

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1983

Volume I

*Summary records
of the meetings
of the thirty-fifth session
3 May-22 July 1983*

UNITED NATIONS



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New York, 1984



NOTE

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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-fifth session of the Commission (A/CN.4/SR.1753–A/CN.4/SR.1813), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

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First Vice-Chairman: Mr. Alexander YANKOV
Second Vice-Chairman: Mr. Edilbert RAZAFINDRALAMBO
Chairman of the Drafting Committee: Mr. José Manuel LACLETA MUÑOZ
Rapporteur: Mr. S. P. JAGOTA

Mr. Valentin A. Romanov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

AGENDA

The Commission adopted the following agenda at its 1754th meeting, held on 4 May 1983:

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

ABBREVIATIONS

ANC	African National Congress of South Africa
ASEAN	Association of South-East Asian Nations
ECE	Economic Commission for Europe
EEC	European Economic Community
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
World Bank	
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
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
NATO	North Atlantic Treaty Organization
OAS	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
SWAPO	South West Africa People's Organization
UNDRO	Office of the United Nations Disaster Relief Co-ordinator
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNITAR	United Nations Institute for Training and Research
WHO	World Health Organization
WMO	World Meteorological Organization

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

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)
- Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978) (United Nations, *Juridical Yearbook 1978* (Sales No. E.80.V.1), p. 106)

CHECK-LIST OF DOCUMENTS OF THE THIRTY-FIFTH SESSION

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/361	Provisional agenda	Mimeographed. For the agenda as adopted, see p. ix above.
A/CN.4/362	Comments and observations of Governments on part 1 of the draft articles on State responsibility for internationally wrongful acts	Reproduced in <i>Yearbook</i> . . . 1983, vol. II (Part One).
A/CN.4/363 [and Corr.1] and Add.1 [and Add.1/Corr.1]	Fifth report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	<i>Idem.</i>
A/CN.4/364	First 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.4/365	Draft Code of Offences against the Peace and Security of Mankind: analytical paper prepared pursuant to the request contained in paragraph 256 of the report of the Commission on the work of its thirty-fourth session	Mimeographed.
A/CN.4/366 and Add.1 [and Add.1/Corr.1]	Fourth report on the content, forms and degrees of international responsibility (part 2 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	Reproduced in <i>Yearbook</i> . . . 1983, vol. II (Part One).
A/CN.4/367 [and Corr.1]	First report on the law of the non-navigational uses of international watercourses, by Mr. Jens Evensen, Special Rapporteur	<i>Idem.</i>
A/CN.4/368 and Add.1	Draft Code of Offences against the Peace and Security of Mankind: compendium of relevant international instruments	Mimeographed.
A/CN.4/369 and Add.1 and 2	Draft Code of Offences against the Peace and Security of Mankind: comments and observations of Governments received pursuant to General Assembly resolution 37/102	Reproduced in <i>Yearbook</i> . . . 1983, vol. II (Part One).
A/CN.4/370 [and Corr.1]	Preliminary report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	<i>Idem.</i>
A/CN.4/371	Jurisdictional immunities of States and their property: memorandum presented by Mr. Nikolai A. Ushakov	<i>Idem.</i>
A/CN.4/372 and Add.1 and 2	Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier: information received from Governments	<i>Idem.</i>
A/CN.4/373 [and Corr.1 and 2]	Fourth 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.4/374 [and Corr.1] and Add.1 [and Corr.1] and Add.2 [and Corr.1] and Add.3 [and Corr.1] and Add.4 [and Corr.1 and 2]	Fourth 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/L.352	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-seventh session of the General Assembly	Mimeographed.
A/CN.4/L.353	The law of the non-navigational uses of international watercourses: note presented by Mr. Constantin A. Stavropoulos	Reproduced in <i>Yearbook</i> . . . 1983, vol. II (Part One).
A/CN.4/L.354 and Add.1	Draft report of the International Law Commission on the work of its thirty-fifth session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see <i>Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 10</i> (A/38/10). The final text appears in <i>Yearbook</i> . . . 1983, vol. II (Part Two).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.355	<i>Idem</i> : chapter II (Draft Code of Offences against the Peace and Security of Mankind)	Mimeographed. See A/CN.4/L.366.
A/CN.4/L.356 [and Corr.1] and Add.1–3 [and Add.3/Corr.1]	<i>Idem</i> : chapter III (Jurisdictional immunities of States and their property)	Mimeographed. For the adopted text, see the references relating to A/CN.4/L.354 and Add.1.
A/CN.4/L.357 and Add.1 [and Add.1/Corr.1]	<i>Idem</i> : chapter IV (State responsibility)	<i>Idem</i> .
A/CN.4/L.358 and Add.1 [and Add.1/Corr.1]	<i>Idem</i> : chapter V (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	<i>Idem</i> .
A/CN.4/L.359 and Add.1	<i>Idem</i> : chapter VI (The law of the non-navigational uses of international watercourses)	<i>Idem</i> .
A/CN.4/L.360	<i>Idem</i> : chapter VII (Relations between States and international organizations (second part of the topic))	<i>Idem</i> .
A/CN.4/L.361	<i>Idem</i> : chapter VIII (International liability for injurious consequences arising out of acts not prohibited by international law)	<i>Idem</i> .
A/CN.4/L.362 and Add.1 and 2	<i>Idem</i> : chapter IX (Other decisions and conclusions of the Commission)	<i>Idem</i> .
A/CN.4/L.363	Draft articles on State responsibility (part 2 of the draft articles). Texts adopted by the Drafting Committee: articles 1, 2, 3 and 5	Texts reproduced in summary record of the 1805th meeting, paras. 30, 33, 37 and 39.
A/CN.4/L.364	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 10, 12, 2, para. 1 (g), 3, para. 2, and 15	<i>Idem</i> , paras. 60, 63 and 67–69.
A/CN.4/L.365 and Add.1	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 1 to 8	<i>Idem</i> , 1806th meeting, paras. 2, 4, 6, 19, 21, 23, 25 and 27.
A/CN.4/L.366	Draft report of the International Law Commission on the work of its thirty-fifth session: chapter II (revised) (Draft Code of Offences against the Peace and Security of Mankind)	Mimeographed. For the adopted text, see the references relating to A/CN.4/L.354 and Add.1.
A/CN.4/L.367	Draft articles on jurisdictional immunities of States and their property: revised texts of articles 13 and 14 submitted by the Special Rapporteur	Mimeographed.
A/CN.4/L.368	Statement made by the Secretary-General of the United Nations at the 1795th meeting of the Commission, on 4 July 1983	<i>Idem</i> .
A/CN.4/SR.1753–A/CN.4/SR.1813	Provisional summary records of the 1753rd to 1813th 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-FIFTH SESSION

Held at Geneva from 3 May to 22 July 1983

1753rd MEETING

Tuesday, 3 May 1983, at 3.15 p.m.

Outgoing Chairman: Mr. Paul REUTER

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Opening of the session

1. The OUTGOING CHAIRMAN declared open the thirty-fifth session of the International Law Commission.

Statement by the outgoing Chairman

2. The OUTGOING CHAIRMAN extended a warm welcome to the members of the Commission and said that it was gratifying to note the presence of Mr. Flitan, who had recovered from the illness which had prevented him from attending a considerable part of the previous session. Mr. Ni, who had suffered an accident, would be unable to participate in the Commission's work for a few weeks and Mr. Suy, Director-General of the United Nations Office at Geneva, had been prevented by pressing obligations from attending the first meeting.

3. As to the chief events since the previous session, at the thirty-seventh session of the General Assembly the Sixth Committee had devoted some 15 meetings to consideration of the Commission's report on the work of its thirty-fourth session.¹ He had addressed the Sixth Committee on two occasions.² To begin with, he had given a general account of the work accomplished by the Commission and had explained the manner in which it was preparing its future work. He had stressed the fact that the Commission was concerned to improve its methods of work and was conscious of the privilege it enjoyed regarding the preparation of summary records and also the waiving of the rules on the limitation of documentation. It was apparent from the documents of the General Assembly that the Commission's report had

received an excellent reception from the Sixth Committee.

4. In his second statement to the Sixth Committee, on the question of the Commission's methods of work, he had emphasized that it had little leeway in the organization of its work. It was a fact that the special rapporteurs, who had to take account of government comments and the observations made in the Sixth Committee, normally had only a short time available in which to draft their reports. As for the suggestion that the Commission, in its new enlarged composition, might be in a position to work simultaneously in a number of internal groups, he had pointed out that such a method had never been used regularly and that it was contrary to the principle of the equality of the members of the Commission.

5. The Sixth Committee had examined more particularly the draft articles on the law of treaties between States and international organizations or between international organizations³ and its conclusion in that regard had been in line with that of the Commission. In its resolutions 37/110, 37/111 and 37/112, of 16 December 1982, the General Assembly had adopted the proposals submitted by the Commission. It had agreed that the draft articles would form the subject of a convention, but had reserved the question of the appropriate framework for adopting the convention. That question would be examined again by the General Assembly at its next session. One suggestion had been that the Sixth Committee itself might examine the draft for the purpose of giving it the form of a convention.

6. In the course of the past year the Commission had been represented by Mr. Francis at the session of the Inter-American Juridical Committee and by himself at the session of the European Committee on Legal Co-operation. More recently, the Asian-African Legal Consultative Committee had extended to the Commission an invitation to attend the Committee's forthcoming session in Tokyo, from 16 to 20 May 1983. In his opinion, it would not be possible to accept the invitation; otherwise, a member of the Commission would be prevented from participating in the present session.

7. Lastly, Mr. Fleischhauer, Legal Counsel, showed very great interest in the Commission and intended to be present at its work on the occasion of his next visit to Geneva.

The meeting rose at 4.05 p.m.

¹ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10 (A/37/10)*, published as *Yearbook* . . . 1982, vol. II (Part Two).

² *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 37th meeting, paras. 1-29; and 46th meeting, paras. 96-103.*

³ *Yearbook* . . . 1982, vol. II (Part Two), pp. 17 *et seq.*, para 63.

1754th MEETING

Wednesday, 4 May 1983, at 10.15 a.m.

Outgoing Chairman: Mr. Paul REUTER

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Quentin-Baxter, Mr. Razafindralambo, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Election of officers

Mr. Francis was elected Chairman by acclamation.

Mr. Francis took the Chair.

1. The CHAIRMAN thanked the outgoing Chairman for the efficient and distinguished manner in which he had conducted the proceedings of the previous session and the opening phase of the present one. He also expressed the Commission's warm appreciation of the ability with which the outgoing Chairman had represented it at the thirty-seventh session of the General Assembly. Lastly, he thanked members for the honour they had done him by electing him Chairman.

Mr. Yankov was elected first Vice-Chairman by acclamation.

Mr. Razafindralambo was elected second Vice-Chairman by acclamation.

Mr. Lacleta Muñoz was elected Chairman of the Drafting Committee by acclamation.

Mr. Jagota was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/361)

2. The CHAIRMAN drew attention to the fact that adoption of the provisional agenda in no way prejudged the order in which the items were to be considered.

The provisional agenda (A/CN.4/361) was adopted on that understanding.

Organization of work

3. The CHAIRMAN pointed out that, in paragraph 255 of its report on its thirty-fourth session,¹ the Commission had expressed the intention of proceeding at an early stage during the present session to a general debate in plenary on the draft Code of Offences against the Peace and Security of Mankind (item 4 of the agenda), on the basis of a first report to be submitted by the Special Rapporteur. It would also be remembered that a number

of the draft articles on jurisdictional immunities of States and their property (item 2 of the agenda) had been referred to the Drafting Committee for further refinement, a process which, he hoped, would be actively pursued at the present session.

4. After a discussion in which Mr. THIAM, Mr. SUCHARITKUL, Mr. USHAKOV, Sir Ian SINCLAIR and Mr. REUTER took part, the CHAIRMAN suggested that the Commission should start its work with item 4 of the agenda (Draft Code of Offences against the Peace and Security of Mankind).

It was so agreed.

The meeting rose at 11.30 a.m.

1755th MEETING

Thursday, 5 May 1983, at 10.15 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364,¹ A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2²)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Commission to begin its consideration of item 4 of the agenda. Following the Commission's decision at its thirty-fourth session,³ the General Assembly had requested it to comply with General Assembly resolution 36/106, of 10 December 1981, and to submit a preliminary report on the draft code to the Assembly at its thirty-eighth session. The Commission was therefore giving urgent consideration to the item. The documents on the topic presented to the Commission comprised the Special Rapporteur's first report (A/CN.4/364), the analytical paper (A/CN.4/365) prepared pursuant to the request contained in paragraph 256 of the Commission's report on its thirty-fourth session and the Government comments received so far (A/CN.4/369 and Add.1 and 2). In addition, the Secretariat was preparing a compendium of relevant international

¹ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

² *Idem*.

³ *Yearbook* . . . 1982, vol. II (Part Two), p. 121, para. 256.

¹ *Yearbook* . . . 1982, vol. II (Part Two), p. 121.

instruments (A/CN.4/368) which would be circulated to members shortly.

2. He invited the Special Rapporteur to introduce his first report.

3. Mr. THIAM (Special Rapporteur) said that he wished to emphasize the necessarily exploratory nature of his report, whose purpose was to place a number of questions before the Commission and elicit answers that would guide him in his work.

4. It was by resolution 177 (II), of 21 November 1947, that the General Assembly had assigned the Commission the task of elaborating a draft code of offences against the peace and security of mankind. Such a difficult topic, which had not yet resulted in an international instrument, had given rise to enthusiasm, followed by hesitation and procrastination. More than once, optimism had yielded to pessimism. A wealth of legal writings had emerged, but no positive decision had been taken. Precisely because the subject-matter was tied in with events occurring at different periods in history, efforts had been made to study it, only to be abandoned later. It was his hope, however, that the topic could at last be dealt with comprehensively and that an international instrument would be adopted. To date, it had always been after acts of violence, wars and other events which had aroused strong feelings throughout the world that the international community had been concerned to seek solutions based on law.

5. In historical terms, it was as a result of the enormity of the crimes committed during the Second World War that the subject had truly assumed an important place in the conscience of men. An effort had then been made to find ways of penalizing the atrocities and violations of human rights and breaches of the laws of war that the world had witnessed. However, even by the time of the First World War, the atrocities perpetrated had led to affirmations that war crimes would not go unpunished. Thus, following the acts of destruction committed by the retreating German troops, the French Government had stated in 1918 that all violations of the international laws of war would entail punishment. In 1919, the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties had been established to determine the acts committed during the war and the responsibilities incurred. That Commission had prepared a report in which it proposed the establishment of an international jurisdiction to pass judgment on individuals committing war crimes.⁴ However, the Allied Powers of the time had considered that it was not possible to penalize, on the basis of law, acts committed in violation of the laws of war. One of them had adopted the report only with a reservation to the effect that acts of Heads of State incurred political responsibility but not penal responsibility.⁵ Consequently, the Treaty of Versailles of

1919 had in the end referred only to the political responsibility of the former Emperor William II. Since the special tribunal constituted to try the accused would have had to be guided not by law but by motives of policy, no criminal prosecution had had any chance of acceptance. It was by invoking the absence of a legal basis for such prosecution that the Government of the Netherlands had declined to surrender the former monarch to the Allies for trial.

6. During the period between the wars, the question had continued to be of concern to jurists and diplomats. Three organizations, the International Law Association, the Inter-Parliamentary Union and the International Association for Penal Law, had given impetus to major advances in legal thinking. The first of those organizations had, in 1926, prepared a draft statute for an international penal court; the International Association for Penal Law had adopted, in 1928, a draft statute for the creation of a criminal chamber within the PCIJ; and the three bodies had entrusted to the Romanian jurist, Vespasien Pella, the task of preparing a draft international penal code, which was published in 1935 (see A/CN.4/364, paras. 14-17).

7. Along with the scholars, diplomats had sought to find solutions capable of providing a legal basis for the prosecution of criminal acts constituting offences against peace or human rights. In the 1930s, many conflicts had broken out in Europe and even in Latin America and Africa. However, diplomacy had already been trying to find ways of coping with the problems. The Protocol for the Pacific Settlement of International Disputes, adopted at Geneva in 1924,⁶ which had established the principle of compulsory arbitration, had for the first time qualified wars of aggression as international crimes. In 1927, the Declaration concerning Wars of Aggression, adopted at the eighth Assembly of the League of Nations,⁷ had also regarded war of aggression as an international crime. Neither of those instruments had been made effective. Lastly, the Kellogg-Briand Pact, the General Treaty for Renunciation of War as an Instrument of National Policy,⁸ had been signed on 27 August 1928. It, too, was never to be implemented. Mention should also be made of the adoption in 1937, at the initiative of the League of Nations, of the Convention for the Creation of an International Criminal Court⁹ to deal with terrorism. That instrument, adopted following two assassinations which had kindled strong feelings in the international community, had never entered into force.

8. During the Second World War, the Allied Powers had undertaken not to permit a repetition of the hesitations and errors which had characterized the attitude of the Allies after the First World War. It was possible to mention, in that connection, the Inter-Allied Declaration

⁴ League of Nations, *Official Journal, Special Supplement No. 21*, p. 21.

⁵ *Ibid.* No. 54, p. 155.

⁶ League of Nations, *Treaty Series*, vol. XCIV, p. 57.

⁷ League of Nations, document C.547(1). M.384(1). 1937.V, reproduced in United Nations, *Historical survey of the question of international criminal jurisdiction* . . . , p. 88, appendix 8.

⁴ See the relevant extract from this report in United Nations, *Historical survey of the question of international criminal jurisdiction*, memorandum by the Secretary-General (Sales No. 1949.V.8), p. 47, appendix 1.

⁵ *Ibid.*, p. 52, appendix 2.

signed at St. James's Palace in 1942 by the United Kingdom Government and the Governments-in-exile in London, the Inter-Allied Declaration of 1942, issued simultaneously in London, Moscow and Washington, and the Moscow Declaration, done in the name of the "Big Three" in 1943 (*ibid.*, para. 24). All had expressed the need to punish those responsible for war crimes. It was for that reason that the Agreement for the prosecution and punishment of the major war criminals of the European Axis,¹⁰ which established the International Military Tribunal of Nürnberg, had been adopted on 8 August 1945. The Nürnberg system had been criticized for violating the principle *nullum crimen sine lege* and for setting up *ad hoc* jurisdictions.

9. The soul-searching to which the Nürnberg Judgment had given rise in the international community had led the United Nations General Assembly to request the Commission to scrutinize the Judgment in order to determine its guiding principles. Simultaneously, the Commission had been entrusted with the task of elaborating a draft code of offences against the peace and security of mankind. Prepared in 1951, that draft had been submitted to the General Assembly, which had referred it back to the Commission; the Commission had submitted a new version to the Assembly in 1954.¹¹ However, the General Assembly had postponed consideration of the draft on the grounds that it was preferable to await the adoption of a definition of aggression.¹² As that definition had been adopted only in 1974, it was possible that the draft code had been overtaken by developments in the international community.

10. The text of the draft code adopted by the Commission at its sixth session in 1954 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.

(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.

¹⁰ United Nations, *Treaty Series*, vol. 82, p. 279.

¹¹ *Yearbook* . . . 1954, vol. II, pp. 149-152, document A/2693, chap. III.

¹² General Assembly resolution 897 (IX) of 4 December 1954.

(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.

11. At the present stage, it was important first of all for the Commission to determine what should be added to or deleted from the draft. The problems in that regard could be divided into three categories, according to whether they concerned the scope of the draft, the methodology of codification or the implementation of the draft.

12. The first category encompassed the question of the offences to which the codification applied and the question of the subjects of law to which international criminal responsibility might be attributed. With regard to the first question, under article 1 of the 1954 draft code, offences against the peace and security of mankind defined in the code were crimes under international law. By confining itself to the study of crimes under inter-

national law, the Commission had taken into account only crimes that were defined directly by international law, without any reference to internal law. It even seemed to have had no desire to make its list of crimes under international law exhaustive in character.

13. Crimes under international law were indeed to be included among international crimes, which could be classed into three categories. The first were international crimes by their very nature, the ones which the Commission had perhaps had in mind when it had referred to crimes under international law. Such crimes assailed sacred principles of civilization and, as it were, fell under *jus cogens*. Aggression, genocide, racism, forced labour and colonization were to be included in that category.

14. Then there were crimes that were not international by their nature but became so by virtue of a convention or because of the circumstances in which they were committed. Modern means of communication enabled offenders to travel easily from one point of the world to another and they provided each other with assistance across national boundaries in order to escape from justice. For their part, Governments had been induced to co-operate with one another, on the basis of international conventions, for the purpose of punishing the guilty parties. Consequently, certain crimes were elevated from the national to the international level.

15. Lastly, the personality of the author of a crime under internal law could give that crime an international character. Where a State was the author of or an accomplice in a crime under internal law, that crime became international.

16. It was very difficult to make a clear-cut distinction between those three categories of international crimes, since it was possible that a crime regarded at one point in history as a crime under internal law could later be regarded as an international crime. For example, a crime under internal law such as counterfeiting became an international crime if it was committed with the complicity or connivance of a State. Similarly, crimes such as traffic in narcotic drugs and hijacking of aircraft seemed to be becoming increasingly international in nature, in view of the dangers they posed for mankind.

17. It would perhaps also be appropriate to reconsider another choice the Commission had made in 1954. It had taken the view that the draft should be limited to crimes which contained a political element and which endangered or disturbed the maintenance of international peace and security. The distinction between "political" and "non-political" depended frequently on a person's philosophical, ideological or political convictions. The world was divided into different political systems; therefore the old saying "What is true on this side of the Pyrenees becomes a fallacy on the other side" remained entirely valid. The same consideration applied with regard to time, since the fallacies of today were sometimes the truths of tomorrow. Moreover, the political element was generally considered to be a factor for making the conditions of detention more humane and it often precluded extradition. Would it not be dangerous,

in such circumstances, to invoke the concept of a political crime, when the draft concerned the authors of the most heinous crimes? Furthermore, most of those crimes were politically inspired.

18. As to the question of the subjects of law to which international criminal responsibility might be attributed, under article 1 of the 1954 draft code, any person responsible for committing a crime against the peace and security of mankind was liable to punishment. The Commission had therefore excluded the question of the criminal responsibility of other entities, notably States. In so doing, it had followed the Nürnberg Tribunal, which had stated that crimes were committed by men, not by abstract entities, and had to be punished under international law.

19. He wondered whether such a position could be upheld despite the clear tendency at the present time to consider that subjects of law other than individuals could be prosecuted for such crimes. The question of the criminal responsibility of legal entities was not posed solely in international law. Many systems of internal law admitted the concept of the criminal responsibility of legal entities, and commercial companies were sometimes tried and convicted for economic crimes. Under international law, the question was to be seen in a different light since the elaboration of article 19 of part 1 of the draft articles on State responsibility, which listed a number of offences considered to be international crimes attributable to States.¹³ The Commission would have to find a way of harmonizing that provision with article 1 of the 1954 draft.

20. Growing numbers of writers advocated the concept of criminal responsibility of States, in addition to the individual responsibility of the leaders of those States. That theory had come increasingly to the fore as a result of the efforts of Vespasien Pella, who considered it essential that the author of the criminal act should be made to realize that it was being prosecuted not because it had been vanquished but because it was guilty. Furthermore, Pella upheld the theory of the collective will, according to which States, as human groups, had a will distinct from that of each of their members. According to that theory, which could be dangerous if carried to extremes, the concept of collective psychology conferred on a national community a direct responsibility which was distinct from that of its members. The difficulty of that argument lay particularly in the fact that it was hard to inflict on States criminal sanctions which were necessarily coercive in nature. Some had thought it possible to inflict on States penalties appropriate to their nature, such as reprimands and fines. A kind of *capitis diminutio* could also be imposed on States, one which would deny them, for example, the right to manufacture certain types of armaments. To date, however, decisions along those lines had been taken by the Governments of victorious States, not by courts. In view of the evolution in legal thinking, it

¹³ 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.*

would perhaps be appropriate for the Commission to re-examine the position it had taken in 1954, when it had decided to take account only of individuals.

21. As for the methodology, in 1954 the Commission had adopted a pragmatic method and had listed the offences regarded as crimes under international law, without necessarily referring to a specific criterion. Furthermore, no reference had been made to any general principle of criminal law, such as *nulla poena sine lege*, the theory of justified acts, or that of extenuating circumstances. Admittedly it could be argued that they had become general principles, and had to be respected even if they were not enunciated. Moreover, in the meantime they had been set forth in part 1 of the draft articles on State responsibility.¹⁴ In the light of the evolution of *jus cogens*, it might well be asked, however, whether the Commission should not seek to formulate a criterion that would make it possible to define crimes against the peace and security of mankind. Enunciating a criterion would doubtless be a difficult task, but all of the crimes listed could then be linked to a common denominator. Although it was not possible to proceed as in the case of internal law, where most criminal codes contained a general part which defined crimes by specific criteria, it would be useful to formulate a principle making it possible to determine which were the crimes against the peace and security of mankind.

22. Implementation of the code was a question that the Commission should not necessarily have to consider. In the 1954 draft, it had expressed no views on the question and had made no mention of penalties. However, a code which did no more than define crimes without providing for penalties was not truly a criminal code. It was essential that the principle *nullum crimen sine lege* should be supplemented by the principle *nulla poena sine lege*. It was, of course, possible either to draw on the Nürnberg precedent, leaving it to the judge to establish the applicable penalties, or to refer to national legislation. In both cases, however, it was necessary to be explicit.

23. The main question in connection with implementation of the code was that of the establishment of an international criminal jurisdiction. In response to a question put to it by the General Assembly,¹⁵ the Commission had said that it was possible and desirable to establish such a jurisdiction.¹⁶ The General Assembly had then set up, in 1950, a committee of representatives of 17 member States which was assigned the task of preparing proposals; and in 1952 it had established a new committee, with the task of re-examining the draft prepared in 1951 by the previous committee.¹⁷ In 1954,

the General Assembly decided to suspend consideration of the draft pending completion of the Definition of Aggression.¹⁸ In his opinion, the matter must now be taken up, since it was not possible to imagine how a code which passed over in silence the question of penalties and of the competent jurisdiction could be implemented. Opponents of the establishment of an international criminal court considered that a Head of State or Government could not be tried before such a court unless his Government had been overthrown or his State defeated; accordingly, it would be preferable to leave the question aside. Those in favour of an international jurisdiction referred to Articles 94 and 39 of the Charter of the United Nations, which dealt, respectively, with giving effect to decisions of the ICJ and with measures under Chapter VII of the Charter. However, opponents of an international criminal jurisdiction pointed out that any such jurisdiction would contravene the principle of the sovereignty of States and that of the territoriality of criminal law. Yet if the international community considered that the situation had altered sufficiently to allow for the establishment of such a jurisdiction, it was because the principle of territoriality had become subject to certain necessary exceptions.

24. The Commission could, of course, confine itself to elaborating the code requested of it; but in order to gain the impression of doing useful work, it might find it necessary to envisage the creation of an international criminal jurisdiction. Indeed, it could well consult the General Assembly on that point. In the event of an affirmative reply, the preparation of a draft would inevitably require more time.

25. In conclusion, he wished to thank the Secretariat for its valuable assistance and to pay tribute to the memory of Jean Spiropoulos, who had been the first Special Rapporteur entrusted with the topic and whose work had served as a very useful guide.

26. The CHAIRMAN congratulated the Special Rapporteur on his masterly introduction of his first report, which raised a number of fundamental issues that called for the attention of the Commission.

Organization of work (continued)

27. The CHAIRMAN submitted the recommendation of the Enlarged Bureau concerning the organization of the work of the session (ILC (XXXV)/Conf.Room Doc. 2); the schedule proposed by the Bureau was as follows:

1. Draft Code of Offences against the Peace and Security of Mankind (item 4)	5-13 May
2. Jurisdictional immunities of States and their property (item 2)	16-27 May
3. State responsibility (item 1)	30 May-10 June
4. The law of the non-navigational uses of international watercourses (item 5)	13-24 June
5. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 3)	27 June-1 July

¹⁴ Yearbook . . . 1980, vol. II (Part Two), pp. 30 *et seq.*

¹⁵ General Assembly resolution 260 B (III) of 9 December 1948.

¹⁶ See the report of the Commission on its second session in Yearbook . . . 1950, vol. II, p. 379, document A/1316, para. 140.

¹⁷ See "Report of the Committee on International Criminal Jurisdiction on its session held from 1 to 31 August 1951" (Official Records of the General Assembly, Seventh Session, Supplement No. 11 (A/2136)); and "Report of the 1953 Committee on International Criminal Jurisdiction, 27 July-20 August 1953" (*ibid.*, Ninth Session, Supplement No. 12 (A/2645)).

¹⁸ General Assembly resolution 898 (IX) of 14 December 1954.

6. Relations between States and international organizations (second part of the topic) (item 7)	4-8 July
7. International liability for injurious consequences arising out of acts not prohibited by international law (item 6)	11-15 July
8. Draft report of the Commission and related matters	18-22 July

28. It should be noted that the Drafting Committee still had before it a number of draft articles on the topics of jurisdictional immunities of States and their property (item 2), State responsibility (item 1) and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 3). The Drafting Committee thus already had quite a full workload. No provision had been made in the proposed schedule for item 8 (Programme and methods of work) because it was the custom to decide on that item in the light of the recommendations made by the Planning Group, which was traditionally chaired by the first Vice-Chairman of the Commission.

29. With regard to item 3, the status of the diplomatic courier, for which only one week had been allocated, it was the understanding of the Enlarged Bureau that some additional meetings would be devoted to it at a later stage. That could be done through the use of meetings allocated but not actually used for other topics. Furthermore, he would personally suggest the possibility of holding some afternoon meetings.

30. Sir Ian SINCLAIR said that he had no objection to the proposed schedule of work for the session, on the understanding that it was in the nature of a set of guidelines. With regard to item 4, for example, he agreed with the remark by Mr. Reuter at the previous meeting that it might prove necessary at a later stage to devote one or two meetings to that topic in order to discuss the contents of the relevant passage to be included in the report. Adoption of the schedule recommended by the Enlarged Bureau did not necessarily preclude the allocation later of one or two meetings for item 4.

31. The CHAIRMAN said that allowance should, of course, be made for the contingency mentioned by Sir Ian Sinclair. Every effort should be made by the Commission to give the fullest possible consideration to the various items on its agenda within the time available to it. He urged members to exercise some discipline with regard to the length of their statements. For his part, he would confine his own remarks in a personal capacity to that which was absolutely necessary, such as a point not mentioned in the course of the discussion.

32. Mr. DÍAZ GONZÁLEZ said that, in principle, he approved the programme of work under consideration, but stressed its purely indicative value. The Commission should not seek to study each and every topic in detail, for it was clear, if not from the resolutions of the General Assembly then at least from its discussions, that the Commission should study certain topics as a matter of priority. Some were in the process of being concluded, while others, such as that of international watercourses,

still required considerable work. The Commission should therefore concentrate on the topics on which progress was being made, such as that of the diplomatic bag, and those which should be studied as a matter of urgency.

33. The CHAIRMAN said that there was considerable merit in what Mr. Díaz González had said. However, the Enlarged Bureau, in its recommendation to allocate one week to the status of the diplomatic courier (item 3), had taken into account the fact that 14 articles on that topic were now pending in the Drafting Committee. As for the topic of State responsibility (item 1), there were also some articles before the Drafting Committee. Lastly, it should be borne in mind that the decisions of the Enlarged Bureau did not in any way prejudice the priority given by the General Assembly, or by the Commission itself, to any topic.

34. Mr. BALANDA, referring to the possibility that the Commission might hold afternoon meetings, observed that afternoons were generally set aside either for meetings of the Drafting Committee or for the study of documents by members of the Commission. Like Mr. Díaz González, he was of the opinion that the Commission should examine in detail the topics that it did take up. Rather than try to consider everything rapidly, it was preferable to try to produce work of good quality.

35. The CHAIRMAN explained that his suggestion for possible afternoon meetings had been made on the understanding that any such meetings would never coincide with meetings of the Drafting Committee. Some afternoon meetings might also be necessary to compensate for the impossibility of holding meetings on certain official holidays.

36. Mr. BARBOZA stressed the provisional nature of the programme under consideration. The Commission had always set out the main outlines of its programme, modifying it in accordance with the progress of its work. In addition to the difficulties already mentioned, there was also the need for a second examination of the topics on the agenda. During consideration of the Commission's report in the Sixth Committee of the General Assembly, the impression had been gained that the Drafting Committee was somewhat behind in its work. The Drafting Committee's task was likely to be particularly difficult during the current year. He did not think that it would be possible for the Commission to hold afternoon meetings, in view of the need for members to study the reports that were to be considered and for the Drafting Committee to have afternoons available in order to carry out its task.

37. Mr. USHAKOV said that the programme of work recommended by the Enlarged Bureau seemed acceptable, inasmuch as it would be possible to modify it in the course of the session.

38. Sir Ian SINCLAIR said that the points raised by Mr. Díaz González were important and merited discussion, possibly within the framework of the Planning Group rather than in connection with the recommendation of the Enlarged Bureau now under consideration. He hoped that the recommendation did not preclude the possibility

of a reasonable number of meetings of the Planning Group at the present session.

39. Mr. CALERO RODRIGUES asked for an assurance that the recommendation of the Enlarged Bureau took due account of the availability of documents. He would be strongly opposed to embarking upon the consideration of any item unless the basic documentation had been circulated to members at least two weeks in advance. As for the possibility of afternoon meetings, the Drafting Committee had enough work to keep it occupied on most afternoons throughout the session, so the issue hardly arose.

40. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, in view of its particularly heavy programme of work, the Drafting Committee would have to begin its work the following week and perhaps schedule other meetings in addition to those in the afternoon. It would examine successively the draft articles on jurisdictional immunities of States and their property, the draft articles on State responsibility and the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, work that would take it approximately up to mid-June.

41. Mr. DÍAZ GONZÁLEZ said that he shared the view expressed by Sir Ian Sinclair and asked Mr. Yankov, as Chairman of the Planning Group, to arrange for the Group to hold a meeting as soon as possible.

42. Mr. YANKOV said that he, too, was of the view that the recommended timetable should be regarded as indicative and tentative and should be reviewed from time to time. In particular, he noted that only five working days were set aside for the discussion of item 3, for which he was the Special Rapporteur. It was to be hoped that additional time could be gained, either as a result of early completion of the consideration of other items, or by some other rearrangement of the programme. With regard to the question of meetings of the Planning Group referred to by Sir Ian Sinclair, several speakers in the Sixth Committee had stressed the desirability of the Group holding more meetings at the present session. In his capacity as first Vice-Chairman of the Commission, he intended to start consultations forthwith on the Group's membership and schedule of meetings.

43. Mr. MAHIOU said that, at first sight, the recommendation of the Enlarged Bureau seemed to set a timetable which made it possible to examine all the topics on the agenda, in keeping with their priority and the progress of work on them. However, it seemed that it would be difficult to adhere strictly to the timetable. It was certain that, in practice, the detailed nature of the discussion on any given question would mean that the timetable would not be followed. When a report as important as that of Mr. Evensen on the law of the non-navigational uses of international watercourses was circulated, it would be necessary for members of the Commission and the Drafting Committee to have the

requisite time to study it. The order indicated by the Chairman of the Drafting Committee for the examination of the draft articles was already different from that of the work of the Commission. Hence some degree of flexibility would be necessary.

44. Mr. ROMANOV (Secretary to the Commission), replying to the point raised by Mr. Díaz González, said that, according to information available to him, the basic documents on items 1 and 5 would be available for distribution in time to enable members to study them well in advance of the dates recommended for the consideration of those items. The Secretariat would urge the responsible services to expedite the production of the documents in question. As for the compendium of international instruments relevant to item 4, the text was to be sent from New York for reproduction at Geneva on 9 May.

45. The CHAIRMAN said that, if he heard no objection, he would take it that the recommendation of the Enlarged Bureau (ILC(XXXV)/Conf.Room Doc.2) was approved on the understanding that the programme for the organization of work would be applied with considerable flexibility.

It was so agreed.

46. Mr. ROMANOV (Secretary to the Commission) said that Thursday, 12 May and Monday, 23 May (Ascension Day and Whit Monday, respectively) had been designated as official holidays of the United Nations Office at Geneva, and he drew attention to official memoranda to the effect that arrangements for meetings to be held on those days should be made only in exceptional circumstances.

47. The CHAIRMAN said that, in the light of that information, he assumed that the Commission would not wish to meet on 12 May and 23 May 1983.

It was so agreed.

The meeting rose at 12.45 p.m.

1756th MEETING

Friday, 6 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. SUCHARITKUL warmly congratulated the Special Rapporteur on the objectivity, candour and clarity displayed in his first report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364).

