “by drawing up a provisional list of offences and by drafting an introduction summarizing the general principles of international criminal law”.

35. Mr. THIAM (Special Rapporteur) said that the members of the Commission could naturally differ on the interpretation of General Assembly resolutions. With regard to the study of the various topics assigned to special rapporteurs, the Commission had always left it to each special rapporteur to decide on his methods of work. For his own part, he could not agree to work under supervision. He simply expected to receive guidelines from the Commission. Mr. Mahiou’s suggestion was acceptable.

36. Mr. FRANCIS said his stance was dictated by the terms of General Assembly resolution 38/132. He had spoken in his personal capacity as a member of the Commission, but also in the context of what the General Assembly had asked the Commission to do. He could not agree to the subparagraph in its existing form, but there was no reason for the Commission not to accept it, either as drafted or in an amended form. His own position was simply that the matter should be referred to the General Assembly for its response and further instructions.

37. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the amendments proposed by Mr. McCaffrey and Mr. Mahiou.

*It was so agreed.*

*Subparagraph 2, as amended, was adopted.*

*Subparagraph 3 (a)*

38. Mr. USHAKOV proposed that the opening words of subparagraph 3 (a) should be replaced by: "The Commission intends to include the offences covered by the 1954 draft code...".

*It was so agreed.*

*Subparagraph 3 (a), as amended, was adopted.*

*Subparagraph 3 (b)*

39. Sir Ian SINCLAIR proposed that the words "and possibly" should be added before "serious damage".

*It was so agreed.*

40. Mr. OGISO proposed that the word "suitable" should be replaced by "appropriate".

*It was so agreed.*

*Subparagraph 3 (b), as amended, was adopted.*

*Subparagraph 3 (c)*

41. Mr. KOROMA proposed that the opening phrase should simply read: "With regard to the use of atomic weapons ...".

*It was so agreed.*

42. Mr. USHAKOV said that he failed to see what "more specific guidance" the General Assembly could give the Commission, since a number of its resolutions already condemned the first use of atomic weapons. Only when the draft was communicated to the Governments could the Commission expect to receive specific indications.

43. Mr. THIAM (Special Rapporteur) suggested that the latter part of the sentence, "considers that it should await more specific guidance from the General Assembly in view of the political aspects of the problem", should be replaced by "intends to examine the matter in greater depth".

44. Sir Ian SINCLAIR suggested that the words "in the light of any views expressed in the General Assembly" should be added at the end of the sentence as thus reworded.

*It was so agreed.*

*Subparagraph 3 (c), as amended, was adopted.*

*Subparagraph 3 (d)*

45. Mr. KOROMA proposed that the words "stability of political régimes", in the first sentence, should be replaced by "stability of Governments".

*It was so agreed.*

*Subparagraph 3 (d), as amended, was adopted.*

*Subparagraph 3 (e)*

46. Mr. USHAKOV proposed the deletion of the words "serious violations by diplomats of law and order in the country to which they are accredited".

47. Mr. THIAM (Special Rapporteur) proposed that the words in question should be replaced by a comma and the abbreviation "etc.".

*It was so agreed.*

*Subparagraph 3 (e), as amended, was adopted.*

*Subparagraph 3 (f)*

*Subparagraph 3 (f) was adopted.*

*Paragraph 55, as amended, was adopted.*

Paragraphs 24 and 25 (*concluded*) and paragraph 25 *bis*.

48. The CHAIRMAN invited the Commission to resume its consideration of paragraphs 24 and 25 and to examine the revised text of those paragraphs, together with a new paragraph 25 *bis*, as proposed by the informal group set up at the 1870th meeting.

49. The paragraphs in question read:

"24. With regard to the content *ratione materiae* of the draft code, the Commission had well in mind General Assembly resolution 38/132, which invited it to elaborate, as a first step, an introduction in conformity with paragraph 67 of its report on its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report. It considered, however, that this mandate, which lists in their logical order the elements of the final result which the Commission's work is expected to yield, does not necessarily establish an order of priority for their elaboration, and that a question of method obliges it, at the present stage, to begin by preparing a list of international crimes and to take up the drafting of the introduction as a second step. Although the final draft will necessarily have to include such an introduction, it would be premature at the present stage to prepare a general part containing a definition of an offence against the peace and security of mankind and deducing the general principles and rules applicable.

"25. Some members were, however, of the view that preparation of an introduction should proceed in parallel with the establishment of the list of offences, which in any case was desirable in response to General Assembly resolution 38/132. The view was expressed that more precise criteria for identifying offences against the peace and security of mankind should be established. Among the several possible criteria suggested were the following: the inspiration of the criminal act (for example, an act based on racial, religious or political conviction); the status of the victim of the criminal act (for example, a State or a private individual); the nature of the law or interest infringed (the interest of security appearing more important than a purely material interest); or lastly, the motive, etc. Interesting as those suggestions were, none of the criteria proposed sufficed by itself to identify an offence against the peace and security of mankind.

The seriousness of an act was judged sometimes according to the motive, sometimes according to the end pursued, sometimes according to the particular nature of the offence (the horror and reprobation it arouses), sometimes according to the physical extent of the disaster caused. Furthermore, these elements seemed difficult to separate and were often combined in the same act.

"25 bis. It was also thought that the introduction should contain a statement of principles in regard to the content of which the following were among observations made by one member: the notion of individual criminal responsibility should be one of the basic principles of the code; offences against the peace and security of mankind constituted international crimes whose prosecution was a universal duty; the non-applicability of statutory limitation in respect of crimes committed by individuals; criminal responsibility may be attributed to States, although they cannot as such be subject to any international criminal jurisdiction; the need to draw further upon the Nürnberg Principles in the preparation of the introduction. The above-mentioned approach would, in the view of that member, be consistent with the Commission's decision "that the deductive method should be closely combined with the inductive method ..."—a decision which was overwhelmingly endorsed by representatives in the Sixth Committee during the thirty-eighth session of the General Assembly."

50. The CHAIRMAN noted that there were no comments on the proposed paragraphs. He would therefore take it that the Commission agreed to adopt them.

