United Nations
GENERAL ASSEMBLY
FORTY-FIRST SESSION
Official Records*

SIXTH COMMITTEE
34th meeting
held on
Wednesday, 5 November 1986
at 10.30 a.m.
New York

SUMMARY RECORD OF THE 34th MEETING

Chairman: Mr. FRANCIS (Jamaica)

later: Mr. CASTROVIEJO (Spain)

CONTENTS

Distr. GENERAL
A/C.6/41/SR.34
12 November 1986
ENGLISH
ORIGINAL: FRENC

86-57240 6115S (E)

/..

The meeting was called to order at 10.35 a.m.

AGENDA ITEM 130: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS THIRTY-EIGHTH SESSION (continued) (A/41/10, A/41/498, A/41/406)

AGENDA ITEM 125: DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND: REPORT OF THE SECRETARY-GENERAL (continued) (A/41/537 and Add.1 and 2)

1. Mr. CALERO RODRIGUES (Brazil) said, in connection with chapter VII of the report of the International Law Commission on the law of the non-navigational uses of international watercourses, that his delegation had already pointed out that an international instrument on that topic could not be expected to solve all the problems; solutions could come only through bilateral or regional agreements concluded between the countries directly concerned with a particular watercourse. The idea, now accepted, of a framework agreement seemed a good start. The provisions of such an instrument should be limited to broad principles and general guidelines. The riparian States of a particular watercourse could complement those principles and apply those guidelines through specific agreements.

2. To that end, the ILC should continue its efforts to find for each problem a solution capable of receiving widespread and, if possible, general support. The inclusion in the draft of controversial elements that a number of States would not be able to accept would render the exercise futile. The second report of the Special Rapporteur seemed to follow the correct line. In addition to his new drafting for articles of a procedural nature, the Special Rapporteur had specifically raised four questions.

3. To one of those questions - whether the concept of "shared natural resources" should be reintroduced into the draft articles - his delegation's reply was, of course, negative. As it had already argued, the concept was not clear from a legal point of view; nor had it been sufficiently developed so that it could per se indicate the legal consequences attached to it. Furthermore, it was highly controversial.

4. In fact, as the Special Rapporteur had recognized in paragraph 74 of his second report (A/CN.4/399), the elimination of the reference to "shared natural resources" produced greater legal certainty and had not caused any harm to the draft as a whole. His delegation preferred to speak of "equitable use", meaning any use that caused no harm to another State. It considered the concept of "harm" to be the foundation of the draft articles as a whole.

5. On another of the questions raised by the Special Rapporteur - whether the draft should refer to the obligation not to cause "harm" or to the obligation not to cause "injury" - he said that States were in any case bound not to cause injury to other States. If one did so, it was transgressing a legal obligation and its responsibility was engaged. If reference was made in the articles to an obligation not to cause harm, it was tantamount to saying that causing harm corresponded to injury in the legal sense, with all the ensuing consequences. On the other hand, harm, being susceptible to objective verification, was a far better yardstick for determining whether a specific use was inequitable.

(Mr. Calero Rodrigues, Brazil)

6. A third question raised by the Special Rapporteur concerned the definition of the term "international watercourse", some States being understood to prefer the expression "international watercourse system". The Special Rapporteur proposed that the decision on the definition should be deferred to a later stage of the work. His delegation was in favour of postponement and it was also ready to accept either "watercourse" or "watercourse system".

7. The last question of the Special Rapporteur concerned draft article 8, and whether it should include a list of factors to be taken into account to determine whether the use of the waters by a State was "reasonable and equitable". Since the draft article itself said that the States concerned should take into account all relevant factors, a list of such factors did not seem necessary in the text and could be included in the commentary. In paragraph 239 of the Commission's report, a compromise solution was suggested whereby the article would include only an indicative list of general criteria. His delegation was prepared to give that suggestion adequate consideration.

8. Turning to the question of international liability for injurious consequences arising out of activities not prohibited by international law, he said that the first report of the new Special Rapporteur (A/CN.4/402) was a critical analysis of his predecessor's "schematic outline". Starting with the title, the Special Rapporteur suggested that the word "acts" should be replaced by "activities". His delegation fully endorsed that suggestion, which would bring the English text into line with the French and Spanish versions. It also considered that the expression "physical transboundary loss or injury" was acceptable as a definition of the scope of the articles, and that the Special Rapporteur had been right to address himself to both reparation and prevention. His delegation had been doubtful whether it was desirable to bring the concept of prevention into the field of liability. However, recognizing that preventing harm was useful, it could in the last analysis admit the inclusion in the draft of provisions on prevention. However, it maintained that reparation and prevention could not be treated on the same level. Reparation was the essential element of liability. Prevention was a general duty through which one sought to avoid harm and, thus, liability.

9. If the concept of reparation were to be accepted, there would seem to be no way of dissociating it from the idea of strict liability. Strict liability did not mean absolute liability and it could be mitigated by a definition of its limits and the application of "mitigating factors". Prevention, on the other hand, was a duty of a general character. The establishment of a régime of prevention through international co-operation and agreement could be useful, but it was not a requirement sine qua non for prevention, the aim of which was to avoid or minimize harm. The previous Special Rapporteur had followed a similar line of thought in his "schematic outline", while the present Rapporteur took the view that non-observance of the obligation to inform and to negotiate would justify retaliatory action on the part of the affected State. His delegation was not convinced that that approach should be followed. States should, of course, be encouraged to co-operate, but it was questionable whether making co-operation constraining was in fact the best way of achieving the desired results. In matters of prevention, conduct on substance was more important than conduct dictated by rules of procedure.