2. The report called for a number of preliminary comments. Although he would not go into the historical background of the topic, he wished to recall that, of the 26 States that had signed the Final Act of the first Peace Conference held at The Hague in 1899, only four had been Asian States (China, Japan, Persia and Siam). At the second Hague Peace Conference in 1907, 16 Latin-American States had joined those signatories.⁴ The First World War had been a world-wide one in that some Asian countries had fought in the European theatre of operations. The Second World War had been broader in scope, since virtually all regions of the world had taken part in it. Several territories in Asia and the Pacific had been occupied, civilians and soldiers alike had been involved and forced labour had been established. The Tokyo Tribunal, which had been set up after the Nürnberg Tribunal, had included among its members Indian, Dutch and Australian judges. The charges that had been brought and the judgments rendered by that Tribunal filled more than 100 volumes and, in its work, the Commission should take account of such important international case law.

3. With regard to the scope of the draft code, he said that he agreed with the distinction drawn by the Special Rapporteur between crimes under international law, namely those defined by international law without any reference to internal law, and another category of crimes which had consequences and effects capable of transcending frontiers, but which were not as a rule crimes under international law. The Commission should restrict its work to the first category. In the past, piracy on the high seas committed outside territorial waters had been recognized as an offence under international law and pirates could be tried by any court of a coastal State. The Commission was now dealing with particularly serious offences which threatened the peace and security of mankind. Such offences concerned mankind as a whole and not only one territory or country.

4. Such offences could be committed by an individual,

but were usually committed by a State, by a State organization, by a group of States or by all of them. National case law did afford examples of convictions of national, international or internationalized juridical persons. The murder of an ambassador by one State in the territory of another State came under international law in that a State was involved in the murder and the ambassador was a person protected by a convention. The Commission must consider whether States could be indicted: the penalties to be imposed could take the form either of restrictive measures or of *capitis diminutio*.

5. Although the list of offences drawn up in 1954 would serve as a starting-point, the Commission should also take account of developments which had taken place since that time. Acts of air piracy, which had become increasingly frequent in recent years, could constitute offences against the peace and security of mankind.

6. The Commission would have to decide how to define the applicable procedures and whether an international penal jurisdiction should be established. In his opinion, such a jurisdiction would ultimately have to be set up. After recognizing the liability of States in civil matters, setting up courts for the peaceful settlement of disputes between States and considering international liability for injurious consequences arising out of acts not prohibited by international law, it would have to consider the possibility of applying a code of offences against the peace and security of mankind.

7. Mr. MAHIOU, referring to the approach to be adopted in discussing the broad topic under consideration, suggested that, instead of expressing their views on the entirety of the text proposed, members of the Commission should deal with it point by point; that would probably make for a more fruitful exchange of ideas.

8. Mr. BALANDA congratulated the Special Rapporteur on his first report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364) which fully and clearly described the main problems that arose in connection with the consideration of the draft code. The report, its introduction by the Special Rapporteur and the analytical paper prepared by the Secretariat on the topic (A/CN.4/365) would greatly facilitate the Commission's task. The report called for a number of comments and raised certain questions.

9. In the first place, the draft Code of Offences against the Peace and Security of Mankind differed from most of the topics the Commission had considered so far. Those topics mainly concerned States, while the draft code was of concern to each member of the Commission in particular, from both the scientific and the human points of view, since it dealt mainly with mankind and its survival. Those human considerations should induce the Commission to adopt a progressive approach to its discussions.

10. In the second place, it could be asked whether there was enough political will to include the draft code in the international body of laws. In his view, such political will definitely existed and States had sought on several occasions to punish "the most serious offences", as shown by the establishment of the Commission on the Responsibility of the Authors of the War and on Enforcement of

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ See J. B. Scott, ed., *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915), pp. 229 *et seq.*, "Summary of the signatures, ratifications, adhesions and reservations".

Penalties; by the Geneva Protocol of 24 October 1924,⁵ which had established the principle of compulsory arbitration and had, for the first time, termed war of aggression an international crime; by the declaration of 24 September 1927,⁶ which had been adopted under the auspices of the League of Nations and had been worded along the same lines as the Geneva Protocol; and by the Kellogg-Briand Pact,⁷ to which more than 60 States had acceded. After the Second World War, the General Assembly had taken account of the concerns of States by requesting the International Law Commission, in resolution 177 (II) of 21 November 1947, to formulate the principles recognized by the Nürnberg Tribunal, to draw up a list of acts constituting offences against the peace and security of mankind and to prepare a draft code of such offences. Consideration of the draft code had been suspended for several years, but, at its thirty-third session, the General Assembly had decided to resume it and, in its resolution 37/102 of 16 December 1982, it had requested the Commission to examine the question as a matter of priority.

11. In the third place, such offences should not be regarded as things of the past. Technological developments, the arms race and the hegemonism of certain States suggested that the world was not at present safe from offences against the peace and security of mankind. The elaboration of a draft code on such offences was fully justified by the preventive and dissuasive effect such an instrument would have.

12. In the fourth place, it could be asked how the draft code would fit into the United Nations system. In the preamble to resolution 35/49 of 4 December 1980 relating to the draft code, the General Assembly had recalled its belief that

... the elaboration of a Code of Offences against the Peace and Security of Mankind could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations.

It was quite clear that, in the General Assembly's opinion, the elaboration of a new draft code could only contribute to the strengthening of the Charter.

13. Lastly, the elaboration of the draft code under consideration should be an opportunity for the Commission not only to codify, but also to develop, international law in general and to contribute to the development of international penal law. In internal penal law, which defined offences clearly and precisely, there was a legal framework in which the conduct of offenders, who were usually individuals, could be assessed, as well as means of suiting penalties to circumstances. Judging by the observations on the draft code made by delegations in the Sixth Committee of the General Assembly (see A/CN.4/365, sect. V), the Commission would have to deal with the criminal

responsibility of States. If it did so, it would have to make certain adjustments to take account of new circumstances. It was because of such adjustments that the draft code would be of a progressive nature and, thus, contribute to the establishment of a new legal order.

14. In internal penal law, the State exercised sovereignty over a specific geographical area and everyone in that area. The fact that the draft code would not fully take account of the concept of territoriality was no reason to reject it. Switzerland was considering the possibility of exchanging Swiss ordinary-law criminals serving their sentences abroad for criminals of other States serving their sentences in Switzerland. Following the Second World War, the Nürnberg and Tokyo Tribunals had introduced the concept of the international criminal responsibility of the individual: the individual had thus moved from the internal level to the international level. Those examples called for an open-minded attitude during the elaboration of the draft code.

15. Opinions differed with regard to the criminal responsibility of States, juridical persons and *de facto* groups, but such differences should not be an insurmountable problem. Changes were now taking place in the penal law of States. For example, the French draft penal code provided for the punishment of offences committed by juridical persons; and, in Zairian case law, judgments had been rendered in which criminal responsibility had been attributed to juridical persons and the penalties had taken account of the nature of the offenders. International law could not fail to take account of the development of internal penal law. In the context of the new law, he would be in favour of the non-applicability of statutory limitations to offences, as in the case of war crimes, and of the principle of compulsory extradition.

The meeting rose at 11.10 a.m.

1757th MEETING

Monday, 9 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

⁵ See 1755th meeting, footnote 6.

⁶ *Ibid.*, footnote 7.

⁷ *Ibid.*, footnote 8.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. STAVROPOULOS said that, of all the items on the agenda, the topic under discussion was the one with the longest history both in the United Nations and in the Commission itself. Since the Commission, in response to a request made by the General Assembly in 1947, had submitted its first draft Code of Offences against the Peace and Security of Mankind, the General Assembly had on several occasions decided to defer consideration of the matter before referring it to the Commission again in 1981. The question that came to mind was what had led the General Assembly to the belief that it could now deal successfully with an item which it had avoided facing for almost 30 years, particularly since the experience of the United Nations in dealing with the matter had, if anything, been rather adverse. If he had been a representative to the General Assembly when the resolution relating to the draft code had been debated, he would have shared the doubts expressed by Canada and France.⁴ But since the resolution had been adopted,⁵ the Commission had a duty to discharge, and it had to ensure that the task was performed effectively.

2. When introducing his first report (1755th meeting), the Special Rapporteur had raised the question whether it was possible to define the crimes but not the penalties. There was a further question to consider, namely whether it was possible to have a code without a penal jurisdiction to enforce it. That was a point which should be given particular emphasis in the preliminary report which the Commission was to submit to the General Assembly at its thirty-eighth session. A decision by the General Assembly that a penal jurisdiction to enforce the code was indeed necessary would not, of course, make matters easier; quite the contrary. He believed nevertheless that such a jurisdiction was indispensable.

3. In 1957, the General Assembly itself had recognized the relationship between international criminal jurisdiction, aggression and the draft Code of Offences against the Peace and Security of Mankind. It would be recalled that the question of establishing an international criminal jurisdiction had first been raised by the General Assembly in 1948 and that the Commission, at its second session, in 1950, had concluded that the establishment of an international judicial organ for the trial of persons charged with genocide or other crimes was both desirable and

possible.⁶ The two Committees of 17 set up by the General Assembly in 1950 and 1952, respectively, had prepared a draft statute of an international criminal court and had submitted it to the General Assembly⁷ which, in 1954 and again in 1957, had decided to postpone consideration of the matter until it had taken up the report of the Special Committee on the Question of Defining Aggression and the draft Code of Offences against the Peace and Security of Mankind.⁸ In 1968, when discussing the report of the Special Committee on the Question of Defining Aggression, the General Assembly had decided to complete a first discussion of the question of aggression and to defer the other two items to a later session, when further progress would have been made in arriving at a generally agreed definition of aggression. A draft Definition of Aggression had been submitted to the General Assembly at its twenty-ninth session, in 1974, and the Secretary-General, in a memorandum addressed to the General Committee, had drawn the attention of Member States to the three related questions.⁹ On that occasion, the General Assembly had adopted the Definition of Aggression¹⁰ by consensus but had taken no action on the two other issues, namely the draft code and the establishment of an international criminal jurisdiction.

4. Now that consideration of a draft code had been resumed and that a definition of aggression was available, it appeared that the international community should also deal with the question of an international criminal jurisdiction. Many States, including most of the permanent members of the Security Council, had expressed that view during the recent discussions in the General Assembly on the question of a code. The history of the item under consideration proved the existence of an indissoluble link between the two concepts; indeed, article 1 of the 1954 draft code provided that individuals responsible for offences against the peace and security of mankind, as defined in the code, should be punished. If the General Assembly were to decide that the question of establishing an international criminal jurisdiction should be taken up once more, the 1953 report of the second Committee of 17¹¹ could serve as a basis for discussion in the Sixth Committee of the General Assembly or in the Commission.

5. The international community should not continue to be unprepared to enforce justice when faced with war crimes and crimes against mankind itself, as had happened in the First and Second World Wars and in a considerable number of undeclared wars since then. In the First World War, the principle *nullum crimen, nulla poena sine lege* had prevailed; in the Second, it had been

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ See *Official Records of the General Assembly, Thirty-fifth Session, Sixth Committee*, 11th meeting, paras. 7-12 (Canada); and 15th meeting, paras. 9-10 (France).

⁵ General Assembly resolution 36/106 of 10 December 1981.

⁶ See 1755th meeting, footnote 16.

⁷ *Ibid.*, footnote 17.

⁸ General Assembly resolutions 898 (IX) of 14 December 1954 and 1187 (XII) of 11 December 1957.

⁹ A/BUR/182, para. 26.

¹⁰ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹¹ See 1755th meeting, footnote 17.

ignored. In view of the uniquely atrocious quality of the acts perpetrated, and against the background of the Kellogg-Briand Pact,¹² the United Nations War Crimes Commission had decided to disregard the principle when drafting a procedure for trying German war criminals, and that decision had eventually led to the establishment of the Nürnberg and Tokyo Tribunals. He agreed with the view expressed in the Special Rapporteur's report (A/CN.4/364, para. 25) that the Nürnberg system was an important precedent, but that its incidental and contingent features and the *ad hoc* character of the Tribunal which it had instituted were matters for regret. The system had been criticized for placing the vanquished under the jurisdiction of the victors. Everything possible should be done to avoid the recurrence of such a situation. Without a law defining both the crime and its punishment, the draft code might merely be a stylistic exercise.

6. Mr. BARBOZA stressed the preliminary nature of the remarks he was proposing to make on a subject which he considered vast and difficult. The Commission must first of all determine the scope and structure of the draft code, as it had been requested to do by the General Assembly in resolution 37/102. The fact that the study of the topic had been interrupted since 1954 was due not only to a technical reason, namely the lack of a definition of aggression, but also to the political difficulties involved. True, a political will to achieve concrete results had existed for some time, but it was of a general nature and became less clear-cut on particular aspects of the subject, especially criminal penalties, the establishment of an international jurisdiction and the criminal responsibility of the State. Certain difficulties were perhaps also due to the topic's lack of unity and the fragmentation would become even greater if the State were considered as a potential accused. The Commission should, therefore, review the work already done and consider whether certain hypotheses should be corrected, bearing in mind particularly that a definition of aggression now existed, and whether others should be added to the draft in the light of events since 1954.

7. So far as the scope of the draft was concerned, the Special Rapporteur had explicitly drawn attention to the risk of applying criteria which were too broad and would thus rob the topic of its specific nature. The title of the topic, which was very general, offered little help in the search for an adequate criterion. It referred to "the peace and security of mankind", a concept broader than that of "international peace and security" which figured in the Charter of the United Nations. The content of the latter expression was much more clearly delimited than that of the former.

8. According to paragraph 2 of article 19 of part 1 of the draft articles on State responsibility,¹³ an internationally wrongful act resulted from the breach of an international obligation essential for the protection of fundamental interests. Any international crime could affect the peace and security of mankind once the fundamental values

referred to in article 19 were threatened, thus theoretically jeopardizing the peace and security of mankind. A specific criterion therefore had to be found to identify the crimes that should be taken into consideration in the draft. Piracy, a typically international offence although committed by individuals, should not be included in that category of crimes. One day, a category of crimes against the security of international means of transport or international trade would perhaps be established. For the moment, the point at issue was to give a content to the term "mankind" in order to determine the nature of the crimes to which the draft should apply. Certain crimes not envisaged in 1954 should be included, such as *apartheid*, colonialism, the retention of territories obtained by aggression, the employment of mercenaries and, possibly, the violation of treaties providing for the denuclearization of certain territories. All those crimes in fact endangered the peace and security of mankind. The criterion which would confer unity upon the topic need not necessarily appear in the draft; it could be mentioned in the commentary. In the absence of such a criterion, the Commission would not elaborate a code of offences against the peace and security of mankind but a code of international crimes.

9. He saw no need to introduce a political element into the concept of crime under international law. Even in internal law, the question of political offences was extremely complex. It was legal thinking that had assimilated offences under ordinary law containing a political element to political offences in the light of the perpetrator's intention. But political offences were not enumerated in any criminal code. The Commission, whose role was more like that of a legislator, should leave it to legal writers to determine whether crimes against humanity were political crimes and should not allow the inclusion of a particular crime in the draft to depend upon its political or non-political nature.

10. The subjects of international criminal responsibility could be individuals, States or certain groups in internal law. The individual seemed to be the typical subject of responsibility of the kind envisaged. It was usually thought that the individual attained the international level through the penalty. That had been the case well before the Judgments of the Nürnberg and Tokyo Tribunals, both with regard to piracy and to breaches of the customs of war. The penalty inflicted on the individual could be effective and could be punitive or preventive in nature.

11. The international criminal responsibility of States was connected with the establishment of an international criminal jurisdiction and with the stipulation of penalties appropriate to the nature of a State. There appeared to be no theoretically or legally insurmountable difficulty in that connection. The penal sanctions which could be taken against a State would then imply collective responsibility. That concept had certain weaknesses, it was true, as it meant that members of a group, although innocent, were subject to punishment by the mere fact of belonging to the group. The justice of that notion was arguable, but that it corresponded to the concept of

¹² *Ibid.*, footnote 8.

¹³ For the text, see *Yearbook* . . . 1976, vol. II (Part Two), p. 95.

punishment in international law could not be denied. An economic measure taken by way of reprisals in accordance with international law was sometimes prejudicial to citizens who bore no responsibility for the perpetration of the wrongful act which had given rise to that measure.

12. International sanctions could be simple reparations or they could take the form of penal sanctions. Reprisals, which were regarded as international sanctions, already contained a certain punitive element. The principle of reciprocity did not rule out going a little further than simple reparations. That was what distinguished a criminal sanction from a civil one. The fact that a sanction was described as a penalty and that it was inflicted by a court and not by a State was immaterial. In its Judgment of 5 February 1970 in the *Barcelona Traction* case, the ICJ had declared that certain offences violated obligations of concern to the international community as a whole.¹⁴

13. Those views, however, gave rise to practical difficulties. What States would sign an international instrument which was liable to place them in the dock? The Commission should indicate to the General Assembly that there was no legal obstacle to making States the subjects of criminal responsibility, but that a political decision would be necessary to that end. In that case, it might perhaps be advisable to bring forward the second reading of part 1 of the draft articles on State responsibility¹⁵ and, more particularly, that of the provisions relating to the origin of State responsibility. No clear distinction had been drawn previously between civil and criminal responsibility. Moreover, there existed practically no precedents in the matter of criminal responsibility of States.

14. With regard to juridical persons in private law, he pointed out that the Nürnberg Tribunal had exercised great caution in examining the possible consequences for individuals of the criminal nature of certain associations under German internal law. A tendency to inflict punishment on juridical persons under private law certainly existed, but it was a limited one and met with resistance because it implied a certain form of collective responsibility which was not acceptable under internal law.

15. Mr. RAZAFINDRALAMBO noted that, in resolution 36/106, the General Assembly had invited the Commission to review the 1954 draft code with the required priority, taking into account the results achieved by the process of progressive development of international law. It was in that light that the main problems arising in connection with the examination of the draft should be viewed.

16. In the title of the topic, the General Assembly appeared to have accentuated the notion of crime. The Commission should therefore ponder the question of the kind of crimes to be considered—in other words, the scope of codification. But it should adopt a method which would enable it to choose between categories of offences

and to evaluate the degree of responsibility or accountability. The Commission could either draw upon the structure of internal criminal codes by including an introductory part devoted to general principles, or follow the example of the drafters of the Charter of the Nürnberg Tribunal by adopting an attitude of prudent reserve. In the former case, it would have to sift through all the general principles of international law which might be relevant to the proposed codification. Moreover, there would be a risk of the list of crimes being regarded as exhaustive. If the Nürnberg Tribunal had been bound by certain principles generally recognized as inviolable, such as that of the non-retroactivity of criminal laws or that of *nullum crimen sine lege*, it would have had great difficulty in operating. Furthermore, the fact of spelling out certain principles, such as that of *nulla poena sine lege*, would have the consequence of tying the Commission down in its future work. The Commission had therefore been right in 1951 not to venture upon listing the general principles that were applicable.

17. With regard to the scope of the draft and the methodology of codification, the Commission had some indications from paragraph 2 of article 19 of part 1 of the draft on State responsibility,¹⁶ as well as the wishes expressed in the Sixth Committee. Numerous gaps in the list of offences against the peace and security of mankind had been pointed out (see A/CN.4/365, paras. 55 and 72–105). It should not be too difficult to determine crimes that were international by their nature in the light of draft article 19, already mentioned.

18. The situation was less straightforward with regard to crimes which were international by virtue of conventions. In order to classify them as crimes it would be necessary to refer to the criteria applied in determining crimes which were international by their nature, so that this category of crimes, or at least those among them which fell into the first category of crimes by their nature, should not constitute a category apart. In any case, a safeguard clause should be included in respect of the effect of conventions in force relating to specific offences.

19. The same criteria appeared valid with regard to the possible incrimination of a State and its participation in the commission of a crime, either as perpetrator or as accessory. Indeed, complicity in the commission of any of the crimes by nature was already covered by paragraph (13) (iii) of article 2 of the 1954 draft. As for States responsible for crimes which were not international by nature, it appeared advisable to leave them to be dealt with either by the mechanisms provided for in the conventions relating to the offence or by domestic courts.

20. He agreed with the distinction drawn by the Special Rapporteur between political crimes and crimes under ordinary law and was of the opinion that the Commission had been right not to include in its 1954 draft any distinction based on the political or non-political nature of the perpetrator's motives. At most, the political end pursued might possibly affect the question of the perpetrator's

¹⁴ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment, I.C.J. Reports 1970, p. 32, paras. 33–34.

¹⁵ For the text of part 1 of the draft articles adopted on first reading, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

¹⁶ See footnote 13 above.

responsibility. From that point of view, the distinction between political and non-political offences might just be warranted if the codification were to endorse the position taken by the Commission in 1954 and apply only to individuals, to the exclusion of juridical persons. Such a distinction would, however, be of limited usefulness because certain offences against the peace and security of mankind could only be imputed to States, whose political motive was only too evident. *Apartheid* provided a striking example.

21. He also endorsed the views expressed by the Special Rapporteur as to the criminal responsibility of the State. The existence of such responsibility gave rise to the question of penalties and of the implementation of the code. There seemed to be no reason why the penalties applicable to international crimes, including those which, as appropriate, could be applied to guilty States, should not be listed. In that respect, the Commission might draw not only upon the penalties imposed by the Nürnberg Tribunal, but also upon the array of sanctions provided for by the United Nations Charter and extensively used by the Security Council.

22. The application of penalties presupposed the existence of a jurisdiction to pronounce them. At a time when the efforts of the international community were directed towards the establishment of a new international or world order, to think of orienting those efforts towards the punishment of crimes against the peace and security of mankind was hardly out of place. The countries of the third world, which had been and could be the victims of numerous crimes of that nature, were unanimous in their resolve to fill the legal gap created thus far by the refusal to give serious attention to the topic under consideration. They hoped that the Commission would, within a reasonable period of time, submit to the General Assembly a draft code which would be viable and operational and would no longer constitute a mere catalogue of the crimes in question.

23. Sir Ian SINCLAIR said that the topic under consideration was manifestly of great importance and significance. The generation which had come to maturity during and after the Second World War was well aware of the horrors and suffering inflicted upon individuals and groups during that terrible conflict. The notion *inter arma silent leges* was no longer acceptable. Nor was the subject before the Commission confined to those manifestations of evil which became apparent in times of war or armed conflict. Terror and violence were constantly being practised around the globe and no continent could claim to have been spared from the contagion.

24. The interest which the topic had aroused in the General Assembly and elsewhere could thus be readily understood. However, to believe that the preparation of a draft code would serve as a panacea against all the ills of contemporary society would be mistaken. Such a code could achieve a deterrent effect only if the deterrent were perceived to be real and not illusory—and possibly not even then. The existence of elaborate national penal codes backed by suitable judicial and enforcement machinery had not resulted in the elimination of common

crimes in any country; indeed, many of the more sophisticated criminals operated on the assumption that the chances of detection, conviction and eventual punishment were sufficiently remote to make the risk worth while. That did not mean, however, that the existence of a penal code did not have some deterrent effect upon individuals inherently indisposed to accept the need for regulating anti-social behaviour.

25. The relevance of those general considerations to the topic under debate was twofold. On the one hand, it was unrealistic to think that the elaboration of a code, even if accompanied by an international criminal jurisdiction, would have much deterrent effect upon the actual behaviour of States. On the other hand, such a code might have an impact upon the behaviour of individuals because the notion of individual criminal responsibility under international law could be imparted to members of armed forces or to State officials and could influence their actions in particular circumstances.

26. Another risk attendant upon the enterprise on which the Commission was embarking was related to a contemporary phenomenon, the inflation of language. In that connection, he referred to paragraph (59) of the commentary to article 19 of part 1 of the draft articles on State responsibility, in which the Commission sounded a warning against any confusion between the expression "international crime" as used in that article and similar expressions used in a number of conventions and international instruments to designate certain heinous individual crimes for which States were required to punish the guilty persons adequately, in accordance with the rules of their internal law.¹⁷ The concept of an offence against the peace and security of mankind was clearly not coextensive with the notion of "international crime" as elaborated in the above-mentioned article 19; nor was it necessarily coextensive with the breach of an obligation deriving from a rule of *jus cogens*, as the Commission had been careful to point out in paragraph (62) of its commentary.¹⁸

27. A definition of offences against the peace and security of mankind could start with the notion of crimes which were international by their very nature in the sense that they derived directly from international law. But even within that more general category, the notion of offences against the peace and security of mankind should be taken to denote crimes of such magnitude and intensity that they shocked the conscience of all mankind. As Mr. Sucharitkul had pointed out (1756th meeting), in classical international law the crime of piracy had fallen into that limited category because the pirate had been acknowledged to be *hostis humani generis*, so that any State was entitled to exercise jurisdiction over him in respect of his criminal activities on the high seas. The modern counterpart of that notion would be a category of crimes under international law recognized by the international community of States as a whole as being offences against the

¹⁷ Yearbook . . . 1976, vol. II (Part Two), pp. 118–119.

¹⁸ *Ibid.*, pp. 119–120.

peace and security of mankind. Recognition by the international community of States as a whole was surely the key to the problem. In trying to apply that test to the identification of those crimes which should appear in the draft code, the Commission should be careful to distinguish between conduct which might be offensive to the moral conscience and conduct which was so barbaric and so disruptive of peace and security as to qualify the perpetrator as *hostis humani generis*. Certain types of conduct, such as the preparation and waging of wars of aggression, the commission of crimes against the peace, crimes against humanity and war crimes as defined in the Nürnberg principles, certainly fell within the latter category, as did genocide and other comparable large-scale breaches of the most fundamental of all human rights, that pertaining to the integrity and inviolability of the human person. Beyond that, the Commission would have to tread cautiously if it wished to construct a viable and realistic code capable of objective application.

28. That the draft code should apply to individuals seemed beyond question; but could it, and should it, be applied to States as such? Realism surely dictated a negative answer. To the extent that the activities of a State resulted in an act of aggression or a threat to, or breach of, international peace and security, the international community had at its disposal a whole panoply of measures of a coercive or semi-coercive nature which could be taken by the Security Council under Chapter VII of the Charter with a view to restoring the situation. The idea of solemnly indicting a State or collective entity for a criminal offence under international law seemed to him to savour of the absurd, at least in the existing state of international relations.

29. Lastly, a very real dilemma arose in connection with implementation. Drafting a code would inevitably involve drawing up a list of crimes, many of which would be imbued with highly political elements or would have been committed for political motives. That being so, it would be highly imprudent and dangerous to leave it to national courts to enforce that code on the basis of the principle of universal jurisdiction. No matter how objective the national court might be in seeking to apply the code, it would inevitably be argued that justice had not been done. There would be overwhelming difficulties in procuring evidence. Indeed, it was not too far-fetched to suppose that the peace and security of mankind might be just as adversely affected by the holding of such a trial before a national court as by the commission of the original offence.

30. Implementation of the code should therefore be ensured by an international criminal court. But was there enough common will in the international community to envisage such a radical development? In the context of its work on the law of treaties, the Commission had deliberately refrained from seeking to identify rules of *jus cogens*, but had pronounced itself clearly on the consequences of a violation of a rule of *jus cogens*. In its work on the draft Code of Offences against the Peace and Security of Mankind, it had to proceed in the opposite direction. It would have to enumerate and define those

gravest of all international crimes which qualified to be treated as offences against the peace and security of mankind. At the same time, if its work was to be meaningful and not simply an exercise in semantics, it would have to consider carefully how the code would be implemented. As the Special Rapporteur's report demonstrated (A/CN.4/364, paras. 60–65), the history of work on the question of establishing an international criminal court was far from encouraging. If the Commission concluded that it was too dangerous to entrust the implementation of the code to national courts, further guidance should be sought from the General Assembly on how it envisaged that the code would be applied. An international penal code which could not be enforced impartially and objectively would be a mockery and a delusion, and would do grave disservice to the cause of international justice.

31. Mr. REUTER congratulated the Special Rapporteur on the clarity, precision and sobriety of expression of his first report on the draft Code of Offences against the Peace and Security of Mankind. The report tackled many issues with regard to which some hesitation was permissible, and the reflections to which it gave rise should be formulated with caution.

32. The Commission should embark upon the examination of the topic in a spirit of obedience to the General Assembly and should endeavour to do useful work — that was to say, work of an essentially legal nature. To remain on strictly legal ground within so eminently political a field would, however, be difficult if only in the matter of defining international crimes. The Commission should, furthermore, take account of international conventions in force or in the process of elaboration and of recommendations by the General Assembly.

33. The Special Rapporteur had raised three major questions, that of the scope of the draft, that of the methodology of codification and that of the implementation of the code. So far as methodology was concerned, he suggested that the question should be put to the General Assembly. The procedure was an unusual one; the Commission generally made suggestions. In order to facilitate matters for the General Assembly, the Commission might perhaps state its preferences when asking for instructions.

34. With regard to the scope of the topic to be dealt with by the Commission, it might be advisable to assess the extent of the material effort involved. The preparation of a report could take between 5 and 10 years; the elaboration of a draft code might take 15 to 20 years. The Commission should adopt a position on that point with a view to informing the General Assembly.

35. The Commission would have to decide whether it was going to deal with both crimes by private persons and crimes by States or with crimes by private persons only. By private persons, he meant individuals and groups of individuals. The Commission had already adopted a position on international crimes committed by States in article 19 of part 1 of the draft articles on State responsibility.¹⁹ That provision defined a scale of gravity of

¹⁹ See footnote 13 above.

international offences, but it said nothing about the régime governing international crimes. If, within the framework of the examination of a draft Code of Offences against the Peace and Security of Mankind, the Commission chose to deal with both crimes by private persons and crimes by States, a problem of demarcation would arise, since part 1 of the draft articles on State responsibility dealt with international crimes of the State in general and the draft under consideration with a specific category of international crimes. Apart from that minor question of demarcation of work areas, a problem of substance was also involved. In principle, the existence of a crime by a State also implied an individual crime; an act of aggression could not be imputed to a State without someone being individually responsible for it. The reverse, however, was not the case, since individual crimes might well not be State crimes.

36. The Commission would have to make a further choice: should the draft code contain general rules or special rules? To confine the code to special rules would mean producing a second edition, revised, corrected and supplemented, of existing texts such as the International Convention on the Suppression and Punishment of the Crime of *Apartheid*²⁰ or the Convention on the Prevention and Punishment of the Crime of Genocide.²¹ Yet treaties remained operative as between States, and it would be an extremely grave matter if the Commission, subordinated as it was to the General Assembly, departed from its exploratory role and attempted to correct the Assembly's work. If there were disputes which prevented the General Assembly from arriving at a solution in an area not regulated by a convention, the Commission could not act as the arbiter between two opposing trends. On the other hand, there were problems in criminal law which had not been envisaged in those texts and in respect of which the Commission could make suggestions: statutory limitations on international offences committed by States, aggravating circumstances, justificatory facts, mitigating circumstances, provocation, threat and complicity.

37. A third question on which the Commission would have to take a decision was whether to confine itself to drawing up a list of offences, and perhaps of penalties, or to embark upon the subject of application of penalties. A schedule of penalties for States—for example, deprivation of a part of the national territory, whose size would vary according to the gravity of the crime—was difficult to imagine because every problem was specific to itself and because the criminal responsibility of States was a political responsibility. Because of that, punishment was not something that a judicial body could be asked to dispense or apply. On the other hand, the establishment of an international court of justice for private individuals could be envisaged; the General Assembly might be

asked for its views on that point. The Commission should ask itself what was politically and legally possible in the contemporary world. A universal competence to punish and an obligation to extradite might have to be envisaged.

38. Mr. BOUTROS GHALI said that he would confine himself to a few preliminary considerations which might be modified in the course of the debate. An initial problem which had attracted his attention was whether the establishment of an international jurisdiction entrusted with the implementation of the code should be envisaged. In other words, was it necessary to consider the question of the procedural rules which the operation of such a jurisdiction presupposed? While recognizing the close connection between an offence and its punishment, he suggested that the Commission should defer the study of that problem to a later stage and concentrate exclusively on elaborating the draft code. Such a deferral was warranted for two reasons: first, it corresponded to the general evolution of international law, which had begun with the normative stage before going on to the institutional stage; second, by reducing the volume of work to be done, the Commission would proportionally increase the practical possibilities of elaborating the code. A suggestion to that effect might be made to the General Assembly.

39. A second problem related to codification. It might be asked why the Commission, which had been requested to prepare a Code of Offences against the Peace and Security of Mankind in 1947, had failed to complete its task and why the idea of the code had recently re-emerged. The first draft had been too closely tied to the Nürnberg principles and had been embarked upon in a cold war context. Today there was something of a revival of the cold war, but the situation contained a new element in the form of new conventions which had been elaborated or were in preparation. A growing maturity of the international community had made public opinion aware of the need for a draft code.

40. That being so, the question arose of how those conventions should be reviewed and integrated in the draft. The discussion on the draft code might cast doubt upon certain principles proclaimed in the conventions. Furthermore, the elaboration of the draft would perhaps make the Commission's work in connection with other agreements more difficult. Without minimizing the importance of the Nürnberg and Tokyo Judgments, he would suggest that the Commission should give far more attention to conventions already concluded and implemented and should draw up a list of such instruments. Such a list would help the Commission and the Special Rapporteur to assess the amount of work that would be needed and the General Assembly to visualize more clearly what work it was requesting and, consequently, to form a clearer picture of the code to be elaborated.

41. Summing up, he suggested that the Commission should at first tackle the subject with limited ambitions. If it did so, there would be no need to fear the profound divergences in international opinion as to the elaboration of the draft code.

²⁰ General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

²¹ United Nations, *Treaty Series*, vol. 78, p. 277.

MEMBERSHIP OF THE DRAFTING COMMITTEE

42. The CHAIRMAN said that, if there was no objection, he would take it that the Commission decided that the Drafting Committee should be composed of the following 15 members: Mr. Lacleta Muñoz (Chairman), Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Flitan, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Reuter, Sir Ian Sinclair, Mr. Ushakov and Mr. Jagota, *ex officio* member as Rapporteur of the Commission.

It was so agreed.

The meeting rose at 5.55 p.m.

1758th MEETING

Tuesday, 10 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. MALEK said that, in order to determine what was required of the Commission with regard to the agenda item under consideration, it was necessary to refer to the relevant General Assembly resolutions, and particularly to resolution 36/106, in which the Commission was invited to resume its work with a view to elaborating the draft Code of Offences against the Peace and Security of Mankind and to examine it with the required priority in order to review it, taking duly into account the results achieved by the process of the progressive development of international law. In resolution 37/102, the General Assembly requested the Commission to continue its work with a view to elaborating the draft code, taking into account the decision contained in paragraph 255 of its

report on its thirty-fourth session;⁴ in that paragraph, the Commission expressed the intention to proceed, at an early stage during its thirty-fifth session, to a general debate in plenary on the basis of a first report to be submitted by the Special Rapporteur. It would present to the General Assembly at its thirty-eighth session the conclusions of that general debate. In accordance with resolution 37/102, the Commission should furthermore submit a preliminary report to the General Assembly bearing, *inter alia*, on the scope and structure of the draft code.

2. The Commission now had before it the first report of the Special Rapporteur on the matter (A/CN.4/364), and in the interests of the future discussion a historical review of the question was perhaps in order. Following a proposal presented by the United States of America, the General Assembly had on 11 December 1946 adopted resolution 95 (I), in which it had affirmed the principles of international law recognized by the Charter of the Nürnberg International Military Tribunal and by the Judgment of that Tribunal, and had directed the Commission to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the Nürnberg principles. After the Judgment had been pronounced and the General Assembly had affirmed the principles of international law enshrined in the Charter and Judgment of the Tribunal, the General Assembly had decided to proceed to formulate those principles and to consider three closely related fundamental issues: the preparation of a draft Code of Offences against the Peace and Security of Mankind, the establishment of an international criminal jurisdiction and the definition of aggression.

3. At its second session, in 1950, the Commission had adopted a formulation of the principles recognized in the Charter of the Nürnberg International Military Tribunal and in the Judgment of the Tribunal,⁵ and at its sixth session, in 1954, it had adopted a draft Code of Offences against the Peace and Security of Mankind.⁶ There had been two conflicting lines of reasoning in the Commission at the time: on the one hand, it had been argued that the Nürnberg principles should be reaffirmed in the framework of a general codification of offences against the peace and security of mankind, and that the need to draw up a code of such offences was undeniable; on the other hand, it had been argued that combating crime fell within the domestic jurisdiction of States and that the intervention of an international organization in that sphere was a violation of the sovereign right of States. There, as in other areas, experience had shown that positions could change.

4. Subsequently, the General Assembly had decided to defer consideration of the 1954 draft code until it had

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ *Yearbook* . . . 1982, vol. II (Part Two), p. 121.

⁵ *Yearbook* . . . 1950, vol. II, pp. 374 *et seq.*, document A/1316, part III.