*It was so agreed.*

*Paragraphs 24 and 25, as amended, and paragraph 25 bis were adopted.*

*Section B, as amended, was adopted.*

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

**CHAPTER III. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.372 and Add.1)**

51. Mr. McCAFFREY said that it was not desirable to include in chapter III of the Commission's report (A/CN.4/L.372 and Add.1) material drawn from the summary records of the Commission's meetings, a course that had made chapter III unduly lengthy and created an imbalance in the draft report as a whole. Moreover, it meant that the same article was dealt with in five or six places in chapter III. He proposed that, in line with the Commission's usual practice, all the material in section B (A/CN.4/L.372) dealing with draft articles on which the Commission had taken action should be deleted, since the background was fully explained in the relevant commentaries in section C (A/CN.4/L.372/Add.1). The remaining material in section B could be rearranged in two subsections: the first dealing with the fifth report (A/CN.4/382) and the draft articles as a whole submitted by the Special Rapporteur, and the second

setting forth the views expressed on specific draft articles, article by article.

52. The CHAIRMAN, speaking as Special Rapporteur, explained that the format of chapter III had been used in order to avoid overburdening the commentaries with particulars of the discussion on each draft article.

53. Mr. FRANCIS proposed that the Commission should deal with chapter III as submitted and consider Mr. McCaffrey's proposal for rearrangement afterwards.

*It was so agreed.*

54. The CHAIRMAN invited the Commission to consider chapter III of the Commission's draft report, paragraph by paragraph.

**A. Introduction (A/CN.4/L.372)**

*Section A was adopted.*

**B. Consideration of the topic at the present session (A/CN.4/L.372)**

Paragraphs 10 to 14

*Paragraphs 10 to 14 were adopted.*

Paragraphs 15 to 31

55. Mr. McCAFFREY said he reserved the right to propose the deletion of paragraphs 15 to 18 and paragraphs 22 to 26, since they dealt with draft articles which had been adopted and for which commentaries existed.

*Paragraphs 15 to 31 were adopted.*

Paragraph 32

56. Mr. OGISO noted that in the last two sentences of paragraph 32 it was stated that the Special Rapporteur's fifth report "elaborated further" on the interpretation of the expression "articles intended for official use". As he recalled, the fifth report of the Special Rapporteur (A/CN.4/382) contained a very useful list of such articles, drawn up on the basis of national practice. He hoped such an enumeration could be included in paragraph 32.

57. The CHAIRMAN, speaking as Special Rapporteur, said that the enumeration in question, which appeared in paragraphs 65 to 69 of his fifth report, had been given by way of illustration. A form of words could be introduced at the end of paragraph 32 referring to that enumeration.

*Paragraph 32 was adopted on that understanding.*

Paragraphs 33 to 48

*Paragraphs 33 to 48 were adopted.*

Paragraph 49

58. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the words "in some quarters", in the first sentence, were to be deleted.

59. Mr. McCAFFREY noted that the fourth sentence consisted of two totally different elements. The second, namely "and all the efforts undertaken ..." could be deleted. Alternatively, the two elements could be separated and made into two separate sentences.

60. Mr. RAZAFINDRALAMBO said that the passage in question reflected views he had expressed during the discussion. He therefore preferred the fourth sentence to be divided into two separate sentences. The first sentence would end with the word “hindered”. The conjunction “and” would be deleted and a new sentence would begin with “All the efforts undertaken ...”, and the words “in such a case” would be added after the words “would be meaningless”.

*It was so agreed.*

*Paragraph 49, as amended, was adopted.*

Paragraph 50

*Paragraph 50 was adopted.*

Paragraph 51

61. Mr. McCAFFREY said that the statement in the first sentence of the paragraph should be preceded by a formula on the following lines: “It was generally felt that ...”.

*It was so agreed.*

*Paragraph 51, as amended, was adopted.*

Paragraphs 52 and 52 bis

*Paragraphs 52 and 52 bis were adopted.*

Paragraph 53

62. Mr. McCAFFREY said he reserved the right to propose the deletion of paragraphs 53 to 55, as well as of paragraphs 57 to 60, for the reasons he had given earlier.

*Paragraph 53 was adopted.*

Paragraph 54

63. Mr. McCAFFREY noted that paragraph 54 described only two of the views expressed in connection with draft article 21. There was, however, a third view, namely that article 21 should be deleted because it was unnecessary. An additional sentence should therefore be inserted, reading: “Still another view was that the entire article was unnecessary.”

*It was so agreed.*

*Paragraph 54, as amended, was adopted.*

Paragraphs 55 to 75

*Paragraphs 55 to 75 were adopted.*

Paragraph 76

64. Mr. McCAFFREY proposed that the words “secrets of official correspondence”, in the second sentence of the paragraph, should be replaced by “confidentiality of official correspondence”.

65. Mr. LACLETA MUÑOZ supported that proposal. Only a slight change was required in the Spanish text, where the word *de* had to be inserted between *el secreto de la correspondencia y* and *los documentos oficiales*.

*It was so agreed.*

*Paragraph 76, as amended, was adopted.*

Paragraphs 77 to 106

66. Mr. McCAFFREY said he reserved the right to propose the deletion of paragraphs 93 to 95 and 97 to 101 for the reasons already stated.

*Paragraphs 77 to 106 were adopted.*

Paragraph 107

67. Mr. OGISO, referring to the statement in the penultimate sentence of paragraph 107 that the “intention was to refer to articles of a confidential nature”, said it was not clear whether all or only some of the articles for official use contained in the diplomatic bag were of a confidential character.

68. The CHAIRMAN, speaking as Special Rapporteur, explained that the protection was intended to apply to articles for official use of a confidential nature. Other articles for official use, such as furniture for the mission, would be covered by another provision of the 1961 Vienna Convention on Diplomatic Relations, namely article 36.

69. Sir Ian SINCLAIR proposed that the relevant passage should be amended to state: “The protection was designed essentially for articles of a confidential nature, ...”.

*It was so agreed.*

*Paragraph 107, as amended, was adopted.*

*The meeting rose at 1 p.m.*

## 1872nd MEETING

*Wednesday, 25 July 1984, at 3.05 p.m.*

*Chairman: Mr. Alexander YANKOV*

*Present: Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.*

### **Draft report of the Commission on the work of its thirty-sixth session (continued)**

**CHAPTER III. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)**  
(A/CN.4/L.372 and Add.1)

**B. Consideration of the topic at the present session (concluded)**  
(A/CN.4/L.372)

Paragraphs 108 to 114

*Paragraphs 108 to 114 were adopted.*

## Paragraph 115

1. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the words "of existing conventions", at the end of the penultimate sentence of the paragraph, should be replaced by the words "of that Convention".