(Mr. Calero Rodrigues, Brazil)

10. Regarding State responsibility, his delegation had some misgivings about the decision of the International Law Commission to refer the articles proposed by the Special Rapporteur for Part Three to the Drafting Committee. The matters dealt with in Part Three, which concerned the implementation of international responsibility and the settlement of disputes, could be properly considered only after Part Two had been completed. The Commission itself should re-examine the questions of procedure and settlement of disputes after having approved the articles of Part Two.

11. On the whole, his delegation agreed with the general lines of the Special Rapporteur's proposals for Part Three. When a State alleged that an internationally wrongful act had been committed and the responsibility of a State was invoked, the injured State which wished to apply countermeasures should notify the alleged author State. If a dispute arose concerning the allegation, the States concerned should seek a solution by peaceful means. On the whole, the mechanism suggested seemed acceptable. A notification seemed necessary to initiate the process of determining whether a wrongful act had in fact been committed by State A and whether State B was indeed an injured State. Unless State A recognized the validity of the allegations of State B, a dispute existed and a solution must be sought. It was proper to indicate as first step recourse to Article 33 of the Charter. If the dispute was not solved, the parties should accept compulsory conciliation or the jurisdiction of the International Court of Justice if the dispute had to do with the application of a norm of jus cogens or an international crime. That graduation was in line with the degree of seriousness of the alleged offence.

12. As they were proposed, however, the articles seemed to focus on the entitlement to take countermeasures rather than on the commission of an internationally wrongful act. A State might allege that such an act had been committed and seek redress without availing itself of its entitlement to apply countermeasures. It should be made clear that, in such a situation, a notification was also in order and a dispute might be recognized to exist, which should be solved by the means envisaged in the articles.

13. The Commission's Drafting Committee had an awesome task before it; it was to be hoped that it would be able to make progress in its work on the draft articles on State responsibility despite the difficulties of the topic.

14. Mr. EL-ARABY (Egypt) said that it was gratifying that the Commission had been able, despite the financial crisis, to implement all the decisions taken at its thirty-seventh session and in particular to adopt in first reading the draft articles on two of the topics on its agenda.

15. His delegation wished to thank the Special Rapporteur on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and said that the Egyptian Government would submit written observations on the draft articles. The delicate balance between the interests of the sending State with regard to communications with its diplomatic and consular missions and the

(Mr. El-Araby, Egypt)

interests of the receiving State and the transit State concerning security should be maintained, as should the balance between the need to develop friendly relations between the sending State and the receiving State and the need to avoid any abuse of the privileges and immunities accorded to the diplomatic courier. In that regard, his delegation wished to reaffirm that those privileges and immunities should be limited to what was necessary to enable the courier to perform his functions.

16. His delegation was glad that the relationship between the draft articles and the four multilateral Conventions governing the matter appeared clearly in article 3. The systems provided for by those four Conventions must be harmonized.

17. Although the expression "at any time" in article 9, paragraph 2, was consistent with the provisions of article 12, it posed a problem to the extent that it could provide legal grounds on which a receiving State that had consented to allow the sending State to appoint a diplomatic courier from among persons having the nationality of the receiving State could arbitrarily withdraw its consent once the courier had begun his mission. A provision should be inserted in article 9 to prevent that from occurring.

18. Concerning articles 16, 17 and 18, a distinction should be made as to whether or not the courier had the bag in his charge. The protection, inviolability and immunity provided for in those articles should be accorded only in the first case, and the courier should not enjoy privileges and immunities as broad as those accorded to diplomatic representatives accredited to the receiving State.

19. Since article 21 did not specify what was meant by the moment when the courier "begins to exercise his functions" (para. 1), it allowed for different interpretations of that point. Moreover, despite the distinction made in that article between the regular diplomatic courier, whose privileges and immunities ceased at the moment when he left the territory of the receiving or the transit State, and the diplomatic courier ad hoc, whose privileges and immunities ceased at the moment when he had delivered the bag to the consignee, the two types of courier were in fact practically on the same footing: in practice, both left the territory of the receiving State within a short period of time. In the opinion of his delegation, it might be possible to grant the courier ad hoc only a minimum of privileges and immunities and to reserve the full set of privileges and immunities envisaged in the draft articles for the regular courier.

20. It was difficult to see why the inviolability of the diplomatic bag should not be affirmed in article 28, paragraph 1: that inviolability was the corollary of the obligation to permit and protect the official communications of the sending State, which, pursuant to article 4, was incumbent on the receiving State and was derived from the principle of the inviolability of the documents contained in the bag. In response to the argument that the concept of inviolability would be inconsistent with the need for a just balance between the interests of the sending State and those of the receiving State and the transit State, it was possible to argue that, in accordance with article 5, the sending State was charged with ensuring that the diplomatic bag was not used in a manner incompatible with the

(Mr. El-Araby, Egypt)

object and purpose of the draft articles. The addition to article 5 of a provision specifying the measures to be taken against the sending State in the event that it was proved that it had not met that obligation would be a considerable help in ensuring a just balance and in lessening differences of opinion regarding article 28.

21. His delegation supported article 31 but considered that the case of partial diplomatic representation should also have been considered.

22. Article 32 did not call for any substantive comments. However, if "regional agreements" meant any non-bilateral agreement on the issues discussed in the draft articles other than the four multilateral Conventions referred to in article 3, that fact should be stated explicitly.

23. With regard to the draft articles on the jurisidictional immunities of States and their property, the provisional text adopted by the Commission in first reading constituted a good basis for the second reading. His delegation was glad that the scope of the draft articles was restricted to immunity from the jurisdiction of the State courts and did not apply to the executive or administrative branches, since the State's sovereignty in its territory was thus maintained.