⁶ *Yearbook* . . . 1954, vol. II, pp. 151–152, document A/2693, para. 54.

adopted a definition of aggression. It had taken the same decision with regard to the establishment of an international criminal jurisdiction⁷ and, although it had adopted the Definition of Aggression in 1974,⁸ it had reverted to the question of a draft code only relatively recently. It remained silent on the question of an international criminal jurisdiction, despite the importance of the latter for the preparation of a draft code.

5. The draft code adopted in 1954 gave great importance to the "Nürnberg principles". Article 1 set forth the principle of the responsibility of individuals for crimes under international law; article 2 contained a list of acts considered to be offences against the peace and security of mankind; article 3 recognized the criminal responsibility of Heads of State and of government officials; and article 4 recognized responsibility in international law for acts committed pursuant to an order of a superior. The "Nürnberg law" had been the subject of heated comment. In any event, regardless of the opinion which might be held as to the principles on which it was founded, the 1954 draft provided a sound basis for the preparation of a code. Of course, account should be taken of developments in international criminal law since that date. Such developments concerned the conception of principles themselves; they also included the lengthening of the list of acts considered, by a large number of recent international instruments, as crimes that might be covered by a Code of Offences against the Peace and Security of Mankind. The draft code would have to be reviewed in the light of developments since 1954.

6. With regard to the major question of the scope of the draft code, a decision must first be taken on whether the code to be drawn up was to be a draft code of international criminal law concerning acts qualified as international offences, or a draft code confined to offences falling within the strict category of offences against the peace and security of mankind. The analytical paper prepared by the Secretariat (A/CN.4/365) included an impressive list of acts which, according to the comments made by Governments, should be included in the draft code: piracy, the slave trade, crimes directed against the economic interests of States, damage caused to the environment, the hijacking of aircraft, acts committed against the safety of international civil aviation, the taking of hostages, terrorism, imperialism and expansionism, the fact of obliging large numbers of persons to leave their country against their will and to seek asylum elsewhere, racial discrimination and racism, and so forth.

7. It appeared from the formal proposals which lay at the origin of the 1954 draft code and from the work which had led to its adoption that it was confined to offences against the peace and security of mankind. In its report on its third session, the Commission pointed out that

... the term "offences against the peace and security of mankind" ... should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and

security. For these reasons, the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters; nor does it include such matters as piracy, traffic in dangerous drugs ... etc.⁹

He wondered whether the Commission now intended to change its position so as to include in the draft code international offences such as slavery or piracy, simply because the punishment of such offences was provided for by international conventions. On the other hand, he wondered whether it should exclude offences of a serious nature which could affect good relations among States, crimes which were the subject of recent international conventions such as offences against persons enjoying international protection, the hijacking of aircraft, or unlawful acts directed against the safety of international civil aviation.

8. With regard to the legal definition of the various acts considered to be offences against the peace and security of mankind, account should be taken of developments in international criminal law—for example, the Definition of Aggression adopted by the General Assembly in 1974, or the concept of a crime against humanity, for which the fact that it had been committed in time of war or in time of peace was today of little importance. That new concept had been incorporated in international law by the conclusion and entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide¹⁰ and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.¹¹

9. Furthermore, the draft code should be reviewed from the standpoint of the motives for crimes, which played a decisive role in the definition of offences against the peace and security of mankind. The charter of the Nürnberg International Military Tribunal referred to *political, racial or religious* grounds,¹² to which the 1954 draft code added *cultural* grounds. The Convention on the Prevention and Punishment of the Crime of Genocide referred to acts committed with intent to destroy, in whole or in part, a *national, ethnical, racial or religious* group.

10. The text of the draft code could also be improved with regard to offences committed in violation of the laws and customs of war, in other words war crimes in the strict sense. In its commentary to article 2, paragraph 11, of the draft code,¹³ the paragraph on war crimes, the Commission stated that it had considered whether every violation of the laws or customs of war should be regarded as a crime under the code, or only acts of a certain gravity, and that it had adopted the first alternative. It was to be hoped that the Commission would reconsider its decision in the light of the international instruments which had inclined

⁷ See 1757th meeting, footnote 8.

⁸ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

⁹ Yearbook ... 1951, vol. II, p. 134, document A/1858, para. 58 (a).

¹⁰ United Nations, *Treaty Series*, vol. 78, p. 277.

¹¹ *Ibid.*, vol. 754, p. 73.

¹² Art. 6, subpara. (c) of the Charter (United Nations, *Treaty Series*, vol. 82, p. 288).

¹³ Yearbook ... 1951, vol. II, p. 136.

to the adoption of the second of the alternatives considered. Thus the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity tended to view only grave war crimes as not being subject to statutory limitations. Indeed, the States parties to the four 1949 Geneva Conventions were bound under those conventions to take the necessary legislative measures to establish suitable penal sanctions only in the case of serious crimes.¹⁴

11. On considering the principles relating to the application of punishment set forth in the 1954 draft code, the question could be asked whether the Commission should not envisage the principle of the responsibility of States as such, although article 1 referred only to the responsibility of individuals. Under article 3, the official status of the perpetrator of an offence did not relieve him from responsibility. The question arose whether the Commission should not consider adopting the text proposed by the former Special Rapporteur, the late Jean Spiropoulos, in his first report on the matter in 1950, according to which

Any person in an official position, whether civil or military, who fails to take the appropriate measures in his power and within his jurisdiction, in order to prevent or repress punishable acts under the draft code shall be responsible therefor under international law and liable to punishment.¹⁵

Article 4 of the 1954 draft code, which concerned the effect of an order of a superior, did not appear to present any difficulty from the standpoint either of substance or of form.

12. Other principles or concepts should, however, be considered in connection with the review or preparation of the draft code: the principle of the non-retroactivity of criminal law, the concept of self-defence, and the non-applicability of statutory limitations to serious crimes under international law, for example.

13. With regard to the implementation of the code, the Commission had never lost sight of the possibility of setting up an international criminal jurisdiction to try to punish the perpetrators of the offences set forth in the code. The question could be raised whether the Commission, even at the current preliminary stage of the resumption of its work on the draft code, might not draw the attention of the General Assembly to resolution 1187 (XII) of 11 December 1957, in which the Assembly had decided to defer consideration of the question of an international criminal jurisdiction until such time as it took up again the question of defining aggression and the question of a draft Code of Offences against the Peace and Security of Mankind. Some speakers had considered that the question of the implementation of the code should be put aside for the time being. In his opinion, the Commission, in its report to the General Assembly, could only stress the link which existed between the draft code and the

setting up of an international criminal court, and state whether or not the establishment of that court would be necessary for the implementation of the code being prepared.

14. Mr. CALERO RODRIGUES said that, while he shared to some extent the doubts expressed by certain members regarding the usefulness of the proposed draft Code of Offences against the Peace and Security of Mankind, he considered that the Commission should simply carry out its work at the technical level, in deference to the instructions of the General Assembly.

15. The Commission had before it an excellent first report by the Special Rapporteur (A/CN.4/364), who had presented it as an exploratory report and invited the members of the Commission to reply to a number of questions. Before going into those questions, he reminded the Commission that the proposed code would not form part of the traditional "international penal law" which regulated relations between the legal orders of various States and which had been compared with private international law, but would instead constitute "inter-State penal law" or "supranational penal law", in the words of the Special Rapporteur (*ibid.*, footnote 32), or what Claude Lombois had called "*droit des infractions internationales*" (the law of international offences).¹⁶

16. The code would deal with what the Special Rapporteur had appropriately termed "crimes under international law *stricto sensu*" (*ibid.*, para. 34). That concept was not a new one. It was embodied in part 1 of the draft articles on State responsibility, article 19, paragraph 2 of which defined an international crime in the following terms:

2. An internationally wrongful act which results 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 is recognized as a crime by that community as a whole constitutes an international crime.¹⁷

The code would thus address itself to acts which affected a fundamental interest of the international community, namely the peace and security of mankind, and those acts had been defined as crimes. With regard to the title of the code, he would prefer the English version to read "crimes against the peace and security of mankind" rather than "offences against the peace and security of mankind". On that basis, the only offences to be included in the code should be those acts that could be considered crimes under international law because they violated the fundamental interests of mankind in matters of peace and security. There was no need to include in the code crimes under internal law that were internationally punishable or "crimes which are internal crimes and whose internationalization is due solely to the fact that a State is implicated in their perpetration" (*ibid.*). Those categories should not be taken into account for the purposes of the future code.

17. Turning to the possible distinction between

¹⁴ See, for example, arts. 129 and 130 of the Geneva Convention relative to the Treatment of Prisoners of War (United Nations, *Treaty Series*, vol. 75, pp. 236 and 238).

¹⁵ *Yearbook . . . 1950*, vol. II, p. 270, document A/CN.4/25, para. 100.

¹⁶ C. Lombois, *Droit pénal international* (2nd ed.) (Paris, Dalloz, 1979).

¹⁷ *Yearbook . . . 1976*, vol. II (Part Two), p. 95.

“political” and “non-political” crimes, he fully subscribed to the Special Rapporteur’s view (*ibid.*, para. 38) that the political criterion appeared inadequate, and considered that the reference made in 1954 to a political element was confusing and unnecessary.

18. With regard to the Special Rapporteur’s first question, as to which offences should be included in the code, his reply would be international crimes (in the sense of article 19 of part 1 of the draft articles on State responsibility) which directly affected international peace and security. Admittedly, that did not dispel every possible doubt. There remained such questions as determining which of the examples given in paragraph 3 of article 19 were to be included in the code. He felt that it would not be appropriate to attempt to answer such questions at the current stage. When the Commission’s work had proceeded further, and in the light of concrete suggestions for articles made by the Special Rapporteur, it could try to be more specific.

19. The second question was that of the attribution of international criminal responsibility under the code. It involved a decision as to whether to accept or reject the theory of criminal responsibility of States. There had, of course, been a prolonged discussion between advocates and opponents of that theory and, whatever the appeal to the legal mind of the arguments of such writers as Vespasien Pella in favour of the criminal liability of States, it was apparent that any attempt to incorporate the legal consequences of that concept in a legal instrument—in the form of penalties to be applied to the State itself—would be a totally futile exercise, with no hope whatsoever of achieving practical results.

20. Probably it was not necessary to answer that question either in the affirmative or in the negative. He emphasized that article 1 of the 1954 draft code did not exclude the criminal responsibility of the State; it stated that the responsible individuals must be punished, and it could well be that those individuals were criminally liable under international law because they were responsible for the acts of a State. Examples could be given from national law of individuals who were punished for the actions of legal entities: thus, in the case of a fine imposed for a wrongful act committed by a corporation, that corporation was liable to the fine but, in the case of a penalty of imprisonment, it was the individuals responsible for the actions of the corporation who were sent to prison. The criterion thus established in the 1954 draft was a practical one but, at the same time, not repugnant to strict legal logic. Furthermore, it appeared compatible with the terms of article 19 of part 1 of the draft on State responsibility. The concluding sentence of paragraph (21) of the Commission’s commentary to the article clearly favoured that interpretation:

The need to prevent the breach of obligations which are so essential would indeed appear to warrant both that the individual-organ committing such a breach should be held personally liable to punishment, and that concurrently the State to which the organ belongs should be subject to a special regime of “international responsibility”.¹⁸

¹⁸ *Ibid.*, p. 104.

21. With regard to methodology, the Special Rapporteur had put to the members of the Commission, in chapter III of his report, a number of questions, some of which could be considered rhetorical, since the answer was not in doubt. The first question was whether the code should follow the 1954 pattern, limiting itself to a list of offences. On that point, he agreed with the Special Rapporteur that a penal code which said nothing about penalties was of no use to contemporary society (*ibid.*, para. 50). At the sixth session of the Commission, in 1954, Georges Scelle had observed that the deletion of the original article 5 of the draft (relating to the punishment of the offences defined in the code)¹⁹ “made the whole code illusory”.²⁰ For his part, he believed there would be no point in resuming work on the draft code in order to arrive at an instrument which was so incomplete, unsatisfactory and lacking in practical value.

22. It was essential for the code to observe the principle *nulla poena sine lege*. That principle was perhaps difficult to apply in international law but, unless the code prescribed penalties, it would be useless. The code should at least indicate how and by whom the penalties should be determined, although that constituted an unsatisfactory second choice. The determination of penalties could be left to the competent tribunal, as had been done in the original article 5 discarded in 1954. Another solution was to leave the question of penalties to national legislation, a very unsatisfactory solution which would result in the imposition of different penalties for the same offence. The best solution was of course for the code to determine the penalties itself.

23. The second question was whether the 1954 list of offences should be retained. There was no doubt that that list was in need of revision, but it nevertheless constituted a possible basis for the Commission’s work. He himself believed that it would be useful, although not essential, to supplement the original list. He looked forward to the submission by the Special Rapporteur of a revised list of offences based on the 1954 text, article 19 of part 1 of the draft articles on State responsibility, and the relevant United Nations conventions and General Assembly resolutions.

24. There remained two other questions: to whom should the penalties be applied and by whom should they be applied? The first depended on the question whether penalties could be imposed on States. If so, it was clear that a penalty imposed upon a State must necessarily be different from a penalty imposed on an individual. On that point, without rejecting outright the criminal responsibility of the State, he took the view that actual penalties should be imposed on individuals, namely the individuals answerable for the actions of the State.

25. As to the second question—who should apply the penalties?—it was a problem which did not present itself

¹⁹ Draft article 5 had read:

“The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.”
(*Yearbook* . . . 1951, vol. II, p. 137.)

²⁰ *Yearbook* . . . 1954, vol. I, p. 139, 268th meeting, para. 55.

in national law, which had appropriate implementation machinery. No such machinery existed in international law, hence the close link between the international penal code and the question of international jurisdiction. That connection had been very properly stressed by the Special Rapporteur (*ibid.*, para. 59), who had indicated that the establishment of an international jurisdiction could be a necessary and vital complement to the draft code. The Commission would be justified in taking that view on grounds of legal logic, but the question was not a legal one: it was clearly a political issue which had to be decided in a political forum, namely the General Assembly. For that reason, he fully agreed with the Special Rapporteur's suggestion (1755th meeting) that the Commission might question the General Assembly about its terms of reference and whether or not it was necessary also to draft a statute for the international jurisdiction.

26. There was, unfortunately, a bad precedent in the matter. In 1948, when adopting the Convention on the Prevention and Punishment of the Crime of Genocide,²¹ the General Assembly, by its resolution 260 B (III), had invited the Commission to study "the desirability and possibility of establishing an international judicial organ". Having received a positive reply from the Commission—a technical reply, of course—the General Assembly had set up a committee (followed by another, two years later) to prepare a draft statute for an international criminal court.²² As Lombois had pointed out, that had constituted "a curious reversal of roles": a body of jurists had been asked a political question and then a political body of the General Assembly had been entrusted with the technical task of elaborating a draft.²³

27. In the present case, it was essential to be clear and precise. The Commission should express to the General Assembly the view that the question of the establishment of an international criminal jurisdiction had to be decided on political grounds by the Assembly. If the Assembly were to decide that such a jurisdiction could be established, the Commission's task in preparing the draft code would be made easier. Should the Assembly not take that decision, the Commission's task would become very difficult; it would have to consider whether or not a meaningful code could be prepared and might even come to the conclusion that the whole exercise would be pointless and should be discontinued. He did not wish, however, to sound unduly pessimistic, as the Commission was only just beginning its work on the topic. It could count on the competence and ingenuity of the Special Rapporteur to explore all possibilities of achieving results that would constitute a positive contribution to the development of international law in a particularly sensitive and important field.

28. Mr. USHAKOV congratulated the Special Rapporteur on his outstanding work, although the report (A/CN.4/364) was not beyond criticism on some points. The Commission's task was clearly defined by the

relevant resolutions of the General Assembly. It was to resume its work with a view to elaborating a draft Code of Offences against the Peace and Security of Mankind, and there was no question of anything other than the preparation of that Code. In particular, the General Assembly had not requested the Commission to deal with the question of implementation. Furthermore, the 1954 draft provided the Commission with a sound basis for its work.

29. An examination of that draft showed that it dealt with only part of international offences—crimes under international law committed by individuals; it did not deal with States. Besides, the Commission had to deal with crimes of States under the item of its agenda relating to State responsibility. The responsibility of States had been termed international responsibility. He did not see why international law should be treated like criminal law. As he saw it, there was a criminal responsibility of individuals for offences under criminal law and a responsibility of States, termed "international responsibility", which could be political or material. To confuse the two responsibilities was to create difficulties.

30. Article 19 of part 1 of the draft articles on State responsibility concerned international crimes and international delicts of States.²⁴ It would have been better to use another term. With its limited vocabulary, legal language had given the same term to two very different things. Crimes and delicts of States were crimes and delicts under international law because the responsibility to which they gave rise was international; the international crimes of individuals were crimes under criminal law which, by agreement between States, were recognized as being international. That agreement could be based on international custom or on a treaty of universal scope, such as a codification treaty. The consequence of such an agreement was that States had an inescapable obligation to prosecute the perpetrators of those crimes under their domestic legislation or extradite them so that they could be prosecuted in the State in which the crime had been committed or in the State of which they were nationals. States had thus established a jurisdiction which was in a sense universal, because any State could punish the perpetrator of such a crime regardless of his nationality and without the principle of territoriality having to apply. The creation of an international criminal court in addition to that jurisdiction was conceivable, but would depend on the will of States. It was not the case that, in the absence of such a court, it was not enough to recognize some ordinary offences as international crimes committed by individuals, as the latter were prosecuted and punished, under existing arrangements, thanks to co-operation among States. Those offences—for example, piracy or counterfeiting—were serious crimes. However, for the purposes of the draft code it was only the gravest among them which could be taken into consideration, and a method must be found for identifying those which truly threatened the peace and security of mankind.

²¹ See footnote 10 above.

²² See 1755th meeting, footnote 17.

²³ Lombois, *op. cit.*, p. 83, para. 78.

²⁴ See footnote 17 above.

31. The link between the international crimes of individuals and the international crimes of States was not always very clear. An act of aggression could be committed only by a State, but the individuals who prepared it were criminally responsible for it. On the other hand, the crime of genocide, which could also be committed by a State, as provided for in article 19 of part 1 of the draft articles on State responsibility, could also be an international crime committed by individuals without any official link with that State. However, such a crime should also be taken into consideration in the draft. Furthermore, it sometimes happened that the international crimes of States were recognized as such by the international community, but that the latter had not yet established the responsibility of individuals as a result of that crime. An agreement among some States or all the States of the international community was necessary for such responsibility to exist.

32. If all the international crimes of States were considered as entailing the criminal responsibility of individuals, it would be necessary to include a list of international crimes of States in the draft code. In paragraph 3 of the above-mentioned article 19, however, the Commission had confined itself to giving some examples of offences considered by the international community to be international crimes. With regard to civil liability, to which the Special Rapporteur had referred (A/CN.4/364, para 51), he (Mr. Ushakov) pointed out that it would be better to speak of international responsibility, and that, according to the Soviet view as put forward by Grigory Tunkin, such responsibility existed as political and material responsibility.

33. Contrary to what was said by the Special Rapporteur (*ibid.*, para. 36), it was not in the 1954 draft code but in its observations that the Commission had taken the view that the category of offences against the peace and security of mankind "should be limited to offences which contain a political element".²⁵ He (Mr. Ushakov) considered that it was of little importance whether or not such offences contained a political element. The Commission did not appear to have stated that such offences were political crimes within the meaning of extradition agreements. The term "political crimes" had been used in extradition treaties so that the perpetrators of such crimes should not be extradited. At most, it might be specified that the offences referred to in the draft code were not considered political crimes in the extradition sense.

34. The notion of crimes that were international by their nature (*ibid.*, para 34) was unclear, since crimes could be considered as international offences by individuals only by agreement among the States of the international community. It was in that category of crimes that offences against the peace and security of mankind should be sought, on the basis of any agreements which had been

arrived at among States through customary law or conventions or even United Nations resolutions. In that connection, he recalled that, in the Declaration on the Prevention of Nuclear Catastrophe, the General Assembly had proclaimed that "States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity".²⁶ That crime should certainly be included in the draft code. With regard to crimes against the laws and customs of war, in customary law they had been recognized for centuries as international crimes committed by individuals; the 1899 and 1907 Conventions of The Hague had merely codified the obligation incumbent upon all States to punish the perpetrators of such crimes in accordance with their national law or to extradite them; and the Additional Protocols to the 1949 Geneva Conventions²⁷ had recognized that States and individuals could be the perpetrators of serious crimes against humanity. The Special Rapporteur had referred to the complicity of States with regard to the international crimes of individuals (*ibid.*, para. 38). That case appeared less likely than the converse, namely the complicity of individuals in the commission of an offence by a State.

35. The inductive method advocated by the Special Rapporteur, which consisted in examining positive law, particularly international conventions, for what was considered an offence against the peace and security of mankind, appeared to be the most appropriate method.

36. He concluded by urging the Commission to prepare a genuine code of offences by individuals against the peace and security of mankind, by selecting the most serious international offences committed by individuals.

37. Mr. LACLETA MUÑOZ stressed that the highly political nature of the subject compounded the difficulties it presented. He considered that the draft should above all cover crimes under international law *stricto sensu*. The second category of international crimes to which the Special Rapporteur had referred (*ibid.*, para. 34) was that of crimes which States could not punish at the purely internal level and which called for international co-operation. When directing the Commission, the General Assembly did not appear to have had such crimes in view. The third category, namely crimes under internal law which took on an international character because of the participation of a State, should be taken into consideration.

38. Conflicting opinions had been expressed as to whether the code should be confined to crimes of individuals or also cover offences by States. It seemed to be accepted that, in the past, only the crimes of individuals had been taken into account, but it did not seem possible at present to leave aside crimes of States. That conclusion flowed not only from article 19 of part 1 of the draft articles on State responsibility,²⁸ relating to international crimes and international delicts, but also

²⁵ Observations formulated by the Commission at its third session, in 1951 (*Yearbook . . . 1951*, vol. II, p. 134, document A/1858, para. 58 (a)).

²⁶ General Assembly resolution 36/100 of 9 December 1981, para. 1.

²⁷ See art. 85 of Protocol I (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 129).

²⁸ See footnote 17 above.

from the actual text of the 1954 draft code. It could not be argued that that text, despite article 1, concerned solely the conduct of individuals. The various paragraphs of article 2 dealt more or less directly with State responsibility. Thus paragraph (2) concerned "Any threat by the authorities of a State to resort to an act of aggression against another State". That provision referred not to individuals but to the authorities of a State. Of course, those authorities consisted of individuals, but the acts of those individuals were attributable to the State, as was clear from part 1 of the draft articles on State responsibility. It was therefore essential to deal with the international responsibility of States, as otherwise the Commission would go against the attitude it had adopted when drawing up the draft articles on that subject. Difficulties would no doubt ensue, but they must be tackled.

39. If it was difficult to pass over in silence the question of State responsibility, which was different from the responsibility of individuals, it was not easy to ascribe criminal responsibility to States. In the case of international crimes or delicts, the State's responsibility was essentially political. In that connection, he pointed out that, in the Spanish version, the 1954 draft code used the term *delitos*, but that the term *crímenes* would be more correct as it was a question of particularly serious breaches which endangered the peace and security of mankind.

40. Unlike Mr. Ushakov, he did not favour a purely inductive method. Such a method, which should be used to supplement the list of crimes, should be combined with a study of the incontrovertible principles which prevailed in the sphere. With regard to the list of crimes, the Commission should confine itself to including in the draft code serious crimes under international law which endangered the peace and security of mankind. Needless to say, offences such as piracy, which were committed by individuals, did not normally endanger the peace and security of mankind, unless they were repeated frequently with the support or tolerance of a State. The members of the Commission seemed to consider that it was not necessary to refer to the political element. Any offence which endangered the peace and security of mankind surely included a political motive which it would be pointless to mention.

41. Finally, the implementation of the code, however utopian it might be, could not be passed over in silence. It was important to take account of what was legally and politically feasible. The international community was heading towards institutionalization, towards the replacement of individual justice by international co-operation in the framework of a new international order which reduced the exclusive power of States to mete out justice. Consequently, the draft code would be fruitless unless it was combined with an effort to institutionalize the machinery for its implementation. Of course, it would be difficult to bring a State before a criminal court, but it was essential to consider the matter. The situation was simpler in the case of individuals, although the question of what would happen to an individual protected by a State

could be asked. Besides, it was hard to imagine an international crime not involving some participation by a State. In conclusion, he wondered how effective a code whose implementation was not guaranteed by the existence of institutional machinery could be. Its provisions would be invoked in vain, and the perpetrator of an international crime who fell into the hands of the State accusing him might possibly find himself delivered up to the vengeance of that State.

The meeting rose at 12.55 p.m.

1759th MEETING

Wednesday, 11 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. RIPHAGEN said that the very title of the topic under consideration typified a modern approach to international law by presupposing, first, that mankind was a homogeneous and, to that extent, solid group comprising all human beings and, second, that there existed a set of categorical imperatives, as the Special Rapporteur had put it in his first report (A/CN.4/364, para. 54), which were valid for every human individual. In a world where the notions of "mankind" and "categorical imperatives" really prevailed, offences against the peace and security of mankind would doubtless be punished. In the real world, however, that was not the case because of the existence of independent powers—States or groups of people wishing to form a State or at least to keep their collective identity—which were in fierce competition

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

with each other. If mankind as a homogeneous entity and the "categorical imperatives" invoked by the Special Rapporteur were to be made a reality, an organization incorporating those opposing powers was required.

2. But even then there remained two sides to the question. Thus, for instance, the principle of *nullum crimen, nulla poena sine lege* was basically designed to protect the individual against society and the vagaries of public opinion. Furthermore, imperatives were seldom as categorical as they might seem out of their context; the problem of military necessity versus respect for human rights in armed conflict, as well as that of the scope and limits of self-defence, were cases in point. Finally, the question of punishment or non-punishment and its effects both on the criminal and on the general public also had to be considered. In that connection, he thought it inadvisable to draw an analogy between possible punishment imposed on States for offences against the peace and security of mankind and financial penalties imposed on commercial companies found guilty of economic crimes, as the Special Rapporteur had done (*ibid.*, para. 44). Such penalties were perhaps acceptable so far as private economic offences were concerned, although even then they were possibly unjust to individual shareholders. Collective punishment, namely punishment of individuals for acts committed by others, although perhaps an effective deterrent, was definitely not a lofty principle of civilization. The case of an aggressor State which, after its defeat, was ordered to dismantle war factories or deprived of the right to manufacture certain types of armaments (*ibid.*, para. 46) also did not lend itself to analogy, being rather in the nature of an obligation imposed on the State in order to prevent the repetition of an internationally wrongful act.

3. The foregoing should not be interpreted to mean that article 19 of part 1 of the draft on State responsibility⁴ was irrelevant to the topic under consideration, but only that the use of the term "international crimes" in that article did not automatically entail legal consequences in the field of penal responsibility of individuals. The two topics should be kept separate. The qualification of certain internationally wrongful acts as international crimes in article 19 was primarily relevant for the determination of the injured State. Article 19 was an important deviation from the classical bilateralism of international law; the proposition was that some internationally wrongful acts were injurious to the international community as a whole, so that all States had the right, and sometimes the duty, to react against such international crimes. The punishment of individuals, however, was an entirely different matter.

4. Turning to the questions put by the Special Rapporteur in the concluding section of the report, he remarked that the problem of implementation of the code was crucial and largely determined the answers to the other questions raised. If the notions of "mankind" and "categorical imperatives" were to be made a reality through the mechanism of individual penal responsibility, an impartial international tribunal capable of meting out

justice in concrete situations would have to be instituted. Since it was the conflict between independent Powers which gave rise to most offences against the peace and security of mankind, the normal process of national administration of justice could hardly be adequate. That, of course, was not the case with other offences, such as traffic in narcotic drugs, counterfeiting, hijacking of aircraft and piracy, which were offences against the international order but which could very well be tried by national courts, with some international co-operation.

5. The questions put by the Special Rapporteur could not be answered separately or in isolation from one another. On the topic as a whole, he was inclined to believe that a Code of Offences against the Peace and Security of Mankind should be accompanied by the establishment of an international criminal jurisdiction and should concern only very grave offences committed by individuals which could not be adequately tried by national courts.

6. Mr. FLITAN recalled the preamble and the first two paragraphs of General Assembly resolution 37/102, inviting the Commission to continue its work with a view to elaborating a draft code and requesting it to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, *inter alia*, on the scope and the structure of the draft. Three conclusions emerged from that resolution. First, it was not for the Commission to re-open the issue of the desirability of elaborating a new draft code, since that task had already been entrusted to it by the General Assembly. Second, the Commission's task was in no way delimited, so that it could tackle any aspect of the problem, including that of the implementation of the code. Third, the Commission was not required to elaborate a code covering all violations of international law but one relating exclusively to crimes which endangered the peace and security of mankind. It should therefore leave aside those offences which were transposed from the internal to the international level either by the manner in which their punishment was organized by States or by the fact that a State was the perpetrator or accomplice. The Commission should confine itself to dealing with crimes directed against the peace and security of mankind. The crime of *apartheid*, which because of its scope endangered the peace and security of mankind without having to be transposed from the national to the international level, belonged to that category.

7. In order to discharge its task, the Commission should not only proceed on the basis of the 1954 draft code but should also take account of events which had occurred since then. Among international instruments of a universal nature which had been adopted since 1954 and which the Commission should take into consideration, he mentioned the International Convention on the Suppression and Punishment of the Crime of *Apartheid*,⁵ the International Convention on the Elimination of All

⁴ Yearbook . . . 1976, vol. II (Part Two), pp. 95-96.

⁵ General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

Forms of Racial Discrimination,⁶ the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁷ the Convention on the Prevention and Punishment of the Crime of Genocide,⁸ the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity⁹ and the important Manila Declaration on the Peaceful Settlement of International Disputes adopted by the General Assembly in 1982.¹⁰

8. Several paragraphs of the first report by the Special Rapporteur were devoted to the distinction between political crimes and crimes under ordinary law (A/CN.4/364, paras. 36–41). For the purposes of the draft code, that distinction was probably less obvious than the Special Rapporteur implied. However that might be, the indulgence generally shown under domestic law to perpetrators of political offences or crimes should surely not be extended to perpetrators of crimes against the peace and security of mankind.

9. The Special Rapporteur had raised the question whether the draft code, which in its 1954 version had been concerned only with individuals, should not also apply to juridical persons (*ibid.*, paras. 42–46). To dissociate an act committed by an individual from one committed by the State itself was, in his (Mr. Flitan's) view, impossible. The fact that a crime against the peace and security of mankind had been perpetrated by a State leader could in no circumstances exonerate the State from criminal responsibility. Thus the policy of *apartheid*, even though it was applied by individual South African leaders, was a policy which threatened international peace and security and involved the criminal responsibility of the State of South Africa. The very fact that an offence of that kind was directed against international peace and security made it impossible to regard it as entailing the criminal responsibility of the individual who was its perpetrator but not that of the State on whose behalf the individual was acting. Moreover, he failed to see how the draft code could play the preventive role which many representatives in the Sixth Committee of the General Assembly had stressed unless it recognized the criminal responsibility of the State (A/CN.4/365, paras. 121–125). States had to know that, although foreign occupation and annexation might result from decisions taken by a particular State leader, they always involved the criminal responsibility of the State concerned. That being so, it was difficult not to go into the question of the implementation of the draft code and not to envisage the establishment of a competent international jurisdiction to punish States guilty of offences against the peace and security of mankind. The issue was certainly a sensitive one, but if the Commission reached the conclusion that States could commit such offences, it would be inconceivable that the punishment of such crimes should be a matter exclusively

for national jurisdiction, the more so as the separation of powers was not clear-cut in all countries.

10. The structure of the draft code should be modelled largely on that of domestic criminal codes. A first part should be set aside for the statement of fundamental principles and for the definition of offences against the peace and security of mankind. A second part should contain a list of such offences, specifying all their constituent elements. The preparation of a nuclear, thermonuclear or bacteriological war should certainly be included in the list, which should not be confined to acts perpetrated on earth but should also cover acts of militarization of outer space. The concepts of incitement, complicity and conspiracy as well as that of the non-applicability of statutory limitations to war crimes should also find a place in the second part. Lastly, a third part should be devoted to implementation and to the execution of penalties imposed by bodies established for the purpose of punishing the offences listed in the second part. The need for co-operation among States with a view to unmasking, arresting and punishing offenders should also be mentioned. In addition, the Commission should attempt to define the notion of the peace and security of mankind. In that connection, the wording of article 4 of the 1954 draft code seemed to be rather too vague and to have the effect of exonerating from criminal responsibility those persons for whom it had been impossible not to comply with an order of their Government or of a superior.

11. Many representatives in the Sixth Committee had emphasized the importance of elaborating the draft code from the point of view of the international climate (*ibid.*, para. 22). Since the end of the Second World War, the international situation had never, perhaps, been as tense as it was at present. The major issues of the day were the cessation of the arms race and nuclear disarmament; the elaboration of the code might well contribute to some extent towards a relaxation of tensions. The numerous countries which had recently achieved independence were resolved to strengthen their national sovereignty against all interference in their domestic affairs and to dispose of their own natural wealth. If the future code led to the penalization of all acts which ran counter to those countries' legitimate concerns, there was no doubt that it would contribute towards improving the international climate.

12. Mr. QUENTIN-BAXTER remarked that a certain parallel could be drawn between the matter under consideration and the great debate on the right of peoples to self-determination which had taken place within the United Nations in the 1950s. Although the subject had been regarded as too important and too politically charged to be entrusted to the Commission or some other legal body, the debate had nevertheless been sustained by legal considerations. Two principal opposing views had come to light in the discussion: one side had argued that, however important as a political principle, the right to self-determination could never be an individual human right; the other side had maintained that the right to self-determination was so important that, without it, no

⁶ United Nations, *Treaty Series*, vol. 660, p. 212.

⁷ General Assembly resolution 1514 (XV) of 14 December 1960.

⁸ United Nations, *Treaty Series*, vol. 78, p. 277.

⁹ *Ibid.*, vol. 754, p. 73.

¹⁰ General Assembly resolution 37/10 of 15 November 1982, annex.

other human right was even worth talking about. Both sides, of course, had been right in their own terms. But it was clear that the question of the right to self-determination could not be removed from the sphere of politics into that of an autonomous legal order governed exclusively by legal rules. Whatever its importance, the right to self-determination had to be considered in relation to political circumstances; failure to do so could result in a serious threat to the sovereignty of nations.

13. For similar reasons, he felt that the Commission was currently faced with a topic fundamentally different from those with which it had dealt since 1954. There was an essential difference between devising a system of autonomous legal value and drawing up a set of rules designed to influence the course of policy. The fact that the Charter of the United Nations had not ruled out the need for laws of war had been a rude awakening, and a large part of the United Nations' efforts in the legal field had been concerned of late not with building an autonomous legal order, but with formulating legal principles capable of informing policy decisions. The way in which the legal and political documents resulting from those efforts were evaluated depended on the commentator's point of view: in terms of autonomous legal rules, it was easy to hold those documents in disregard; on the other hand, seen as a means of ensuring that political decisions were not arbitrary but took account of objective factors and principles of fairness and justice, those documents were unquestionably very important.

14. The work of the Commission generally fell within the autonomous legal system, relatively independent of policy. In the case of the topic under consideration, the Commission was stepping out of a familiar field into a very different one, in which, of course, other United Nations bodies, such as the Commission on Human Rights, had long been active. In breaking new ground, the International Law Commission should be aware that the question of the role of the United Nations with regard to individual rights or obligations was as yet by no means resolved.

15. In his opinion, the Nürnberg principles and the draft articles of 1954 already covered all the matters with which the Commission was now concerned. The fact that in the intervening period the nature of offences had become more complex and that the international community had become aware of the difficulty of applying such principles in a divided world did not add anything new. The current tendency to charge individuals with universal crimes, if allowed to develop in a disorganized way, would surely be more of a threat than an encouragement to the future world order to which everyone aspired.

16. The Commission should be particularly careful with regard to the connection between the topic under consideration and the question of State responsibility. The United Nations organ responsible for dealing with political issues and for taking decisions in the event of acts of aggression, threats to the peace and breaches of the peace was the Security Council. The Council's discretion in the discharge of its primary political responsibility to Member States could not be limited, although, of course,

its decisions should always be rooted in legal principles. That was the reality and he, for one, would be sorry if the Commission's action were to conflict with it.

17. Replying to one of the questions raised in the Special Rapporteur's first report (A/CN.4/364, para. 69), he said that he did not believe that States should be regarded as the subjects of the code; that would be a most regrettable departure from the Commission's approach. While recognizing the complicity of the State in many offences against the peace and security of mankind, as shown by the Nürnberg and Tokyo Tribunals, he hoped that the difference between the State and the individual would be kept in mind. As for the other questions raised in the report, it was difficult to answer them without knowing whether the Commission was merely being asked to perform the rather modest task of expressing some legal ideas to assist the policy work of the United Nations or whether the General Assembly considered that the time was ripe to remove the question of offences against the peace and security of mankind from an essentially political context and make it an autonomous subject in the sphere of law. The mere fact that the topic had been referred to the Commission was not sufficient to remove it from one field to the other. All other issues were contingent upon that distinction.