*Paragraph 115, as amended, was adopted.*

## Paragraph 116 to 119

*Paragraphs 116 to 119 were adopted.*

## Paragraph 120

2. Mr. McCaffrey proposed that the words "taken up again" should be replaced by the word "continued".

*It was so agreed.*

*Paragraph 120, as amended, was adopted.*

## Paragraph 121

*Paragraph 121 was adopted.*

## Paragraphs 122 to 126

*Paragraphs 122 to 126 were adopted.*

## Paragraph 127

3. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the words "any paragraph of" should be deleted.

*Paragraph 127, as amended, was adopted.*

4. Sir Ian SINCLAIR suggested that, before taking up section C of chapter III of the draft report, the Commission might take a decision on the point raised by Mr. McCaffrey at the 1871st meeting concerning section B. Personally, he was inclined to agree that chapter III should be shortened and the structure rearranged.

5. The CHAIRMAN, speaking as Special Rapporteur, said that he appreciated the reasoning behind Mr. McCaffrey's suggestion. It should none the less be borne in mind that, in drafting chapter III of the draft report, he had followed the pattern of the corresponding chapter of the Commission's report on the work of its thirty-fifth session, the only new feature being the insertion of new headings. Chapter III, although admittedly voluminous, reflected the work done on the item at the current session. Moreover, a thorough revision of the text at the current stage of the session would require considerable thought.

6. Mr. USHAKOV said he saw no reason to shorten chapter III. Much depended on the reader and his wish for a greater or lesser degree of detail.

7. Mr. MAHIU agreed that the chapter might seem cumbersome. The draft articles, however, had been the subject of lengthy discussion, both in plenary and in the Drafting Committee. A further argument in favour of maintaining the text of the chapter in its existing form was that the proposed deletions and rearrangement might prove time-consuming.

8. Mr. McCaffrey said that he would not insist on his suggestion, which was largely aimed at improving the

form of the chapter. The only point of principle at issue was whether it was appropriate to report on discussions in connection with draft articles on which the Commission had already taken action. The suggestion to rearrange certain paragraphs was more procedural in nature.

9. Mr. KOROMA said that the Special Rapporteur was to be congratulated on a faithful and comprehensive summary of the debate on the item. Nevertheless, he wondered whether it was wise for the report to refer to certain positions which would not reflect favourably on the Commission in the minds of readers. Without wishing to press the point, he hoped that the Special Rapporteur, and indeed the special rapporteurs on other items, would bear that in mind in the future.

10. Chief AKINJIDE agreed with Mr. Ushakov's objections to the suggested revision of the chapter. In his view, the chapter was very helpful as it stood, and he urged Mr. McCaffrey not to insist on his suggestion.

11. Mr. BALANDA said that the structure of the chapter was not new and reflected the discussions as a whole, both in the Commission and in the Drafting Committee. Besides, it would be difficult at the current stage to perform some kind of cosmetic surgery to improve the appearance of the text. The presentation should remain unchanged, despite the length of the chapter.

12. Mr. McCaffrey reiterated that he would not insist on his suggestion, but that he wished to register strong opposition to the practice of including in the draft report accounts of discussions that had taken place in the Commission on articles in respect of which action had already been taken. The practice merely encouraged the reopening of the subject in the Sixth Committee of the General Assembly and should be deprecated.

13. The CHAIRMAN said that the discussion had been of great interest to all special rapporteurs, present and future. He, for one, would certainly bear it in mind. He invited the Commission to proceed to the consideration of section C of chapter III of the draft report.

**C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, provisionally adopted by the Commission (A/CN.4/L.372/Add.1)**

14. Mr. LACLETA MUÑOZ said that, in the Spanish text of the title of section C, the first word, *Proyecto*, should be in the plural.

*It was so agreed.*

*The title of section C, as amended, was adopted.*

## Paragraph 128

*Paragraph 128 was adopted.*

## Paragraph 129

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

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

## Paragraph (4)

15. Sir Ian SINCLAIR proposed that the second part of the first sentence should be redrafted to read: "he

thus becomes or may become a member of the permanent or temporary staff of the Foreign Office, with rights and duties deriving from his position as a civil servant”.

*It was so agreed.*

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

Paragraph (5)

*Paragraph (5) was approved.*

Paragraph (6)

16. Sir Ian SINCLAIR proposed that the paragraph should be redrafted to read: “The Commission was of the view that the draft article did not exclude the practice whereby, in exceptional cases, two or more States could jointly appoint the same person as a diplomatic courier. The Commission was also of the view that the foregoing should be understood subject to the provisions of articles 9 and 12, although the requirement of paragraph 1 of article 9 would be met if the courier had the nationality of at least one of the sending States.”

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

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

*Commentary to article 10 [9] (Nationality of the diplomatic courier)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

Paragraph (5)

17. Sir Ian SINCLAIR suggested that the paragraph should be deleted.

*It was so agreed.*

*Paragraph (5) was deleted.*

Paragraph (6)

*Paragraph (6) was approved.*

*The commentary to article 10 [9], as amended, was approved.*

*Commentary to article 11 [10] (Functions of the diplomatic courier)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

18. Further to comments by Mr. McCAFFREY, Mr. LACLETA MUÑOZ and Chief AKINJIDE, Sir Ian SINCLAIR suggested that the final sentence should read: “The facilities, privileges and immunities accorded to the diplomatic courier are closely connected with his functions.”

*It was so agreed.*

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

Paragraphs (4) and (5)

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

Paragraph (6)

19. Sir Ian SINCLAIR suggested that the paragraph should be replaced by the following: “The Commission decided to delete draft article 12 as submitted by the Special Rapporteur and dealing with the commencement of the functions of the diplomatic courier on the grounds that the matter would be better dealt with in the context of draft article 28, on the duration of privileges and immunities.”

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

*The commentary to article 11 [10], as amended, was approved.*

*Commentary to article 13 [11] (End of the functions of the diplomatic courier)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

Paragraph (5)

20. Mr. LACLETA MUÑOZ said that, in the Spanish version, the word *cesación*, at the beginning of the second sentence, should be replaced by *cese* or *terminación*.

