*United Nations*
**GENERAL ASSEMBLY**
**THIRTY-NINTH SESSION**
***Official Records****

SIXTH COMMITTEE
37th meeting
held on
Wednesday, 7 November 1984
at 3 p.m.
New York

SUMMARY RECORD OF THE 37th MEETING

Chairman: Mr. GOERNER (German Democratic Republic)

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84-57387 3632S (E)

Distr. GENERAL
A/C.6/39/SR.37
12 November 1984

ORIGINAL: ENGLISH

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The meeting was called to order 3.15 p.m.

AGENDA ITEM 15: ELECTIONS TO FILL VACANCIES IN PRINCIPAL ORGANS:

(c) ELECTION OF FIVE MEMBERS OF THE INTERNATIONAL COURT OF JUSTICE

1. The CHAIRMAN said it was with great pleasure that he had learned of the election to the International Court of Justice of Mr. Elias, Mr. Evensen, Mr. Lachs, Mr. Ni and Mr. Oda. The Sixth Committee looked forward to the continuation of a mutually beneficial relationship with the Court.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-SIXTH SESSION (continued) (A/39/10, A/39/412, A/39/306)

2. Mr. ECONOMIDES (Greece) said that his delegation was in general agreement with the Commission's approach to the draft Code of Offences against the Peace and Security of Mankind. However, it considered that the final objective should be to establish the criminal liability of the State itself. In the final analysis, it was the State itself that through its organs, committed or could commit crimes against international peace and security. The international community, like any other society, had an obligation to adopt appropriate legislation against criminal acts committed by its members.

3. His delegation was of the opinion that the Commission's 1954 draft was a good point of departure in that regard. At the current stage, he had only two comments to make on it: self-defence, referred to in article 2, paragraphs (1) and (3), constituted an exception under paragraph (7) of that article; the draft would have to be extended in order to take into account international crimes proclaimed as such since 1954.

4. The topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier" was too broad in scope. The Commission should have dealt only with the diplomatic bag not accompanied by diplomatic courier, not with the status of the diplomatic courier, which had been established by the four Conventions concerning relations between States. However, since the Sixth Committee was considering the draft articles on both subjects provisionally adopted by the Commission (A/39/412), his delegation had the following comments to make. Draft article 1 was extremely broad in scope and left room for abuse. It should apply solely to official communications between the sending State and its missions, consular posts or delegations, not to communications between missions, consular posts and delegations. All the consular conventions concluded by Greece since 1963 followed that restrictive approach. The last sentence of draft article 5, paragraph 2, referring to the duty of the diplomatic courier not to interfere in the internal affairs of the receiving State or the transit State should be deleted as superfluous. Draft article 6, paragraph 2 (b), limited the contractual freedom of States unjustifiably and should therefore also be deleted. Draft articles 17 ("Inviolability of temporary accommodation"), 19 ("Exemption from personal examination, customs duties and inspection") and 20 ("Exemption from

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dues and taxes") did not seem to be functionally necessary in view of the very short duration of the diplomatic courier's functions.

5. With regard to draft article 23 as presented by the Special Rapporteur ("Immunity from jurisdiction"), his delegation felt that jurisdictional immunity should cover only acts performed in the exercise of the diplomatic courier's functions. Those functions, moreover, could not be considered as being official, since the diplomatic courier was not a representative within the meaning of the term in diplomatic law. The wording of paragraph 4 of that article should be considerably attenuated.

6. The five draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission at its thirty-sixth session were along the right lines. With respect to draft article 13 ("Contracts of employment"), his delegation believed that the exception provided for in paragraph 1 should be extended by eliminating the condition relating to social security or replacing it with a more general and flexible condition. His delegation did not entirely share the very broad interpretation given in paragraph (11) of the commentary to the terms used in article 13, paragraph 2 (a), "the employee ... recruited to perform services associated with the exercise of governmental authority". If such an interpretation were accepted, article 13 might lose almost all its value. Neither was his delegation in agreement with the interpretation in paragraph (8) of the commentary to article 13.