18. Mr. BALANDA said that he wished to elaborate on some points which he had only touched upon in his first statement (1756th meeting), to reply to arguments advanced by several members of the Commission, and to try to answer the questions asked by the Special Rapporteur.

19. On the subject of the Commission's mandate with regard to the elaboration of the draft code under consideration, he seriously doubted whether the Commission should, as certain members had maintained, exclude the criminal or political responsibility of States from its work. The fact that article 1 of the 1954 draft mentioned only the responsibility of individuals under international law did not mean that the intention had been to exclude State responsibility. Acts listed as constituting offences against the peace and security of mankind included aggression, incursions, annexation and blockade, acts which could be performed only by States. In the Charter of the Nürnberg Tribunal, the intention had been to penalize acts by heads of State and Government. The persons brought before the Nürnberg Tribunal had acted not only as individuals, but also as State agents.

20. There were also arguments of a non-legal nature in favour of including State responsibility in the discussion on the draft code. In its resolutions 33/97 and 35/49, the General Assembly had invited Member States and relevant international intergovernmental organizations to submit their views on the *procedure* to be followed in the future consideration of the draft code. In resolution 37/102 it had requested the Commission to submit a preliminary report to the General Assembly at its thirty-eighth session bearing, *inter alia*, on the *scope* and the *structure* of the draft code. In the discussions which had preceded the adoption of those resolutions there had

never been any question of limiting the subject. It had been their sponsors' idea that the Commission should envisage the responsibility of individuals, States or groups of States. The analytical paper prepared by the Secretary-General pursuant to paragraph 2 of General Assembly resolution 35/49¹¹ showed that States themselves had envisaged both the criminal responsibility of States and the possibility of establishing an international criminal jurisdiction. The Commission's mandate with regard to the draft code could not, therefore, be confined to only one aspect of the problem.

21. He further noted that, in the opinion of the General Assembly, the preparation of a draft code was bound to contribute to strengthening the Charter. In the preamble to its resolutions 36/106 and 37/102 relating to the draft code, the General Assembly had referred to Article 13, paragraph 1a, of the Charter of the United Nations, which provided that the General Assembly should initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. Going back in time, it would be seen that it had not been by chance that the General Assembly had in 1946 affirmed the principles contained in the Charter of the Nürnberg Tribunal;¹² it had been aware of the criticisms to which that affirmation might give rise, but had wanted those principles to be set in the general context of the progressive development of international law. The notion of the individual's criminal responsibility under international law had at that time been new and controversial. The recognition of the universal competence of States to extradite or try major war criminals and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity¹³ were two further elements in the progressive development of international law. The Commission should not be afraid to promote that development in accordance with article 1 of its Statute. Law, including international law, was an instrument in the service of man and, as such, had to be capable of developing in line with requirements.

22. The General Assembly had expressed its will by requesting the Commission to resume the elaboration of the draft code and, in so doing, to take account of the present situation. That will was comprehensive in the sense that the question of State responsibility could not be excluded from the Commission's work. If there was a will to hold the State responsible, the legal means of putting it into effect would be found. He had referred (*ibid.*) to judgments rendered by Zairian courts in which criminal responsibility had been attributed to juridical persons, and he agreed with Mr. Barboza (1757th meeting) that technically it was not absolutely impossible to envisage attributing criminal responsibility to States. It would suffice to adapt the penalties to the special nature of the perpetrators of the crimes. Moreover, there existed certain kinds of reparations, such as apology and the

expression of regret, which were appropriate to international responsibility.

23. The establishment of an international criminal jurisdiction was unavoidable—despite the difficulties connected with the operation of such a jurisdiction and the procedure to be followed—if the future code was to be made effective. The idea of an international jurisdiction was not new. The Commission on Human Rights had entrusted an *ad hoc* committee with setting up an international jurisdiction within the framework of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*.¹⁴

24. The General Assembly's concern was the same whether the point at issue was human rights or the draft Code of Offences against the Peace and Security of Mankind. Commission on Human Rights resolution 12 (XXXVI) of 26 February 1980, on the implementation of the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, General Assembly resolution 34/24 of 15 November 1979, on the implementation of the Programme for the Decade for Action to Combat Racism and Racial Discrimination, the "Study concerning the question of *apartheid* from the point of view of international penal law"¹⁵ and the documents of the *Ad Hoc* Working Group of Experts relating to the study on ways and means of insuring the implementation of international instruments such as the above-mentioned Convention, including the establishment of the international jurisdiction envisaged by the Convention,¹⁶ supplied useful evidence in that respect. The General Assembly had wished to attribute responsibility to States and it believed that violations of human rights and offences against the peace and security of mankind could not be ascribed exclusively to individuals. Today, there existed *de facto* groups which "claimed" responsibility for crimes committed against persons.

25. Sanctions were the corollary of every code. The draft code under consideration should provide for sanctions; however, in reply to the Special Rapporteur's question whether all crimes covered by the draft and all sanctions should be explicitly defined in that instrument, he took the view that, in elaborating the draft code, the Commission should not follow the model of national criminal codes. In that connection, he endorsed the view expressed by Poland in its comments and observations submitted in pursuance of General Assembly resolution 35/49.¹⁷ There was a need for flexible definitions which made it possible to take future developments into account. Such flexibility was not incompatible with the principle *nullum crimen sine lege*. To be able to connect the indictable offence with a rule was enough. If the rule was violated, the sanction followed. A schedule of sanctions applied under internal criminal law could not be transposed to the draft code. What mattered in the

¹¹ A/36/535.

¹² General Assembly resolution 95 (I) of 11 December 1946.

¹³ See footnote 9 above.

¹⁴ See footnote 5 above.

¹⁵ E/CN.4/1075 and Corr.1.

¹⁶ E/CN.4/1426 and E/CN.4/AC.22/1980/WP.2.

¹⁷ A/36/416, p. 8, para. 7; see also A/36/535, para. 216.

present case was the will to punish and to penalize, a will which would also have a deterrent effect.

26. With regard to the methodology of codification, the question had been raised whether the draft code should include a part stating the general principles applicable or whether an empirical approach should be adopted. He had no very decided views on that point; in the interests of clarity it might be desirable for the basic principles to appear in a part of the draft specially set aside for that purpose. The most important point, however, was that the code should, in one form or another, include guiding principles to be used in determining the acts declared to be criminal and the applicable sanctions, those sanctions being suited to the nature of the subject of international law. Lastly, the future code should take account of certain special circumstances, such as self-defence or the endeavour to achieve liberation from all forms of domination. It should also deal with the questions of complicity, the non-applicability of statutory limitations to certain crimes, and extradition.

The meeting rose at 12.15 p.m.

1760th MEETING

Friday, 13 May 1983, at 10 a.m.

Chairman: Mr. Alexander YANKOV
later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. JAGOTA said that the topic under discussion was a sensitive subject with which the Commission had already dealt from 1949 to 1954 and on which opinions

were divided, as was shown by the comments of Governments and the statements made in the Sixth Committee of the General Assembly and summarized in the excellent analytical paper prepared by the Secretariat (A/CN.4/365). The topic constituted a separate item of the General Assembly's agenda instead of being merely considered as part of the Commission's report. There was also a division of opinion as to whether the topic should be dealt with by the Commission or by a special body.

2. The Commission was called upon to examine a number of issues in the light of the existing situation, including the prevailing insecurity in international relations. Those issues were the contents of the draft code, whether to include in it provision for penalties, and implementation. On the latter point, there were several possibilities: one was to set up a separate international criminal jurisdiction, another was to entrust a special chamber of the ICJ with that jurisdiction, and a third was to leave it to national courts to prosecute and punish offences under the code. There was a considerable division of opinion on that matter, as felicitously described by the Special Rapporteur in his admirable report (A/CN.4/364, chap. IV). In particular, some of those who were favourable in principle to the idea of setting up an international criminal jurisdiction had doubts regarding its practical feasibility.

3. In the conclusion of his report, the Special Rapporteur had put to the Commission a number of questions relating to the scope of the topic, methodology and implementation of the code. In its resolution 37/102 the General Assembly had adopted a somewhat simpler approach to the question by referring to the scope and the structure of the draft code. For his part, he welcomed the approach of the Special Rapporteur and would examine the first two points together and then deal with the third one separately.

4. The first issue which called for attention was that of the offences to be covered by the code and the subjects of law which could be held responsible. The determination of offences and subjects of law was closely linked to the question of the method to be followed in formulating the code. Should the Commission follow the same method as for the 1954 draft code or adopt that applied in article 19 of part 1 of the draft on State responsibility⁴ or, if feasible, combine the two methods?

5. The 1954 draft code did not contain any definition of an international crime; nor did it define the concept of "peace and security of mankind". The method followed was to list the offences covered by the code. Furthermore, only the individuals responsible for the acts constituting offences were held liable, to the exclusion of the State or other subjects of international law — although it was clear that only a State could commit some of the acts treated as crimes in the 1954 draft, such as the annexation of territory by means contrary to international law.

6. The 1954 draft code was silent on the subject of penalties, differing in that respect from national penal codes. The Commission had attempted to solve that

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ *Yearbook* . . . 1976, vol. II (Part Two), pp. 95–96.

problem by proposing a draft article 5⁵ which provided that the penalty for any of the offences set forth in the code would be that laid down for the graver crimes by national legislation, leaving it to the tribunal competent to try the accused to determine the actual penalty. However, that article had not been included in the final version of the draft. The 1954 draft code had been equally silent on the subject of jurisdiction. The Commission had discussed the question both in connection with genocide and in general terms and had appointed two different Special Rapporteurs to study the possibility of setting up an international jurisdiction to try international crimes. The Special Rapporteurs had submitted their reports to the Commission at its second session, in 1950.⁶ Unfortunately they had arrived at different conclusions; one of them had favoured the establishment of a special international jurisdiction, while the other had adopted a more guarded position. The General Assembly had then set up two successive committees to deal with the issue.⁷

7. The other precedent derived from the work of the Commission, namely part 1 of the draft articles on State responsibility,⁸ article 1 of which was entitled “Responsibility of a State for its internationally wrongful acts” and article 2 “Possibility that every State may be held to have committed an internationally wrongful act”, while article 19 characterized as “international crimes and international delicts” certain internationally wrongful acts. Paragraph 2 of article 19 defined international crimes by reference to an objective element—“the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community”—combined with a subjective element, namely “that its breach is recognized as a crime by that community as a whole”. That general definition was followed, in paragraph 3, by an enumeration which was not exhaustive. The categories of international crimes thus listed included offences against the peace and security of mankind.

8. Apart from the 1954 draft code and part 1 of the draft articles on State responsibility, there were a number of other precedents. In 1954 the General Assembly had deferred consideration of the draft code pending completion of the work on the Definition of Aggression. That question had been entrusted to a special committee which had sat from 1968 to 1974 and whose work had led to the adoption by the General Assembly, in 1974, of the Definition of Aggression.⁹ The Commission should, of course, take into consideration the terms of that definition, as well as a number of other important international instruments, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹⁰ and the 1973 International Convention on the

Suppression and Punishment of the Crime of *Apartheid*.¹¹ In the same context, he cited the international instruments on the prohibition of nuclear weapons, bacteriological weapons and certain other weapons of mass destruction, and the prohibition of the use of outer space for military purposes. Equally relevant were the instruments prohibiting the use of force for the establishment or maintenance of colonial domination.

9. Another important instrument was the ICAO Convention for the Suppression of Unlawful Seizure of Aircraft,¹² in which connection the concept of a universal crime had been recognized. Jurisdiction to try the offences in question was no longer determined by the nationality of the perpetrator of the offence or by the place of its commission. The courts of the State where the offender was found were also competent. The offence was regarded as one which affected humanity as a whole and which could therefore be tried by the courts of any country.

10. Against that background, he would give his reply to the Special Rapporteur's questions regarding scope and method. To begin with, he felt that it would be useful for the Commission to include in the draft a definition of what constituted an “international crime” and also to define the concept of “peace and security of mankind”. The Commission could either formulate two separate definitions or define the whole concept of an “international crime against the peace and security of mankind” in one formulation. Those initial definitions would help to determine the contents of the draft code, namely the crimes to be included in it and those to be excluded.

11. He urged the Commission to adopt the same method as that followed in paragraphs 2 and 3 of article 19 of part 1 of the draft articles on State responsibility, namely to formulate a definition of the crimes concerned in general terms and to follow it up by a non-exhaustive list. The list would be in three parts. The first would enumerate crimes already recognized as such under existing international law, and the second, crimes under international conventions in force or instruments already adopted by the United Nations. In connection with that second category of crimes, it was essential to proceed by reference, in such a way as to make it clear that the Commission would not be reviewing the provisions of those instruments or redefining the crimes set forth therein. The third category would be a more flexible one and would cover any offence which might derive from the violation of a rule of *jus cogens*.

12. However, the Commission should make it clear—as it had done in the above-mentioned article 19—that not every breach of an international obligation constituted an international crime. In order to be so described, the breach would have to be a grave one. Moreover, the offences in question had to affect the peace and security of mankind directly. Such acts as piracy, counterfeiting and

⁵ See 1758th meeting, footnote 19.

⁶ A/CN.4/15 (report of R. J. Alfaro) and A/CN.4/20 (report of A. E. F. Sandström).

⁷ See 1755th meeting, footnote 17.

⁸ *Yearbook* . . . 1980, vol. II (Part Two), p. 30.

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁰ United Nations, *Treaty Series*, vol. 78, p. 277.

¹¹ General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook* 1973 (Sales No. E.75.V.1), p. 70.

¹² United Nations, *Treaty Series*, vol. 860, p. 105.

the unlawful seizure of aircraft could not be held directly to affect the peace and security of mankind, and could therefore be excluded. He also agreed with the Special Rapporteur (1755th meeting) that it was not desirable to mention the political element, because that could lead to controversial interpretations. For the time being, he would not go into the question of which offences should be included in the list. He felt that the matter should be dealt with only at a later stage.

13. Lastly, he felt that it was necessary to include a separate section dealing with the question of exceptions, namely to state the acts which did not constitute offences. That point had been dealt with in article 19 of part 1 of the draft on State responsibility in combination with the definition of the various acts constituting offences. His own suggestion would be that separate provision should be made for such matters as self-defence and actions taken under United Nations sanctions.

14. Turning to the question of the subjects of international law to be covered by the code, he urged the Commission to be consistent with the approach it had adopted in its draft on State responsibility. In article 19 of part 1 of that draft, it was clear that the State as such incurred responsibility. Even the list of offences contained in the 1954 draft code and the terminology used therein had made it clear that acts for which individuals were held responsible were acts of State. To take the example of aggression, no penal code referred to aggression, which could only be the act of a State. The same was true of unlawful annexation of territory. In view of those precedents and of the opinion of most writers, the Commission should recommend that the draft code should recognize that an international crime could be committed by a State. He suggested that the relevant passage of the code should specify that an international crime could be committed either by a State or other legal entity, or by an individual.

15. While thus advising that the Commission should be consistent with its decision on article 19 of part 1 of the draft on State responsibility, he at the same time urged caution. In that connection, he drew attention to the following passage in the Special Rapporteur's first report (A/CN.4/364, para. 45):

... The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated ... Toppling the State from the lofty pedestal ... and prescribing for it a course of conduct and a code of ethics to be followed under pain of coercive sanctions would clearly amount to a complete reversal of hitherto prevailing ideas and concepts.

Thus, even if the criminal responsibility of a State were to be recognized, there would remain the very difficult problem of how to prosecute and punish it. He suggested that, while recognizing the responsibility of the State as it had done in article 19 of part 1 of the draft on State responsibility, the Commission should restrict to individuals the application of the provisions on penalties and jurisdiction. It should then await the reaction of the Sixth Committee of the General Assembly on the subject. In that connection, the Commission should endeavour not to create difficulties for the acceptance of the draft by the

Sixth Committee and subsequently by Governments. Moreover, the implementation of the code would be difficult even with respect to individuals. It would be necessary to determine who would prosecute, who would pronounce the sentence and who would execute it.

16. Clearly, the two questions of punishment and jurisdiction required further study by the Commission, which would have to decide whether the penalty must be clearly defined in each case. In that connection, it was possible that the *nulla poena sine lege* rule might not be sacrosanct. One possible solution would be to adopt the system embodied in the deleted article 5 of the 1954 draft code.¹³ The system of leaving it to the competent court to decide the penalty was not unusual. To some extent it was applied in all legal systems, since judges had considerable discretion—usually within certain specified limits—for determining the penalty to be applied to each offender.

17. With regard to the question of jurisdiction, he noted from paragraph 23 of the Special Rapporteur's report that in 1937 two conventions had been adopted at Geneva on the subject of terrorism: the first was the Convention for the Prevention and Punishment of Terrorism,¹⁴ which had been signed by a number of States but had been ratified only by India, and the second was the Convention for the Creation of an International Criminal Court,¹⁵ which had been signed by 13 countries but ratified by none. The instruments on the Nürnberg and Tokyo Tribunals at the end of the Second World War had related to war crimes, crimes against the peace and crimes against humanity. In the light of those and other precedents he agreed with the Special Rapporteur that the Commission would be well advised to question the General Assembly about its terms of reference and whether or not it was necessary also to draft a statute for an international jurisdiction. In that regard, it was worth noting that the setting up of an international jurisdiction to deal with matters of public international law was invariably a very difficult task, as had been seen at the recent Third United Nations Conference on the Law of the Sea.

18. Mr. EVENSEN said that the introductory historical chapter in the Special Rapporteur's admirable report (A/CN.4/364) was a depressing reminder of the basic ills of modern society, which were becoming increasingly serious with technical developments that unfortunately seemed uncontrollable.

19. The Commission's starting-point for its current examination of the topic was the General Assembly's request in its resolution 36/106, in which it had invited the Commission to resume its work with a view to elaborating a draft code which would take into account new developments. There were four interesting elements in the mandate thus conferred upon the Commission: (a) it referred to the elaboration of a draft code; (b) the work to be undertaken by the Commission was seen as a prolongation of its previous work, which had resulted in the formulation of the 1954 draft code; (c) the

¹³ See 1758th meeting, footnote 19.

¹⁴ League of Nations, document C.546(1) M.383(1). 1937.V.

¹⁵ See 1755th meeting, footnote 9.

Commission had to take into account new developments in international law; and (d) it should not confine itself to a mere codification but should work towards the progressive development of international law.

20. With respect to the title of the future draft code, he agreed with those members who had pointed out (1758th meeting) that, in the 1954 text, the French title, which used the term *crimes*, was preferable to the English one, which spoke of “offences”, and also to the Spanish one, which used the term *delitos*. The English title should read: “Draft Code of Crimes against the Peace and Security of Mankind”.

21. Turning to the question of the form in which the Commission should present the results of its work, he said that a closer examination of the term “code” was necessary. That term was used in internal law to designate major enactments such as the French Civil Code of 1804 or the penal codes of various countries. In international law, however, the term “code”, under the 1969 Vienna Convention on the Law of Treaties, was one of the many designations of an international agreement governed by that Convention, which included “treaty”, “convention”, “statute” and “pact”. The word “code”, however, was also used at the international level with an entirely different connotation in such expressions as “code of conduct”, the provisions of which were not legally binding but merely defined the behaviour that it would be desirable for States to adopt. Obviously, the General Assembly had not entrusted the Commission with the drafting of a mere code of conduct in that sense. That being so, the Commission might prepare a draft treaty and designate it a “code” in order to indicate its fundamental and comprehensive character. The Commission’s mandate, however, did not oblige it to adopt that formula.

22. He believed that, with the guidance of the Special Rapporteur, the Commission should be able to frame a set of principles which, by their authority and weight and because they reflected the fundamental bases of a law on international crimes emanating from legal, ethical and even religious tenets, would constitute general principles of law accepted by all. Those principles would stem not merely from natural law but also from customary international law and from the basic tenets of the Charter of the United Nations. Accordingly, the Commission’s main object should be to submit to the General Assembly a draft code which could be adopted by the Assembly in the form of a declaration or proclamation by consensus or unanimous decision. By its very nature, such an instrument would become a pillar of the legal order which could serve as a basis for efforts to create a more peaceful, more humane and, above all, more responsible world. An international instrument adopted in that manner would not be open to any of the objections, based on the principles of *nullum crimen sine lege* and *nulla poena sine lege*, which had been advanced against articles 227 to 230 of the Treaty of Versailles of 1919,¹⁶ the Charter and

Judgment of the Nürnberg International Military Tribunal of 1945¹⁷ and the Charter of the International Military Tribunal for the Far East of 1946.¹⁸

23. However, that instrument would continue to have one obvious weakness, which was illustrated by the 1919 and 1945/1946 precedents. In both cases, the vanquished had been placed under the jurisdiction of the victors, who had enforced the basic principles of law through *ad hoc* jurisdictions which they themselves had set up. The Commission should do its utmost to overcome that difficulty, but it should remember that its primary task was to formulate a draft code which defined the crimes punishable under international law.

24. Turning to the questions put to the Commission by the Special Rapporteur, and more especially that of the crimes to be covered by the code, he stressed that the Commission’s task went beyond mere codification. State practice, especially in time of war but unfortunately also in peacetime, did not provide much encouragement for codification. As he saw it, the Commission was really being called upon to elaborate principles for the future. If, however, the term “codification” was taken as involving the drawing up of a comprehensive code which took into account the progressive development of the principles concerned, he would not object to such a procedure.

25. With regard to the crimes to be covered by the code, he did not favour the idea of enumerating such crimes, but the method of setting forth only general principles might be equally unsatisfactory. The Commission should strive to determine categories of crimes by describing in general terms the main constituent elements thereof, and, in addition, giving examples, an approach already used to some extent in the 1954 draft code. It should, however, be made perfectly clear that those examples did not constitute exhaustive lists.

26. The 1954 draft code was, of course, the natural starting-point of the Commission’s work but, at the same time, it had to be carefully scrutinized in the light of later developments in the form of international conventions and innumerable resolutions and declarations of the General Assembly. Perhaps the Commission should also take into account other current developments, such as the terrifying technological evolution, the galloping arms race and the abhorrent violations of human rights.

27. In the light of all those developments, a number of obvious flaws in the 1954 draft code became apparent. Thus article 1 appeared to suggest that the enumeration of offences in the code could be regarded as exhaustive. That same article stated far too absolutely that only individuals were to be punished under the code. Clearly, those provisions would have to be tempered in the light of the results arrived at by the Commission with regard to State responsibility for criminal acts.

¹⁶ *British and Foreign State Papers, 1919*, vol. CXII (London, H.M. Stationery Office, 1922), pp. 103–104; see also United Nations, *Historical survey of the question of international criminal jurisdiction* . . . , p. 60, appendix 3.

¹⁷ For the Charter of the Nürnberg International Military Tribunal, see United Nations, *Treaty Series*, vol. 82, p. 284.

¹⁸ See United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XIV, No. 349 (10 March 1946), p. 361; and No. 360 (26 May 1946), p. 890 (amendments).

28. Similarly, article 2 stood in need of complete overhaul. Its paragraphs 1 and 2, dealing with aggression, obviously needed to be amended to take into account the Definition of Aggression adopted by the General Assembly.¹⁹ Paragraph 6 of that same article, dealing with terrorism, provided that only the act of a State in undertaking or encouraging terrorism constituted an international crime. However, recent experience showed that terrorist acts committed by groups or bands without the complicity of State authorities should likewise be considered crimes under the code. Consideration should also be given to the suggestion by a number of Governments that the taking of hostages should be classified as a terrorist act (see A/CN.4/365, para. 95).

29. The provisions of paragraph 11 relating to genocide contained certain unacceptable restrictions, since they covered only inhuman acts committed "on social, political, racial, religious or cultural grounds". The Commission should either delete that enumeration of grounds or add to it the words "or on any other ground". With regard to violations of the laws and customs of war, the brief reference in paragraph 12 was inadequate because of recent technical developments and the large number of relevant international instruments adopted since 1954.

30. Several Governments had emphasized in their replies (*ibid.*, paras. 80-84) the importance of condemning the use of nuclear weapons and other weapons of mass destruction as an international crime, in line with the General Assembly decisions of 1978 and 1981. In his opinion, it would not be sufficient to declare that the first use of such weapons constituted an international crime. Nuclear weapons and other weapons of mass destruction were by their very nature a crime against the peace and security of mankind. They did not enable any distinction to be made between civilian populations and military forces or between civilian objectives and military objectives or permit compliance with the rule that civilians enjoyed general protection against dangers arising out of military operations. Moreover, the use of such weapons violated the ban on the use of weapons that might be expected to cause widespread, long-term or severe damage to the international environment. The same considerations applied to biological and certain other dreadful weapons resulting from the technological revolution and the suicidal arms race.

31. The Commission should accordingly consider making additions and amendments to paragraph 12 of article 2 of the 1954 draft code so as to refer to such serious violations of the peace and security of mankind as the testing, production, deployment or use of (a) nuclear weapons or other weapons of mass destruction, (b) biological or chemical weapons and (c) weapons aimed at the alteration or destruction of the environment or having such effects, as well as the use of areas that were the common heritage of mankind (including the sea-bed and the ocean floor and outer space) for any of the purposes

mentioned under (a), (b) and (c) above, and the use of weapons causing unnecessary or unreasonable suffering.

32. He noted the Special Rapporteur's suggestion (1755th meeting) that the code might also cover such violations as the destruction or grave damage of the environment by pollution, piracy and the international trade in narcotics. His own view was that to broaden the scope of the code to include violations of that kind would tend to weaken it, except that gross acts of hijacking and piracy might be considered as acts of terrorism.

33. On the other hand, the Commission should consider amending the draft code to extend its scope to certain acts contrary to the security of mankind, such as *apartheid*, racial discrimination, slavery, colonialism and other grave violations of human rights. It followed from that enumeration that the fact of making a distinction between political crimes and other crimes would add little or nothing to the definition of crimes against the peace and security of mankind.

34. With regard to the suggestion that the code should lay down penalties, he felt that consideration should be given to reintroducing a provision based on the original article 5²⁰ which the Commission had finally discarded in 1954. Such a provision would serve, among other things, to counter objections based on the principle *nulla poena sine lege*. Perhaps it would suffice to state that the penalty should be a penalty ordinarily applied under internal law in cases of serious crimes and to leave it to the competent jurisdiction to determine the type and magnitude of the penalty.

35. The question of statutory limitations had been raised during the discussion. In his view, cases of such gravity as those to be provided for by the code should be governed by the principles laid down in the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.²¹ The rule in the matter was that no statutory limitations applied.

36. On the question of the subjects of law to which the code would apply, the Commission should not confine itself to crimes committed by individuals. Most of the acts to be covered by the code were of such a nature and gravity that they could be committed only by States. Aggression was a good example. It was true that certain sanctions, such as imprisonment, could not be applied to States, but it was not the sanction that made an act criminal but the nature of the act itself. To provide for the possibility of condemning the State as an entity for the perpetration of grave violations of international law would have a considerable preventive effect; the sanctions to be applied should, of course, be of a special nature, such as punitive damages or war reparations.

37. Referring, lastly, to the question of implementation of the code, he said that, like other members of the Commission, he supported the idea of preparing a draft statute for an international jurisdiction. He felt, however,

¹⁹ See footnote 9 above.

²⁰ See 1758th meeting, footnote 19.

²¹ United Nations, *Treaty Series*, vol. 754, p. 73.

that that task should be taken up at a later stage. For the time being, the Commission should concern itself with formulating the code, specifying what made certain acts criminal under international law. Once that task was completed, the Commission could decide to take up—or might be entrusted with—the question of jurisdiction. The code of crimes against the peace and security of mankind was an instrument with intrinsic value and should not be subordinated to the thorny question of creating an international criminal tribunal or extending the jurisdiction of the ICJ. To deal with that question might cause the Commission to fail in the basic task of drafting the necessary code of international crimes.

38. Mr. OGISO said that he, too, thought that the topic under consideration was a political one and, to that extent, accepted that the Commission had to respect the political will of the international community, as expressed in the relevant General Assembly resolutions and, more particularly, in resolution 36/106. By requesting the Commission to elaborate a draft Code of Offences against the Peace and Security of Mankind, the General Assembly had surely called for the formulation of a legal instrument leading to the establishment of an international criminal law; the intention could not simply have been to ask the Commission to engage in a theoretical exercise of legal systematization without regard to the enforceability of the future code. The question arose, however, whether the political will of the international community, as expressed in that resolution, was based on the clear recognition that the international criminal law that would result from the elaboration of the code would be ineffective and futile unless it was applicable and enforceable in an impartial and objective manner and unless it enjoyed the support of international society as a whole. Was the General Assembly of the opinion that such conditions already existed in contemporary international society to an extent that justified the Commission's embarking upon the enormously ambitious task of establishing an international criminal law? On the one hand, the performance of that task would absorb much of the Commission's energy and time; on the other hand, any result which was not altogether satisfactory would involve a risk of certain principles being abused or used for political propaganda purposes. The outcome in such a case would be not only futile but actually detrimental to the Commission's authority. The Commission should therefore proceed with the utmost circumspection; and the need for caution was not made less relevant by the existence of the Definition of Aggression adopted by the General Assembly in 1974,²² a text which was more in the nature of guidelines addressed to the Security Council and whose relevance to the proposed draft code was consequently limited.

39. Any law, whether international or domestic, had to be backed by appropriate means of implementation and accepted by society as an enforceable norm. The pursuit of doctrinal or theoretical possibility was not enough. Criminal law, more than any other, required the certainty

of implementation, and that implementation, in turn, was predicated upon objectivity and impartiality. A code of offences which might form the basis of international criminal law had to be applicable with strict impartiality to all States, all relationships between States and all responsible individuals. The prospect of universal adherence and impartial enforceability therefore had to be sufficiently assured. Failure by any single major Power to support the code would render it useless. Considering the differences of view that had emerged within the Commission, it was highly unlikely that the international community would, now or in the foreseeable future, give universal support to the proposed code. He was unable to agree with the argument that the General Assembly's request in resolution 36/106 absolved the Commission from the obligation to raise fundamental questions. On the contrary, it was the Commission's duty to draw the General Assembly's attention to any problems that might arise, especially problems of a fundamental nature.

40. Turning to the questions posed by the Special Rapporteur in his first report (A/CN.4/364, para. 69), he said, in reply to the first question, that the proposed code should concern itself solely with acts universally recognized to be crimes under international law as constituting offences against the peace and security of mankind. That being so, piracy or hijacking of aircraft should not be included in the draft. Moreover, the Commission should be careful not to place excessive emphasis on the "progressive development" aspect of its task. In view of the political nature of the subject, there was always a risk that a political slogan lacking the required degree of legal maturity might creep into the code, thus turning it into a political or theoretical manifesto rather than a legal instrument. That would clearly be harmful to the Commission's authority as well as contrary to its desire to contribute to the well-being of the international community through the progressive development of international law. In other words, in drawing up the list of offences, the Commission should beware of giving free rein to its imagination and should come back again and again to the fundamental question as to whether each offence was recognized by the whole community of nations as being a crime against the peace and security of mankind. It should also give due regard to existing conventions, such as those on genocide and on hijacking, and avoid the possibility of duplication or confusion. In that respect, too, restraint was called for.

41. With regard to the question of the subjects of law, he was of the view that criminal responsibility, and particularly that arising from the type of offences being considered, attached to individuals only. The concept of criminal responsibility of legal persons, such as private companies, admittedly existed in some legal systems, including that of his country, where juridical persons could be fined for their wrongdoings; however, its application was restricted to very limited fields of activity and to cases considered absolutely necessary in order to achieve certain objectives, mainly of a technical nature. The concept did not exist in the Japanese criminal code for general application. Criminal responsibility of legal

²² See footnote 9 above.

persons should be regarded as a legal fiction, and he saw no justification for introducing the concept into international law, particularly when the object was to punish outrageous acts against mankind as a whole. Moreover, any attempt to punish an offending State would necessitate the establishment of an appropriate supranational mechanism, which, in all honesty, was hardly a realistic prospect for the foreseeable future.

42. In reply to the question concerning the method to be used, he was in favour of what the Special Rapporteur had called the inductive method, without, however, necessarily precluding the possibility that the draft might include a few general principles, which, of course, should command the consensus of the international community at large if the code was to become a viable legal instrument. The principle *nullum crimen, nulla poena sine lege*, which was universally accepted, might be included in the code as meeting that condition.

43. Lastly, on the question of the implementation of the code, he again emphasized the uselessness, and indeed the danger, of drawing up a list of offences not backed by the necessary enforcement provisions. The proposed code must be applied universally, objectively and impartially, and an international mechanism guaranteeing such application, including but not limited to a truly international tribunal, must be established. Punishment imposed in an arbitrary and unpredictable way constituted an injustice in itself. Nothing less than the world's confidence in international law was at stake. The obstacles to effective implementation were numerous; the shortcomings of the existing practice of national jurisdiction accompanied by extradition were only one example. There again, everything depended on the fundamental question whether the international community was prepared to give unanimous backing to the code, not merely by adopting a resolution requesting the Commission to prepare a draft, but by throwing its full weight behind the impartial and objective enforcement of the code if the Commission succeeded in drafting it.

44. In conclusion, he said that everything should be done to avoid a situation in which the victor, for his own satisfaction, condemned the defeated in the name of justice while the same offences committed by the victor went unpunished, as, in his personal opinion, had been the case with the Tokyo Tribunal.

45. Mr. YANKOV said that the Special Rapporteur's first report (A/CN.4/364) had provided a sound basis for discussion and stimulated new ideas. The division of opinion apparent at the current stage of the work should be considered a positive phenomenon, since it offered grounds for reflection and an exchange of views. It was perhaps inevitable that the debate had, in substance, followed the main trends as they emerged from the discussions in the Sixth Committee of the General Assembly. Another major contribution of the report was that it had encouraged further exploration of various important aspects of the topic. Without necessarily sharing all the views expressed in the report, he acknowledged the importance of the questions posed by the Special Rapporteur in its concluding section.

46. In replying to those questions, he wished first of all to affirm that consideration of the question of offences against the peace and security of mankind and elaboration of a code reflecting the new political realities were both timely and feasible. The proposed instrument should be prepared on the basis of the 1954 draft code, taking into consideration the development of international law since that time and, more particularly, the Definition of Aggression adopted by the General Assembly,²³ the recent development of humanitarian law, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,²⁴ the International Convention on the Elimination of All Forms of Racial Discrimination,²⁵ the International Convention on the Suppression and Punishment of the Crime of *Apartheid*²⁶ and other relevant international instruments relating to international security and the prevention of nuclear war.

47. As to the scope of the future code *ratione materiae*, he acknowledged that, if work was resumed on the basis of the 1954 draft, the scope of that draft should be extended to such crimes as racism, racial discrimination and *apartheid*, acts damaging the environment in a manner which threatened the security of mankind (as provided for in the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques of 1977²⁷), the use of nuclear and other weapons of mass destruction, etc. Codification should, in other words, be confined to offences which, by their magnitude and gravity, constituted breaches of peace and security or threatened the peace and security of mankind. In that connection, the Commission would at some point have to proceed to a close scrutiny of the relevant international instruments in order to establish a list of such offences. It should adopt a cautious and circumspect approach in order to avoid unnecessarily broadening the scope of the code. He agreed with the view put forward by the Special Rapporteur and supported by Mr. Calero Rodrigues (1758th meeting) and other members of the Commission that only offences against peace and security *stricto sensu* should be taken into consideration.

48. A realistic approach was required with regard to the scope of the draft code *ratione personae*. Two preliminary questions had to be answered. The first pertained to the Commission's previous position, as reflected in the draft of 1954, and more specifically, to the question whether, under article 1 of that draft, only individuals could be responsible for offences against the peace and security of mankind. The question was not only of theoretical and historical value; its consideration could provide the Commission with relevant material for a possible

²³ See footnote 9 above.

²⁴ See footnote 21 above.

²⁵ United Nations, *Treaty Series*, vol. 660, p. 212.

²⁶ See footnote 11 above.

²⁷ General Assembly resolution 31/72 of 10 December 1976, annex; see also United Nations, *Juridical Yearbook 1976* (Sales No. E.78.V.5), p. 125.

decision. The second question pertained to the feasibility and advisability of going further than the 1954 draft at the present time.

49. With regard to the first question, he was of the opinion that the Commission had deliberately confined the scope of the draft code to individuals and had explicitly excluded groups, States and other entities from the subjects of law incurring international criminal responsibility. In support of that assertion, he quoted from the report of the former Special Rapporteur, Jean Spiropoulos,²⁸ and from the Commission's commentary to article 1.²⁹ Such being the case, it was permissible to ask whether any new developments had occurred since 1954 which might justify extending the scope of the instrument *ratione personae*. In any event, the view expressed by some members of the Commission that article 1 of the 1954 draft code did not confine criminal responsibility to individuals was clearly unfounded.