*It was so agreed.*

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

*The commentary to article 13 [11], as amended, was approved.*

*Commentary to article 14 [12] (The diplomatic courier declared persona non grata or not acceptable)*

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were approved.*

Paragraph (6)

21. Sir Ian SINCLAIR suggested that the paragraph should be deleted.

*It was so agreed.*

*Paragraph (6) was deleted.*

Paragraph (7)

*Paragraph (7) was approved.*

*The commentary to article 14 [12], as amended, was approved.*

*Commentary to article 15 [13] (Facilities)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

22. Sir Ian SINCLAIR suggested that, in the third sentence, the words “might be very circumstantial, unpredictable or peculiar in nature” should be replaced by “might be unpredictable in nature”. Moreover, the sixth sentence could be redrafted to read: “They may be of a technical or administrative nature, relating to the admis-

sion or entry into the territory of the transit or the receiving State, or to the provision of assistance in securing the safety of the diplomatic bag." Also, in the last sentence, the words "privileges and immunities" should be deleted.

*It was so agreed.*

23. Mr. McCAFFREY suggested that, in line with the information contained in paragraph (7), a sentence should be added at the end of paragraph (3) to indicate that at least one member had been opposed to paragraph 1 of article 15.

*It was so agreed.*

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

Paragraphs (4) to (7)

*Paragraphs (4) to (7) were approved.*

*The commentary to article 15 [13], as amended, was approved.*

*Commentary to article 16 [14] (Entry into the territory of the receiving State or the transit State)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

24. Sir Ian SINCLAIR proposed that the word "ultimately", in the third sentence, should be replaced by "where possible".

*It was so agreed.*

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

*The commentary to article 16 [14], as amended, was approved.*

*Commentary to article 17 [15] (Freedom of movement)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

25. Sir Ian SINCLAIR proposed that the last sentence of the paragraph should be deleted.

26. The CHAIRMAN, speaking as Special Rapporteur, said he saw no difficulties in connection with that sentence other than those inherent in the article itself.

27. Sir Ian SINCLAIR said the purpose of his proposal was to avoid any suggestion that the receiving or transit State was under an obligation to assist the courier in the manner described. If the last sentence of the paragraph was maintained, he would suggest that, in the fourth sentence, the words "save in exceptional circumstances" should be inserted between the words "should" and "assist".

*It was so agreed.*

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

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were approved.*

*The commentary to article 17 [15], as amended, was approved.*

*Commentary to article 20 [16] (Personal protection and inviolability)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were approved.*

Paragraph (4)

28. Sir Ian SINCLAIR suggested that the reference in the last sentence to the provision of a special guard should be deleted. The sentence would thus read: "They must take all reasonable steps to that end."

*It was so agreed.*

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

Paragraph (5)

*Paragraph (5) was approved.*

*The commentary to article 20 [16], as amended, was approved.*

*Commentary to article 21 [17] (Inviolability of temporary accommodation)*

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

29. Mr. LACLETA MUÑOZ said that, in the Spanish version, the first word, *Normalmente*, should be replaced by *En muchas ocasiones*.

*It was so agreed.*

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

Paragraphs (3) to (7)

*Paragraphs (3) to (7) were approved.*

Paragraph (8)

30. Mr. McCAFFREY suggested that a sentence should be added at the end of the paragraph stating that some members had been opposed to paragraph 1 of article 21 [17], for the reasons given in paragraph (3) of the commentary.

*It was so agreed.*

31. Sir Ian SINCLAIR proposed that the word "would", in the fifth sentence, should be replaced by "might in exceptional circumstances".

*It was so agreed.*

*Paragraph (8), as amended, was approved.*

Paragraphs (9) to (11)

*Paragraphs (9) to (11) were approved with drafting changes.*

*The commentary to article 21 [17], as amended, was approved.*

*Commentary to article 24 [19]* (Exemption from personal examination, customs duties and inspection)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were approved.*

Paragraph (3)

32. Sir Ian SINCLAIR proposed that, in the first and second sentences of the paragraph, the word "sentence" should be replaced by "phrase" and that the word "prerogative" in the second sentence should be replaced by "extension of the principle".

*It was so agreed.*

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

Paragraphs (4) and (5)

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

Paragraph (6)

33. Sir Ian SINCLAIR proposed that the words "possible abuses on the duty-free articles or other exemptions", in the fifth sentence, should be replaced by "possible abuses of the exemptions".

*It was so agreed.*

*Paragraph (6), as amended, was approved.*

Paragraph (7)

*Paragraph (7) was approved.*

*The commentary to article 24 [19], as amended, was approved.*

*Commentary to article 25 [20]* (Exemption from dues and taxes)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

34. Sir Ian SINCLAIR proposed that the first sentence should read:

"Notwithstanding the foregoing, the provision has been drafted bearing in mind that the short stay of the diplomatic courier in a given country places him in a somewhat different position from that of members of a mission and renders much less likely and almost impossible the exercise by him of certain activities or his entering into legal relationships which would expose him to liability for particular forms of taxation."

*It was so agreed.*

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

Paragraph (3)

35. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the words "movable property" at the end of the third sentence, should read "real property".

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

Paragraphs (4) and (5)

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

Paragraphs (6) and (7)

36. Sir Ian SINCLAIR pointed out that, since paragraphs (6) and (7) related to draft articles 26 and 27, which had been deleted, those paragraphs might also be deleted.

37. The CHAIRMAN, speaking as Special Rapporteur, recalled that draft article 26, relating to exemption from personal and public services, had been deleted by the Drafting Committee at his suggestion. However, that draft article should be mentioned in the commentary because the point had been made both in the general debate and in the Drafting Committee that, although the situation in question would rarely arise, it might none the less constitute an impediment to the performance of the functions of the courier. The case of draft article 27, on exemption from social security provisions, was somewhat different, and the article had enlisted very limited support in the course of the discussion.

38. Sir Ian SINCLAIR said he would not press his suggestion.

39. Mr. McCAFFREY wondered whether the paragraphs could not be compressed and aligned with those concerning other draft articles that had been deleted. For example, the opening sentence of paragraph (6) might read: "The set of draft articles as submitted by the Special Rapporteur contained a draft article on exemption from personal and public services." The next two sentences would be deleted, up to: "The Commission opted for ..." With regard to paragraph (7), it might not be inappropriate to delete it altogether.