24. In article 3, two criteria had been used to determine whether a contract was covered by immunity: the nature of the contract and its purpose. His delegation considered that priority should be given to the purpose of the contract, since frequently the commercial character of a State's activities did not prevent it from enjoying jurisdictional immunity.

25. In article 6, the bracketed portion should be deleted, since the basic aim was to unify the applicable rules of international law and not to create a loophole allowing the agreed provisions to be breached. In addition, the wording of the Arabic version should be amended: the phrase preceding the brackets should refer not to the need to avoid contravening the provisions of the articles but to the need for conformity with those provisions.

26. His delegation welcomed the second report of the Special Rapporteur on the law of the non-navigational uses of international watercourses. Unfortunately, the Commission had not had sufficient time to consider the report in detail at the thirty-eighth session. It was to be hoped that more time would be available at future sessions and that progress would be made on that question. Egypt would submit detailed written observations on the draft articles. It was difficult to reconcile the interests of States with acquired rights and the interests of States which interpreted the phrases "shared natural resource" and "equitable use of an international watercourse" as implying a redistribution of a river's waters; that would inevitably hamper relations between the States concerned. It would be helpful to insert in article X a paragraph specifying that the application of that article should not jeopardize acquired rights. Equitable sharing must be negotiated in good faith for the purpose of concluding a new agreement. It should be borne in mind that the development of international law was designed to establish an equitable international system that maintained a balance between the rights and duties of States without jeopardizing international stability.

27. Mr. GOROG (Hungary), commenting on the chapter of the ILC report on the jurisdictional immunities of States and their property, said that, thanks to the Commission's diligence, the Committee had before it the draft articles in their entirety. However, the work on that question was still far from complete, as the basic principles and the details of regulation had yet to be commented on by Governments. On that occasion, his delegation would simply express its preliminary opinion on the fundamental question, namely, the concept and scope of State immunity, which were the determinant aspects of the draft as a whole. It was evident that the Commission had formulated draft article 6 on the conceptual basis of relative or restricted immunity, as was made clear in Part III of the draft articles submitted in 1985. Without repeating his delegation's statements, he deemed it necessary to stress two ideas on that subject. As was clearly evidenced by the history of immunity-related disputes between States, by relevant literature and by studies of the practices of different States, the immunity of a State from the jurisdiction of another State constituted a basic principle of international law.

28. No one disputed the fact that immunity from the jurisdiction of another State followed from the principle of the sovereign equality of States. Just as there existed concepts of absolute and relative sovereignty, with a whole range of variations between the two poles, the same held true for State immunity. The scope of immunity recognized by a particular State depended on the set of historical, economic and social conditions prevailing from time to time and determining the extent to which a State was willing or able to recognize the immunity of another State by restricting its own sovereignty.

29. The socialist legal system of Hungary, for instance, regarded State immunity as a basic principle of virtually unlimited scope, for it provided that a Hungarian court could not exercise its jurisdiction over another State or its property unless the State in question had expressly waived immunity. In short, his delegation felt that the text of article 6, without the phrase in brackets, was satisfactory, but it would have preferred a general formulation of the principle as a fundamental tenet of international law which could have been simply stated in the following terms: "A State enjoys immunity, in respect of itself and its property, from the jurisdiction of another State." Such a formulation would not have excluded the possibility of allowing a certain number of carefully drafted and clearly limited exceptions.

30. Article 6, which was characterized as a compromise formula even in the Commission's report, contained two restrictions. First, the phrase "subject to the provisions of the present articles" had been added to the correctly defined principle, and secondly, the immunity of a State and its property had been limited to immunity from the jurisdiction of the courts of another State. The latter phrase was meant to reduce the scope of disputes, for the Commission was certainly aware that under the legal systems of numerous States, the immunity of another State might be disregarded not only by the courts, but also by other State authorities through the adoption of administrative measures that were not amenable to court action. On the other hand, his delegation could not accept the reference to the relevant rules of general international law, for that would make it completely impossible to define the extent of exceptions to the principal rule, and

(Mr. Görög, Hungary)

was apt to prevent the practical application of that rule. His delegation was none the less confident that the new draft articles to be prepared after a careful study of the views of Governments would be worded in simpler and more flexible terms that would break the impasse.

31. While appreciating the quality of the work done by the Special Rapporteur on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, as well as by the Commission, his delegation regretted that the Commission had adopted in first reading compromise formulations that were likely to satisfy neither the Member States which had from the outset denied the necessity of regulation nor those which wanted maximum protection for the courier and the bag. Without wishing to prejudge the results of a thorough analysis of the draft articles, his delegation could already see that several of the provisions, which would weaken the current status of the diplomatic courier and the diplomatic bag, would hardly be acceptable in their current form. The problem had to do mainly, though not exclusively, with draft articles 18 and 28.

32. The jurisdictional immunity of the diplomatic courier was one of the key questions that would make it possible to determine if the new regulations represented a step forward or backward as compared to the current ones. Draft article 18, which was based on the notion of restricted or functional immunity, did not meet his Government's expectations and provided less regulation than had already been widely recognized in practice pursuant to article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations. Furthermore, draft article 18 also differed from the ideas expressed by the Special Rapporteur in the previous drafts. The immunity of the diplomatic courier should not be restricted to acts performed in the exercise of his functions.