50. Nor was there any contradiction or incompatibility between the personal character of criminal responsibility and the nature of the offences listed in article 2, which used the expression "by the authorities of a State". The convincing reasoning contained in the report of the former Special Rapporteur³⁰ showed that, although the Commission had been cognizant of the connection between the two, it had adhered to the view of the Nürnberg Tribunal to the effect that it was men, not abstract entities, who committed crimes which required punishment under international law.

51. A measure of caution and realism was indispensable when considering the criminal responsibility of subjects of law other than individuals. The question was not whether State organs or authorities could commit a criminal act, but who should be punished and by whom. It was not, of course, possible to exclude all reference to States, but the question of implementation was paramount.

52. In dealing with that question, the last of those posed by the Special Rapporteur, the Commission should again display the necessary wisdom and realism. There were a variety of possibilities: recourse to judicial organs set up by international conventions to try specific categories of international crimes, recourse to national courts, the establishment of *ad hoc* tribunals through international treaties, or other similar institutions. For the time being, and before the General Assembly had taken a political decision in the matter, the Commission should not commit itself to a particular course but confine itself to emphasizing the close connection between the draft code and its institutional aspects.

53. Lastly, he said that he preferred the inductive method without, however, ruling out altogether the possibility of drawing up general principles and criteria. The Commission should exercise great caution in drawing analogies with internal penal law. The 1954 draft code

could provide a useful basis for work, provided that the list of offences contained in article 2 was revised to take account of current political realities and the development of international law.

54. In conclusion, he said that the Commission should objectively reflect in its report the diversity of views expressed and should seek further instructions from the General Assembly on the question of jurisdiction.

Organization of work (continued)*

MEMBERSHIP OF THE PLANNING GROUP

55. Mr. YANKOV (first Vice-Chairman of the Commission) proposed that the membership of the Planning Group should be the following: Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Jacovides, Mr. Malek, Mr. McCaffrey, Mr. Reuter, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov and Mr. Yankov. The Group was open-ended and other members of the Commission were welcome to attend its meetings.

It was so agreed.

The meeting rose at 1.10 p.m.

1761st MEETING

Monday, 16 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, 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, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued) (A/CN.4/364,² A/CN.4/365, A/CN.4/368, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. McCaffrey expressed appreciation to the Special Rapporteur for his clear and concise report (A/CN.4/364) and his masterful introduction, both of

²⁸ *Yearbook* . . . 1950, vol. II, pp. 260–261, document A/CN.4/25, chap. III.

²⁹ *Yearbook* . . . 1951, vol. II, p. 135.

³⁰ *Yearbook* . . . 1950, vol. II, p. 261, document A/CN.4/25, paras. 53–56.

* Resumed from the 1755th meeting.

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

which had distilled a very difficult subject down to its essential points, presented a balanced view of a not uncontroversial topic and focused the Commission's attention on the three fundamental issues that now had to be discussed, namely the scope of the draft, the methodology of codification and the implementation of the draft code.

2. The topic under consideration was one with which his own country had some historical connection, as the first Special Rapporteur, Jean Spiropoulos, had noted in his first report in 1950,⁴ and as Mr. Malek had pointed out at the Commission's 1758th meeting. The idea of a code of offences against the peace and security of mankind had been expressed for the first time in correspondence between the United States member of the Nürnberg Tribunal, Justice Biddle, and President Truman, in which Justice Biddle had suggested that the time had come to draft what he had referred to as a code of international criminal law. President Truman had replied that that would be a fitting task to be undertaken by the United Nations and had expressed the hope that the United Nations would "reaffirm the principles of the Nürnberg charter in the context of a general codification of offences against the peace and security of mankind".⁵

3. Acting on President Truman's proposal, the United States delegation had submitted a draft resolution to the General Assembly at its first session calling for the submission of the matter to the Committee on the Codification of International Law. The General Assembly had adopted that draft resolution⁶ and, at its second session, had entrusted the Commission with the task of formulating the principles of international law recognized in the Charter and Judgment of the Nürnberg Tribunal and preparing a draft code of offences against the peace and security of mankind.⁷

4. A fundamental decision determining the method of approaching the subject had been taken by the first Special Rapporteur and the Commission in 1950, as reflected in paragraph 1 of the Special Rapporteur's first report, which read:

1. There were two methods of approaching our subject: one was to elaborate a text with detailed substantive and procedural provisions, an "ideal" draft, similar to the penal codes of municipal law, without paying any regard to the question whether such a draft would have any chance of obtaining the approval of the governments. The other consisted in the elaboration of a text which, based on a realistic approach to our task, could serve as a useful basis of discussion at an international conference. We did not hesitate as to the choice. The General Assembly, directing the International Law Commission to prepare a draft code of offences against the peace and security of mankind, could have in mind but the second method of approach.⁸

5. In his view, the last sentence of the paragraph which he had just quoted was as true today as it had been in 1950 and the Commission would be derelict in its duty not to make the same choice that had been made by its predecessor in 1950. Indeed, the draft code of offences was a subject whose importance to the international community was far too great to allow it to be approached on a strictly idealistic level with no thought being given to its practical utility as a basis for discussion by Governments. The recent unfortunate experience in Vienna with the articles on succession of States in respect of State property, archives and debts⁹ stood as a warning in that respect. The draft code was a subject whose importance to the international community was far too great to allow it to be diluted by the introduction of a whole array of purported offences, so that it became just another aspirational document which stood no real chance of being accepted by all the essential components of the international community.

6. The question of the scope of the draft code consisted of two parts. It must first be determined to what acts, activities or practices the draft code should apply, since it was the determination of the acts, activities and practices which constituted offences that was at the heart of the Commission's enterprise. It must then be determined whether there was any justification for a departure from the position taken by the Commission in the 1954 draft code that the code applied not to legal entities, but to individuals.

7. In his first report, the first Special Rapporteur had noted that the Committee on the Progressive Development of International Law and its Codification had originally conceived of the codification project as having three distinct elements, namely the codification of the Nürnberg Principles, the codification of offences against the peace and security of mankind and the codification of "international penal law", which had been described as concerning "every crime in which there was an international element".¹⁰ The international penal code aspect of the project had, however, been dropped and had not been referred to in General Assembly resolution 177 (II). Thus, unless the position of the General Assembly had changed in that regard—and there was no clear indication that it had—it would appear that the Commission should exclude from the scope of the draft code any matters that would fall within such an international penal code. The first Special Rapporteur had concluded, with regard to the intention of the above-mentioned resolution, that the "code of offences against the peace and security of mankind" was "intended to refer to acts which, if committed or tolerated by a State, would

⁴ *Yearbook* . . . 1950, vol. II, pp. 255–256, document A/CN.4/25.

⁵ United States of America, *The Department of State Bulletin* (Washington, D.C.), vol. XV, No. 386 (24 November 1946), p. 954.

⁶ General Assembly resolution 95 (I) of 11 December 1946.

⁷ General Assembly resolution 177 (II) of 21 November 1947.

⁸ *Yearbook* . . . 1950, vol. II, p. 255, document A/CN.4/25, para. 1.

⁹ The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts was signed on 8 April 1978. For the text of the Convention, see A/CONF.117/14.

¹⁰ *Yearbook* . . . 1950, vol. II, pp. 257–258, document A/CN.4/25.

constitute violations of international law and involve international responsibility"; he had observed that the "main characteristic of the offences in question is their highly *political* nature" and that they "normally would affect the international relations in a way dangerous for the *maintenance of peace*".¹¹ As Mr. Calero Rodrigues (1758th meeting) and other members of the Commission had pointed out at the current session, however, the criterion of the "political nature" of an offence did not seem to be very useful and probably should not play a role in the determination of the scope of the draft code.

8. The first Special Rapporteur had also concluded that questions concerning conflicts of legislation and jurisdiction in international criminal matters were beyond the scope of the draft code,¹² since they did not normally affect international relations in a way dangerous for the maintenance of peace. The draft code would thus not apply to piracy, traffic in dangerous drugs or in women and children, counterfeiting or interference with submarine cables.

9. When distilled to its essence, the draft code had originally been seen and should be seen today as being restricted to what the first Special Rapporteur had referred to as those acts in violation of international law which would affect international relations in such a way as to be dangerous for the maintenance of peace. He submitted that the scope of the topic under consideration had not changed since it had originally been defined, although the experience of the intervening years might enable the Commission to delineate the contours of the topic with greater precision. Thus, at present, it might be said that the topic related to acts which seriously interfered with the interest of the international community in the maintenance of peace and security. More specifically, an offence against the peace and security of mankind might be said, to use the wording of article 19, paragraph 3 (a), of part 1 of the draft articles on State responsibility,¹³ to result from "a serious breach of an international obligation of essential importance for the maintenance of international peace and security". That wording might be very useful in helping to answer the question of the scope *ratione materiae* of the draft code.

10. The Commission might also seek guidance in Principle VI of the Nürnberg Principles, which described as "crimes under international law" crimes against peace (which might today be taken to include not only wars of aggression, but also acts of aggression); war crimes; and crimes against humanity (which might today be taken to include gross violations of human rights).¹⁴ Those three categories of acts would appear to be those that would be most commonly accepted as constituting offences against the peace and security of mankind and would also seem to

fit the criterion of article 19, paragraph 3 (a), of part 1 of the draft articles on State responsibility.

11. In seeking a test or criterion for offences against the peace and security of mankind, the Commission might, as Sir Ian Sinclair had suggested (1757th meeting), draw inspiration from the technique employed in the context of article 19 of part 1 of the draft articles on State responsibility to distinguish more serious breaches of international law from relatively less serious breaches. Paragraph (61) of the Commission's commentary to article 19¹⁵ explained that the criterion formulated in paragraph 2 of that article for determining what it called—he thought inaccurately—an international "crime" had two aspects. Those two aspects would be useful to the Commission in its attempts to define the substantive scope of the draft code.

12. The first aspect was "the requirement that the obligation breached shall, by virtue of its content, be essential for the protection of fundamental interests of the international community". Applying that requirement to the draft code, to constitute an offence against the peace and security of mankind, the obligation breached should, by virtue of its content, be essential for the protection of the fundamental interest of the international community in the maintenance of international peace and security.

13. Who, then, determined whether a given obligation was essential? That question was answered by the second aspect of the criterion formulated in article 19, paragraph 2, the commentary to which stated that "the other [aspect], which complements the first and provides a guarantee that is essential in such a delicate matter, makes the international community as a whole responsible for judging whether the obligation is essential and, accordingly, whether its breach is of a 'criminal' nature".¹⁶

14. The international community as a whole would thus have to be the judge of whether the obligation breached was essential for the protection of international peace and security and, accordingly, whether its breach was an offence against the peace and security of mankind. It was also explained in the same paragraph of the commentary to article 19 what was meant by the requirement that the obligation should be recognized as essential by the "international community as a whole":

... It certainly does not mean the requirement of unanimous recognition by all the members of that community, which would give each State an inconceivable right of veto. What it is intended to ensure is that a given internationally wrongful act shall be recognized as an "international crime", not only by some particular group of States, even if it constitutes a majority, but by all the essential components of the international community.

15. In that connection, he agreed with earlier speakers who had pointed out that the kinds of acts or practices that would qualify as "offences" under the draft code were those that shocked the conscience of all mankind. He also associated himself with the cautious and wise approach adopted by Mr. Ogiso (1760th meeting), who had sounded a warning against allowing political slogans to

¹¹ *Ibid.*, p. 259, para. 35.

¹² *Ibid.*, para. 36.

¹³ *Yearbook* . . . 1976, vol. II (Part Two), p. 95.

¹⁴ See the formulation of the Nürnberg Principles adopted by the Commission at its second session, in 1950, in *Yearbook* . . . 1950, vol. II, pp. 374-378, document A/1316, part III.

¹⁵ *Yearbook* . . . 1976, vol. II (Part Two), p. 119.

¹⁶ *Ibid.*

masquerade as legal principles. That explained the importance of a consensus by the entire international community on the offences to be included in the draft code, if the latter was not to be, instead of a real code of legal norms, an idealistic set of principles with very little chance of acceptance by Governments. More than one member of the Commission had, after all, pointed out that few, if any, States could face undaunted a test according to such principles. Finally, he shared Mr. Riphagen's view (1759th meeting) that the problems of piracy, hijacking and counterfeiting could be effectively dealt with through national courts, the exercise of whose jurisdiction could be harmonized by international co-operation in respect of extradition.

16. The second part of the question of scope, namely that of the scope of the draft code *ratione personae*, was a very difficult one whose answer was closely connected with the question of the establishment of an international criminal court and with the question of the form the draft code would ultimately take. For reasons he would discuss later in connection with the issue of implementation, he considered that it would be inadvisable, if not dangerous, to make the code applicable to individuals without, at the same time, establishing an international criminal court. That would also be true if the code was to take the form of a declaration of principles adopted by a unanimous vote of the General Assembly or by consensus, as suggested by Mr. Evensen (1760th meeting). In such a case, the code should probably be made applicable only to States. Assuming, however, that the ultimate form of the draft code would not be decided until a more advanced stage, it seemed to him that three considerations pointed to the conclusion that the subjects of the draft code should be individuals and not States, provided, of course, that an international criminal court was established and notwithstanding the fact that, as many members of the Commission had pointed out, only States or groups of States appeared to be capable of committing the offences listed in the 1954 draft code. In other words, an individual could not commit those offences alone.

17. The arguments for restricting the application of the draft code to individuals were that it should be brought into line with article 19 of part 1 of the draft articles on State responsibility; that the code would probably have a greater deterrent effect on individuals than on States; and that, if the draft code was ever to be implemented, it must apply to individuals and not to States.

18. With regard to the first consideration, the Commission had stated in paragraph (59) of its commentary to article 19 that

... it wishes to sound a warning against any confusion between the expression "international crime" as used in this article and similar expressions, such as "crime under international law", "war crime", "crime against peace", "crime against humanity", etc. . . . Once again, the Commission takes this opportunity of stressing that the attribution to the State of an internationally wrongful act characterized as an "international crime" is quite different from the incrimination of certain individuals-organs for actions connected with the commission of an "international crime" of the State. . . .¹⁷

¹⁷ *Ibid.*

The Commission had thus made a clear distinction between régimes of State responsibility for particularly serious wrongs and individual responsibility for offences such as war crimes and crimes against peace. Its commentary provided some insight into the two questions of the scope of the code: first, with regard to the scope *ratione materiae*, it indicated that aggravated State responsibility for acts characterized as international "crimes" covered a wider range of acts than did the topic under consideration; and, secondly, with regard to the scope *ratione personae*, it indicated that the responsibility of States for such crimes was covered by article 19, while the criminal responsibility of individuals was covered elsewhere. In his view, it would hopelessly and, perhaps even dangerously, confuse the issue to have two parallel and overlapping régimes of State responsibility for acts that amounted to breaches of international peace and security.

19. Referring to the second consideration, namely deterrence, he said that a number of members of the Commission had convincingly argued that a draft code which could not be implemented would be an empty gesture. The Special Rapporteur had, moreover, rightly pointed out in his report (A/CN.4/364, para. 45) that the "odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated". Of the two conclusions that followed from that observation, one was that, unless the Commission wanted the code to be a dead letter from the outset or to be enforceable only against defeated States, States should not be the subjects of the draft code. The second was that, since States should not be held to answer before an international criminal court except by the raw power of the victor over the vanquished, the code, if applied to them, would not significantly deter them and would amount to a toothless, aspirational document.

20. The third consideration led him to ask whether there was any sense in making States the subjects of the draft code if it could not be enforced against them. In considering whether States should be subject to the draft code, fundamental questions arose in connection with the relationship between the draft code and the system prescribed in Articles 39, 41, 42 and 103 of the Charter of the United Nations. Thus any system set up under the draft code and any régime of State responsibility would be subject to the Charter and the "jurisdiction" of the Security Council would preempt that of any international criminal tribunal with regard to the determination whether a State had committed an act of aggression and, if so, what the consequences would be. For all those reasons, it seemed to him that the subjects of the draft code should be individuals and not States.

21. Turning to the question of methodology, he said that, in his report (*ibid.*, paras. 55-57), the Special Rapporteur had argued persuasively for the formulation of a criterion for offences against the peace and security of mankind. For realistic and practical reasons, the criterion should not be too broad. The Special Rapporteur had recognized that point when he had stated that the Commission's task would be less arduous if it adopted a

criterion along the following lines: “an offence against the peace and security of mankind is any offence which, by its *nature*, is covered by international law, in that it infringes a lofty principle of human civilization” (*ibid.*, para. 57). That, in his own view, well expressed the essence of what the draft code should cover, although he would add to it the two-pronged criterion he had suggested earlier in connection with the scope of the code *ratione materiae*. With the association of those two criteria the code would have the best chance of being successful because it would be broadly acceptable to States. Once a criterion had been formulated, however, account should be taken of paragraph 55 of the Special Rapporteur’s report by prescribing in some detail the conditions and effects of individual criminal responsibility.

22. The question of the implementation of the draft code could not be divorced from the question of its scope. To do so would be tantamount to the enactment by a State of a criminal code without establishing a system of criminal courts or otherwise providing for the manner in which the criminal code was to be enforced. That could only lead to chaos, with the powerful meting out their own brands of justice. Contrary to what the scenario might suggest, he did not believe in the depravity of man, but in an area as sensitive and delicate as the one under consideration, why take chances? States would be much more likely to accept the draft Code of Offences against the Peace and Security of Mankind if they could be assured that it would be administered by an impartial tribunal than if any State into whose hands a hapless foreign official might fall could indict, try and punish that individual, with no possibility of review, according to its unilateral interpretations and findings—a situation which could well be more harmful to international peace and security than the alleged offence itself. Given today’s unstable world situation, a draft code without a court to apply it could easily become a dangerous instrument in the hands of States, providing them with a pretext for taking unjustifiable action. What Mr. Ago, the Special Rapporteur responsible for part 1 of the draft articles on State responsibility, had stated in connection with international crimes under article 19 of these draft articles, namely that the “existence of an international crime should always be established by an international instance”,¹⁸ was all the more true in the case of offences under the draft code.

23. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his very thorough report on the draft Code of Offences against the Peace and Security of Mankind. The Special Rapporteur had traced the history of one of mankind’s greatest pieces of hypocrisy. The offences covered by the 1954 draft code were not new; some, thought to have vanished forever, were now reappearing in the course of colonial wars in which mercenaries trained for crime were used. The Nürnberg trial was more the expression of *vae victis* than a desire to establish rules of law. The request for the formulation of the “Nürnberg Principles” had been an attempt to justify vengeance and,

while punishing the Nazis’ abominable crimes had been a necessity, other offenders were today committing equally serious crimes with impunity. In his first report, the Special Rapporteur had stated that crimes against the peace and security of mankind could be attributed to individuals and also to States or organizations (A/CN.4/364, paras. 42–46). Who was today bringing down Governments in Latin America and causing the death of thousands of people? Some invoked a moral duty to justify such acts; that “moral” duty was akin to the divine right of kings. The crimes in question perhaps went unpunished for racial reasons.

24. The Commission had received a mandate to elaborate a Code of Offences against the Peace and Security of Mankind. It could define the crimes and indicate the corresponding penalties, but could the code ever be implemented? For law to be applied in an equitable manner, all its subjects must be equal before it. The very basis of international law lay in the Charter of the United Nations, but some States remained outside the law.

25. Some members of the Commission had expressed the opinion that the draft should be confined to crimes committed by individuals. However, when committing offences, individuals could act as organs of a State. The 1954 draft recognized among the crimes against the peace and security of mankind incursions by armed bands within the territories of a State organized or encouraged or tolerated by the authorities of another State; activities calculated to foment civil strife in a State and undertaken or encouraged by the authorities of another State; the annexation by the authorities of a State of territory belonging to another State, by means of acts contrary to international law; and 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. Consequently, as of 1954, crimes against the peace and security of mankind could be attributed to States. Since the Nürnberg trial, no such crimes had been committed by small States; the latter had on the contrary been the victims of such offences. What was the use of elaborating a code, given that those who could violate it would never be punished either as individuals or as States? It was doubtless possible to elaborate a draft code within certain limits and, in particular, to define the offences. For the rest, it would be best to request instructions from the General Assembly. The draft code might have a use in the future: in case of conflict, the victors could hang the vanquished without the possibility of the rules *nullum crimen sine lege* and *nulla poena sine lege* being invoked against them.

26. Mr. FLITAN said that the code should contain a provision to the effect that any action directed against the peace and security of mankind was an offence; the obligation for States to use the peaceful means provided in the Charter for the settlement of their disputes (good offices, mediation, etc.) should also be included as a binding legal rule. Any State which failed to live up to that obligation would be committing an offence for which it would be held responsible.

¹⁸ *Yearbook* . . . 1976, vol. I, p. 60, 1371st meeting, para. 37.

27. During the discussion, some members of the Commission had expressed the opinion that the draft code to be elaborated should apply only to individuals, like the draft code of 1954. He recalled that, during the debate in the Sixth Committee of the General Assembly, many Member States which supported the elaboration of a draft Code of Offences against the Peace and Security of Mankind had said that the 1954 draft, now almost 30 years old, had shortcomings and that account must be taken of developments since then, and particularly of the many international legal instruments adopted in the meantime (see A/CN.4/365, paras. 50-52). Some provisions of the 1954 draft code had been considered too vague or too general. In addition, as some members of the Commission had pointed out, certain acts considered as offences against the peace and security of mankind could be committed only by States—annexation, for instance. In the Sixth Committee, emphasis had been placed on the preventive and deterrent role of the code to be elaborated; it was better to prevent offences against the peace and security of mankind than to have to repress them (*ibid.*, paras. 14-18 and *passim*). To confine the scope of the future code to individuals would be to fall short of the targets set by the General Assembly, to neglect the need for the code to have a preventive and deterrent value and to ignore the development of the international community over the past 30 years. Present conditions were more favourable to the elaboration of a code than those existing in 1954; there were new States Members of the United Nations which were capable of successfully elaborating the code.

28. Finally, the world contained super-Powers, medium-level States and small States. The super-Powers could resort to force to defend their interests, but that was not true of the great majority of other States. They, the medium or small States, wanted some morality to be introduced into international life and some justice to be applied in it. In the interests of those States, the scope of the draft code should include States and other legal entities.

29. Mr. YANKOV said that it might be advisable for the Commission to decide whether the compendium of relevant international instruments (A/CN.4/368) should be examined by the Special Rapporteur alone or whether he might need the assistance of a small working group in presenting conclusions and recommendations.

30. Observing that the acts enumerated in the 1954 draft code could be committed either by States, acting through Government agencies or institutions, or by individuals, he expressed doubt whether the structure of the international community had changed so much since 1954 that States could now be called before an international tribunal to account for criminal acts. There had, of course, been changes in international relations and in international law since 1954, but they had not affected the structure or the foundations of the international community of States. Even the process of economic and political integration in various parts of the world had not altered the structure or the institutions of the international community.

31. The problem was not whether acts constituting offences against the peace and security of mankind could be attributed to States, but rather, whether the draft code could be effective if its main subjects were States, which would not accept a draft code easily. Indeed, they were already reluctant to accept the jurisdiction of the ICJ. In the existing political and legal order, the United Nations was perhaps the only global institutional system for collective preventive and enforcement measures relating to the maintenance of international peace and security. The competent organ vested with primary responsibility for adopting effective measures that might or might not involve the use of force was the Security Council. Although the procedural functioning of the Security Council did give rise to problems, it was open to discussion whether the system provided for under Chapter VII of the United Nations Charter was ineffective and needed to be replaced by another. The problem with which the Commission had to deal was thus whether the world was prepared to take a realistic view of the question of offences against the peace and security of mankind and to formulate a draft code that would be universally applicable.

32. Mr. STAVROPOULOS said that, in his view, the compendium of relevant international instruments would be much more useful if it was accompanied by an addendum indicating which States had ratified the treaties and conventions to which it referred.

33. Sir Ian SINCLAIR supported Mr. Stavropoulos's suggestion. The addendum in question should also indicate how States had voted on the General Assembly resolutions referred to in the compendium.

34. Mr. ROMANOV (Secretary of the Commission) said that the Secretariat would make the necessary arrangements to have the addendum in question prepared and circulated at the current session. As a matter of practicality, however, it would be of great assistance to the Secretariat if States themselves could provide the necessary information on their participation in the instruments referred to in part I, section A, subsections 1 and 2.

35. Sir Ian SINCLAIR suggested that, in order to simplify the Secretariat's task, the Commission might initially confine its request to instruments of which the United Nations Secretary-General was the depositary and to General Assembly resolutions.

36. Mr. DÍAZ GONZÁLEZ said that it would be most useful to have document A/CN.4/368 and the requested addendum in Spanish.

37. Mr. BARBOZA recalled that it had been decided to distribute the English version of document A/CN.4/368 first because it alone had been available; it had been understood, however, that the document would subsequently be distributed in the other languages. Failing that understanding, he would have opposed the decision concerning the English version.

38. Mr. LACLETA MUÑOZ endorsed Mr. Barboza's remarks.

39. Mr. FLITAN said that he too wished document

A/CN.4/368 and the requested addendum to be made available in the other languages.

40. The CHAIRMAN said that the compendium contained in document A/CN.4/368 would be issued in the official languages other than English and that the Secretariat would be requested to prepare an addendum indicating ratifications of international agreements and instruments and the results of votes on General Assembly resolutions.

41. Mr. THIAM (Special Rapporteur), summarizing the discussion, said that the variety of the opinions expressed was no doubt attributable to the complexity of the topic, in which strictly technical elements were often mixed with political considerations. He wished to begin by refuting two objections. The first had been made by Mr. Ogiso (1760th meeting) and Mr. Díaz González, who had questioned the timeliness of studying the topic. The General Assembly had not only requested the Commission to pursue its study of the matter, but had emphasized the importance and urgency of the task. It was therefore not for the Commission to question the task which had been entrusted to it. Of course, it could request the General Assembly to defer study of the issue on the grounds that the time was not ripe. However, he recalled in that connection that in 1950 the Commission had considered that it was worth studying the matter and had even advocated the setting up of an international court. The second objection concerned the scope of the subject, which some considered to be too wide. He had endeavoured to study all aspects of the matter in order to avoid being reproached for having highlighted some at the expense of others and for having gone too far at an exploratory stage towards taking a stand. His intention had simply been to trigger a general discussion. On the grounds that the Commission was requested to elaborate a code, he could have confined himself to proposing the enumeration of offences against the peace and security of mankind. However, in its resolution 36/106, the General Assembly had invited the Commission to "review" the draft code of 1954, taking duly into account the results achieved by the process of the progressive development of international law. In the circumstances, it would be difficult merely to tidy up the 1954 draft.

42. The three main questions on which he had sought the opinion of members of the Commission were those of the scope of the draft code, the method of codification and the implementation of the draft. The first of those questions had been discussed at great length, both *ratione materiae* and *ratione personae*. In order to decide *ratione materiae* which offences should be codified, he had provisionally classed international offences in three categories (A/CN.4/364, para. 34), according to whether they were international by nature, by the effect of a convention, or because a State had taken part in their commission. He had stressed, however, that those categories could not always be clearly delimited in international reality. Some offences which were international by their nature were the object of conventions, such as those relating to slavery, *apartheid* or forced labour, whereas most of the offences which took on an international

character because a State was the perpetrator or accomplice were originally internal crimes. This classification had been established for analytical purposes, but far more precision would be required for the elaboration of the draft code.

43. Above all, the Commission should not stray from the work it had already accomplished. In that connection, article 19 of part 1 of the draft articles on State responsibility,¹⁹ which defined international offences, should serve as a basis for the elaboration of the draft code. It was accepted that the draft code should concern only international offences—in other words, the offences referred to in that article. However, that article applied to all international offences, whereas the draft code should cover only some of them. Criteria were needed to determine which they should be. The discussion had been particularly fruitful on that point. A great many members of the Commission had recognized that the draft should concern the most serious international offences, those which threatened the peace and security of mankind. Thus the first distinguishing criterion chosen by the majority was seriousness. It was agreed that the political element, which the Commission had not ruled out in 1954, as well as problems arising from conflicts of laws and of jurisdictions, should be left aside.

44. If the Commission took that approach, it should have no great difficulty in defining the notion of an offence against the peace and security of mankind. Draft article 19 on international crimes and international delicts contained, in paragraph 2, a definition of international crimes and, in paragraph 3, listed a number of crimes which, in his opinion, should be considered offences against the peace and security of mankind. That view was justified by the fact that, in its commentary to that article,²⁰ the Commission specified the four categories of international crimes to which paragraph 3 referred (crimes relating to the maintenance of international peace and security, to the safeguarding of the right of self-determination of peoples, to respect for human rights and fundamental freedoms, and to the preservation of certain assets essential for the progress and survival of humanity), taking the view that they were so many degrees on the scale of seriousness of international offences. The Commission could therefore now take article 19 as its basis for considering that those international crimes against the peace and security of mankind were the offences to which the draft code should apply. Once it had drawn up the list of the relevant international conventions, declarations and political position statements, it could if necessary add to the list of offences. It would probably not have to add the crimes relating to the use of nuclear weapons, as suggested by Mr. Flitan (1759th meeting), since they were already implicitly covered by article 19. If the Commission resorted to the criterion of seriousness, it would be following the method used in domestic law, where it was the degree of gravity of

¹⁹ Yearbook . . . 1976, vol. II (Part Two), pp. 95–96.

²⁰ Ibid., pp. 120–121, paras. (67)–(71).

offences which could entail, beyond the obligation to remedy them, personal punishment or infamous punishment. It would, no doubt, have to refine that criterion and to determine in particular the threshold between one degree of seriousness and another.

45. The question of the implementation of the draft code *ratione personae* was far more controversial. Some members of the Commission had spoken against the criminal responsibility of States, while many others had considered that draft article 19 did not explicitly rule out such responsibility. In view of its rather unrealistic nature, the problem could have been passed over in silence. However, he considered that the Commission might one day have been reproached for taking a different attitude from that it had adopted when drafting article 19. In that connection, it should be noted that part 1 of the draft articles on State responsibility essentially focused on the responsibility of the State. A distinction had been made in the degree of responsibility, bearing in mind what was already a long-standing doctrine, with which Soviet doctrine was not unassociated. In draft article 19, there was a clear association between the words "State" and "crime". In the commentary to that article,²¹ the Commission stressed that an act of a State might not engage the responsibility of the organs of that State and that likewise the acts of an organ of the State might not engage the responsibility of the State itself. The Commission had thus distinguished between individual and State responsibility. In the circumstances, he considered it essential to raise the question of the subjects of law to be taken into consideration in the draft code. If the Commission wished to bring its notion of general responsibility into line with its notion of the criminal responsibility of the State, it had to take account of draft article 19. As Mr. Reuter had pointed out (1757th meeting), perhaps two régimes of responsibility would be established. In that connection, it would be interesting to hear the opinion of the Special Rapporteur responsible for part 2 of the topic of State responsibility.

46. The fact that the problem had been stated did not mean that it was not important to refrain from developing theories, however much they might be warranted in law or in fact. It might be asked whether it was desirable, in practical terms, to take into consideration crimes which could only be attributed to States, to which Mr. Flitan had referred (1759th meeting). A political decision would be required on that matter, and it would be interesting to learn the opinion of the political bodies which had entrusted the study of the topic to the Commission. It was not impossible to impose sanctions on a State: the Security Council and the General Assembly were empowered to recommend or take measures against States which violated international law. However, in the case under consideration it would be a question not of measures taken by political organs, but of penalties imposed by a jurisdictional body. Was the international community prepared to accept that penalties should thus

be imposed on States? The Commission could not ignore that question, even if it replied in the negative. The Nürnberg Tribunal had not been unanimous in opting for the responsibility of individuals rather than that of States. What seemed bold today might be normal tomorrow. As Mr. Jagota had suggested (1760th meeting), the Commission could state the principle of the criminal responsibility of States without for the time being providing for sanctions.

47. With regard to the method of codification, there seemed to be wide agreement that certain general principles must be stated. However, Mr. Ushakov (1758th meeting) and Mr. Boutros Ghali (1757th meeting) had spoken against such a course. In that connection, it should be noted that the difficulties encountered by the Nürnberg Tribunal had stemmed in part from the fact that certain general principles had not been proclaimed. Consequently, he considered that principles or concepts such as the non-applicability of statutory limitations to war crimes or complicity should be recognized. As for the method itself, it seemed widely accepted that it should be both inductive and deductive.

48. With regard to the implementation of the draft code, Mr. Ushakov had stressed that the Commission had not been requested by the General Assembly to deal with the matter. Some members of the Commission had said that the Commission should tackle the question, whereas many others had held it preferable to refer to the General Assembly on that point. He considered that there was a political willingness to study the problem, as the General Assembly had first consulted the Commission on the matter in 1948 and had then established two successive committees (Committees of 17) for that purpose, in 1950 and in 1952.²² It remained to be determined whether the question of the elaboration of the draft code and that of its implementation should be entrusted to separate bodies. Hitherto that method had had the drawback that the progress of work in one body had served as a pretext for delaying the work of the other. There was also the question of which body should examine the issue of penalties, a matter so thorny that the Commission had withdrawn the article devoted to it²³ from its draft code of 1954 pending the outcome of the work of the Committee of 17. In any event, it would not be bad for the Commission to tackle or at least to raise the question. It would not do for it to find itself in the same situation as in 1954, with its new draft code left in abeyance until the results of the work of another body were known. The question of the implementation of the draft code was certainly political, but once the political will of the General Assembly to study it was established, it was the technical side which came to the fore, so that the matter would rather fall within the sphere of competence of the Commission.

49. The CHAIRMAN thanked the Special Rapporteur for his summing up of the discussion and recalled that the

²¹ *Ibid.*, p. 118, para. 59.

²² See 1755th meeting, footnote 17.

²³ See 1758th meeting, footnote 19.

Commission was to resume consideration of the draft code towards the end of the session, before taking a decision on its preliminary report on the topic to the General Assembly.

50. Mr. MALEK, referring to Mr. Yankov's suggestion, said that he personally thought it might be desirable to set up a small informal working group of about five members, chaired by the Special Rapporteur, to prepare a compendium of the instruments covered by document A/CN.4/368. That compendium could be submitted to the Commission at the end of the current session or the beginning of the next session.

51. Mr. BARBOZA supported that idea, but stressed that the Commission must submit to the General Assembly, as part of its sessional report, a preliminary report, whether prepared by the proposed working group or by the Special Rapporteur, on the scope and structure of the draft code.

52. Sir Ian SINCLAIR said that it was not clear to him what the mandate of the suggested working group would be. Moreover, he subscribed to the remarks by Mr. Barboza. He suggested that it should be left to the Special Rapporteur to engage in whatever consultations he felt appropriate before submitting to the Commission a report on the basis of which the Commission could resume its discussion towards the end of the present session. He was not at all convinced that a working group would be useful at the present stage.

53. Mr. CALERO RODRIGUES agreed that it should be left to the Special Rapporteur to decide whether to undertake formal or informal consultations or to propose the establishment of a small working group.

54. Mr. YANKOV said that his suggestion had actually been a question to the Special Rapporteur concerning the best way of making use as source material of the valuable Secretariat compendium of relevant international instruments (A/CN.4/368). The purpose of such action would, of course, be to respond to the instructions of the General Assembly, which had asked the Commission to report on the problems of scope and method with regard to the topic of the draft code. He agreed with previous speakers that it should be left to the Special Rapporteur to decide how to go about preparing his preliminary report for the next stages of the Commission's discussion of the topic and, in particular, whether he needed the assistance of a small working group or preferred to engage in purely informal consultations with members of the Commission. It went without saying that document A/CN.4/368 would serve as a valuable further source of information to the Special Rapporteur and the Commission.

55. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to leave it to the Special Rapporteur to propose, if he so wished, the setting up of a working group to assist him.

It was so agreed.

The meeting rose at 6.05 p.m.

1762nd MEETING

Tuesday, 17 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stravropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (A/CN.4/357,¹ A/CN.4/363 and Add.1,² A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/Conf.Room Doc.1)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR⁴

1. The CHAIRMAN invited the Commission to consider item 2 of the agenda concerning jurisdictional immunities of States and their property and called upon the Special Rapporteur to introduce his fifth report on the topic (A/CN.4/363 and Add.1) and, in particular, draft articles 13, 14 and 15, which read as follows:

Article 13. Contracts of employment

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a "contract of employment" of a national or resident of that other State for work to be performed there.

2. Paragraph 1 does not apply if:

(a) the proceedings relate to failure to employ an individual or dismissal of an employee;

(b) the employee is a national of the employing State at the time the proceedings are brought;

(c) the employee was neither a national nor a resident of the State of the forum at the time of employment; or

(d) the employee has otherwise agreed in writing, unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

Article 14. Personal injuries and damage to property

Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to injury to the person or death or damage to or loss of tangible property, if the act or omission which caused the injury or damage in the State of the forum occurred in that territory, and the author of the injury or damage was present therein at the time of its occurrence.