40. The CHAIRMAN, speaking as Special Rapporteur, said he accepted Mr. McCaffrey's suggestion regarding the reformulation of paragraph (6). Paragraph (7) might also be compressed to read, after the first sentence: "The inclusion of the draft article would lead beyond the realistic factual context which the Commission had been called upon to codify and it was therefore deleted."

41. Mr. THIAM proposed that, in the second sentence proposed for paragraph (7), the words "factual context" should be replaced by "factual matter".

42. The CHAIRMAN suggested that paragraphs (6) and (7) should be reformulated along the lines proposed by Mr. McCaffrey, Mr. Thiam and himself, speaking as Special Rapporteur.

*It was so agreed.*

*Paragraphs (6) and (7), as amended, were approved.*

*The commentary to article 25 [20], as amended, was approved.*

*Paragraph 129, as amended, was adopted.*

*Section C, as amended, was adopted.*

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

*The meeting was adjourned at 4.35 p.m. and resumed at 5.05 p.m.*

**CHAPTER IV. Jurisdictional immunities of States and their property**  
(A/CN.4/L.373 and Corr.1 and Add.1 and 2)

**A. Introduction** (A/CN.4/L.373 and Corr.1)

Paragraphs 1 to 5

*Paragraphs 1 to 5 were adopted.*

Paragraph 6

43. Sir Ian SINCLAIR pointed out that, in the third sentence, the reference should perhaps be to part III of the draft articles and not to part II. The matter should be verified.

*Paragraph 6 was adopted on that understanding.*

Paragraphs 7 to 13

*Paragraphs 7 to 13 were adopted.*

Paragraph 14

44. Sir Ian SINCLAIR suggested that the first sentence should be simplified to read: "Introducing draft article 19, concerning ships employed in commercial service, the Special Rapporteur pointed out that this was a subject possibly more familiar in its detail to common-law lawyers than to civil-law lawyers."

*It was so agreed.*

*Paragraph 14, as amended, was adopted.*

Paragraphs 15 and 16

*Paragraphs 15 and 16 were adopted.*

Paragraph 17

45. Sir Ian SINCLAIR suggested that the word "archaic", in the second sentence, should be deleted. Furthermore, the last sentence should be reformulated to read: "It would therefore be preferable to use more general terms which could more easily be understood by those not acquainted with the particularities of admiralty law."

*It was so agreed.*

*Paragraph 17, as amended, was adopted.*

Paragraphs 18 and 19

*Paragraphs 18 and 19 were adopted.*

*Section A, as amended, was adopted.*

46. The CHAIRMAN observed that the documents containing section B of chapter IV of the draft report were not yet available in all the working languages. He therefore suggested that the Commission should pass to the consideration of chapter VI of the draft report.

*It was so agreed.*

**CHAPTER VI. The law of the non-navigational uses of international watercourses** (A/CN.4/L.375 and Add.1 and Add.1/Corr.1 and Add.2)

47. The CHAIRMAN invited the Commission to consider chapter VI of the draft report (A/CN.4/L.375 and Add.1 and Add.1/Corr.1 and Add.2).

**A. Introduction** (A/CN.4/L.375)

Paragraphs 1 to 20

*Paragraphs 1 to 20 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session** (A/CN.4/L.375/Add.1 and Corr.1 and Add.2)

Paragraphs 21 to 46 (A/CN.4/L.375/Add.1 and Corr.1)

Paragraphs 21 to 33

*Paragraphs 21 to 33 were adopted.*

Paragraph 34

*Paragraph 34 was adopted with drafting changes.*

Paragraphs 35 and 36

*Paragraphs 35 and 36 were adopted.*

Paragraph 37

48. Sir Ian SINCLAIR suggested that the phrase "and not necessarily accurate", in the fifth sentence, should be deleted.

*It was so agreed.*

*Paragraph 37, as amended, was adopted.*

Paragraphs 38 and 39

*Paragraphs 38 and 39 were adopted.*

Paragraph 39 bis

49. Mr. USHAKOV pointed out that it was he who had expressed the opinion reflected in paragraph 39 bis (A/CN.4/L.375/Add.1/Corr.1, para. 3). However, he had certainly not used the words "which had set up such an international watercourse". He requested the Secretariat to correct the paragraph by referring to his statement as reported in the summary record of the 1856th meeting.

50. Mr. LACLETA MUÑOZ said that in the Spanish version too the passage corresponding to the words quoted by Mr. Ushakov was meaningless. Clearly, States could not "set up" an international watercourse. He asked that the passage should be amended in all the language versions.

51. The CHAIRMAN said that he understood that the Commission was prepared to adopt paragraph 39 bis on the understanding that it was reformulated in accordance with the language used in the relevant summary record.

*It was so agreed.*

*Paragraph 39 bis was adopted on that understanding.*

Paragraph 40

*Paragraph 40 was adopted.*

Paragraph 41

52. Sir Ian SINCLAIR, referring to the addition of a new sentence to paragraph 41 (A/CN.4/L.375/Add.1/Corr.1, para. 4), said that he did not recall the matter

having been discussed in plenary. Had it been, he would have commented on the subject. The Commission was dealing with the non-navigational uses of international watercourses, and their impact on navigational uses had admittedly to be borne in mind, but draft article 2 already covered that point. The new sentence would raise a whole new set of problems, including the right to participate in negotiations on navigational as well as non-navigational uses.

53. Mr. EVENSEN (Special Rapporteur) said that the sentence in question had been an afterthought and that he had no objection to its deletion.

54. The CHAIRMAN noted that the new sentence had been withdrawn.

*Paragraph 41 was adopted.*

Paragraphs 42 and 43

*Paragraphs 42 and 43 were adopted.*

Paragraph 44

55. Sir Ian SINCLAIR expressed his appreciation for the proposed addition to paragraph 44, after the third sentence (A/CN.4/L.375/Add.1/Corr.1, para. 5). However, the second sentence of the additional text might be amended to read: "It was presumably not the intention that the provisions included in the framework agreement should constitute norms of *jus cogens*."