33. As to article 28, the need to safeguard the legitimate interests of the receiving State or the transit State could not justify examination of the diplomatic bag through electronic devices, because that might fundamentally infringe the principle of confidentiality. In addition, much more sophisticated means of examination might be devised in the future, and the adoption of the bracketed provision would open a door that it would be impossible to close later. His delegation also feared that an institutionalization of the method by which the diplomatic bag could be returned, if the sending State refused a request to have it opened, would allow the receiving State an obvious way of hindering or even preventing courier service at will, for many States would refuse such a request on principle or on practical grounds involving confidentiality.

34. With regard to State responsibility, his delegation doubted that it would be possible to consider part three of the draft articles so long as part two had not taken better shape. There was no discernible change in the wording of draft articles 1 to 5 (A/41/10, pp. 97 to 99) on the basis of proposals made in the Sixth Committee. He recalled that Hungary had been strongly critical of the provisions of article 5, paragraph 2. The main rule was the one set forth in article 5, paragraph 1, and paragraph 2 should contain clearly defined principles to ensure the application of the general rule. His delegation could accept neither the general orientation of part three nor the specific provisions, particularly those of

(Mr. Görög, Hungary)

draft article 4. Hungary's main objections were reflected in paragraph 48 of the report. It was not convinced by the argument that draft articles 1 to 5 of part three closely followed the relevant provisions of the Vienna Convention on the Law of Treaties and the United Nations Convention on the Law of the Sea, for the provisions of those instruments were actually meant to be applied partly in a narrower sense and partly in specific circumstances. Moreover, a considerable number of States still hesitated to accede to those Conventions precisely because of those rules on State responsibility.

35. Concerning the law of the non-navigational uses of international watercourses, he said the fact that the definitions constituting the pillars of the future legal instrument had changed four times in such a short period indicated that even fundamental issues of theory still needed clarification. The theoretical approach should be based on the principle of sovereignty. The greatest difficulty was to find a healthy balance between the sovereign right of States to dispose of the natural resources on their territories on the one hand, and on the need for system States to have regard, on the other hand, for the legitimate interests of other States. Because of those problems, his delegation welcomed the fact that the Special Rapporteur was continuing to try to formulate a general rule that would lay down the fundamental principles, would be broadly acceptable and would provide a basis for specific agreements regulating co-operation between riparian States. Without taking a final position, it recalled that Hungary had already accepted the concept of "international watercourse", and feared that a return to the "system" concept would not be welcomed by many countries, since it was hardly in keeping with the sovereign right of States to use freely the stretches of an international watercourse situated in their territories.

36. Mr. MIKULKA (Czechoslovakia) said he believed that the draft articles on the jurisdictional immunities of States and their property were not on the whole very satisfactory. As before, the draft articles adopted went in the direction of functional State immunity based on an artificial distinction between acta jure imperii and acta jure gestionis. The Commission had not taken enough account of the comments and objections that the socialist States and some developing countries had consistently made since the start of work on the topic. The result was a complete set of draft articles which, however, in his delegation's view, could not serve as the basis of a generally acceptable instrument of codification.

37. With respect to draft articles 2 and 3, he did not understand why the Commission had devoted draft article 3 (Interpretative provisions) to the definition of the expression "State" rather than including it in paragraph 1 of draft article 2 (Use of terms), along with the other definitions. Moreover, while the definition of the terms "court" and "State" properly belonged in part I of the draft articles, because those terms were employed in all parts of the draft articles, the same did not apply to the term "commercial contract", which was used only once, in article 11 of part III. Paragraph 1 (b) of article 2 and paragraph 2 of article 3 should not be separate from the text of draft article 11, to which they were linked. That suggestion conformed to the procedure already followed by the Commission in the 1963 Vienna Convention on Consular Relations, where the definition of the expression "official correspondence" was to be found in the

(Mr. Mikulka, Czechoslovakia)

article to which it was exclusively linked, not in article 1, devoted to definitions in general. In any case, his suggestion in no way changed Czechoslovakia's negative position as to the content of draft article 11.

38. With regard to draft article 4, his delegation believed that paragraph 2, according to which the draft articles were without prejudice to the privileges and immunities accorded under international law to heads of State ratione personae, should be extended to include all high-ranking persons, in the sense of article 50 of the 1975 Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, in order to ensure full concordance between the instruments elaborated by the Commission.

39. Czechoslovakia welcomed the new formulation of draft article 6, which represented progress in the search for an acceptable compromise between two opposite concepts. The fusion of the principle of State immunity and the expressly defined exceptions to that principle was a well-balanced idea which could become a solid foundation for the future instrument. However, the provision contained within brackets, which tended to limit the scope of State immunity by referring to the "relevant rules of general international law", would rob the instrument prepared by the Commission of any practical value. His delegation was therefore strongly opposed to the insertion of that expression in the text of draft article 6. In view of the fact that draft article 6 formulated the general principle of State immunity, part III of the draft articles should be entitled "Exceptions to State immunity".

40. His delegation could not subscribe to the provision of draft article 21 (a), which, like draft article 11, tended towards the concept of functional State immunity. Draft article 21 (a) was a serious derogation of the principle of State immunity regarding measures of execution, which was not justified by current international practice. The introductory provisions of part IV of the draft should, first of all, stress unequivocally that immunity from execution was distinct from immunity from jurisdiction in the proper sense of the term. The validity of that thesis, confirmed by international practice and widely recognized by jurists, should not depend on States' consent to the exercise of jurisdiction by foreign courts, in the meaning of article 22, paragraph 2. His delegation's negative position with regard to draft article 21 also applied to draft article 23, since those two provisions were inseparably linked. On the other hand, Czechoslovakia could agree in principle to the provisions of part V, namely, draft articles 24 to 28.