7. Work on the question of international liability for injurious consequences arising out of acts not prohibited by international law should continue to focus on the notion of transboundary damage. The draft articles contained in the fifth report of the Special Rapporteur constituted a sound basis for the study of the whole topic. The guiding principle was without doubt that international law strictly limited the right of any State to use its territory or allow it to be used to the detriment of neighbouring States.

8. His delegation attached great importance to the law of the non-navigational uses of international watercourses. With regard to draft article 1 as proposed by the Special Rapporteur in his second report, his delegation regretted that the Special Rapporteur had abandoned the rich, modern notion of "international watercourse system" to return to the traditional concept of "international watercourse". However, Greece had noted the Special Rapporteur's assurance that that change was not intended to put in doubt the inherent unity of an international watercourse or the interdependence of the various parts and components thereof (A/39/10, para. 293). He felt that the key terms "relevant parts or components" in article 1, paragraph 1, should be explained, as the Commission indeed had done in the note of tentative understanding contained in paragraph 270 of its report. His delegation shared the opinion of the Commission contained in that note concerning ground water in particular, and did not agree with that of the Special Rapporteur (para. 299). His delegation deplored the abandoning of the notion of shared natural resources, in article 6, and shared the opinion already expressed by other delegations on that subject, notably the delegations of the Netherlands and Argentina. That notion was one of the most healthy creations of contemporary international law. It underlined the necessary interrelationship between the

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rights of adjacent riparian States and was the basis for certain essential obligations in that area. His delegation wanted the Commission to re-examine that subject with a view to reintroducing that fundamental notion into draft article 6. Moreover, it should be mentioned in article 9 or in the commentary thereto that "harm" within the meaning of that article would be estimated globally and not individually in order to take into account previous harm. His delegation shared the opinion set forth in paragraph 284 of the report that the diversion of waters, which, affecting the watercourse, automatically constituted harm prohibited under the terms of article 9, should be expressly prohibited.

9. With regard to State responsibility, his delegation wondered whether the general principles of law should not be referred to in draft article 5 (a); they also constituted a source of international law according to Article 38 of the Statute of the International Court of Justice. His delegation agreed with article 5 (e), which served as a basis for certain logical, just and necessary solutions contained, in particular, in article 14. Article 13 did not technically constitute a restriction to articles 8 and 9 but was a condition for the lifting of the restrictions contained in articles 10 and 11; his delegation therefore felt that the contents of article 13 should be transferred to articles 10 and 11. Articles 14 and 15, dealing, respectively, with international crime and acts of aggression as the worst form of international crime, were both necessary and constituted the basis and substance of the draft. His delegation hoped that the Special Rapporteur and the Commission would attempt to define more precisely the notion of "self-defence", always the excuse of aggressor States. That definition was indispensable for the implementation of those draft articles. The Definition of Aggression would facilitate the task of defining self-defence.

10. His delegation wished to see work on State responsibility speeded up; the topic should be given top priority.

11. Mr. LEHMANN (Denmark) said that the Special Rapporteur on the topic entitled "Draft Code of Offences against the Peace and Security of Mankind" had analysed the basic problems involved in drafting such a code and had made the right decision in limiting the topic for the time being to the less controversial aspects and in beginning with the content ratione materiae of the draft. His delegation agreed with the Special Rapporteur that in formulating the list of offences, the point of departure should be the catalogue prepared by the Commission in 1954, updated by the addition of those offences which had since been generally accepted as offences against the peace and security of mankind. The inductive approach seemed the most useful. However, care should be taken to draw a distinction between offences based on treaty law or customary international law and offences so far recognized only in non-legally-binding instruments, such as resolutions and declarations. His delegation would favour the content of the draft ratione materiae being limited for the time being to those offences generally accepted as binding upon members of the international community. The insertion into the Code of a clause to the effect that a review of the Code would be undertaken every 5 or 10 years might be envisaged. He made that suggestion in order to prevent progress from being halted when the list of offences was being established.