*It was so agreed.*

*Paragraph 44, as amended, was adopted.*

Paragraphs 45 and 46

*Paragraphs 45 and 46 were adopted.*

**CHAPTER VII. State responsibility** (A/CN.4/L.376 and Add.1)

**A. Introduction** (A/CN.4/L.376)

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

*Section A was adopted.*

*The meeting rose at 5.55 p.m.*

## 1873rd MEETING

*Thursday, 26 July 1984, at 10.05 a.m.*

*Chairman: Mr. Alexander YANKOV*

*Present: Chief Akinjide, Mr. Balanda, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.*

### Draft report of the Commission on the work of its thirty-sixth session (*continued*)

**CHAPTER VI. The law of the non-navigational uses of international watercourses (*concluded*)** (A/CN.4/L.375 and Add.1 and Add.1/Corr.1 and Add.2)

**B. Consideration of the topic at the present session (*concluded*)** (A/CN.4/L.375/Add.1 and Corr.1 and Add.2)

Paragraphs 47 to 81 (A/CN.4/L.375/Add.2)

Paragraphs 47 to 54

*Paragraphs 47 to 54 were adopted.*

Paragraph 55

1. Sir Ian SINCLAIR proposed the deletion of the last two words, "and unacceptable", of the first sentence, which would thus end with the words "was highly controversial". The concept of "shared natural resources" was undoubtedly highly controversial, but it could not be described as unacceptable, since it had been accepted by several members of the Commission in the past.

*It was so agreed.*

*Paragraph 55, as amended, was adopted.*

New paragraph 55 bis

2. Mr. OGISO proposed the insertion of a new paragraph 55 bis, drafted along the following lines:

"Some members thought it should not be excluded that a watercourse agreement for a certain project, such as development of a dam, could be facilitated by using the concept of shared natural resources, if the watercourse States concerned so agreed. Therefore it was suggested that a new paragraph could be added to the effect that: 'To the extent that the watercourse States concerned agree, an agreement for special projects may be made on the basis of the concept of shared natural resources within the framework of that agreement.' The Special Rapporteur, however, thought that the introduction of such a provision might become a cause of confusion."

The aim was to take note of a proposal which had not met with a positive response on the part of the Special Rapporteur.

3. Mr. EVENSEN (Special Rapporteur) said that the new paragraph was acceptable, but that the last sentence should be amended to state that the Special Rapporteur had considered the proposal to be unnecessary.

*It was so agreed.*

*New paragraph 55 bis, as amended, was adopted.*

Paragraphs 56 to 60

*Paragraphs 56 to 60 were adopted.*

Paragraph 61

4. Mr. BALANDA proposed that the words "territorial sovereign", in the penultimate sentence, should be replaced by "territorial State".

*It was so agreed.*

*Paragraph 61, as amended, was adopted.*

Paragraphs 62 to 81

*Paragraphs 62 to 81 were adopted.*

5. Mr. OGISO noted that chapter VI made no reference to any of the articles following article 9. Did the Special Rapporteur intend to reformulate them, or to re-submit them in their existing form?

6. Mr. EVENSEN (Special Rapporteur) said it was not his intention to alter the articles in question. The comments made on them during the debate had not been sufficiently penetrating to warrant inclusion in the report.

7. The CHAIRMAN suggested the insertion at a suitable place—possibly in paragraph 32—of a sentence stating that the Special Rapporteur had confined his comments to articles 1 to 9. In that way, readers would not wonder about the other articles.

*It was so agreed.*

*Section B, as amended, was adopted.*

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

**CHAPTER VII. State responsibility (concluded)** (A/CN.4/L.376 and Add.1)

**B. Consideration of the topic at the present session** (A/CN.4/L.376/Add.1)

Paragraph 1 to 30

*Paragraphs 1 to 30 were adopted.*

New paragraph 30 bis

8. Sir Ian SINCLAIR proposed the insertion of a new paragraph 30 bis along the following lines:

“In conclusion, several members commented generally that the submission of this new set of draft articles marked a major breakthrough in the consideration of part 2 of the topic by the Commission. It should enable the Commission to make progress in the drafting of articles within a measurable time-scale.”

*It was so agreed.*

*New paragraph 30 bis was adopted.*

Paragraph 31

*Paragraph 31 was adopted.*

*Section B, as amended, was adopted.*

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

**CHAPTER V. International liability for injurious consequences arising out of acts not prohibited by international law** (A/CN.4/L.374 and Add.1)

**A. Introduction** (A/CN.4/L.374)

Paragraphs 1 to 6

*Paragraphs 1 to 6 were adopted.*

*Section A was adopted.*

**B. Consideration of the topic at the present session** (A/CN.4/L.374 and Add.1)

Paragraphs 7 to 22 (A/CN.4/L.374)

Paragraph 7

*Paragraph 7 was adopted.*

Paragraph 8

9. Mr. BALANDA said that the paragraph began with an unusual sentence: “Most Commission members who were present took part in the debate.” The sentence should be deleted and the next sentence should start with the words: “In the debate, some members devoted...”

10. Mr. QUENTIN-BAXTER (Special Rapporteur) said that previous reports had occasionally included information on the extent of participation in a debate. Information of that kind was useful to the Sixth Committee of the General Assembly.

11. The CHAIRMAN, speaking as a member of the Commission, pointed out that, if the first sentence were retained, particulars of that sort would have to be given in other parts of the report. The best course would be to delete it. Representatives in the Sixth Committee could obtain information on the participation in a debate by perusing the summary records of the Commission.

*The amendment proposed by Mr. Balanda was adopted.*

*Paragraph 8, as amended, was adopted.*

Paragraphs 9 to 22

*Paragraphs 9 to 22 were adopted.*

Paragraphs 23 to 43 (A/CN.4/L.374/Add.1)

Paragraphs 23 to 30

*Paragraphs 23 to 30 were adopted.*

Paragraph 31

12. Mr. RIPHAGEN, supported by Mr. DÍAZ GONZÁLEZ, proposed the deletion of the last sentence, “No dissenting view was expressed in the Commission’s debate”, since it conveyed an inaccurate impression of unanimity.

*It was so agreed.*

*Paragraph 31, as amended, was adopted.*

Paragraphs 32 to 41

*Paragraphs 32 to 41 were adopted.*

Paragraph 42

13. Sir Ian SINCLAIR proposed that the somewhat inappropriate words, “contained a note of pleasant surprise”, in the first sentence, should be replaced by “raised a point of particular interest”.