41. His delegation was pleased that the Commission had completed its first reading of the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Draft article 28, regarding the protection of the diplomatic bag, was one of the key provisions of the draft, and it was disturbing that the members of the Commission had not reached agreement on the extent of protection to be accorded to the diplomatic bag. Since the beginning of work on the topic, his delegation had maintained that the freedom of communication and strict respect for the confidentiality of diplomatic correspondence were indispensable conditions for the normal functioning of diplomatic and consular missions, and had long been consecrated by international

(Mr. Mikulka, Czechoslovakia)

practice. It would be an inexcusable error to challenge the confidentiality of diplomatic correspondence. That was why his delegation considered that draft article 28 should stipulate expressly that the diplomatic bag was inviolable wherever it might be and that it was exempt from examination directly or through electronic means or other technical devices. It was hard to see how the inviolability of the diplomatic bag could be inconsistent with a fair balance between the interests of the sending State and those of the receiving State and the transit State, as had been stated in paragraph (6) of the commentary to article 28.

42. Inviolability as a privileged status accorded to diplomatic missions, consular premises or the person of diplomatic agents was a well-balanced concept, and there was no reason why it should not be applied to the diplomatic bag. That concept did not imply that the receiving State had a purely passive role and did not exclude the possibility of establishing, at the same time, guarantees against the abuse of the diplomatic bag. However, his delegation understood the Commission's efforts to achieve a balance between the interests of the sending State and those of the receiving State when there were serious reasons to believe that the diplomatic bag contained objects other than those referred to in draft article 25. In his opinion, the extension of the régime provided for in the 1963 Vienna Convention on Consular Relations to all types of bags could provide an acceptable solution, and the adoption of reciprocal measures could be a sufficient guarantee against abuse of the options afforded under article 28, paragraph 2. On the other hand, Czechoslovakia had serious doubts about the need to extend to the transit State the same rights as the receiving State.

43. His delegation noted with satisfaction that its comments regarding draft articles 29 and 30 had been taken into consideration. Czechoslovakia could not, however, subscribe to the substantive provisions of paragraphs 1 and 2 of draft article 30. Paragraph 1 provided for "force majeure or other circumstances", while paragraph 2 contained express mention of "force majeure" only. The four Conventions regarding diplomatic and consular law referred to in paragraph (5) of the commentary to article 30 also mentioned only cases of force majeure. However, account should also be taken of situations which were not, strictly speaking, cases of force majeure, but rather cases of distress. For the sake of greater consistency, his delegation considered that the expression "due to force majeure or other circumstances" should be used in both paragraphs 1 and 2 of article 30.

44. With regard to draft article 32, it should be generally understood that the future instrument would not affect bilateral or regional agreements governing the status of the diplomatic courier and bag. However, he wondered how the relationship between the draft articles and the four Conventions of 1961, 1963, 1969 and 1975 on the status of the diplomatic courier and bag could be defined. That relationship could be expressed in one of two ways: by excluding the four Conventions from the scope of article 32 either explicitly or implicitly. The Commission had opted for the second solution, but the formulation it had chosen did not seem to be very felicitous. Indeed, the expression "regional agreements", which was similar to the "regional arrangements" of Article 52 of the Charter of the United Nations, was generally used to designate agreements concluded between States of the same geographic region. That expression should not be used in draft article 32 in yet another sense, which was, moreover, imprecise.

(Mr. Mikulka, Czechoslovakia)

45. The new wording of draft article 33 was an improvement over the previous text and was more in keeping with the logic of the efforts to standardize the régimes of different categories of couriers and bags. However, the practical result would hardly be changed. On the one hand, article 33 would permit States to become parties to the future instrument even if they were not parties to the four Conventions relating to the status of the diplomatic courier and diplomatic bag. On the other hand, it would result in a plurality of régimes, which was hardly compatible with the original objective of standardization. The international practice thus created would be likely to diminish the results of the codification efforts made until then. That was why the Commission should consider limiting even further the freedom to make optional declarations.

46. On the question of State responsibility, Czechoslovakia considered that it was necessary to draw attention to the fact that draft article 9 of part two, regarding reprisal, would be more appropriate in part three, since reprisal constituted a means of constraint used with a view to implementing international responsibility. The Commission should, moreover, endeavour to establish time-limits within which recourse to reprisal would be lawful.

47. His delegation considered that the provisions regarding the settlement of disputes, which would also be contained in part three, should relate not only to disputes referred to in part two, namely, those concerning the definition of the internationally wrongful act, but also those dealt with in part one concerning the content of the obligation arising from responsibility. The provisions regarding the settlement of disputes should fully respect the principle of free choice of means of settlement by the parties.

48. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, Czechoslovakia approved the idea of establishing the unity of the topic by linking prevention and reparation. The fact that those two elements fell within the domain of primary rules was essential for making a formal distinction between State responsibility for internationally wrongful acts and State liability for the consequences arising out of an act not prohibited by international law. The Commission should concentrate its attention on activities which could be injurious in the sense of causing material damage, such as activities involving risks. His delegation considered that if the Commission wished to impart practical value to its conclusions, it should not lose sight of contemporary realities.

49. With regard to the non-navigational uses of international watercourses, Czechoslovakia considered, along with the majority of the members of the Sixth Committee, that the formula of the "framework agreement" was an acceptable solution. Moreover, it approved the Special Rapporteur's intention of drafting both legal principles and rules and guidelines which, while not strictly required by general international law, would nevertheless be of great practical use in the preparation of a régime governing the uses of international watercourses.