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12. Although work on the draft Code could be undertaken separately from the drafting of a general convention on State responsibility, his delegation hoped that the Commission would move forward with those two topics in co-ordination. With regard to State responsibility, the Commission should concentrate on completing part two of the draft determining the consequences of an internationally wrongful act by a State. The submission by the Special Rapporteur of 12 new articles was a major contribution in that respect.

13. Having avoided the mistake of incorporating into the topic the primary rules of international law, the Commission should now be careful not to try to incorporate into the present study the tertiary rules establishing procedures to be adopted with regard to the implementation and settlement of disputes concerning any alleged violation of the primary rules. That item deserved consideration on its own merits. The Charter of the United Nations provided the framework and the forum for the peaceful settlement of disputes. Furthermore, a whole body of law existed already in that field. In his delegation's view, the main obstacle to using existing facilities was the reluctance of most States to allow an independent international body to be entrusted with the power to settle with binding force, disputes between States. It was that sensitive question of an optional or compulsory approach which, his delegation felt, should not be introduced, for it would delay completion of a topic that was a corner-stone of international law.

14. There was an obvious link between State responsibility and the question of international liability for injurious consequences arising out of acts not prohibited by international law. Once the rules governing State responsibility were established, it was a natural further step to analyse the extent to which States might be under an obligation to make good harmful consequences arising out of lawful activities.

15. He noted with satisfaction the progress achieved on the topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". It was important to strike a realistic balance between the principle of inviolability and the principle of respect for the laws and regulations of a State. The purpose of establishing certain immunities was not to benefit individuals, but to ensure the efficient performance of diplomatic functions.

16. The question of the jurisdictional immunities of States and their property presented considerable conceptual and doctrinal difficulties. The Commission had made considerable progress and had been right to choose the inductive approach with special emphasis on the judicial practice of States. He supported the Special Rapporteur's endeavours to draw a workable distinction between acta jure imperii, which were covered by immunity, and acta jure gestionis. Attempts to view State commercial activities differently from those conducted by private entities would grant the States unfair advantages. In principle, when a State engaged in private-law activities, it placed itself on an equal footing with private contracting parties and must also accept the terms of law applicable to the latter. At the same time, there was some merit in the arguments advanced by the developing countries that, within certain fields of contract law, the restrictive doctrine ought to be somewhat modified in their interest.

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17. The question of the abandonment of the "system" concept in article 1 of the draft articles on the law of the non-navigational uses of international watercourses illustrated the difficulties in striking a balance between divergent views. It might be advisable not to try to formulate the definition until a number of the substantive provisions had been agreed upon and a clearer picture had emerged of the concept covered by the draft. The method of drafting a framework agreement setting forth only the main principles was the most realistic approach. A universal convention could hardly take account of the particular needs of States and the special features of different watercourses. The framework approach would leave room for supplementary regulation through more specific agreements between the States involved. In some cases, however, disputes which could not be solved by negotiations might arise. It was therefore of particular importance to include mandatory procedures leading to binding decisions, at least with regard to some types of disputes.

18. His Government, as in previous years, would make scholarships available for nationals of developing countries to attend the International Law Seminar.

19. Mr. AL-QAYSI (Iraq) said that the draft Code of Offences against the Peace and Security of Mankind, while a sensitive and difficult topic, was a viable one that could promote the purposes and principles of the Charter. He was gratified that the Commission had been able to reach some agreed conclusions. Its approach with respect to the content of the code ratione personae was a practical one, adopted to help advance work on the topic. The difficulties involved in connection with the international criminal responsibility of States were great, but should be thoroughly examined. In that regard, he recalled the conclusions deriving from article 19 of part one of the draft articles on State responsibility and the references in the 1954 draft to the authorities of a State in relation to the offences set forth in article 2. Such authorities consisted of individuals, and part one of the draft articles on State responsibility made it clear that the acts of those individuals were attributable to the State. There was a need to be consistent, to delineate precisely the two areas of international criminal responsibility and to handle carefully the implementational and procedural aspects involved. He agreed with the approach set forth in paragraph 65 (b) of the Commission's report (A/39/10) on the steps for elaborating the code.