*It was so agreed.*

*Paragraph 42, as amended, was adopted.*

Paragraph 43

*Paragraph 43 was adopted.*

*Section B, as amended, was adopted.*

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

*The meeting rose at 11.20 a.m.*

## 1874th MEETING

*Thursday, 26 July 1984, at 3.25 p.m.*

*Chairman: Mr. Alexander YANKOV*

*Present: Chief Akinjide, Mr. Balanda, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.*

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

**CHAPTER IV. Jurisdictional immunities of States and their property (concluded)\* (A/CN.4/L.373 and Corr.1 and Add.1 and 2)**

**B. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.373/Add.1 and 2)**

**SUBSECTION 1 (TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION) (A/CN.4/L.373/Add.1)**

*Section B.1 was adopted.*

**SUBSECTION 2 (TEXTS OF ARTICLES 13, 14, 16, 17 AND 18, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SIXTH SESSION) (A/CN.4/L.373/Add.2)**

*Commentary to article 13 (Contracts of employment)*

Paragraph (1)

1. Mr. SUCHARITKUL (Special Rapporteur) pointed out that the words “This exception is a logical sequence following”, at the beginning of the second sentence, should be replaced by “This exception follows logically from”.

2. Mr. BALANDA, referring to the expression “significant exception”, in the first sentence, said he failed to see the need to qualify any of the exceptions as “significant”. All exceptions to State immunity had the same standing, regardless of subject-matter. The adjective “significant” should therefore be deleted.

*It was so agreed.*

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

Paragraphs (2) and (3)

*Paragraphs (2) and (3) were approved.*

Paragraph (4)

3. Sir IAN SINCLAIR proposed that the words “special laws”, in the first sentence, should be replaced by “respective laws”.

*It was so agreed.*

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

Paragraph (5)

4. Sir Ian SINCLAIR, referring to the second sentence, proposed that the words “liquidation money” should be replaced by “compensation”.

*It was so agreed.*

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

Paragraphs (6) to (10)

*Paragraphs (6) to (10) were approved.*

Paragraph (11)

5. Mr. MAHIOU proposed that the words “Higher officials”, at the beginning of the third sentence, should be replaced by “Officials”.

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

Paragraph (12)

*Paragraph (12) was approved.*

Paragraph (13)

6. Sir Ian SINCLAIR proposed the deletion, in the third sentence, of the words “the desirability and opportunity”.

*It was so agreed.*

*Paragraph (13), as amended, was approved.*

Paragraph (14)

7. Mr. MAHIOU, referring to the last sentence of the French version, proposed that the words *le droit à impliquer* should be replaced by *le droit à appliquer*.

*It was so agreed.*

8. Mr. BALANDA, referring to the first sentence of the French version, proposed that the words *une autre sauvegarde* should be replaced by *une autre mesure de sauvegarde*.

*It was so agreed.*

*Paragraph (14), as amended, was approved.*

Paragraphs (15) and (16)

*Paragraphs (15) and (16) were approved.*

Paragraph (17)

9. Mr. THIAM proposed the deletion, in the first sentence, of the words “the substance of”.

*It was so agreed.*

*Paragraph (17), as amended, was approved.*

\* Resumed from the 1872nd meeting.

*The commentary to article 13, as amended, was approved.*

Commentary to article 14 (Personal injuries and damage to property)  
Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

10. Mr. SUCHARITKUL (Special Rapporteur) pointed out that the words "responsible under international law and", in the first sentence, should be deleted.

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

Paragraph (3)

*Paragraph (3) was approved.*

Paragraph (4)

11. Mr. THIAM said that the first sentence was puzzling, for it appeared to suggest that only physical damage resulting in death was insurable. In point of fact, death was an insurable risk. He therefore proposed that the sentence should be reworded along the following lines: "Furthermore, the physical injury to the person or the damage to tangible property, resulting in death...".

*It was so agreed.*

12. Mr. LACLETA MUÑOZ pointed out that, in the Spanish version, the words *los atentados contra la integridad física* did not reflect the idea of an accident underlying the provisions of article 14. The passage should be appropriately reworded in Spanish. In addition, a comma should be inserted between the words *que originan la muerte* and the words *o los daños*.

*It was so agreed.*

13. Mr. KOROMA said that the drafting of the second sentence of the paragraph should be reviewed by the secretariat.

14. Mr. LACLETA MUÑOZ said that, in the Spanish version at least, the last part of the penultimate sentence was inaccurate in that it spoke of *responsabilidad pública* with reference to insurance companies.

15. Mr. THIAM said that the same comment applied to the French text, which spoke of an insurance company's *responsabilité publique* towards the injured individuals. The liability in question could only be a civil liability.

16. Mr. McCAFFREY said that the words "public responsibility" were intended to refer to the insurance companies' general responsibilities towards the public, which explained the strict government control exercised over them in most countries in order to protect the insured. The subsequent words, namely "and liability to the injured individuals", referred to liability at civil law in the technical legal sense.

17. Sir Ian SINCLAIR, supported by Mr. MAHIOU, proposed the deletion of the words "public responsibility and", so that the penultimate sentence would end with the words "and evading its liability to the injured individuals".

*It was so agreed.*

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

Paragraphs (5) to (10)

*Paragraphs (5) to (10) were approved.*

*The commentary to article 14, as amended, was approved.*

Commentary to article 16 (Patents, trade marks and intellectual or industrial property)

Paragraph (1)

*Paragraph (1) was approved.*

Paragraph (2)

18. Mr. SUCHARITKUL (Special Rapporteur) pointed out that the word "One", at the beginning of both the first and second sentences, should be replaced by "The".

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

Paragraph (3)

19. Mr. SUCHARITKUL (Special Rapporteur) pointed out that, in the sixth sentence, the word "more" should be inserted before "clearly intellectual".

20. Sir Ian SINCLAIR, referring to the end of the third sentence, proposed that the word "property" should be inserted between the words "industrial" and "rights".

*It was so agreed.*

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

Paragraph (4)

*Paragraph (4) was approved.*

Paragraph (5)

Sir Ian SINCLAIR proposed that the word "sanctity", in the fourth sentence, should be replaced by "scope".