(Mr. Mikulka, Czechoslovakia)

50. Czechoslovakia hoped that the financial problems facing the United Nations would not have a negative effect on future work regarding the progressive development of international law and its codification. In particular, it wished to draw attention to the irreparable damage which could result from any limitation of certain basic documents of the Commission or of summary records of the Sixth Committee, which were an irreplaceable source in the interpretation of documents prepared by the Commission.

51. Mr. Castroviejo (Spain) took the Chair.

52. Mr. AL-QAYSI (Iraq) said it was not surprising that the draft articles on jurisdictional immunities of States and their property contained a number of provisions in brackets. The reservations in question were the result of ideological, conceptual and policy differences. From the ideological standpoint, the question of whether jurisdictional immunities of States should be treated as a general principle of international law or as an exception to the more fundamental principle of territorial sovereignty had yet to be settled. The principle of the sovereign equality of States was in fact the very foundation of international law, which signified that all States had equal rights and duties. Since rights and duties were interdependent, the concept of sovereign equality could not be considered in its strictest sense in situations involving conflicts of sovereignty between States caused by the presence of one sovereign authority within the jurisdiction of another. In such situations, the conflict had to be settled in a manner that respected the law of the jurisdiction in question, failing which the equality of States in respect of duties would be impaired.

53. Conceptual differences centred principally on safeguards that would duly accommodate the concerns and needs of the developing countries and give reasonable protection to their sovereign right to pursue policies commensurate with their economic and social development objectives. In international relations, every State was both a grantor and beneficiary of jurisdictional immunities; the question that arose, then, related to the balance to be struck in a given set of circumstances involving a conflict of sovereignties. The acceptability and durability of that balance depended on its responsiveness to the actual needs of the vast majority of the members of the international community.

54. The principal difference of opinion over policy revolved around the question of whether the topic should be dealt with in a draft convention that would be applied universally, or whether solutions should be worked out through bilateral agreements or individual concessions in each particular case.

55. On the whole, his delegation felt that the International Law Commission had made a good attempt at striking a balance between the various interests involved, although improvements could still be made in certain areas: the drafting of certain articles was sometimes cumbersome; the commentary on some draft articles was occasionally brief, and, accordingly, difficult to comprehend immediately; a clearer distinction should be made between acta jure imperii and acta jure gestionis; and there was an over-abundance of brackets - he particularly

(Mr. Al-Qaysi, Iraq)

agreed with some members of the Commission that the bracketed reference to general international law in connection with exceptions to the principle of immunity rendered the entire set of draft articles useless and inadmissible in the absence of precise exceptions. His delegation would also prefer to see the title of Part III of the draft articles read "Exceptions to State immunity".

56. With regard to the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission had sought to harmonize and render uniform the legal rules governing that subject by codifying existing rules and by progressively developing additional rules along empirical and pragmatic lines, and in the light of modern State practice. The Commission had struck a reasonable balance between the requirements of codification and amplification of the law and States' interest in security and free communication.

57. The year before, his delegation had dealt at length with the difficulty of comprehending clearly the general conclusions of the Commission's discussion of draft article 36, now draft article 28, on the inviolability of the diplomatic bag, and draft article 43, now draft article 33. That difficulty stemmed from the possibility of making two optional declarations. The difficulty would be partly resolved if the possibility of making an optional declaration with regard to inviolability under draft article 28 was eliminated. However, final agreement had not yet been reached on that draft article, and until the text assumed its definitive form, it was almost impossible to assess how the article related in practice to draft article 33, since it was not yet known whether it would incorporate the régime of the diplomatic bag or the régime of the consular bag. Obviously, the final assessment would also be influenced by the decision whether or not the examination of the bag through electronic or other technical means was approved.

58. With regard to draft article 28, his delegation favoured protecting the security interests of the receiving State, particularly in view of the numerous cases of abuse there. The brackets in the text should therefore be removed in order to establish a flexible régime of protection. Those considerations, however, should not apply to the transit State.

59. His delegation had already pointed out in 1983 that Part Three of the draft articles on State responsibility was interlinked with Part Two, because the machineries for implementation were largely dependent on the different cases that would be dealt with in Part Two. Likewise, in 1985, his delegation had noted with satisfaction that a consensus was emerging within the Commission on the need to elaborate legal and judicial safeguards against abuse, given the existence of political interests in the realm of State responsibility. The result would be a strengthening of the law of State responsibility and of the international legal order. That was why his delegation welcomed the five draft articles and the annex, which formed a necessary link with Part Two, if not a vital means for safeguarding its implementation.

(Mr. Al-Qaysi, Iraq)

60. His delegation shared the views expressed in paragraph 49 of the Commission's report, but did not think that the views contained in paragraph 50 would prove effective in all situations. The views expressed in paragraph 51 seemed obvious. As for those expressed in paragraph 52, he wished to point out that the purposes of notification specified in article 1 and in paragraph 1 of article 2 were different, and that the situation of special urgency related to the time-limit set in paragraph 1 of article 2. It would undoubtedly be useful, as stated in paragraph 53, to indicate what would constitute "cases of special urgency". While the views expressed in paragraphs 53 to 56 were perfectly understandable, the same could not be said for the view expressed in paragraph 58, since the word "solution" in the introductory part of article 4 related to failure to reach agreement on the basis of paragraph 1 of article 3. His delegation also endorsed the views expressed in paragraphs 59 and 60; in connection with paragraph 61, it believed that draft article 5 was necessary, since without a provision of that nature the very objectives of Part Three would be defeated.