Article 15. Ownership, possession and use of property

1. Unless otherwise agreed, a State is not immune from the jurisdiction of the courts of another State in respect of proceedings relating to:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, any immovable property situated in the State of the forum; or

(b) any right or interest of the State in any immovable or movable property in the State of the forum, arising by way of succession, gift or *bona vacantia*; or

(c) the distribution of assets in connection with the estates of deceased persons or persons of unsound mind or insolvency, the winding up of companies or the administration of trusts, in which a State has or claims a right or interest in any property; or

(d) any property in the possession or control of a State or in which a State claims a right or interest, if the claim is neither admitted nor supported by *prima facie* evidence, and the proceedings have been brought against a person other than a State, if the State itself would not have been immune had the proceedings been brought against it.

2. Paragraph 1 is without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of premises of diplomatic or special missions or consular premises.

2. Mr. SUCHARITKUL (Special Rapporteur) said that, when he had taken up the duties of Special Rapporteur, he had been warned by older members of the Commission of the difficulties inherent in the subject, which was extremely complex. It involved delicate problems not only of public international law but also of private international law. In the Sixth Committee of the General Assembly, Sir Ian Sinclair had sounded a similar warning regarding the nature of the topic and the abundance of the material to be sifted and analysed. For his own part, he had been comforted by the advice of Mr. Tsuruoka that, if the topic was approached in a conciliatory spirit of give-and-take, it would be possible to formulate a draft that was generally acceptable.

3. He wished to lay particular stress on certain recent developments, in the form not only of changes in legislation but of judicial decisions, legal writings and international instruments. Since the submission of his fourth report (A/CN.4/357), a significant amount of material had appeared and should enable the Secretariat to publish in the Legislative Series of the United Nations a second volume to its excellent compilation entitled *Materials on Jurisdictional Immunities of States and their Property*,⁵ one that would contain additional information on recent legislation, cases and draft international conventions. For example, the Inter-American Juridical Committee had in 1983 prepared an Inter-American Draft Convention on Jurisdictional Immunity of States.⁶ In the case of the 1972

European Convention on State Immunity, which had come into force in 1976,⁷ he had endeavoured to obtain information on the legislative background but had been informed that the material in question was of a restricted character and could not be made available. Schools of opinion among international lawyers should also be taken into account. For example, the International Law Association, at its Sixtieth Conference at Montreal in 1982, had adopted a set of draft articles proposed by its Committee on State Immunity.⁸

4. Interest among international lawyers regarding the topic under discussion went back a long time. As early as 1891, the Institute of International Law had prepared "Draft international regulations on the competence of courts in proceedings against foreign States, sovereigns or heads of State" (*projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etat étrangers*).⁹ Hence, the phenomenon of instituting proceedings against a foreign State was nothing new and the international lawyers of the past had come to certain conclusions in that connection. Plainly, the more modern trends could not be halted, nor could they be ignored. Within the past 10 years alone, a number of countries, including Australia, Pakistan, Singapore, Trinidad and Tobago, the United Kingdom, the United States of America and, recently, Canada, had enacted legislation on the subject of State immunity.

5. It was not altogether desirable that every State should adopt its own legislation on a subject of that kind, independently of other States, and the task before the Commission was to seek to harmonize the differing trends. The aim should be to uphold the basic principle of international law in the matter, namely the principle of the immunity of the State, while making provision for certain instances in which it should reasonably be set aside for a number of reasons, notably in cases of waiver and disclaimer. In that regard, he welcomed the constructive attitude taken by the Commission, one which, as he saw it, had been endorsed by the General Assembly.

6. Previously there had been some misunderstanding about his use of the inductive approach and he hoped that the present report, based firstly on judicial decisions, secondly on State practice and conventions, and thirdly on the opinion of writers, would serve to dispel those misgivings. He had not resorted to any particular theory and, in particular, had avoided the functional concept and the distinction between acts performed *jure imperii* and acts performed *jure gestionis*. He had sought to avoid unnecessary theoretical controversies and to remain faithful to available judicial precedents, while facing up squarely to the existing realities of emerging State practice.

⁷ Council of Europe, *European Convention on State Immunity and Additional Protocol*, European Treaty Series (Strasbourg), No. 74 (1972).

⁸ See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 5-10, resolution No. 6: "State Immunity".

⁹ See Institute of International Law, *Tableau général des résolutions (1873-1956)* (Basel, Editions juridiques et sociologiques, 1957), pp. 14-16.

⁵ United Nations publication, Sales No. E/F.81.V.10.

⁶ OEA/Ser.G-CP/doc.1352/83 of 30 March 1983, subsequently distributed in the Commission as document ILC(XXXV)/Conf.Room Doc.4.

7. The dangers faced by the Commission were well illustrated by the recent United Nations Conference on Succession of States in Respect of State Property, Archives and Debts,¹⁰ at which opposition had arisen between different groups, more particularly between developed States and developing States. As a result, the greatest difficulty had been experienced in achieving a general consensus. As far as the present topic was concerned, there was a danger of division between socialist and non-socialist countries, capitalist and non-capitalist countries, and worst of all, between developed and developing countries. There was, however, one important positive aspect, namely that every State was both the giver and the taker of State immunity. There was thus complete parity of interest in the subject.

8. As a citizen of a developing country, he felt bound to point out that some inequalities which developing States had complained of in the past were no longer matters of concern. He had in mind more particularly the system of extraterritorial jurisdiction, or capitulations, by virtue of which not only foreign States but also foreign nationals fell outside the jurisdiction of the territorial State. Such situations, however, had long since been done away with. At the same time, it was essential not to go to the opposite extreme and to claim that a State was absolutely sovereign within its own territory, without any limitation whatsoever. Where another State was concerned, the principle *par in parem imperium non habet* was still valid.

9. The articles presented in his fifth report came under part III of the draft, entitled "Exceptions to State immunity". If part II (General principles) were to be entitled "General provisions", the concept of "exceptions to State immunity" might perhaps be replaced by a reference to certain concrete areas of activity that required further specification of the rules of State immunity. Such an approach would make it possible to cover certain areas of future interest that did not represent exceptions to State immunity, if only because no question of immunity had ever arisen in the past. Later in the present session, he hoped to submit an addendum containing draft articles 16 (Patents, trade marks and other intellectual properties), 17 (Fiscal liabilities and customs duties) and 18 (Shareholdings and membership of bodies corporate) and, at the next session, a report containing articles 19 (Ships employed in commercial service) and 20 (Arbitration), as well as part IV of the draft, on the immunity of State property from attachment and execution, a question that was much less controversial.

10. With regard to draft article 13, the problem of contracts of employment as an exception to State immunity was closely bound up with the possibility of proceedings being instituted by an employee of a foreign State. The problem did not arise at all where no jurisdiction existed, for there was no occasion to invoke State immunity if, in the ordinary course of events, the courts would not have jurisdiction over the dispute. A similar situation arose with respect to the question of the

applicable law. In some countries, certain members of diplomatic staff were considered as parties to a contract of employment, but the contract was covered exclusively by the law of the sending State and not by that of the receiving State, in which event the courts of the latter State would have no jurisdiction.

11. As for judicial practice in the matter, it would be seen from the Italian cases cited in his fifth report (A/CN.4/363 and Add. 1, para. 44) that the local courts had been held to have no jurisdiction in matters concerning the employment of an Italian citizen by foreign State-owned entities.

12. On the other hand, the recent legislative practice of States revealed a different trend. According to section 4 of the United Kingdom's *State Immunity Act 1978*,¹¹ proceedings could be instituted against a foreign State in respect of a contract of employment where the contract was made in the United Kingdom or the work was wholly or partly performed there (*ibid.*, para. 52). That rule was none the less subject to certain exceptions, namely where the employee was a national of the State concerned or was neither a national of the United Kingdom nor habitually resident there. Canada and Singapore, as well as the Republic of South Africa, had adopted similar legislation. An analogous provision was included in article 5 of the 1972 European Convention on State Immunity (*ibid.*, para. 55).

13. The 1983 Inter-American Draft Convention provided for an exception to State immunity for employment contracts between a State and one or more individuals when the work was performed in the forum State (*ibid.*, para. 56), and a somewhat similar provision was to be found in the draft convention adopted by the International Law Association at Montreal in 1982 (*ibid.*, para. 58).

14. A State was supreme in its own territory and it therefore had the right to lay down conditions for other States employing persons on that territory. It would indeed be very difficult to prevent a State from compelling other States or State-owned bodies to comply with its labour law in such cases, yet it had to be admitted that the outcome was a confusing situation in terms of international relations. Since the aim now was to bring some harmony to differing trends, it was essential to formulate some well-balanced principles in order to safeguard the interests of all concerned, and particularly those of all Governments.

15. Just as draft article 13 dealt with the problem of contracts, draft article 14 dealt with the problem of tort. It was confined to personal injuries and damage to property and did not cover financial and economic losses. The exceptions set forth in the article were comparatively new and their legal basis was closely connected with the kind of damage claimed and the place at which the tort or wrongful act had been committed. National laws on the matter had been prompted largely by the problem of road

¹⁰ The Conference was held at Vienna from 1 March to 8 April 1983.

¹¹ United Kingdom, *The Public General Acts, 1978*, part I, chap. 33, p. 715.

accidents and, to a lesser extent, accidents arising from maritime and inland navigation. The risks involved were in almost all cases insurable and, indeed, were required to be insured. In practice, the claim by the victim was one against the insurance company and the State was not directly involved. The fact that proceedings could go ahead in the local courts did not in any way offend the sovereignty of the State concerned. In recent times, the law had changed somewhat. In the past, the essential difference had been between *acta jure gestionis* and *acta jure imperii* and State immunity had fully applied in cases where the person responsible for the accident had been acting in an official capacity. That distinction had been largely abandoned, although it was still applied in Belgium and Egypt. In that connection, it was interesting to note the developments in United States judicial practice (*ibid.*, paras. 84–85).

16. As to Government practice, section 5 of the United Kingdom's State Immunity Act 1978 precluded State immunity in cases of death or personal injury or damage to or loss of tangible property caused by an act or omission in the United Kingdom (*ibid.*, para. 88), an exception that was indeed very broad. Similar legislation had been enacted or was being drafted in several other common-law countries. Article 11 of the 1972 European Convention contained an analogous provision (*ibid.*, para. 92), but it should be noted that the provision in the United Kingdom Act applied to all States and not merely those that were parties to the European Convention. With regard to international opinion, article III of the International Law Association's draft convention (*ibid.*, para. 97) was akin to the European provision. The Commission would realize that, in drafting article 14, he had attempted to select salient points and pinpoint certain emerging trends.

17. In respect of draft article 15, State immunity did not apply in all cases involving property, a point that had been made as long ago as 1891 in the *projet de règlement international sur la compétence des tribunaux* of the Institute of International Law, article 4 of which drew a distinction by excluding from immunity those claims relating to real property and actions relating to inheritance.¹² By and large, the exception was based on the sovereign authority of the local State to regulate the legal relations on its territory concerning land, ships, aircraft and certain types of movable property. It should be remembered that, in most cases where an exception did apply, the foreign State appeared as a claimant endeavouring to assert its title to property or its claim to an inheritance; it was then natural that the State concerned should be deemed to have submitted to the jurisdiction of the territorial State to adjudicate on its claim. Once title had been recognized, however, the court might well decline jurisdiction thereafter.

18. With regard to Government views, he wished to draw special attention to the position in Hungary (*ibid.*, para. 125) and in Madagascar (*ibid.*, para. 126). It was gratifying to note the practice of certain States, and in

particular the legislation adopted in the United Kingdom and other common-law countries.

19. Lastly, he had introduced draft articles 13, 14 and 15 together in order to save time, but it would be advisable for them to be considered and discussed one by one.

20. Mr. CALERO RODRIGUES said he wished to make it clear that the text described in the Special Rapporteur's fifth report as an inter-American draft convention was not really an international instrument. It was a draft prepared in 1983 by the Inter-American Juridical Committee—a technical body similar to the Commission itself—and had not yet been examined by the political organs of OAS. If the Council of OAS approved the draft, it would come before the General Assembly, which would then convene a conference in order to convert the draft into a convention. At the present time, therefore, the draft prepared by the Inter-American Juridical Committee was not on the same footing as the 1972 European Convention on State Immunity, which was a binding international instrument.

21. Mr. USHAKOV drew the attention of members to the memorandum which he had prepared (A/CN.4/371) on the basis of the first four reports of the present topic. Unlike the Special Rapporteur, he did not believe that a general trend existed in favour of the concept of "limited" or "functional" State immunity. The concept of restricted State immunity was entirely without foundation, whether theoretical or practical.

22. With regard to the fifth report of the Special Rapporteur (A/CN.4/363 and Add. 1), he wished to point out first of all that it gave a wrong interpretation of the Soviet Union's position. The Special Rapporteur had himself stated in his report (*ibid.*, para. 39) that his treatment of the exception of trading or commercial activities had been criticized for not covering the practice of all Member States of the United Nations, or for distorting that of some. The Special Rapporteur had stated (*ibid.*, para. 23) quite erroneously that the rule of immunity "was from the beginning subject to various qualifications, limitations and exceptions", adding: "This is recognized even in the recent legislation adopted in socialist countries." Yet the recent Soviet legislation mentioned in the footnote relating to that assertion contained no qualification of, limitation on or exception to the sovereign immunity of States. The legislation in question recognized the complete and absolute immunity of States. Consequently, it could not be viewed as a trend towards restricting State immunity. At the Commission's previous session he had cited examples of commercial agreements concluded by the USSR in which the USSR had in fact voluntarily consented to submit its commercial representatives to foreign jurisdiction by waiving the principle of immunity only in certain instances.¹³ Furthermore, in its replies to the questionnaire circulated by the Secretariat, the Soviet Union had specified that it respected the principle of the sovereign immunity of all States and that the consent of a foreign State was neces-

¹² See footnote 9 above.

¹³ *Yearbook* . . . 1982, vol. I, pp. 187–188, 1728th meeting, para. 43.

sary in order for proceedings to be instituted against it before a Soviet court.¹⁴

23. Lastly, he suggested that the new draft articles submitted by the Special Rapporteur should be considered one by one.

24. Mr. NI, referring to the Special Rapporteur's fourth report (A/CN.4/357), said that the topic of jurisdictional immunities was particularly important, yet highly controversial. It had been discussed at considerable length both in the Commission and in the General Assembly. In the light of the comments made by delegations in the Sixth Committee, further deliberations would be necessary, since the articles should be drafted in such a way as to be acceptable to a large majority of States.

25. Of the draft articles previously proposed by the Special Rapporteur,¹⁵ articles 6 and 12 lay at the heart of the matter. As most members of the Commission had agreed, draft article 6 should be revised in order to make it clear that immunity was a rule based on the principle of sovereign equality embodied in the Charter of the United Nations. To that end, the words "in accordance with the provisions of the present articles" might be replaced by the words "except as otherwise provided in the present articles". Account might, of course, also be taken of the suggestions made by Mr. Yankov, Mr. Calero Rodrigues¹⁶ and other members. The sole purpose of revising draft article 6 would be to make it clear that immunity was subject to certain exceptions. The principle that the rule should come first and then be followed by specific exceptions had not been observed in article 15 of the 1972 European Convention on State Immunity, which read: "A Contracting State shall be entitled to immunity from the jurisdiction of the courts of another Contracting State if the proceedings do not fall within articles 1 to 14".

26. At the present stage, the crux of the matter was the question of trading or commercial activity as an exception to the rule enunciated in article 6. What constituted a commercial activity was by no means clear and the definition given in article 2, paragraph 1 (f), was far from satisfactory. What was meant by "a regular course of commercial conduct, or . . . a particular commercial transaction or act"? It had been suggested that the definition should include financial and industrial activities, as well as other economic activities, such as investment, fishing and hunting. The question of selecting a criterion for determining how an activity was to be characterized as commercial gave rise to further difficulties. At the thirty-seventh session of the General Assembly, one delegation in the Sixth Committee had pointed out that the present wording of article 2, paragraph 1 (f), was virtually identical to the corresponding provisions of the United States *Foreign Sovereign Immunities Act of 1976*¹⁷ and had drawn the

Commission's attention to the difficulties caused by their application by United States courts.¹⁸ Another delegation had rightly argued that immunity should not be denied when the activities were of a commercial nature but were conducted for specifically State purposes, such as deliveries for national defence.¹⁹ Other delegations had expressed the view that the purpose of the transaction should be taken into account. At recent sessions of the Commission, several members had also taken the view that the nature of the transaction should not be taken as the sole criterion for determining whether an activity was to be regarded as commercial. That was especially important for the socialist countries and for developing countries with planned economies, in which trading and commercial activities were undertaken by the State for the benefit of the people as a whole. The principle stated in the United States Supreme Court decision in the case *Berizzi Brothers Co. v. The S.S. "Pesaro"* (1926)²⁰ had been that the maintenance and advancement of the economic welfare of the people was no less a public purpose than the maintenance and training of a naval force. Although that decision had been overruled, the principle was a sound one.

27. Under the restrictive theory of immunity, the problem of determining what constituted a commercial activity was a source of endless dispute. Consequently, judicial decisions and national laws on the topic varied from country to country and even from court to court in the same country. They tended to diversify, rather than unify, the rules. One delegation had appealed to the Sixth Committee to help prevent a further proliferation of national legislation that was plunging international relations and trade into a state of utter chaos.²¹ Another had suggested a "legislative moratorium" while the Commission sought to complete its work on the topic.²² Indeed, during the thirty-seventh session of the General Assembly, many delegations had pointed out that a source of growing concern was the increasing tendency of some developed countries to limit unilaterally the scope of jurisdictional immunities by giving their domestic courts jurisdiction.

28. In that connection, it should be remembered that many Asian, African and Latin-American countries and many socialist countries still adhered to the unrestricted theory. Admittedly, because of the long-standing affiliation of their legal systems with those of certain western countries, a few Asian and African States had associated themselves with the restrictive theory of immunity. It was also true that, in 1960, a committee set up by the Asian-African Legal Consultative Committee had recommended that a State which entered into transactions of a

¹⁴ See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 616.

¹⁵ See footnote 4 above.

¹⁶ *Yearbook* . . . 1982, vol. I, pp. 72-73, 1710th meeting, para. 29, and p. 78, 1711th meeting, para. 35, respectively.

¹⁷ United States of America, *United States Code, 1976 Edition*, vol. 8, title 28, chap. 97.

¹⁸ *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 47th meeting, para. 54 (Mexico).

¹⁹ *Ibid.*, 38th meeting, para. 20 (France).

²⁰ *United States Reports* (1927), vol. 271, p. 562, at p. 574.

²¹ *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 44th meeting, para. 21 (Thailand).

²² *Ibid.*, 49th meeting, para. 43 (Sierra Leone).

commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions.²³ Yet, a memorandum of the same Asian-African Legal Consultative Committee, dated 11 September 1982 and distributed at the thirty-seventh session of the General Assembly,²⁴ had pointed out that a large number of Latin-American, Asian, African and socialist States had not in fact adopted the restrictive doctrine. It had gone on to assert that the State practice and the emerging trend referred to by the Special Rapporteur were confined largely, though not exclusively, to the western countries and that it was extremely doubtful whether that trend was in the interest of developing countries and whether it should find a place in the process of codification and progressive development of law on the topic by the Commission. That statement certainly deserved the most careful attention.

29. It had been maintained that acceptance of the restrictive theory was a general trend and that the absolute theory would eventually give way to the restrictive approach. Much emphasis had been placed on the judicial decisions and national laws of certain States. While it was true that such precedents and legislation abounded in the municipal systems of the western countries, they continued to be relevant only at the domestic level in a limited part of the world. In the Sixth Committee, one delegation had rightly stated that, since a large number of developing countries shared a more unqualified view of State immunity that led to a notable absence of judicial decisions in their municipal systems, excessive reliance on judicial decisions as evidence of State practice would naturally shift the balance against the developing countries.²⁵ Another third world delegation had corroborated that affirmation by saying that, although an imposing body of case law from many States provided evidence that State immunity was restrictive, any exception to a general rule of international law must be founded on analogous recognized rules and not on the domestic practice of a few States.²⁶ Still another delegation had pointed out that the long list of court decisions contained in the Special Rapporteur's fourth report (A/CN.4/357) reflected only the practice of a dozen, mainly capitalist, States and their internal judicial practice. That delegation had regretted the fact that the position of the overwhelming majority of nations, and in particular the attitude of those which were denied immunity by the courts of developed countries, had not been taken into consideration.²⁷ Asian and African States summoned against their will by the courts of developed

States often preferred to absent themselves and to suffer the consequences of judgments by default. One Latin-American delegation had complained of the requirement to be represented at great expense by a local attorney to plead in the courts of a developed State and of the possibility of being involved in endless procedural quibbles that resulted in total disregard for sovereign immunity.²⁸ Those were obvious examples of irritants to international relations.

30. It was extremely questionable whether the alleged trend towards restrictive immunity constituted a progressive development away from the absolute theory. First of all, restrictive immunity ran counter to the principle of sovereign equality embodied in the Charter of the United Nations. Secondly, restrictive practice disrupted good relations among States because it was anomalous, to say the least, for the courts of one State to judge another sovereign State without its consent. Even in the ICJ, a sovereign State could not be sued without a prior agreement to be sued in a specific case. It was unthinkable that a national law could make another sovereign State a defendant in a case without its consent. Admittedly, it might be argued that the so-called absolute theory of State immunity would place the plaintiff and the defendant foreign State on an unequal footing, but could equality between the plaintiff (an individual or entity) and the foreign State override the equality of the sovereign States? Moreover, immunity did not absolve the foreign State of its obligations. The plaintiff, however, was not left without a remedy: more often than not, arbitration or some other mode of settlement could be pre-arranged. As stated by Chief Justice Stone of the United States Supreme Court in a case relating to the Republic of Peru, national interests would be better served if wrongs to suitors that involved United States relations with a friendly foreign power were righted through diplomatic relations rather than through the compulsion of judicial procedures.²⁹

31. Again, the argument had been advanced that the trend towards restrictive immunity was irreversible, something that was not borne out by the historical facts. In his fourth report (A/CN.4/357), the Special Rapporteur had described the course of developments in certain western countries as a zigzag between unqualified immunity and restrictive immunity. The change of attitude of the Asian-African Legal Consultative Committee, to which he had referred earlier (see para. 28 above), confirmed the fact that the tendency was not always to move from general immunity towards restrictive immunity.

32. It had been asked whether the evolutionary process of the law required the positive or active participation of all States. That question could only be answered in the negative. However, if only a small number of States positively or actively participated, while the majority of States reacted unfavourably or remained committed to

²³ See Asian-African Legal Consultative Committee, *Report on the Third Session (Colombo, 20 January to 4 February 1960)* (New Delhi [n.d.], p. 68).

²⁴ The relevant chapter of this memorandum was subsequently distributed in the Commission as document ILC(XXXV)/Conf.Room Doc.6.

²⁵ *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 50th meeting, para. 68 (Bangladesh).

²⁶ *Ibid.*, 51st meeting, para. 70 (Trinidad and Tobago).

²⁷ *Ibid.*, 40th meeting, para. 70 (German Democratic Republic).

²⁸ *Ibid.*, 47th meeting, para. 53 (Mexico).

²⁹ *Ex parte Republic of Peru* (1943) (*United States Reports* (1943), vol. 318, p. 578, at p. 589).

the general rule in conformity with the fundamental principles of law, the latter could hardly be said to have acquiesced in the process, particularly when it was incompatible with their social and economic systems. Under such circumstances, general acceptance or even acquiescence could not be implied. It was difficult to see how the national laws of a few States could, in the name of international law, be imposed on the rest of the international community.

33. Accordingly, he was of the opinion that the exception of commercial activity embodied in draft article 12 was not valid. The reference to any activity conducted “partly or wholly” in the territory of a forum State was entirely unsatisfactory. In order to strike a balance, an alternative might be to draw on article 7, paragraph 1, of the 1972 European Convention on State Immunity, which was worded: “. . . if [the Contracting State] has on the territory of the State of the forum an office, agency or other establishment through which it engages . . . in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment”; action could be taken only against such an office, agency or establishment. A foreign State *eo nomine* could not be sued without its consent, but State enterprises or similar entities having independent legal personality could not claim State immunity. Consequently, it would be necessary to reformulate, in draft article 3, paragraph 1(a), the definition of a “foreign State” and, in draft article 3, paragraph 2, the criterion for determining whether an activity was commercial by reference to its nature rather than to its purpose.

34. He reserved the right to speak at a later stage on the Special Rapporteur's fifth report (A/CN.4/363 and Add.1).

35. Mr. SUCHARITKUL (Special Rapporteur) said that, when Mr. Ni had mentioned the work on State immunity done by the Asian-African Legal Consultative Committee, he had realized that he had perhaps been wrong not to refer to it in his fifth report. In 1980, Sir Ian Sinclair had given a lecture at the Academy of International Law in which he had noted that the Asian-African Legal Consultative Committee had established a Committee on Immunity of States in respect of Commercial and Other Transactions of a Private Character and that, in 1960, it had adopted the committee's final report.³⁰ The report had made the following two recommendations:

(1) State trading organizations which have a separate juristic entity under the municipal laws of the country where they are incorporated should not be entitled to the immunity of the State in respect of any of its activities in a foreign State. Such organizations and their representatives could be sued in the municipal courts of a foreign State in respect of their transactions or activities in that State.

(2) A State which enters into transactions of a commercial or private character ought not to raise the plea of sovereign immunity if sued in the courts of a foreign State in respect of such transactions. If the plea of

immunity is raised, it should not be admissible to deprive the jurisdiction of the domestic courts.³¹

At that time, the members of the Asian-African Legal Consultative Committee had been Burma, Ceylon, India, Indonesia, Iraq, Japan and Syria. Indonesia alone had expressed reservations regarding those recommendations.

36. He wished to make it clear that the memorandum prepared by the secretariat of the Asian-African Legal Consultative Committee to assist members attending the meetings of the Sixth Committee of the General Assembly did not necessarily reflect the views of the member Governments of the Asian-African Legal Consultative Committee. It merely gave an idea of the work being done by the Commission.

37. The CHAIRMAN said that he had represented the Commission at the most recent session of the Inter-American Juridical Committee, held at Rio de Janeiro in January/February 1983, and that he greatly appreciated the warm welcome he had received. On 2 February 1983, he had made a statement describing the Commission's work at its thirty-fourth session, and placing particular emphasis on the most important topics discussed.

38. In the course of his visit, a working group of the Inter-American Juridical Committee had been discussing the Inter-American Draft Convention on Jurisdictional Immunity of States, which differed somewhat from the draft now under discussion in that it was not quite so broad in scope. The Secretariat would make copies of that draft convention available to members of the Commission.³²

The meeting rose at 12.40 p.m.

³¹ See footnote 23 above.

³² See footnote 6 above.

1763rd MEETING

Wednesday, 18 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, 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. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

³⁰ I. Sinclair, “The law of sovereign immunity: Recent developments”, *Collected Courses of The Hague Academy of International Law, 1980—II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, p. 140.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/357,¹ A/CN.4/363 and Add.1,²
 A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/
 Conf. Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
 SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 13 (Contracts of employment)⁵

1. Mr. EVENSEN said that, in previous reports, the Special Rapporteur had relied on the so-called inductive method and had presented a wealth of information on the internal legislation of States and the jurisdiction of their courts. However, such jurisdiction was sometimes confusing, because it varied from country to country and even from court to court within the same State. Examples had also been provided of international conventions and draft conventions dealing either directly or indirectly with the topic of State immunity, together with the opinions of international law publicists. In his fifth report the Special Rapporteur had stated: "The inductive method has not been primarily used in the study of all the topics but is highly recommended, while on the current topic it has become the selected and respected method" (A/CN.4/363 and Add.1, para. 14).

2. A note of caution should be sounded about the danger of any over-emphasis on that method. State practice was always valuable and must be thoroughly examined by any serious student of international law, but it had obvious weaknesses, which had become increasingly apparent as a result of the technological revolution, the advent of the nuclear age, the emergence of more than 100 new States in the developing world, the disappearance of colonial empires and the division of the world into different economic systems and power blocs.

3. The Special Rapporteur himself had drawn attention to some of the weaknesses of the inductive method, particularly if it was based on State practice. Thus he had observed that resort to the inductive method had proved "most disconcerting" (*ibid.*, para. 16), had admitted that the practice of only 25 States had been available to him (*ibid.*, para. 22) and had added that, "when State immunity was considered to have been firmly established,

the world was not so divided into socialist and non-socialist, or developing and industrially advanced countries" (*ibid.*, para. 19).

4. Again, it was quite clear, as noted by the Special Rapporteur (*ibid.*, para. 17), that there were glaring contradictions and divergences in the practice of States and even in the practice within the borders of a single State. There was always a danger that State practice, particularly with regard to court decisions and internal legislation, might be misunderstood or misinterpreted. Indeed, it might be so contradictory as not to afford much guidance even if it was correctly interpreted. Since an essential part of the Commission's role was to contribute to the progressive development of international law, taking account of the trends and developments which had occurred over the past 30 years, it must be on its guard against using largely only one method of research.

5. He fully shared the view that the general principle of State immunity had been recognized in State practice as a principle of international law. Refinements with regard to all aspects of its application had been carefully elucidated in thorough and intellectually challenging reports, but in his opinion those refinements were more an expression of progressive development than of codification.

6. The formulation of draft article 13, on contracts of employment, had to some extent drawn on the precedents of the United Kingdom's State Immunity Act 1978⁶ and the 1972 European Convention on State Immunity.⁷ Paragraph 1, which provided that a State was not immune from the jurisdiction of the courts of another State in cases concerning contracts of employment, had obvious merits, but a distinction should be drawn between contracts of employment relating to ordinary types of work and contracts involving the performance of official functions. A State should be immune from jurisdiction with regard to contracts of employment which involved the performance of official functions even if the official concerned was a national of the State exercising jurisdiction. That was a substantive problem that should be given further consideration. Moreover, the expression "Unless otherwise agreed" was not entirely clear. Did it refer to other provisions of the draft, to other bilateral or multilateral conventions or to express provisions of the contract of employment? If the provisions of the contract were involved, the matter was covered by paragraph 2 (d).

7. He also experienced some difficulties regarding the words "failure to employ an individual" in paragraph 2 (a). Surely it was not necessary to say that the State concerned was immune if it had no employment vacancies to offer, particularly since there would be no contract of employment that would give rise to the application of paragraph 1. Similarly, should a State enjoy immunity in connection with the "dismissal of an employee"? That possibility might impair the principle of the right to sue a foreign State in respect of contracts of employment. In that regard, the distinction between official and ordinary

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem.*

⁴ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

⁵ For the text, see 1762nd meeting, para. 1.

⁶ See 1762nd meeting, footnote 11.

⁷ *Ibid.*, footnote 7.

functions might be relevant. Lastly, he suggested that the words “unless otherwise agreed in writing” should be added at the end of paragraph 2 (c).

8. Mr. RIPHAGEN said that the current report (A/CN.4/363 and Add.1) contained a wealth of interesting material. It gave a balanced view of the subject-matter and he had been particularly struck by the wisdom of the remarks made by the Special Rapporteur in paragraph 25. The topic should not give rise to a heated political debate, for it was a neutral, technical one that dealt with matters of concern to all States, irrespective of their social system or level of development.

9. As to draft article 13, the problem lay in determining whether or not the exceptions to State immunity resulted from the interplay between inter-State relations governed by international law, the relationship between domestic legal systems (choice of law) and the regulation of international movements of persons, goods and services. Particular difficulties arose because domestic legal systems differed in terms of (a) the extent to which domestic *jus cogens* protected the weaker party to the contract, namely the employee; (b) the extent to which a contract of employment between an individual and the State or any other instrumentality exercising governmental authority differed from a contract of employment concluded with another employer; and (c) the extent to which a contract of employment was linked to labour law and social security legislation.

10. There seemed to be no doubt that the authorities of one State could not compel another State to continue to employ any particular individual, even when the work was to be performed within the territory of the forum State or it involved other factors connected with that State. Hence it would be irrelevant whether the work itself entailed the exercise of governmental functions. Any distinction of that kind had to be made by the domestic law of the foreign State, and the contract of employment itself would freely determine the status of the employee in that regard. Account also had to be taken of the view that the individual in question was both a servant and an employee of the foreign State. The “master-servant” relationship was a labour relationship and it was in that respect that the question of the choice of law and the connecting factor of the labour relationship with the forum State came into play. The principle was that the protection of employees by the domestic legal system of the forum State should apply to all employees working on the territory of that State.

11. How could these two points of view be reconciled? First of all, it appeared that a claim by an individual based on the fact that a foreign State decided not to employ him would clearly fall outside the jurisdiction of the forum State. Secondly, it might be advisable to examine connecting factors other than the foreign-State character of the employer and the locus of the work to be performed by the employee. From the viewpoint of protection of the employee, it was important to inquire whether the employee belonged to the local labour market of the forum State or whether he had been engaged elsewhere by the foreign State and sent out to do such work in the forum

State. That functional criterion could then be translated into various other connecting factors which were easier to verify.

12. While the recent inter-American draft convention (ILC(XXXV)/Conf. Room Doc.4) apparently recognized the locus of the work as the only relevant connecting factor, what the European Convention on State Immunity, and indeed the Special Rapporteur, regarded as relevant was the nationality of the employee at the time the proceedings were brought. If the connecting factor in the situation pointed to the foreign State, the latter had immunity from the jurisdiction of the forum State. In fact, draft article 13 went further in granting immunity than did the European Convention. Under article 5, paragraph 3, of the European Convention, the coincidence of the nationality of the employee and the “nationality” of the foreign State employer did not lead to immunity unless, at the time the contract had been entered into, the employee had had his habitual residence in the foreign State employing him. That provision of the European Convention was in keeping with the functional criterion to which he had just referred. If, at the time the contract had been entered into, the employee had had his habitual residence in the foreign State employing him and had been sent out by the foreign State to work in the forum State, he did not belong to the labour market of the forum State. It would therefore be advisable for the Special Rapporteur to consider including in the draft articles a provision along the lines of article 5, paragraph 3, of the European Convention.

13. The argument for protecting the local labour force of the forum State became less convincing when the employee neither had the nationality of the forum State nor was habitually resident in the territory of that State. Immunity should then prevail. Indeed, the European Convention did not go so far, since there was no immunity when the work had been done for an office, agency or other establishment through which the foreign State had engaged, in the same manner as a private person, in an industrial, commercial or financial activity, unless the employee, when he had entered into the contract of employment, had had his habitual residence in that foreign State. Although he himself had taken part in the elaboration of the European Convention, he would not recommend such a further limitation of immunity. If the employee in question was neither a national of the forum State nor habitually resident in that State, the additional requirement of habitual residence in the foreign State would seem unwarranted.

14. Another method of trying to reconcile the two points of view was to distinguish between the various types of relationship involved. It was possible to protect the employee without interfering in the “master-servant” relationship between the individual employee and the foreign State employer or, in other words, without forcing the foreign State to keep the individual in employment. In his own country’s legal system, for example, a court could not compel the Government to reinstate a civil servant who had been dismissed, but it could order the Government to pay the employee a sum of money by way of

compensation. The combination of leaving it entirely to the discretion of the Government to determine which individuals it accepted as its servants and of affording employees some protection against arbitrary action by their employer was not unlike the system of liability for injurious consequences arising out of acts not prohibited by law.

15. For all those reasons, he had considerable difficulty in accepting the words "dismissal of an employee" in article 13, paragraph 2 (a), a provision that granted immunity to the foreign State in respect of proceedings relating to the dismissal of an employee, regardless of the nationality and habitual residence of the employee and of the place at which the contract of employment was concluded. Dismissal was a unilateral termination of the contract and, as such, a grave breach of the contract. If immunity was granted in such an instance, article 13 might just as well be dropped altogether.

16. Like Mr. Evensen, he was uncertain about the phrase "Unless otherwise agreed" in paragraph 1 and assumed that it did not refer to a treaty between the forum State and a foreign State or to an agreement between the employee and a foreign State. Taken literally, it suggested an "agreement" between the courts of the forum State and the foreign State, but obviously that was not what was intended.

17. Turning to the question of the possible link between a contract of employment and the labour law and social security legislation of the forum State, he drew attention to two recent conflicting judgments in his own country. Two lower courts had had to deal with the situation in which a resident of the Netherlands, employed by a foreign State as a staff member of its consulate, had sued the foreign State for alleged wrongful dismissal. One lower court had granted immunity, while the other had not. The reason was that the employee had needed a court ruling only to establish the fact that he was not voluntarily unemployed and that, as such, he could claim the unemployment benefits provided for in the Netherlands' social security legislation. Admittedly, that problem could be solved by changing domestic legislation, since only the relationship between the individual resident employee and his own Government was at stake. Nevertheless, such a solution would still involve a foreign "act of State", namely the dismissal, as well as an appraisal of the relationship between the employee and the foreign State, in other words "sitting in judgment over" a foreign State. For all that, such domestic legislation could not possibly be considered contrary to any rule of international law.