*It was so agreed.*

22. Mr. LACLETA MUÑOZ proposed that, in the Spanish version, the word *llenar*, in the second sentence, should be replaced by *cumplimentar*.

*It was so agreed.*

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

Paragraphs (6) and (7)

*Paragraphs (6) and (7) were approved.*

Paragraph (8)

23. Mr. LACLETA MUÑOZ proposed the insertion, in the first part of the second sentence, of the word "necessarily" between the words "does not" and "have".

*It was so agreed.*

*Paragraph (8), as amended, was approved.*

Paragraph (9)

24. Sir Ian SINCLAIR proposed that the words "This article contains", at the beginning of the paragraph, should be replaced by "This article expresses".

*It was so agreed.*

25. Sir Ian SINCLAIR further proposed the deletion, at the end of the paragraph, of the words “as they find them”.

26. Mr. McCAFFREY said that it would be preferable to replace the words “as they find them in” by “in accordance with”.

*It was so agreed.*

*Paragraph (9), as amended, was approved.*

Paragraph (10)

27. Mr. McCAFFREY said that the second sentence should be redrafted so as to avoid the use of the passive voice. It could be worded: “The Special Rapporteur suggested...”, followed by a statement that the Commission had adopted the suggestion.

*It was so agreed.*

*Paragraph (10), as amended, was approved.*

Paragraph (11)

28. Sir Ian SINCLAIR proposed that, in the second sentence, the words “the exception to State immunity in this article is confined, in the territorial scope, to the State of the forum”, should be replaced by “the exception to State immunity in subparagraph (b) of this article is confined to infringements occurring in the State of the forum”.

29. Mr. LACLETA MUÑOZ pointed out that, in the Spanish version of the same sentence, the words *la aplicación a la excepción* should read: *la aplicación de la excepción*.

*It was so agreed.*

*Paragraph (11), as amended, was approved.*

Paragraph (12)

30. Mr. KOROMA said that the words “A few members”, at the beginning of the first sentence, should be replaced by “Some members”. As he recalled, many members had expressed the reservations in question. Again, in the second sentence, the words “so as to give greater priority to” should be replaced by “so as not to hinder”.

31. Mr. BALANDA supported the suggestion to amend the second sentence and proposed that, in the French text, the words *pour donner plus de poids aux besoins des pays en développement* should be replaced by *pour mieux tenir compte des besoins des pays en développement*.

32. Sir Ian SINCLAIR proposed that the relevant passage in the second sentence should be amended to read: “... so as to take more fully into account the needs of ...”. The opening words of the paragraph would read: “Some members”.

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

*The commentary to article 16, as amended, was approved.*

*Commentary to article 17 (Fiscal matters)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were approved.*

Paragraph (5)

33. Sir Ian SINCLAIR, referring to the first sentence, pointed out that it was inaccurate to speak of “the immunities or privileges” when the example given was that of a reduced tariff, which did not constitute an immunity. The words in question should be replaced by “exemptions or special privileges such as nil or reduced tariffs”.

*It was so agreed.*

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

Paragraph (6)

34. Mr. KOROMA proposed that the words “A few members”, at the beginning of the first sentence, should be replaced by “Some members”.

*It was so agreed.*

35. Mr. BALANDA pointed out that the use in French of the expression *Plusieurs membres* reflected the real position.

*Paragraph (6), as amended, was approved.*

*The commentary to article 17, as amended, was approved.*

*Commentary to article 18 (Participation in companies or other collective bodies)*

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were approved.*

Paragraph (7)

36. Mr. RIPHAGEN said that the first two sentences were confusing. They did not seem to reflect correctly the legal position regarding incorporated bodies and unincorporated bodies constituted under the laws of the State of the forum.

37. After a brief discussion in which Mr. SUCHARITKUL (Special Rapporteur) and Mr. McCAFFREY took part, Sir Ian SINCLAIR proposed that the first two sentences should be merged so as to read: “Secondly, the body in question must be incorporated or constituted under the law of the State of the forum, or be controlled from, or have its seat or principal place of business in that State.”

*It was so agreed.*

*Paragraph (7), as amended, was approved.*

Paragraph (8)

*Paragraph (8) was approved.*

Paragraph (9)

38. Sir Ian SINCLAIR proposed that the third sentence should be reworded to read: “One of the three links

based on substantial territorial connection with the State of the forum must be established to warrant ...”.

*It was so agreed.*

*Paragraph (9), as amended, was approved.*

Paragraphs (10) and (11)

*Paragraphs (10) and (11) were approved.*

Paragraph (12)

39. Sir Ian SINCLAIR proposed the deletion of the fourth sentence, beginning with the words “Paragraph 2 is not at all affected”.

*It was so agreed.*

*Paragraph (12), as amended, was approved.*

Paragraph (13)

40. Mr. THIAM proposed the deletion, in the first sentence, of the words “the substance of”.

*It was so agreed.*

41. Mr. MAHIU proposed that the words “A few members”, at the beginning of the first sentence, should be replaced by “Some members”.

*It was so agreed.*

42. Sir Ian SINCLAIR proposed the insertion at the end of the paragraph of a sentence to indicate that the Commission had decided to look more closely at the terminology of article 18 on second reading.

*It was so agreed.*

*Paragraph (13), as amended, was approved.*

*The commentary to article 18, as amended, was approved.*

*Section B.2, as amended, was adopted.*

*Section B, as amended, was adopted.*

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

**CHAPTER VIII. Other decisions and conclusions of the Commission (A/CN.4/L.377)**

43. The CHAIRMAN invited the Commission to consider chapter VIII of the draft report (A/CN.4/L.377), paragraph by paragraph.

Paragraphs 1 to 4

*Paragraphs 1 to 4 were adopted.*

Paragraph 5

44. Mr. McCAFFREY noted that the last sentence contained an idea that also appeared in other places in the report, namely the need for the Commission to make progress in adopting draft articles. In that connection, it was necessary to emphasize the necessity for not only quantitative but also qualitative achievement. Accordingly, the words “taking into account the importance of each topic” should be inserted at the end of the last sentence.

*It was so agreed.*

*Paragraph 5, as amended, was adopted.*

Paragraphs 6 to 41

*Paragraphs 6 to 41 were adopted.*

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

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

**Closure of the session**

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

*The meeting rose at 6 p.m.*



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