61. With regard to the draft Code of Offences against the Peace and Security of Mankind, his delegation agreed with the Special Rapporteur that an offence must include a mass element to be characterized as a crime in the sense of the Code, and that the only element which seemed to be unanimously accepted was motive. It also agreed with the view expressed in paragraph 88 of the report that the crime should form part of a systematic plan to perpetrate acts directed against a human group or a people upon grounds of, for instance, racial or religious hatred. While views contrary to those just mentioned had merit, a degree of flexibility being desirable in certain cases, the definition should nevertheless be couched in certainty. At any rate, if acts committed against individuals met those tests, there was no reason why they should not be considered crimes against humanity: the question was very much one of proof.

62. Of the crimes against humanity not covered by the 1954 draft Code, apartheid was one that should be included in the draft Code in preparation, and its fundamental elements should be defined so that they could be applied in identical situations. A good point of departure was to be found in the provisions of relevant conventions. With regard to serious damage to the environment, the element of seriousness should apply not only to the damage, but also to the initial breach of the relevant treaties and conventions. Moreover, the serious breach should be intentional.

63. Iraq had doubts, pending further consideration, as to whether the concept of a crime against humanity should be extended to include terrorist acts committed by individuals on their own behalf, or drug trafficking. Moreover, while it agreed fully with the substance of the view stated in paragraph 101 of the report, it did not agree with the way that view was expressed. Crimes against humanity should include any acts intended to prevent a people from exercising its inalienable right to self-determination within the meaning ascribed to that concept in the Declaration on friendly relations. Any extension of that common denominator might adversely affect the application of other fundamental principles of international law, such as those of sovereignty, territorial integrity and non-intervention in the internal affairs of States.

(Mr. Al-Qaysi, Iraq)

64. As to war crimes, the terminology problem was not difficult to solve. Although war was a wrongful act under international law, the term "laws and customs of war" was commonly understood. The objective of those laws and customs was humanitarian, and if the term "armed conflict" was to be used in keeping with the current state of international law, the wording should cover cases which were pertinent in the light of the relevant humanitarian conventions. As for the substantive problem, his delegation agreed with the Commission that the overlapping of concepts was fairly common in both internal and international law. Concerning methodology, a more general or combined definition would be preferable.

65. With regard to the question of nuclear weapons, it seemed that what was desirable might not prove to be possible. Admittedly, the question was very political. However, not only reason but also the very survival of mankind called for the total elimination of nuclear weapons. Since that result did not seem conceivable in the near future, the Commission should deal with the question.

66. With regard to other offences against the peace and security of mankind, his delegation felt that complicity could have an extended meaning in international law, provided that no presumptive incrimination was admitted. In connection with attempt, it shared the view of some members of the Commission that the concept had to be interpreted as the commencement of the execution of an act defined as an offence, the act itself having been prevented as a result of circumstances beyond the perpetrator's control. Nevertheless, his delegation was not convinced that the concepts of complot, complicity and attempt should be included in the part of the draft Code relating to general principles; as the Special Rapporteur said, they should be dealt with as separate offences.

67. In connection with the general principles, in particular the several categories of principles, it was important not to confuse crimes under internal law with offences under the draft Code. The principle of non bis in idem was of paramount importance, as was the element of seriousness. In addition, the jurisdictional guarantees must be specified in greater detail. As to the application of the draft Code in time, his delegation supported the considerations put forward by the Special Rapporteur concerning the rules of non-retroactivity and imprescriptibility, and it also felt that it was necessary to specify that the offences in question were not political crimes for the purposes of extradition and right of asylum. With regard to the application of the Code in space, his delegation favoured the view formulated in draft article 4.

68. As for the principles relating to exceptions to criminal responsibility, his delegation was in agreement with the analyses of the Special Rapporteur concerning coercion, state of necessity, force majeure, error and superior order as outlined in paragraphs 152-158, 162 and 164-168, respectively. It also shared the view of some members of the Commission regarding the delicate nature of establishing the moment when compliance with an order given by a superior ceased to be lawful, because disobedience was itself an offence under military law.

(Mr. Al-Qaysi, Iraq)

69. With regard to self-defence, the views of the Special Rapporteur, as stated in paragraphs 171 and 173, certainly had merit. As had been noted, an individual could quite easily violate the laws of war or commit inhuman acts even though the State was acting in accordance with its right of self-defence. Lastly, with regard to defence based on reprisals, his delegation supported the Special Rapporteur's views (paras. 174-176 of the report) and, in that connection, it felt that the element of intent was of fundamental and decisive importance.

70. With respect to the implementation of the Code, the question on which the Commission had sought guidance from the General Assembly in 1983, his delegation felt that it involved two questions, namely, penalties and criminal jurisdiction. Those two questions should be considered in the light of the fact that the Commission had decided for the moment to limit its work to the criminal responsibility of individuals. The Special Rapporteur proposed, in draft article 4, a universal offence without prejudging the question of the existence of an international criminal jurisdiction. While that was of course conceivable, the question of penalties should not be overlooked, in particular their uniform nature and extent. At any rate, the establishment of an international criminal jurisdiction in relation to individuals would be less difficult than in relation to States. The Special Rapporteur had reminded the Commission of that in 1983, and in that connection there was a need to achieve a balance between the need for effectiveness and political realism.