18. In the matter of the regulation of international movements of persons, goods and services, Mr. Ushakov had, with apparent approval, cited in his interesting memorandum (A/CN.4/371) Ian Brownlie's remark that the theories of limited or functional immunity were all unconvincing.⁸ Mr. Ushakov had then gone on to point out:

Every State has opportunities to protect its interests adequately, *inter alia* in the sphere of its jurisdiction.

First, a State may prohibit its nationals, natural or juridical persons, from concluding transactions with foreign Governments.

Secondly, it may obtain by agreement the consent of the other State to submission to local jurisdiction in a specific category of matters. (*Ibid.*, para. 25.)

As cited in the report of the Special Rapporteur (A/CN.4/363 and Add. 1, para. 57, footnote 80), Brownlie had also said:

If a State chooses, it could enact a law governing immunities of foreign States which would enumerate those acts which would involve acceptance of the local jurisdiction . . . States would thus be given a licence to operate within the jurisdiction with express conditions and the basis of sovereign immunity, as explained in *The Schooner "Exchange"*, would be observed.⁹

19. To his mind, all the national legislation cited by the Special Rapporteur did exactly what Brownlie had suggested and what Mr. Ushakov seemed to accept, namely to give foreign States "a licence to operate within the jurisdiction with express conditions". Actually, that was only one approach to State immunity from the point of view of the regulation of international movements of persons, goods and services. It was, however, a well-known fact that, apart from treaties "liberalizing" such international movements, every State was free to determine the types and amounts of international movement to and from its territory, as well as the conditions under which such "operations within the jurisdiction" could take place, something that was particularly true in the case of the operations of foreign States. From that standpoint, the problem of jurisdictional immunities of States and their property was, in a sense, entirely spurious.

20. As in other matters of international relations in the broadest sense, it was much better for the international community as a whole to harmonize national attitudes towards State immunity. It might not succeed in bringing about a complete unification of those attitudes, but it could at least try to reach a consensus on cases in which immunity existed and cases in which it did not. The goal should, of course, be to ensure that the "grey zone" that remained was as small as possible. The Special Rapporteur deserved the Commission's full support in achieving that goal.

21. Mr. CALERO RODRIGUES said he had been very impressed by the general considerations put forward by Mr. Ushakov in his memorandum (A/CN.4/371) and by Mr. Ni in his statement at the previous meeting. The Commission should not embark lightly on the task of elaborating a set of draft articles that might tend to modify completely the traditional concept of State immunity.

22. The theory of restricted immunity posed truly enormous problems and it would be very difficult to deal with them if the intention was—as appropriately indicated by Mr. Riphagen—to harmonize the position of States in the matter. Yet despite its appeal from the standpoint of legal theory, the doctrine of absolute State immunity was not very widely accepted in reality. He therefore believed

⁸ I. Brownlie, *Principles of Public International Law* (2nd ed.) (Oxford, Clarendon Press, 1973), p. 326.

⁹ *Ibid.* (3rd ed., 1979), p. 334.

that, while the Commission should not endorse the doctrine of absolute immunity, it should not go to the opposite extreme and ignore its existence. That problem had already arisen with regard to the drafting of article 6 and also, to some extent, article 7.

23. In the search for reasonable solutions, the inductive approach would not suffice, for as the Special Rapporteur had repeatedly pointed out, the available information on State practice was insufficient. Nor could the Commission be content with analysing national legislation and judicial practice and trying to distil principles therefrom; it should try to develop international law, in an endeavour to secure some degree of concord.

24. Draft article 13 was a case in point. As indicated by the Special Rapporteur in his interesting observations (A/CN.4/363 and Add. 1, paras. 48–49), there was not enough evidence from State practice to justify an exception to immunity with regard to labour relations. Nevertheless, on the basis of what he saw as an emerging trend, the Special Rapporteur had drafted the article so as to embody such an exception. Some countries had recently enacted legislation that severely restricted the immunities enjoyed by foreign States, whereas others continued to adhere to the doctrine of absolute immunity, even though they were denied the benefit of such immunity in certain other States. That disparity of treatment was unsatisfactory and the Commission should indeed strive to propose a set of agreed general principles.

25. The matter of contracts of employment was clearly one area in which an exception could be made to the rule of State immunity. In his own country, Brazil, absolute State immunity was recognized by the judiciary, including the Supreme Court, but there was a tendency in the labour courts to accept jurisdiction in cases relating to the employment of Brazilian citizens by foreign Governments or their agencies. Hence there was a complete divergence between the position of the labour courts and that of the judiciary in general. The underlying reason was the special character of labour legislation, which was intended to protect individuals—an important element of social development in today's world. He concurred with that reasoning.

26. As to the drafting of article 13, however, he shared the doubts regarding the meaning of the expression "Unless otherwise agreed", which opened paragraph 1. It would not seem in any case to refer to an agreement between the parties to the contract, a point that was covered by paragraph 2 (d). Again, the terms of paragraph 2 (a) were too broad. All that needed to be specified was that a foreign State could not be obliged by a court to employ a given person or to keep a person in employment. In a case of dismissal, however, the question of compensation could arise and it could well be adjudicated on the basis of local law. Subparagraph (a) might be redrafted so as to make it clear that the rule related solely to issues of employment and reinstatement and not to claims for compensation, in respect of which the protection of local laws and local courts could be invoked.

27. The provisions on the nationality of the employee,

proposed by the Special Rapporteur in subparagraphs (b) and (c), were satisfactory. A court could not entertain a claim against a foreign State by one of its own nationals or by a person totally unconnected with the forum State.

28. Sir Ian SINCLAIR said that the reason why the task assigned to the Special Rapporteur was such a challenging one was not that there was a difference of perspective between capitalist and socialist States or between developed and developing countries. That argument was altogether too simplistic. Each State was simultaneously a giver and a taker of immunity: a giver in the sense that it had to deny the jurisdiction of its own courts in cases where immunity could properly be claimed by a foreign State, and a taker in the sense that it could seek to assert its own immunity in proceedings before a foreign court in which it was directly or indirectly impleaded. Nevertheless, it should not be forgotten that any immunity granted to a foreign State in effect represented a denial to an individual litigant of his day in court. A plea of immunity operated as a plea in bar and, as such, had to be justified by cogent reasons of public policy.

29. He would be the first to admit that such reasons applied in the case of ambassadors and other diplomatic agents. It was a matter of history that the immunity of ambassadors from the civil and criminal jurisdiction of the courts of the States to which they were accredited had been established and accepted as part of the law of nations long before the question of a corresponding sovereign State immunity had arisen. That was perfectly understandable, since an ambassador, minister or other diplomatic agent was the representative in the receiving State of the sovereign who had arranged for his accreditation. From that had developed the notion of sovereign immunity, in other words the immunity of a sovereign or Head of State from the jurisdiction of the courts of another State in respect of acts done in his capacity as a sovereign or Head of State. It had rightly been thought unnatural that an ambassador, the representative of a foreign sovereign, should enjoy jurisdictional immunity while the foreign sovereign himself might not. Hence, the personal immunity of a foreign sovereign was a by-product or offshoot of the immunity of ambassadors.

30. The doctrine of State immunity was commonly thought to derive from the judgment of Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and Others* (1812).¹⁰ A close analysis of the judgment nevertheless revealed that he had not been propounding the doctrine of absolute immunity. Chief Justice Marshall had invoked the theory that the territorial State was understood to waive the exercise of a part of its exclusive territorial jurisdiction when a foreign sovereign or the "sovereign rights" exercisable by him would otherwise be subject to that jurisdiction. That judgment was in no way inconsistent with the view that immunity might extend only so far as to secure the protection of the "sovereign rights" exercised by a foreign sovereign.

31. The high-water mark had been reached in the late

¹⁰ 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.

nineteenth and early twentieth centuries, when the courts of many countries, including his own, had developed the so-called doctrine of "absolute" immunity, which was described in that way because it always admitted of exceptions deriving from waiver or the nature of the subject-matter of the claim. Almost simultaneously, however, the courts of other States had begun to develop the restrictive theory of immunity, which had harked back to the rationale of Chief Justice Marshall's judgment in *The Schooner "Exchange" v. McFaddon* case and had drawn a distinction between the State acting in its sovereign capacity and the State acting in a non-sovereign capacity by entering the market-place as a trader. As early as 1891, the Institute of International Law had espoused some of the main elements of the restrictive theory of immunity.¹¹

32. Against that background, it was misleading to posit an unqualified rule of State immunity as a matter of *lex lata*. That position could not be sustained and the Commission's task was, as the Special Rapporteur had suggested, to take into account the various trends in State practice, not to seek to harmonize the rules governing the jurisdiction of local courts, particularly since many States might apply rules of jurisdiction which would be regarded elsewhere as exorbitant and might not lead to international recognition. The 1972 European Convention on State Immunity sought to establish a system for the recognition and enforcement of judgments and, in relation to the rules on immunity from jurisdiction, there were, in practically all instances, connecting factors sufficient to warrant such recognition and enforcement. The problem was that the Commission was not engaged in any similar parallel exercise and it therefore had to look closely at the connecting factors proposed in respect of particular provisions of the draft.

33. With reference to the judicial practice mentioned by the Special Rapporteur (*ibid.*, paras. 42 and 46-48), he agreed that there was little jurisprudence on the question of contracts of employment and it was gratifying to hear from Mr. Riphagen about a case in the Netherlands where that issue had arisen. In his review of case law in Italy, which had applied the restrictive rule for many years, the Special Rapporteur had concluded that even Italian jurisprudence provided for a rule of immunity in respect of contracts of employment. It was not certain, however, that that conclusion was entirely correct. He was, of course, aware of the *Tani* case,¹² but account should also be taken of the *Hungarian People's Republic et al. v. Onori* case,¹³ in which the plaintiff had brought an action against the Hungarian People's Republic for damages for wrongful dismissal and the Italian Court of Cassation had ruled that the nature of the plaintiff's employment, which had not involved official functions, was a decisive factor. State practice thus had to be carefully examined to

demonstrate that the idea of non-immunity in respect of certain claims arising out of contracts of employment had not simply been invented and that there was a good deal of support for a rule of non-immunity, subject to certain conditions.

34. As to the wording of draft article 13, the task had been greatly simplified by the comments of Mr. Evensen, Mr. Riphagen and Mr. Calero Rodrigues. With regard to paragraph 2 (a), he did not think that the draft should exclude proceedings relating to the dismissal of an employee, provided the employee had not been entrusted with official functions of the foreign State. It was also doubtful whether failure to employ an individual was a matter that related to a contract of employment. If there had been a failure to employ an individual, there had certainly been no contract of employment. He therefore wondered whether paragraph 2 (a) could not simply be deleted.

35. Another point related to what he had said earlier with regard to connecting factors. Paragraph 1 contained the words "work to be performed there", which would preclude the exercise of jurisdiction in respect of a contract that was made in one country and was to be fulfilled in another. It did not seem logical in that context that the connecting factor should relate exclusively to work to be performed in the forum State, whether wholly or partly. The aim was to protect individuals in the local labour-market who sought employment with a foreign State. Such employment might not be performed entirely in the foreign State, but, if the local courts had jurisdiction in respect of a contract made in the forum State, he did not think that a rule of immunity should necessarily apply. In speaking of the "local labour-market", he agreed that the conditions specified in paragraph 2 (b) and (c) should be fully applicable, but he was not sure whether, in view of the exceptions provided for in those two subparagraphs, it was necessary to retain the words "of a national or resident of that other State" in paragraph 1. However, that problem might be dealt with by the Drafting Committee.

36. Mr. FLITAN congratulated the Special Rapporteur on his excellent report on jurisdictional immunities of States and their property (A/CN.4/363 and Add. 1) and on his introductory statement (1762nd meeting), which revealed a readiness to find compromise solutions to enable the Commission to break the present deadlock. Mr. Ushakov's memorandum (A/CN.4/371) also greatly helped to clarify the subject.

37. The question was whether, faced with two opposing concepts, namely absolute immunity and "limited" or "functional" immunity, the Commission should pursue its task despite the apparently insurmountable difficulties caused by the differences in views. The fact was that the Commission was requested to prepare a set of draft articles, not a doctrinal work in which preference would be given to a particular thesis. By avoiding any formulation favouring either of the two concepts and making every effort to find a compromise, the Commission should be able to overcome those problems.

¹¹ See 1762nd meeting, footnote 9.

¹² *Tani v. Rappresentanza commerciale in Italia dell'U.R.S.S.* (1947) (*Il Foro Italiano* (Rome), vol. LXXI (1948), p. 855; *Annual Digest and Reports of Public International Law Cases, 1948* (London), vol. 15 (1953), case No. 45, p. 141).

¹³ *Repubblica popolare ungherese et al. v. Onori* (1956) (*Rivista di Diritto Internazionale* (Milan), vol. XXXIX (1956), p. 190; *International Law Reports, 1956* (London), vol. 23 (1960), p. 203).

38. With regard to article 13, it was in his opinion difficult to say, as did the Special Rapporteur, that: "In such circumstances . . . the applicable law is still the administrative law or the law governing the civil servants of the employing State as distinct from the labour law of the country in which the service is to be performed" (A/CN.4/363 and Add. 1, para. 33). A distinction had to be made between civil servants performing representational functions, for whom the applicable law was that of the sending State, and other civil servants not performing such functions, who should benefit from the exception provided for in article 13, subject to the requirements of paragraph 2.

39. As to paragraph 1, the expression "Unless otherwise agreed" should be deleted, since it was superfluous and might cause confusion. Furthermore, in view of the diverse meanings attached to contracts of employment in municipal law, the Commission should try to find a definition of that legal concept.

40. Paragraph 2 called for certain comments. In subparagraph (a), it should be made clear in the text that an employing State was in no way obliged to re-employ a dismissed employee; on the other hand, it could be required to pay compensation in the event of dismissal. Subparagraph (b) should be deleted. In subparagraph (d), the phrase "if . . . the employee has otherwise agreed in writing" duplicated the beginning of paragraph 1. The remainder of this subparagraph, which read "unless, in accordance with the law of the State of the forum, the courts of that State have exclusive jurisdiction by reason of the subject-matter", was not justified, whatever the situation, since the law of the State of the forum had no role to play in that field.

41. Mr. MAHIOU said that he would like some clarification on certain passages of the report under consideration, which was of great merit.

42. In his general considerations concerning contracts of employment (*ibid.*, paras. 28–31), the Special Rapporteur had stated the three constituent elements of a definition, namely employment by a State, the contractual relationship between the employee and the State, and the possibility for the employees to institute proceedings against the employer State before the courts of another State. Some members of the Commission had already stressed, with regard to the second element, that the concept of a contract of employment was not always very clear; the Special Rapporteur, moreover, had been right to place the expression "contract of employment" between inverted commas in the text of draft article 13. A glance at the administrative disputes procedure in certain countries showed that the concept of a contract of employment was entirely relative and that it frequently posed problems of law. That was true in Algeria, where, as applied to relations between the State and its employees, it sometimes gave rise to difficulties and doubts and the relevant case law was difficult to interpret. The tendency was to go beyond the classical distinction between recruitment through the civil service and recruitment by contractual means and move towards a concept of labour relations embodied in a general workers'

statute. Despite the efforts made along those lines by the legislature, the concept of a contract of employment was not yet clearly defined. That lack of precision could have an effect on the question of applicable law and of jurisdiction and, therefore, on the matter of State immunity.

43. The three elements identified by the Special Rapporteur were undoubtedly necessary, but perhaps they were not enough. The nationality of the employee constituted another element, one that was referred to later in the report, particularly in paragraphs 36 to 52, and was included in draft article 13. Furthermore, since employment by a State constituted one element, it would be logical for status as an employee, and particularly the nationality of the employee, to constitute another. It would undoubtedly be appropriate to include that point in general considerations relating to contracts of employment, since the connecting factor of nationality was expressly covered by paragraph 2 (b) and (c).

44. The nature of the services performed by the employee formed yet another element that might be mentioned in the general considerations. Depending on whether those services were official or not, the legal relationship between the State and the employee differed, something which could affect the content of the jurisdictional immunity of the State.

45. The Special Rapporteur also spoke of a hypothetical case concerning local staff of lower rank, one that did not "call for the application of foreign administrative law, but more appropriately the applicable local labour law" (*ibid.*, para. 36). Again, the concept of "local staff of lower rank" should be clarified, since it could be interpreted in different ways, depending on whether the local character of the staff was determined from the standpoint of nationality or of the applicable law.

46. As for the *Weiss* case (1953)¹⁴ mentioned by the Special Rapporteur (*ibid.*, para. 45), it should be stressed that it did not question a relationship between an employee and a foreign State or an international organization, but that of an employee and his own State of origin, something which did not, however, detract from the importance of the legal reasoning of the French *Conseil d'Etat*.

47. The trend towards restructuring State immunity was not perhaps as clear as it appeared from the report (*ibid.*, paras. 59–60). To use an image employed by the Special Rapporteur, absolute immunity could be compared with the course of the Mekong River, which ran through many countries and demonstrated its might by passing over and above their jurisdiction, whereas the restrictive trend was to be likened to the Thames, whose meandering path was full of obstacles that had to be overcome in order to try to reach the vast ocean of international law. Admittedly the Special Rapporteur pictured the latter trend with a great deal of caution, more particularly by stressing that judicial practice was almost non-existent and that the legal thinking was controversial. The matter therefore

¹⁴ *Weiss v. Institute of Intellectual Co-operation* (*Journal du droit international* (Clunet) (Paris), vol. 81 (1954), p. 745).

deserved more careful consideration. It was, of course, appropriate to be guided by realities and to follow an inductive method, but that method had its limits, which must be borne in mind in order to make any headway in elaborating an article on contracts of employment.

48. As to the wording of draft article 13, he agreed with Mr. Calero Rodrigues that the expression "Unless otherwise agreed" might give rise to controversy. Secondly, it was essential to clarify the notion of "contracts of employment". Thirdly, for a State to be subject to the jurisdiction of the courts of another State, something more was needed than the three conditions listed in that provision, namely for the proceedings to relate to a contract of employment, for the contract to be concluded with a national or resident of the other State, and for the work to be performed in the territory of that State. Should not the last of those conditions be qualified, in the light of the services performed?

49. Paragraph 2 (a) had already given rise to many comments. To avoid unforeseeable consequences, either with regard to State immunity or the situation of the employee, the underlying idea should be expressed more clearly. The risk in providing for immunity in the case of proceedings relating to failure to employ an individual or dismissal of an employee was that States might apply the most serious penalty, in other words, dismissal, since it enabled them to escape the jurisdiction of other States. That paradox should undoubtedly be remedied.

50. Mr. OGISO said that, before taking a position on the proposal to delete paragraph 2 (a), or only the reference to "dismissal" therein, he would be grateful for some clarifications from the Special Rapporteur. He wondered whether the phrase "failure to employ an individual" could be interpreted to cover the case of a national of the forum State who applied for employment with a foreign embassy and asked for continuation of his local social security benefits. If the embassy refused to comply with the request and accordingly failed to employ that person, the question would arise whether the matter fell within the purview of paragraph 2 (a). It would also be useful to have further information on State practice regarding the application of the local social security system to the employees of foreign State agencies.

51. Lastly, would deletion of paragraph 2 (a) signify that a State would no longer be able to assert jurisdictional immunity in the courts of another State with respect to a case of dismissal? The issue then was whether the State concerned could be sued in the courts of another State for the purposes of reinstatement of a dismissed employee, or for compensation for dismissal.

52. Mr. SUCHARITKUL (Special Rapporteur) said that the provision contained in paragraph 2 (a) was an exception to the rule in paragraph 1 and was very logical. It concerned problems of recruitment and employment of local personnel, who would generally be of the nationality of the forum State or aliens resident in its territory. A dispute could arise between an agency of a foreign State and a person who objected to a decision not to employ him. Judicial decisions relating to that type of case had recognized that the act of appointment always entailed

the exercise of a governmental function. Actually, the decision taken at that stage on behalf of the State concerned or of one of its agencies occurred before any contractual relationship was established. The decision of the French *Conseil d'Etat* in the *Weiss* case (1953)¹⁵ mentioned in the report (*ibid.*, para. 45) illustrated that point. The problem of the obligation, if any, to appoint a certain person to a post was clearly related to the exercise of governmental functions.

53. Dismissal could give rise to a claim for reinstatement and also to an action for damages based on a claim for wrongful dismissal. Case law indicated that claims for reinstatement fell outside the jurisdiction of the local courts because reinstatement, like appointment, constituted the exercise of a governmental function; that was true regardless of the rank and function of the employee concerned.

54. Mr. Ogiso had raised a very important practical point regarding the application of local labour law, including social security legislation. State practice varied considerably. Despite the efforts of the ILO, not all States had a social security system, and even among the countries that did operate social security schemes, the benefits differed a great deal. In that connection, it was necessary to bear in mind that article 33 of the 1961 Vienna Convention on Diplomatic Relations exempted diplomatic agents from social security provisions in the receiving State. A similar exemption was specified in the corresponding articles of the 1963 Vienna Convention on Consular Relations, 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. It was significant that all those instruments exonerated a foreign mission or consulate from the application of local social security legislation in respect even of domestic servants.

55. Those international instruments, however, made no mention of locally recruited staff. The situation in that respect was that errors were being made in a great many countries to apply the local social security system to locally recruited employees of a foreign Government, but exceptions were allowed in cases where an employee was a national of the sending State and did not have the nationality of the receiving State. The receiving State was thus able to enforce the application of its social security system to locally recruited employees who were its own nationals. Most embassies and foreign government agencies were usually prepared to accept that demand.

56. Generally speaking, however, such agencies were not prepared to accept the application of the local social security system in connection with nationals of a third State. Nowadays, it was not at all uncommon for such persons to be employed in an embassy or other foreign State agency. The position was that, while the receiving State had an interest in protecting persons from its own labour force—its own nationals or resident aliens—it had no such interest when it came to non-resident

¹⁵ See footnote 14 above.

foreigners. Indeed, those foreigners themselves might not wish to pay social security contributions in a country in which they were to reside only temporarily and in which they were unlikely to qualify for any benefits. Nevertheless, no clear practice had yet emerged in the matter.

57. Sir Ian SINCLAIR said that, in the light of the Special Rapporteur's explanations regarding paragraph 2 (a), the problem of the reference to "dismissal" might well prove to be one that could be settled by suitable drafting.

58. He agreed that appointments of members of a diplomatic mission within the meaning of the 1961 Vienna Convention on Diplomatic Relations, or of members of a consular post within the meaning of the 1963 Vienna Convention on Consular Relations, came under a rule of immunity. It followed that the rule in paragraph 1, relating to non-immunity, did not apply in those instances, something that should be made clear in article 13 or elsewhere in the draft.

59. He agreed with the Special Rapporteur regarding the need to deal with the problem of locally recruited employees not covered by the provisions of existing international conventions on diplomatic privileges and immunities.

The meeting rose at 12.55 p.m.

1764th MEETING

Thursday, 19 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, 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, Mr. Yankov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,¹ A/CN.4/363 and Add.1,² A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 13 (Contracts of employment)⁵ (continued)

1. Mr. THIAM stressed the practical aspect of the topic, which was to find solutions to problems that arose every day. Hence, he would refrain from engaging in doctrinal questions which came up for discussion at each session of the Commission. From the outset, some members had wondered whether a principle of jurisdictional immunity of the State did actually exist, a question that was difficult to answer without making a choice between the need to respect the sovereignty of the forum State and the need to respect that of the sending State. In the circumstances, the best course would be to aim for balanced solutions conducive to the development of international law.

2. Contracts of employment, the subject-matter of draft article 13, fell within the sensitive sphere of social legislation, which was marked by major social advances that compelled recognition by both the forum State and the sending State and were in some sense matters of public policy. For example, a State could not waive regulations concerning wages, work by children or women, night work, or weekly working hours. The forum State did not enjoy complete freedom in its relations with its workers, for it was subject to the control of its own courts; what was more, at the international level there were conventions on the subject and organizations which ensured their observance. Certain principles might even be considered to form part of *jus cogens*. Consequently, the sending State could not invoke the principle of jurisdictional immunity for the purpose of inserting in contracts of employment provisions that were contrary to the public policy of the forum State. That was the crux of the problem, which the Special Rapporteur had stressed when he had questioned the extent to which the sending State should conform to the labour laws and regulations of the territorial State. The principle of immunity could not be considered as going so far as to allow the sending State entire freedom with regard to contracts of employment. Moreover, in most countries, the entry into force of a contract of employment with a foreign State was subject to a registration procedure which afforded some means of control.

⁴ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

⁵ For the text, see 1762nd meeting, para. 1.

3. Admittedly, disputes were not very common, but they could well become more frequent. In actual fact, establishment agreements generally required the sending State to recruit local employees as far as possible, a practice which was ultimately as much in its own interest—since such employees were paid less—as it was in the interest of the forum State, which was often a developing country seeking to overcome underemployment. The increasing number of such agreements would necessarily give rise to disputes. Consequently, he could not fail to endorse article 13, inasmuch as it considered that contracts of employment should in principle form an exception to jurisdictional immunity for the sending State.

4. Generally speaking, the wording of article 13 was acceptable, but paragraph 2 (a) could give rise to difficulties, since all proceedings relating to the dismissal of an employee would be governed by the principle of immunity. Yet dismissal was precisely the greatest penalty, as Mr. Mahiou had observed (1763rd meeting), and it was difficult to see why a sending State should fail to respect the local labour code with regard to dismissal. In principle, any dismissal must be justified, so that the courts had an opportunity to exercise control by examining the reasons. In its present form, paragraph 2 (a) precluded such an opportunity.

5. Lastly, all the problems posed by article 13 were of particular importance to the developing countries, since they were nearly always the ones that found themselves in the situation of forum State. Hence it was essential to protect them, since jurisdictional immunity could, in borderline cases, be mistaken for impunity.

6. Mr. LACLETA MUÑOZ said that he would refrain from speaking on questions of principle, such as the value of the inductive method, which had led the Special Rapporteur to the conclusion that there was a general trend to restrict State immunity. In the light of his own experience, he was of the view that such a trend did exist. Indeed, that was quite logical, for in today's world States constantly found themselves acting within the legal order of another State, a legal order which was sometimes very different from their own but none the less had to be respected. That in itself was a considerable restriction on their sovereignty. Rather than engage in a discussion on such theoretical questions, the Commission should endeavour to agree on certain points so as to draft acceptable provisions. In that regard, the Special Rapporteur had in fact sought to introduce an element of progressive development of international law into the work of codification of the topic under consideration.

7. It was evident from draft article 13 that State immunity should be widely recognized but that it had its limits. Generally speaking, the provisions of the article successfully harmonized the respective interests of the two States concerned. As Mr. Thiam had observed, labour legislation could be viewed as comprising an element of public policy and as something that was strictly territorial in application. Again, the interests of the foreign State could not be ignored and it could not be compelled to keep a person in its employ.

8. The question of the requisite elements for determining whether or not the territorial State had jurisdiction had been discussed at length. Some members thought that, since the employer State exercised governmental functions, all the contracts of employment it concluded with the persons required to perform such functions were exempt from territorial jurisdiction. Others considered that there could be no exemption unless the employee himself performed those functions. Another element, included in paragraph 2, was the nationality of the employee. In addition, a few members of the Commission had stressed that draft article 13 did not take into consideration the issue of social security, one that was indeed important but should none the less be left on one side, for the application of the social security regulations of the forum State was a question not of jurisdiction but of the applicable law.

9. The wording of article 13 as a whole was acceptable. However, the expression "Unless otherwise agreed" at the beginning of paragraph 1 did not seem necessary. Not only did it fail to clarify anything, but it did not specify between which parties an agreement could be concluded. Moreover, it was difficult to see the link between the case of a contract of employment of a national of another State when the work was to be performed on the territory of that other State, as covered by paragraph 1, and the cases covered by paragraph 2 (b) and (c). It was in fact the same problem viewed from different angles, although the cases did not quite overlap. Paragraph 2 (b) and (c) concerned, respectively, the time the proceedings were brought and the time of employment, something that was not specified in paragraph 1. In view of those provisions of paragraph 2, paragraph 1 could be made less cumbersome.

10. Lastly, the situation regarding diplomatic missions was sufficiently specific to warrant separate treatment. The jurisdictional immunity of a diplomatic mission went beyond that of the State. It would be remembered that, in the course of the work of elaborating and adopting the 1961 Vienna Convention on Diplomatic Relations, the jurisdictional immunity of diplomatic missions had been considered as one aspect of the immunity of the State. As Sir Ian Sinclair had pointed out (1763rd meeting), it would perhaps be advisable to insert a special provision on the jurisdictional immunity of diplomatic missions in labour matters.

11. Mr. MALEK said he wondered whether it was technically possible to consider draft articles 13, 14 and 15 independently of the introductory part of the fifth report. In his oral presentation (1762nd meeting), the Special Rapporteur had laid more emphasis on general principles than on the articles themselves. In addition, the introductory part presented for the first time the specific areas in which limitations on or exceptions to the rule of State immunity could be recognized and applied.

12. It had been rightly noted that the topic was one of practical importance and extreme complexity. Its importance was tied in more particularly with the development of international trade. Unquestionably, the concept of the State had undergone and was still experiencing profound changes and the notions of

sovereignty and sovereign equality, on which the principle of jurisdictional immunity of States was based, were no longer viewed in the same way. Denial of immunity was becoming more and more common, and the rule of absolute immunity was merely undermining court jurisdiction in increasingly numerous and broader areas of the international legal order. It was apparent that the Sixth Committee of the General Assembly, like the Commission, had recognized, on the basis of the judicial practice of a small number of States in the nineteenth century, that a general principle of State immunity did exist, despite divergent views regarding its scope.

13. The Special Rapporteur had affirmed that the present practice of all States had been taken into consideration, practice that was prevalent throughout the world and unopposed by other States that had remained silent. The conclusion was that a principle of immunity existed and had never been considered either as an absolute rule or as *jus cogens*. Differences of opinion seemed to exist only with regard to the areas in which the principle was subject to exceptions or limitations. The Special Rapporteur had stated with equal conviction that the evolution of the law did not require the active participation of all States, a view that he himself shared, but he none the less wondered whether the silence of certain States could be interpreted as a mark of approval or disapproval. Their attitude could rather be interpreted as a lack of interest in the rule of immunity, which perhaps had never seemed necessary to them in practice. Yet the problem of granting or denying immunity would arise more and more in the future.

14. The enumeration of the spheres in which restrictions on or exceptions to the principle of State immunity could be recognized and applied seemed limitative in the opinion of the Special Rapporteur. In any event, the drafting of part III, on the exceptions to the rule, was proving ever more complex, and State practice in that regard was not encouraging. At the previous meeting, one member had suggested that it might be better to discontinue the elaboration of the draft in view of the difficulties it raised. A similar sentiment had been expressed with regard to another topic on the Commission's agenda. If the Commission was to maintain its distinguished scientific reputation, it could not on any account recommend a halt in its work on any topic, particularly when it had itself recommended inclusion of the item on its agenda.

15. The difficulties of applying the rule of immunity could not be surmounted unless national laws were brought into line with each other. In an article published under the auspices of the American Bar Association,⁶ George Kahale III had shown, with a large number of examples taken from the law of certain countries, to what extent national laws could contradict the rule of immunity or the admitted exceptions to the rule. The internal law and even the constitutions of many countries contained

provisions which, for example, both prohibited any possibility of including clauses waiving jurisdictional immunity in contracts in the public interest concluded with foreigners and also provided that the national courts were alone competent to settle any proceedings resulting from the application of such contracts.

16. Draft article 13 would seem to come under those rules which found little or no support in State practice and were the result of a relatively recent trend. It drew on the relevant provisions of the 1972 European Convention on State Immunity,⁷ which had also been the basis for laws adopted recently in various countries. The Special Rapporteur had noted that the Convention had come into force between Austria, Belgium and Cyprus on 11 June 1976 and that they, like the United Kingdom, would probably be adopting a restrictive practice. That information was disappointing, since the Convention did not seem to have aroused any particular interest in the States directly concerned.

17. If the actual principle of article 13 was admitted, the useful comments, suggestions and proposals made could all be sent to the Drafting Committee. The term "national" (*ressortissant*) was used several times, and he wondered whether the Special Rapporteur had used it deliberately in view of the broader sense attached to it in the United Kingdom's *State Immunity Act 1978*.⁸ The expression used in the French text of the European Convention was *qui a la nationalité*.

18. As to the expression "contract of employment", unlike several members of the Commission who thought that it should be defined as accurately as possible in order to avoid differing interpretations in internal law, he doubted whether such a definition was necessary or even timely. It would perhaps be sufficient to give some indication of the meaning in the commentary to article 13. The opening words "Unless otherwise agreed" were perhaps not superfluous. Their presence merely signified that the exception was optional.

19. In conclusion, he endorsed Mr. Flitan's comments (1763rd meeting) that the Commission should increase its efforts to find suitable formulations as soon as possible for reconciling the two different concepts, namely absolute immunity and restricted immunity.

20. Mr. RAZAFINDRALAMBO said that, from the outset of his work, the Special Rapporteur had stressed the importance he attached to the inductive method; but he must now recognize that that method had brought disappointment. The majority of States had not provided material that would have enabled him to establish a fairer, more complete and more balanced view of the world's different systems regarding jurisdictional immunity of States and their property. Furthermore, the Special Rapporteur had found contradictions and divergencies in the practice of the few States which had supplied information. International efforts had not arrived at any more conclusive results, since the 1972 European

⁶ G. S. Kahale III, "State loan transactions: foreign law restrictions on waivers of immunity and submissions to jurisdiction", *The Business Lawyer* (Chicago, Ill.), vol. 37, No. 4 (July 1982), p. 1549.

⁷ See 1762nd meeting, footnote 7.

⁸ *Ibid.*, footnote 11.

Convention on State Immunity was in force between only five countries and the inter-American convention was as yet simply a draft.

21. In the circumstances, one could only question the affirmation that a trend seemed to be emerging in favour of the application of internal labour law in the case of persons recruited in a given country, a conclusion that was all the more surprising in that the judicial practice cited by the Special Rapporteur tended to depict unfailing application of immunity in the field of labour relations (A/CN.4/363 and Add. 1, para. 49). For all that, the predominant place of labour and labour relations in contemporary society could not be ignored, nor could the primacy of social justice and promotion and the ideas of collaboration and human equality be denied. That was why, like many other members of the Commission, he called for prudence and an attempt to find a solution which did not favour any one theory of immunity over another and would enlist the widest possible support from the international community.

22. The Commission should first and foremost formulate draft article 6 in such a way as to recognize unequivocally that the principle of State immunity was a universally recognized rule. With that point of departure and for the sake of the higher interests of mankind, the principle could be restricted to some extent under conditions that it was for States themselves to establish. With those reservations, he could accept the exception embodied in article 13.

23. The expression "Unless otherwise agreed" in paragraph 1 could be maintained, since the proposed exceptions could be justified only if provision was made for the possibility of a contrary agreement restoring the normal operation of the rule of immunity. Furthermore, he endorsed the principle contained in paragraph 2 (d), which recognized the right of States to adopt legislation granting exclusive jurisdiction by reason of the subject-matter.

24. The criteria in paragraph 1 regarding application of the exception seemed acceptable despite the doubts expressed with regard to the exact meaning of the expression "contract of employment". Labour law, as distinct from administrative law, did in fact exist and, depending on the country, reflected more or less faithfully international labour standards, particularly those concerning the equality of the employer. Admittedly, the essential feature of governmental functions lay in the exercise of the sovereign authority of the State, but in order to remove any uncertainty, the Commission could define "contract of employment" in the commentary to article 13.

25. In respect of paragraph 2 (a), several members had observed that failure to employ presupposed the absence of a contract and did not seem to warrant a special reference. The Special Rapporteur had replied (1763rd meeting) that failure to employ was an act performed in the exercise of governmental functions and did not, therefore, fall within the jurisdiction of the territorial courts. The same argument had been adduced in the case of dismissal of an employee, but it did not seem adequate.

In the logic of the proposed system, neither failure to employ nor dismissal should *a priori* constitute cases of non-application of paragraph 1. The relevant international standards, which most States had incorporated in their national legislation by ratifying the pertinent international labour conventions, were binding and included such principles as non-discrimination and compensation for wrongful dismissal. The European Social Charter of 1961⁹ laid down an obligation to give prior notice in the event of dismissal. Non-observance of those principles could well justify proceedings before the courts of the forum State. Dismissals unquestionably lay at the root of most labour conflicts between employees and employers and, if they were removed from the sphere of application of paragraph 1, the Commission might be running counter to the principles of social justice. Hence, paragraph 2 (a) was of doubtful value.