20. The Commission's conclusions on the content ratione materiae (para. 65 (c)) appeared generally appropriate. However, his delegation reserved its position on the question of economic aggression, pending the elaboration of a legal definition of that concept. The question of the use of atomic weapons involved great political difficulties, which had to be solved by political forums, not the Commission. The very survival of mankind depended on the total elimination of nuclear weapons, which would result in the removal of the whole issue from the scope of the code. Attacks with conventional weapons on nuclear installations used for peaceful purposes should be considered as amounting to nuclear attacks.

21. It was not clear whether the code would include a clear definition of offences or mere cross-references to such definitions in existing conventions. In the latter case, the relativity of treaty obligations would come into play, and there would be a need for definitions where none existed, as in the case of terrorism.

(Mr. Al-Qaysi, Iraq)

22. His delegation supported the comprehensive approach followed on the topic entitled "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". While there were clear rules in the relevant multilateral conventions, problems did occasionally arise, not necessarily because of abuse, but rather because of different viewpoints regarding the legal aspects of a particular situation or the extent of the substance of the legal rule in question. A uniform régime governing the question would reduce uncertainty. There was a need for functional rather than doctrinaire rules to serve the interests of States in maintaining friendly relations.

23. Noting that the draft articles on the jurisdictional immunities of States provisionally adopted at the Commission's thirty-sixth session still gave rise to serious reservations within the Commission, he said that the work on the topic was clearly marked by ideological as well as conceptual differences in outlook. The ideological problem was well known, and there was no practical alternative to continuing the work until the total picture was completed, and then looking carefully at the draft articles as a whole with a view to settling the problem in a reasonable and balanced manner. The conceptual differences seemed to be centred on the required safeguards which would take more fully into account the concerns and needs of the developing countries in the reasonable protection of their sovereign rights to pursue policies in line with the objectives of economic and social development. Where there was a conflict of sovereignty between States as a result of the presence of one sovereign authority within the jurisdiction of another, a balance had to be struck on the basis not only of equality of sovereign rights but also of equality in sovereign duties. The acceptability and durability of that balance depended to a large extent on how responsive it was to the actual needs of most States. He, as a representative of a developing country, therefore hoped that the Commission would be able to arrive at appropriate safeguards which would prevent an undue sacrifice of jurisdictional immunities in particular situations.

24. In connection with chapter V of the Commission's report (A/39/10), he drew attention to the observation in paragraph 223 that "there was almost unanimous agreement that the Commission's work on the topic, as now delineated, should continue". There was a clear duty to avoid or minimize, and, if necessary, repair transboundary loss or injury arising as a physical consequence of an activity within the territory or control of another State. The issue was not one of wrongfulness or strict liability, but simply the construction of a régime which regulated certain dangers with due regard for preserving the balance between the freedom to act and the freedom from harm. Obligations were required which met standards of equity and fairness deriving from the duty of States to co-operate. His delegation was satisfied, albeit cautiously, with the Commission's conclusion. It also believed there should be guarantees in order to preserve a proper balance between obligations to avoid transboundary loss or injury and obligations to provide reparation if such loss or injury occurred, because it was the poorer and less developed countries which, for the most part, sustained physical transboundary harm. A far-sighted legal regulation might be the best legal guarantee for assured development; and where progressive development of the law was inevitable, the general and common interests had to be emphasized as the only way to achieve stability and give real meaning to the notion of interdependence.