71. As to international liability for injurious consequences arising out of acts not prohibited by international law, he noted that a consensus had emerged in the Commission on the scope of the topic, namely, that it was not a question of liability arising directly from a primary rule or obligation, which always depended on the occurrence of injury regardless of wrongfulness. It was rather the duty of States to avoid, minimize and, if necessary, repair transboundary injury arising as a physical consequence of an activity within their territory or under their control, such consequence transcending, by its nature, political boundaries. The scope of the topic in relation to content was sufficiently limited. It was now clear that the issue was not one of wrongfulness or of strict liability, but simply the construction of a régime which regulated certain dangers with due regard to the need to preserve the balance between the freedom to act and freedom from harm. Procedural obligations were called for, which must meet standards of equity and fairness flowing from the duty of States to co-operate.

72. His delegation felt that although the topic involved two components, prevention and reparation, it had a unity of its own. Iraq also felt that the obligation to negotiate stemmed from the duty to co-operate, which was in fact the very foundation of the work on the topic. It was therefore not only necessary but also vital that that obligation should be reflected in the text of the draft articles in such a way that it could be viably implemented.

73. Finally, as the developing countries ran the greatest risk of being affected by the dangers arising from technological innovations, very special consideration should be given to their needs and interests, but that should not hinder the transfer of technology for the obvious reason that imbalances in the levels of development among peoples and States were a source of instability and tension.

(Mr. Al-Qaysi, Iraq)

74. Referring to the law of the non-navigational uses of international watercourses, he noted that the Special Rapporteur had drawn attention to four points concerning draft articles 1 to 9, which called for comment. The first point was whether the Commission, for the time being at least, could defer the matter of defining the term "international watercourse" and base its work on the provisional working hypothesis accepted by the Commission in 1980. He failed to see how the definition could be deferred, because it was the cornerstone on which all the draft articles should be built. The topic in question was of a different nature because it concerned a unique physical phenomenon with distinguishing physical characteristics that must be recognized when determining the legal rules. The difficulties involved in making such a determination could not be dismissed, but it must be realized that formulation of the requisite general rules should be based on a conceptual framework. His delegation believed that the system concept was not felicitous: it was ambiguous and its acceptance in 1980 had been tentative and contingent upon the final shape which the draft articles would take. Since then a draft framework convention had been submitted in 1983 and revised in 1984: it contained general residual rules applicable to all international watercourses, rules that were to be supplemented, where necessary, by detailed and distinct agreements, between States of an international watercourse, which would take into account their particular needs and the characteristics of the watercourse concerned. The Commission should not revert to the stage where the working hypothesis had been necessary.

75. Moreover, in view of what was indicated in paragraph 235 of the report, he failed to understand how the Special Rapporteur could so easily reach the conclusion, indicated in paragraph 236, that "the Commission should for the time being defer the matter of defining the term 'international watercourse'". The definition in draft article 1, which was in the hands of the Drafting Committee, should not be temporarily abandoned, for it was flexible enough to dispel any misgivings because, while surface water was emphasized, other relevant components were not ignored and could very well be developed in the commentary to the draft article.

76. The second point raised by the Special Rapporteur was whether the term "shared natural resource" should be used in the text of the draft articles. The question was immaterial, because the starting point and the content would be retained in both cases. It must not be forgotten that the reciprocal rights and obligations of the States concerned were inevitably centred on their shares. States might have different shares but, in all fairness, they should enjoy equal benefits from the use of the watercourse as a whole. He agreed with the Special Rapporteur that the best solution was to give effect to the legal principles underlying the concept without using the term itself in the text of the draft article.

77. The third point raised by the Special Rapporteur was whether an article concerning the determination of reasonable and equitable use should include a list of factors to be taken into account in making such a determination or should be referred to in the commentary. It was important to recall that reasonable and equitable use was the general principle governing the development, use and sharing of international watercourses, as provided for in draft article 7 which was

(Mr. Al-Qaysi, Iraq)

currently before the Drafting Committee. The general principle constituted a standard of conduct conducive to friendly relations between States and the minimization of conflict. His delegation therefore considered it absolutely essential to provide a list of factors governing the determination of reasonable and equitable use so as to enable States to settle any differences that might arise in the process of negotiations. It was not precise to say that those factors did not reflect legal rules and should therefore appear in the commentary: they could be sought in State practice and could, on the basis of technical information, be articulated because it was recognized that the topic comprised a unique physical phenomenon with distinguishing physical characteristics. Moreover, the omission of those factors ran counter to the objective of the Commission's work, namely, the formulation of a framework convention, designed to encourage States to solve their problems in that respect, which involved a measure of progressive development of the law. The merits of the Special Rapporteur's conclusion in paragraph 239 depended on how the draft article would be worded, because the factors listed might be expressed in such general terms that they would not have any guiding influence on the practice of States. Everything would depend on the eventual balance to be struck between generality and particularity on the basis of the criterion of utility in negotiations between States.

78. The fourth and final point on which the Special Rapporteur had sought the views of the Commission concerned the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other hand. His delegation agreed with the Special Rapporteur's conclusion as set out in paragraph 241, and approved of the approach which the Special Rapporteur intended to take as outlined in paragraph 242. His delegation would have preferred to see the text of the five draft articles submitted by the Special Rapporteur reproduced in the Commission's report so as to enable delegations to present their comments thereon.

AGENDA ITEM 124: PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES (continued)

79. Mr. DE SARAM (Secretary of the Committee) announced that Bahrain and Burkina Faso had become co-sponsors of draft resolution A/C.6/41/L.2.

AGENDA ITEM 127: REPORT OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW ON THE WORK OF ITS NINETEENTH SESSION (continued)

80. Mr. DE SARAM (Secretary of the Committee) announced that Kenya, the Libyan Arab Jamahariya, the Philippines and Sudan had become co-sponsors of draft resolution A/C.6/41/L.3.

The meeting rose at 1.20 p.m.