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25. Turning to the draft articles reproduced in paragraph 237 of the report, he noted with interest the views outlined in paragraphs 237 to 256, especially the first sentence of paragraph 257. In draft article 1, the words "situations" and "areas" required clarification. The use of areas within the territory or control of any State might connote a right or an interest, but where the word "enjoyment" was used, a reference to rights or interests was required. As for the term "affecting", the transboundary effect of the physical consequence was fundamental to the operation of the rules to be elaborated, because without such an effect the said rules would not come into play. Since the topic was predicated upon the duty to avoid, minimize and repair, a mere effect would not suffice because it might constitute no harm, or at least no intolerable harm. It might therefore be more appropriate to think in terms of actual or potential adverse effects.

26. He would reserve his comments on draft article 2 for the time being because it depended on the structure of provisions still to be elaborated. Draft articles 3 and 4 were essential since they emphasized the residual character of the draft articles, which was of great importance to States that were already parties to conventional régimes or were likely to construct such régimes tailored to their specific needs. Whether draft article 5 was needed depended upon how the work progressed and what shape it took, and he therefore would not comment on it at the present stage.

27. With respect to the sharing of costs and benefits, due weight must be given to the interests and needs of developing countries. Strict equality in cost sharing should not be imposed when potential partners were not economically, financially, technologically or industrially equal.

28. Turning to chapter VI of the report (A/39/10), he said he supported the views of the Special Rapporteur as stated in paragraphs 281, 282, 286 and 288, and particularly the "framework agreement" approach. The draft articles as a whole dealt appropriately with the rights and obligations of the various States involved regarding the quantity and quality of water used.

29. In draft article 1, the use of the "system" concept was somewhat ambiguous because it might connote the idea of jurisdiction over land areas. Its earlier approval by the Commission had been tentative and contingent upon the final shape which the draft articles would take. There should also be no misgivings as to the conceptual change from "international watercourse system" and "system State" to "international watercourse" and "watercourse State", because even though surface water, the bulk of the resource, was emphasized, other relevant parts or components were not ignored and could be elaborated in the commentary to the draft article. The Special Rapporteur's flexible approach was therefore commendable.

30. In draft article 3, there was a need to clarify the extent of workability of the definition in the light of article 4, paragraph 3, which dealt with the duty of a watercourse State to negotiate in good faith. He wondered whether watercourse States were to be considered on a strictly equal footing in respect of that duty regardless of the differences in the source components present in the sovereign territories.

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31. As to draft article 4, he wondered whether the standards laid down in the Convention might not be weakened if the rule indicated in the article extended to watercourse agreements to be concluded after its entry into force.

32. It was important to clarify whether the expression "affected to an appreciable extent" in article 5, paragraph 2, meant "harmed to an appreciable extent". In connection with paragraph 2, the legal situation with respect to the problem of non-recognition also had to be clarified. As to when the criterion "affected to an appreciable extent" would start to operate, the only way to resolve the difficulty was for the Commission to seek technical advice with a view to incorporating the necessary quantitative element into the text to dispel ambiguity.

33. In connection with draft articles 6 to 9, he supported the view stated in paragraph 318 of the report. It was of the utmost importance not to minimize the significance of the point that the reciprocal rights and obligations of the States concerned were inevitably centred on their shares, which were the subject of those rights and obligations. States obviously might have different shares, but they should enjoy equal benefits from the use of the watercourse as a whole.

34. The synchronization between articles 6 and 7, and the notions of "protection" and "control", had to be clarified. Articles 8 and 9 were useful corollaries to article 7, but the connotational interrelationship between the terms "uses" and "activities" should be clarified.

35. Turning to chapter VII, he said that the new draft articles merited very careful consideration; in order for them to be fully understood, they must be read in conjunction with the previous reports of the Special Rapporteur and the views expressed about them in the Commission or in the Committee. For that reason, his delegation would withhold its comments on the draft articles at the present stage.

36. His delegation fully endorsed the Commission's decisions regarding its programme and methods of work, as outlined in paragraphs 385 to 396.

The meeting rose at 4.50 p.m.