26. As the Special Rapporteur had stressed earlier (*ibid.*), it would be advisable to make a separate provision for immunity covered by the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Convention on Special Missions.

27. Mr. USHAKOV said that the Commission was not a legislative body and, in its work of codification, and sometimes of progressive development of international law, members could not let themselves be guided by personal feelings. Their work must be founded on existing international law. When a general trend did exist, they could propose progressive provisions in the context of the development of the law. However, no trend of that sort existed with regard to the subject-matter of article 13. Some States had admittedly begun to place restrictions on the principle of State immunity in the sphere of contracts of employment, but that could not be interpreted as a trend generally accepted by all States. It was merely a trend in the internal legislation of a few countries. Others which had recently adopted legislation on labour relations were in no sense following the same course. In some instances, recent legislative provisions were entirely contradictory. It was not possible, as the Special Rapporteur had done, to rely on only some legislation and infer that there was a recognized trend in international law. Moreover, States were not free to adopt just any kind of legal text that affected international relations. A legislative trend that prejudiced the rules of international law could not be taken into account. In his opinion, the well-established trend was to ensure strict guarantees of State sovereignty by applying the theory of the absolute jurisdictional immunity of States.

28. It would be dangerous to believe that the question of contracts of employment in which a State acted as employer related in practice to the recruitment of embassy staff; the Commission should not now become involved in problems of diplomatic law. In any event, the matter did not concern consulates, permanent missions to international organizations, special missions and, still less, foreign armed forces.

⁹ Council of Europe, European Treaty Series, No. 35 (Strasbourg, 1967).

29. No distinctions could be made within a single State body between the persons who performed governmental functions. For example, a typist working in an embassy enjoyed immunity nearly as absolute as that of diplomats because of the documents she typed. It was not, however, she but the embassy that performed governmental functions. Among the staff members, the distribution of tasks allowed no distinctions to be made from the standpoint of immunity. The doubtful cases were those in which the State employed nationals of the receiving State. If it concluded a contract of employment, a State observed the terms of the contract. Indeed, legal proceedings were extremely rare and were generally settled by diplomatic means, hence the lack of available State practice in the matter.

30. When a State recruited the staff members of its embassies, consulates and diplomatic missions and they were its own nationals or aliens not permanently resident in the forum State, the applicable legislation was that of the employer State. Why should matters differ if the persons engaged were nationals of the State on whose territory the work was performed? Under private international law, unless the parties agreed otherwise, a State's own legislation applied when it concluded a sales or purchase contract. There was no reason why a contract of employment should be subject to different legislation. On the question of the applicable law, the Special Rapporteur did not, in fact, state which law was involved (A/CN.4/363 and Add. 1, paras. 34–36). Furthermore, the law of the sending State was not necessarily less favourable than that of the State on whose territory the work was performed.

31. Yet another question was whether the courts of the receiving State were authorized to settle proceedings in all cases, when in actual fact many were settled by administrative law. Article 13 referred merely to court jurisdiction and not to administrative jurisdiction. When a State recruited a national of the forum State, was it required to know all the labour law of that State? In practical terms, that was an impossible undertaking. Furthermore, before certain States had adopted legislation restricting the jurisdictional immunity of States, the situation had not been one of anarchy. The very few number of disputes that had arisen had been settled either through diplomatic channels or out of court by the foreign State and the employee. He therefore wondered why it was necessary to introduce rules which had so little practical use.

32. Strictly speaking, under the terms of draft article 13 the sending State was not exempt from the jurisdiction of the forum State. Would ambassadors be affected by them on the pretext that a contract of employment had been concluded? In actual fact, the situation of the staff of embassies, consulates, diplomatic missions and permanent missions to international organizations was governed by the relevant diplomatic conventions. As for nationals of the State in which the work was performed, they were protected by the legislation of the foreign State, which was not necessarily a law-breaker. There was no

point in subjecting foreign State employers to the judicial authority of another State for the genuinely minor disputes that might occur.

33. In conclusion, he did not find in the practice or the position of States any grounds for article 13. It was thought that a tendency could be seen to restrict State immunity. If a few national laws existed in that sense, they were contrary to international law. The national legislations that took the opposite view were far more numerous. The article had no practical or legal foundation and its general terms made no exception for diplomatic staff.

34. Mr. JAGOTA commended the Special Rapporteur on his comprehensive and instructive report (A/CN.4/363 and Add.1) and on the moderate conclusions it contained. The draft articles dealt with a sensitive question and took into account a trend which had been emerging mainly in the practice of industrialized, developed States over the past 30 years and which was being crystallized in the form of the legislation and judicial decisions adopted by those States in the past decade or so. The socialist and developing countries had, in a sense, been disturbed by that trend and, in response, had adopted a cautious attitude towards the granting of reciprocity.

35. When the Commission had begun its discussion of State immunity, it had decided that the Special Rapporteur should first indicate the rule and then indicate the exceptions to the rule. Many members had stressed that the exceptions should be defined in such a way that they would not adversely affect the rule and that they should be restrictive and restrictively interpreted and applied.

36. Draft article 13 differed from draft article 12 in that the latter was based on more abundant State practice regarding immunity and exceptions in the case of State trading or commercial activity. As far as contracts of employment were concerned, the Special Rapporteur had admitted that the inductive method had not proved very helpful and that he had been unable to find judicial decisions relating to the exception provided for in draft article 13. All the decisions cited by the Special Rapporteur upheld the principle of State immunity and, as he had noted, little evidence had been encountered of uniform State practice with regard to contracts of employment (*ibid.*, paras. 39–40).

37. The Special Rapporteur had none the less concluded (*ibid.*, paras. 59–60) that the emerging trend was to consider such contracts as an area of possible exceptions to State immunity. He had based that conclusion on national legislation, international conventions and the opinions of publicists and expert bodies, such as the International Law Association, and had noted that that trend was a positive and useful one in that it would protect the interests of local employees of foreign States who did not perform official functions and whose employment would be governed not by the administrative law or personnel policies of the foreign State, but by that of the forum State in which the work was performed and in which the contract of employment had been concluded. The local

courts would thus have jurisdiction to examine the merits of cases and rule whether or not exceptions to immunity applied.

38. The Special Rapporteur had thus dealt with the questions of the applicable law and non-immunity from jurisdiction, but had not yet discussed the third question, namely the enforceability of the decisions of local courts against foreign States. Clearly, the Commission had to determine whether there were any trends with regard to those three questions and, if so, whether they would promote or hamper friendly relations among States. It must also bear those three questions in mind in drafting the exceptions to the rule of State immunity.

39. The Special Rapporteur had said that he was concerned not with private activities or the activities of corporations but with activities carried out by a State in the territory of another State, either directly or through agencies or enterprises under its control. Hence, it had to be decided what was meant by "agencies of the State" and whether such agencies were governed by local law or by international law. The reason was that diplomatic missions, consular posts and special missions were not government agencies for the purposes of State immunity; they were encompassed by the rules of diplomatic and consular immunity. Local employees might, however, be employed by diplomatic missions, consular posts and special missions, in which case the question arose of whether they would be covered by draft article 13. As it stood, paragraph 2 (d) seemed to indicate that local law would decide the issue.

40. That matter, which should be given careful consideration before the Commission concluded its study of the topic, had arisen in a case involving one of India's embassies in a foreign State. The embassy, which employed local people as gardeners, drivers or ushers, for example, entered into contracts of employment with local employees, whose conditions of work and rights were determined by local law and custom. A local employee had claimed that he had not received due and proper notice of the termination of his employment and had initiated proceedings against the embassy. The case had been brought before a local court which had exercised jurisdiction, asserting that the person in question had been employed not by the embassy, which was an agency of a foreign State, but by the Government of that foreign State, and that the applicable law was not diplomatic immunity but State immunity, which was not recognized by the forum State. Ultimately, in the interests of maintaining friendly relations with the forum State, the embassy had decided to pay compensation to the person in question but had also addressed a note to the Ministry of Foreign Affairs of the forum State, requesting it to intervene. The Ministry had replied that it could not intervene because the local courts were autonomous and competent to apply local law as they saw fit. The final remedy had been for India to apply the same law in Indian territory. India had thus learned that, if its embassies in foreign countries could be subjected to foreign jurisdiction, it would be compelled to subject foreign embassies in its territory to the same treatment.

41. It was an example that revealed the need for a precise definition of the scope of State immunity. If diplomatic immunity was excluded from the draft, the Commission must say so clearly and not leave it to local law to decide under the terms of paragraph 2 (d). That point was particularly important because States were becoming increasingly involved in activities in other States in a variety of fields. Such activities obviously involved the employment of local staff, whose interests had to be protected as against those of the foreign State employers. Yet, at the same time, friendly relations between the States concerned must not be adversely affected. That element formed the real motivation for article 13 and it was in that connection that the emerging trend mentioned by the Special Rapporteur became relevant.

42. With regard to paragraph 1, the purpose of the expression "Unless otherwise agreed" was surely to make the exception embodied in the article a residual rule, one which could be modified by detailed agreement between the parties to the future convention to which the set of draft articles would presumably lead. Unfortunately, the wording did not make it clear that the article related only to the local employees of the foreign State. There were thus two possibilities: either the persons whose interests were being protected should be clearly identified, or the term "contract of employment" should be defined in order to indicate what types of employees were covered. The latter course would, in fact, more clearly indicate the real intention of paragraph 2 (a) by obviating the mistaken impression that the foreign State could engage and dismiss persons at will, and it would also restrict the phrase "unless . . . by reason of the subject-matter" in paragraph 2 (d), which should not give primacy to local law. Furthermore, it would be preferable to replace the word "dismissal" in paragraph 2 (a) by the words "termination of the contract". Article 13 would be acceptable, subject to those changes.

The meeting rose at 1 p.m.

1765th MEETING

Friday, 20 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Evensen, Mr. Flitan, Mr. Jagota, 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. Ushakov, Mr. Yankov.

Gilberto Amado Memorial Lecture

1. The CHAIRMAN recalled the decision taken by the Commission at its twenty-third session,¹ on the recommendation of the Sixth Committee of the General Assembly, instituting the Gilberto Amado Memorial Lecture as an annual event to keep alive the memory of that illustrious Brazilian jurist, who had for so many years been a member of the Commission. The Commission had at that time established an advisory committee to select the lecturer each year and supervise the publication of the text of his lecture. The expenses were borne under a revolving fund sustained by a generous grant from the Brazilian Government.

2. Following consultations with members, he now suggested that the Gilberto Amado Memorial Lecture Advisory Committee for the Commission's current term of office should consist of Mr. Calero Rodrigues as chairman, and Mr. Jagota, Mr. Quentin-Baxter and Mr. Ushakov as members, together with a fifth member from Africa to be named at a later stage. Mr. Gibrain, Principal Legal Officer at the United Nations Office at Geneva, would act as secretary to the Advisory Committee.

It was so agreed.

3. Mr. CALERO RODRIGUES said that he was greatly honoured by the task thus entrusted to him and, as a Brazilian, pleased that the Commission had been able to resume the tradition of the Gilberto Amado Memorial Lecture. He earnestly hoped that the tradition would be maintained in years to come, so as to perpetuate the memory of his eminent predecessor.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,² A/CN.4/363 and Add.1,³ A/CN.4/371,⁴ A/CN.4/L.352, sect. D, ILC(XXXV)/ Conf. Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR⁵ (continued)

ARTICLE 13 (Contracts of employment)⁶ (continued)

¹ *Yearbook* . . . 1971, vol. II (Part One), pp. 354–355, document A/8410/Rev. 1, paras. 164–169.

² Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

⁴ *Idem*.

⁵ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12; *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

⁶ For the text, see 1762nd meeting, para. 1.

4. Mr. McCAFFREY commended the intellectual probity with which the Special Rapporteur had been careful not to engage in advocacy and the frankness with which, in his fifth report (A/CN.4/363 and Add.1), he had pointed to relevant decisions and, in some cases, the lack of any.

5. For his own part, he joined with Mr. Evensen and Mr. Calero Rodrigues (1763rd meeting) in sounding a note of caution not to abuse the inductive method, something the Special Rapporteur had wisely avoided in endeavouring to harmonize the positions of States on the present topic. Clearly, it would be of no help to Governments if the Commission were to proclaim an absolute rule, either of immunity or non-immunity. In order to be of real assistance to States, the draft articles must present a realistic picture of present-day State practice and of the direction in which it was moving.

6. Without wishing to repeat his remarks at the previous session on the general subject-matter, he deprecated the tendency to view the topic in terms of black and white. Indeed, the very use of such expressions as “absolute immunity” and “restricted immunity” had the drawback of erroneously suggesting that there were two diametrically opposed views on the topic. Such an approach was divisive, in that it emphasized the areas of difference rather than the areas of common agreement, when the latter were actually greater, as could be seen from the very successful and very functional 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations.

7. A unitary approach would be for the Commission to start from the principle of the sovereign equality of States, on which there was general agreement. It then followed that one sovereign could not enter the territory of another without the latter's consent, which was given in order to meet the functional need for diplomatic and other kinds of relations. The crucial point, however, was that such consent need not be unqualified. It could be, and nearly always was, subject to certain expressed or implied limitations or conditions. As Chief Justice Marshall had pointed out in his decision in *The Schooner “Exchange” v. McFaddon and Others* (1812),⁷ the jurisdiction of courts was a branch of the jurisdiction possessed by the nation as an independent sovereign power and all exceptions to the full and complete power of a nation, within its own territories, must be traced to the consent of the nation itself, for they could flow from no other legitimate source. Chief Justice Marshall had gone on to observe that, since a sovereign was in no respect amenable to another, it could be supposed to enter a foreign territory only under a “licence”. The term “licence” had been used advisedly because, in United States domestic property law, it signified a revocable permission or privilege given by a landowner to another to enter his land. Not only was a licence by its very nature revocable, but it could be, and usually was, given subject to conditions. Hence the remark by Brownlie, cited by the Special Rapporteur (A/CN.4/363 and Add.1, footnote 80), that a State “could enact a law governing immunities of

⁷ See 1763rd meeting, footnote 10.

foreign States which would enumerate those acts which would involve acceptance of the local jurisdiction" and that "States would thus be given a licence to operate within the jurisdiction with express conditions. . . ."⁸

8. The question now was to determine to what extent—beyond the area covered by the 1961 and 1963 Vienna Conventions—there was a trend towards uniformity in the licences given by States to other States to enter their territory or transact business therein. The essence of draft article 13 lay in the extent to which States made others subject to the jurisdiction of their courts in labour disputes as a condition for granting a licence to enter their territory.

9. Unquestionably, it was in the interest of the host State to leave the diplomatic personnel of the sending, or "guest", State as unencumbered as possible in the performance of their official functions; and in view of the common interest in the smooth functioning of diplomatic relations, it was usually labour disputes not directly involving diplomatic personnel that raised problems. Yet the host State also had an interest in providing remedies for wrongs committed within its borders, a concern that would give way to the need for smooth inter-State relations when the aggrieved employee was a national of the sending State acting in an official capacity.

10. There were, however, a number of other circumstances, for instance when the employee was a national of the foreign State but not serving in an official capacity, when the employee was a national of the host State but not serving in an official capacity, or again, when the employee was a national of the host State but serving in an official capacity. Furthermore, there was a problem of dual nationality, for the employee could be a national of both the host State and the guest State and could be employed either in an official or a non-official capacity. Lastly, the employee might be a national of a third State, a resident or non-resident in the host State and, in either instance, employed in an official or non-official capacity. In cases involving a national of the guest State, the host State was unlikely to have an overriding interest in asserting jurisdiction and the guest State would normally determine how the labour grievance of one of its own citizens should be redressed.

11. The more difficult questions concerned cases in which the employee was a national of the host State or of a third State. Where he was a national of the host State, the latter would obviously wish to assert jurisdiction if the employee had not been engaged to perform official functions and if smooth diplomatic relations would not be significantly disrupted. Even in the rare cases where the person performed official functions, the host State's interest in providing a forum for its own national would be likely to override its concern not to impede diplomatic intercourse.

12. In cases of dual nationality, the question whether the employee was serving in an official or non-official capacity could be important, as could the additional factor of whether, by virtue of citizenship or residence in

the host State, he would become a charge on that State because of his inability to obtain redress from the employer State. Where the employee was a national of a third State but a resident of the host State, the latter would have an interest in providing a forum only to the extent that residence conferred a right to some form of public support, such as unemployment benefits. Clearly, the host State would have little interest in a case where the employee was neither one of its nationals nor a resident in its territory, and it would therefore decline jurisdiction.

13. These interests were generally reflected in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. Article 37, paragraph 2, of the 1961 Vienna Convention specified that members of the administrative and technical staff of a diplomatic mission were not exempt from civil and administrative jurisdiction for "acts performed outside the course of their duties". Moreover, under article 31, paragraph 1(c), diplomatic agents themselves did not enjoy immunity with respect to actions "relating to any professional or commercial activity exercised . . . outside [their] official functions", a provision that should perhaps be contrasted with Mr. Ushakov's view (1764th meeting) that it was not possible to distinguish between official and other functions. He could not but agree that the draft articles should in no way interfere with the subject-matter of the 1961 and 1963 Vienna Conventions, as was already provided for in draft article 4, but an effort should nevertheless be made to fill any gaps in those instruments, such as the case of locally recruited employees covered by draft article 13.

14. As to the applicable law, some members considered that the law of the employer State would always apply to the contract of employment, but the position was not so simple as in tort cases, to which the well-established *lex loci delicti commissi* rule applied. The contract of employment, and the employment relationship itself, would nowadays probably be governed by the law of the State with which the contract had the "closest connection" or "most significant relationship". Hence, it was necessary to evaluate a number of factual contacts, such as the place of contracting, the place of performance, the domicile, residence and nationality of the employee, the question of whether he had been engaged to perform official functions, and the place of a pre-existing relationship between the parties, if any. The assessment would have to be made in the light of the interest of the two States in maintaining smooth diplomatic relations, of the employer State in regulating the employment relationship (the stronger interest where official functions were concerned) and of the host State in protecting employees within its jurisdiction (stronger for locally recruited personnel). Such an analysis might well lead, at least in the case of locally recruited employees, to application of the *lex fori*.

15. Draft article 13 generally took into account the interests of the States involved. It largely accomplished its purpose of providing basic signposts by subjecting the employer state to the jurisdiction of the host State in suits entered by nationals or residents of the host State, but he

⁸ *Ibid.*, footnote 9.

did not favour the further condition set out in the concluding words of paragraph 1 of article 13, namely that the work should be performed in the host State, whose interest in providing a forum for its nationals or residents would not be significantly diminished by the fact that the work was to be performed elsewhere. This condition was also not justified as a jurisdictional connecting factor since care should be taken to avoid prescribing rules of jurisdiction *ratione materiae* or *ratione personae*. In the cases covered by paragraph 2 (b) and (c), the host State was unlikely to display an interest except perhaps in the rare instances in which the employee, although a national of the guest State, was a habitual resident of the host State and did not perform any official functions.

16. He agreed that the opening proviso “Unless otherwise agreed” in paragraph 1 was unnecessary, bearing in mind more particularly the provisions of paragraph 2 (d) and of article 11 as submitted by the Special Rapporteur.⁹ As for the reference in paragraph 2 (a) to failure to employ a person, in the United States of America, for example, an employer could be sued for such failure on the grounds that it was improperly discriminatory, a point that should be borne in mind before any decision was taken to delete that reference. Again, perhaps the term “dismissal” related to cases of refusal to renew an individual’s contract which had automatically terminated; but it should be made clear that the provision was not intended to refer to allegedly wrongful dismissal.

17. Paragraph 1, taken in conjunction with paragraph 2 (b), suggested that cases of dual nationality might be contemplated, and the end result would seem appropriate, since the guest State would be given the benefit of the doubt and hence immunity from jurisdiction. In any event, it was desirable to make the language clearer in that respect. Paragraph 2 (d) presumably referred not only to jurisdiction but to a mandatory rule of the *lex fori*, probably one to protect the employee from clauses inserted in the contract as a result of the superior bargaining power of the employer.

18. Lastly, contracts of employment were not expressly covered in some national legislations and international instruments, but that did not necessarily mean that the employer State would in all cases enjoy immunity from jurisdiction. In actual fact, the majority of such contracts would fall under the exception relating to trading or commercial activity, so that there was an independent ground for denying immunity.

19. Mr. AL-QAYSI, referring to the doctrinal issue regarding the basis of the topic, said that theoretical questions were interesting and thought-provoking but inevitably gave rise to differences of opinion, as was to be seen from Mr. Ushakov’s valuable memorandum, which contained the following passage:

Furthermore, it is altogether inadmissible that a court should examine the activities of a foreign State and should qualify them in one way or another contrary to the views of that State itself. This represents inadmissible interference in the domestic and external affairs of States. (A/CN.4/371, para. 14.)

20. Unquestionably, the principle of the sovereign equality of States lay at the very foundation of international law. It was a principle that, in the spirit of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,¹⁰ meant that States had equal rights and duties and were equal partners in international relations despite any differences with respect to economic, social, political or other factors. The concept of the duties of States was particularly significant for duties constituted a corollary to rights. The presence of one sovereign authority in the jurisdiction of another should not lead to a conflict of sovereignties between States and it was essential that the equality of duties between States should not be impaired.

21. In the initial stages, theoretical considerations had been highly relevant, but the Commission had now covered a measurable distance in the preparation of draft articles designed primarily to solve specific problems. Rather than dwell on doctrinal niceties, it should assess the interests involved and envisage solutions which carefully balanced those interests, always bearing in mind the need to achieve practical and generally acceptable solutions.

22. He welcomed Mr. Evensen’s remarks (1763rd meeting) concerning the use of the inductive approach, since it should not be followed too rigidly throughout the draft. The case covered by article 13 afforded a good example in that regard. The call for harmonization was therefore in order, as the Special Rapporteur had noted in his fourth report, when he had said that the method and techniques employed in preparing the reports and draft articles had been inductive in the sense that conclusions and propositions of law were to be drawn from the practice of States and not in isolation from the living realities of customary international law; the Commission’s task therefore included a process of codification of existing practice and progressive development of rules of international law designed to reconcile, if not resolve, the various conflicts of interests in the exercise of sovereign rights and powers by States (A/CN.4/357, para. 10, subpara. (d)).

23. It seemed evident that article 13 sought precisely to achieve that result, for the Special Rapporteur himself had affirmed in his fifth report (A/CN.4/363 and Add. 1, para. 61) that the possibility should be left open for the exception to assert itself in State practice, but that a mild incentive could be introduced to encourage conformity with local labour law in order to improve social conditions and labour relations.

24. As for the actual text of article 13, he was opposed to the suggestion to delete the opening proviso. It was also found in articles 12, 14 and 15 and had a definite purpose, namely to indicate that the exception constituted a residual rule. The residual character of the exception in article 13 was, in addition, clearly indicated by the revised version of draft article 11, which read:

¹⁰ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁹ A/CN.4/L.351; see also footnote 5, subpara. (g), above.

The application of the exceptions provided in part III of the present articles may be subject to a condition of reciprocity or any other condition as mutually agreed between the States concerned.

25. In respect of the main rule enunciated in paragraph 1, the Special Rapporteur commented (*ibid.*, para. 38) that the first essential point which would determine the exercise or non-exercise of jurisdiction in connection with a contract of employment related to the existence of the governmental authority of the State in the exercise of which a cause of action had arisen. However, it was difficult to see any reflection of that important element in the text of the article.

26. Sir Ian Sinclair (1763rd meeting) had suggested that the words "a national or resident of that other State" in paragraph 1 might not be necessary, but it would be preferable to retain them for the reasons indicated by Mr. Riphagen (*ibid.*) in connection with labour relations and social security legislation in the forum State. To put it differently, it was unlikely that the forum State would wish to ensure the application of its social security legislation in the case of employees who came from abroad. With reference to Mr. McCaffrey's misgivings regarding the element of performance of a contract within the forum State, it was difficult to see what interest the forum State would have in asserting transboundary application of its labour laws if the person's work was not to be performed in that State.

27. Paragraph 2 (a) was presumably designed to cover what the Special Rapporteur had indicated in his report (A/CN.4/363 and Add. 1, para. 43) on the subject of the obligation to employ, in which case the wording would need to be adjusted so as to reflect the semblance of a contractual relationship. Only in that way could the question of dismissal, or termination, be properly covered. With regard to paragraph 2 (b) and (c), Sir Ian Sinclair had been right to point to the need to keep a close watch on the connecting factors, although further precision was required in paragraph 2 (c), especially in the phrase "at the time of employment". These words should be replaced by the formula "at the time when the contract was made", contained in section 4, para. 2 (b), of the United Kingdom's *State Immunity Act 1978*,¹¹ or the expression "at the time when the contract was entered into", adopted in article 5, para. 2(b), of the 1972 European Convention on State Immunity.¹²

28. Lastly, there was a disturbing delay in the issue of the summary records of the Commission's meetings. By the end of the third week of the session, only four records had been distributed in English.

29. The CHAIRMAN said that the Secretary would investigate the matter.

30. Mr. BARBOZA congratulated the Special Rapporteur on his technically excellent report containing an abundance of material. Unfortunately, general statements were still being made at the current stage in the Commission's work, something which doubtless

stemmed from the difficulty of the topic and highlighted the need for the Commission to show flexibility.

31. Mr. Ushakov's memorandum (A/CN.4/371) was a major document that displayed great strength of conviction. Particularly striking was the statement made in paragraph 17, namely:

Many States, possibly a majority, do not subscribe to, or reject, the concept of functional immunity. Hence it is clearly mistaken to speak of any general trend emerging in favour of that concept.

Thus, of the 29 States which, in accordance with the Commission's request, sent information and documentation in reply to the questionnaire, 14 grant full immunity and four have no legislation or practice in this area.

The same is apparent from the discussion on the pertinent sections of the Commission's reports in the Sixth Committee of the General Assembly, which shows that a large group of States are opposed to the above-mentioned concept.

32. In view of the gulf between the opposing concepts of total immunity and limited or functional immunity, it was essential to be practical rather than dogmatic, and to strive to find a compromise formula. The General Assembly was aware of the situation, and its mandate to the Commission was indeed to find just such a formula. Hence the Commission should set out in clear terms the general principles and the exceptions thereto and, as part of its work on the progressive development of international law, take account of the current course of events.

33. With regard to draft article 6, entitled "State immunity", he recalled what he had said at the Commission's previous session about its relationship to draft article 11, concerning the scope of part III, dealing with exceptions.¹³ In his opinion, article 6 should clearly state the principle that immunity was the rule and that cases of jurisdiction by the territorial courts were exceptions. In its present form, article 6 failed to meet that need for clarity. The legislation of the United States and that of the United Kingdom, which tended to limit the immunity of States, none the less clearly stipulated that immunity was the rule. Article 6 reflected an even more extreme position than that of those countries, and was a perfect example of what should not be done in drafting the articles.

34. It was apparent from the fifth report that the trend reflected by article 13 was quite limited: there was virtually no practice in the matter; there were divergences in the case law; there was no doctrine; and national legislation was accounted for by only three countries—the United Kingdom, Singapore and Pakistan. The Special Rapporteur had also cited the 1972 European Convention on State Immunity and an inter-American draft convention. The latter draft had as yet an uncertain future, and the European Convention had been ratified by only a few countries, including Austria, Belgium and Cyprus. Furthermore, the western countries had been able to make remarkable progress in some areas precisely because of their great homogeneity in terms of culture, economic and technological development, and legal outlook. In the circumstances, it was not surprising that they had been able to develop legal instruments such as

¹¹ See 1762nd meeting, footnote 11.

¹² *Ibid.*, footnote 7.

¹³ *Yearbook* . . . 1982, vol. I, p. 195, 1730th meeting, para. 3.

the European Convention, but that could not represent a valid precedent for a universal convention that would apply to a very large number of countries which differed enormously. The idea of protecting the labour force of territorial States was in itself a good one, but the discussion on article 13 had raised doubts as to the timeliness of such a provision. To his mind, account must be taken of the need to preserve certain values in relations among all States.

35. Draft article 13 raised the question of the nature of the relationship between the employer and its employee, a relationship which, regardless of where it occurred, fell under administrative law, as a result of the nature of the State and the special character of administrative contracts of employment, whose object was the provision of a public service. When a State acted in the exercise of its sovereign functions on its territory, relations with all its employees were governed by its administrative law. On the other hand, according to draft article 13, if its functions were exercised outside its territory, it would have two types of legal relations with its employees, the first governed by its own administrative law, and the second by the labour law of the territorial State. The staff of embassies, consulates, diplomatic missions and so forth were protected by conventions; but in the case of local staff, the 1961 Vienna Convention on Diplomatic Relations had a loophole which article 13 could attempt to remedy. Whereas the officials of the foreign State were governed by its administrative law, local employees would be governed by the labour law of the territorial State. The grounds for that distinction would be the official or non-official nature of the functions performed, something that would be difficult to determine in any circumstances. In fact, the relations between States and their employees seemed to be the same in all cases, and the possibility of turning to the labour law of the territorial State had drawbacks. Labour law governed, *inter alia*, labour conflicts, which had repercussions on public opinion and such repercussions were liable to disturb diplomatic relations and undermine the prestige of the foreign State.

36. With regard to the actual wording of article 13, and more specifically paragraph 1, the defect pointed out by Mr. Lacleta Muñoz (1764th meeting) could be made good by inserting the words "of the foreign State" after the word "national" or by deleting the words "of a national or resident of that other State". The proviso "Unless otherwise agreed", which had given rise to much comment, should be retained: in his opinion, it alluded to an international agreement between the States concerned. As for paragraph 2 (a), it was plain that a State could not be obliged to employ a person it considered undesirable; in the case of dismissal, however, compensation should always be awarded, but not through the courts of the territorial State. Recourse to local courts would be useless, since any decision by these courts might come up against difficulties of enforcement. The case of dual nationality, raised by Mr. McCaffrey, was important for all countries of immigration such as his own, Argentina, but it was a complex issue that could possibly be resolved by determining the dominant nationality.

37. Mr. BALANDA stressed how useful the inductive method had been in formulating article 12, on the exception relating to trading or commercial activity. There had been a wealth of national and international practice and the Commission had been on firm ground. In the case of article 13, on the other hand, little practice was available, as the Special Rapporteur had acknowledged (A/CN.4/363 and Add.1, para. 39). The inductive method was valid only if it could draw on a whole range of legal systems and lead to a consensus on the rules proposed. Nevertheless, in the present instance, limited and contradictory judicial practice should not lead the Commission to discontinue consideration of the subject, for under its statute it was entitled to engage in the progressive development of international law.

38. Jurisdictional immunities of States were a particularly delicate topic that touched on so fundamental a concept as that of State sovereignty, which was considered by international law as one of the attributes of the State, and the Commission should proceed most carefully. The issue raised a number of questions. To what extent could a State be subjected to the jurisdiction of another State? Could a State itself renounce its sovereignty or be obliged to do so? The provisions of draft article 13 gave a partial answer to such questions.

39. In his fifth report (*ibid.*, paras. 40 *et seq.*), the Special Rapporteur had indicated the shortcomings and contradictions not only in the legislation of States but also within one and the same legal system. The little practice that was available was marked by hesitation and tentativeness. The situation had been no different in internal law when the task of elaborating the theory of State responsibility had been undertaken. Thus, in French and Belgian administrative law, from which Zaire's administrative law stemmed, there had been a certain amount of ebb and flow before the theory of State responsibility had finally been established. Besides, the theory of acts of government still meant that State responsibility was not recognized in some cases. It was to be hoped that members of the Commission, in their desire to promote international law, would succeed, through compromise, in building a similar legal edifice.

40. The Special Rapporteur had pointed out (*ibid.*, para. 21) that the Commission and subsequently the Sixth Committee of the General Assembly had been able to recognize the existence of a general principle of State immunity, on the basis of an examination of the judicial practice of a few States in the nineteenth century. That had been possible, among other reasons, because the principle was related to another, more fundamental, principle of international law accepted by the entire international community, namely the sovereignty of States, proclaimed in the Charter of the United Nations and embodied in a number of international instruments. However, it was possible to proceed in the same manner with regard to the principles set forth in article 13. As the Special Rapporteur had noted, it was normally necessary to draw upon much more extensive practice in order to be able to point to such a principle.

41. Some members were of the view that it was

unnecessary to clarify the concept of a contract of employment. In his own country, a clear distinction was made between ordinary courts and administrative tribunals. For the article to apply to all legal systems, it should be specified, either in the article itself or in the commentary, whether the term "contract of employment" referred to a contract or to a body of staff regulations (*statut*). In Zaire, the latter were dealt with by administrative tribunals, whereas contracts fell within the purview of the ordinary courts. Furthermore, a distinction was made between contracts of employment, which involved the provision of manual services, and contracts for the rendering of services, which involved the provision of an intellectual service. The term "instrumentalities of a State", used several times in the report (*ibid.*, paras. 29, 38, 63 and 65), did not seem to denote any definite entity, at least in the legal system in Zaire. He also agreed with Mr. Mahiou (1763rd meeting) that the expression "local staff of lower rank", appearing, for instance, in paragraph 36 of the report, should be elucidated.

42. Like Mr. Ushakov (1764th meeting), he entertained doubts concerning the legal foundation for article 13, and he wondered whether it was really advisable to opt for the application of local law to the exclusion of any other law, in other words for the competence of the courts of the forum State. That involved an *a priori* assumption that the law of the sending State was necessarily bad. Yet the principle of freedom of will signified that the parties should be free to provide for the application of that law, particularly if they considered that it would afford better protection of the worker.

43. Furthermore, the article placed undue emphasis on the obligations of a State that failed to fulfil its undertakings in an employment relationship. The report even referred to "innocent persons" injured by the actions of a State (A/CN.4/363 and Add. 1, para. 69). The imbalance might be remedied by drafting the text in such a way that account was also taken of the position of employees who failed to fulfil their obligations. Article 13 should, moreover, take into consideration the nature of the services performed, an element to which the Special Rapporteur had made only a glancing reference (*ibid.*, para. 38).

44. The Special Rapporteur had explained (*ibid.*, para. 31) that the exception did not apply to the case of an employer's liability in respect of acts performed by his employees. Such an approach to the problem might not be sufficiently comprehensive. If employees could institute proceedings against the State to have their rights observed, why should the possibility be ruled out of proceedings by the State against an employee when the latter's fault had caused the State to pay him compensation? The case might well arise in service relations: the State which had been obliged to compensate the injured party on account of the link binding it to its employee might, if the latter were at fault, in turn institute proceedings against him.

45. The Special Rapporteur's comments concerning the applicable law (*ibid.*, para. 35) might perhaps be regarded as contradicting the freedom which parties were

recognized as having, particularly under private international law, of choosing the competent jurisdiction in a dispute. Indeed, it was not always the law of the forum State that might apply. For example, if the Société zairoise de commercialisation des minerais, which had offices in Paris, Brussels and New York, engaged a French national in Paris and sent him to work in Brussels, in the event of a dispute it was not inconceivable that the parties might agree to application of the *lex loci executionis*, in other words Belgian law.

46. With regard to the wording of article 13, it was essential to retain in paragraph 1 the expression "Unless otherwise agreed", as it reaffirmed the principle of jurisdictional immunity. It was for States themselves to decide in what instances they wished to forgo that immunity. As for the circumstances covered by paragraph 2(a), it was difficult to see how failure to employ an individual could give rise to a cause of action, for it did not involve the creation of any obligation, and hence there appeared to be no correlative right. In a case of dismissal, application of the law of the sending State was envisaged—a proper solution if the law of the forum was considered the best. However, in the case of serious fault, the parties should be able to continue to apply a law other than local law if the latter allowed immediate dismissal. Paragraph 2(d) covered cases in which "the employee has otherwise agreed in writing". Since a contractual relationship requiring the consent of the parties was involved, it would be best to avoid emphasizing the unilateral character of the employee's intention and use the formulation "the parties have otherwise agreed".

47. As he would be prevented by professional obligations from attending the discussion of articles 14 and 15, he wished to make a number of comments on those articles. The application of the *lex rei sitae*, proposed in article 14 in connection with property, satisfied a need, and the proposed solution was also in keeping with the provisions of private international law in Zaire. If the application of the *lex loci delicti commissi* to personal injuries and damage to property did not satisfy such a need, it none the less offered some practical advantages. As a result of an act constituting an offence, questions relating to expert appraisal, evidence or statements by witnesses might arise. It should be pointed out, however, that in Belgium, for example, the *lex loci delicti commissi* was now applied, in preference to another law, such as that of the country of origin, simply because of a change in case law.

48. Finally, in the matter of the jurisdictional immunities of States, exceptions should be introduced only with great caution and bearing in mind the following considerations. First, it was necessary to determine the situations where it was beyond all question essential that the law of the forum State must govern the service relationship or the situation in question. Secondly, exceptions should not be extended so far as to jeopardize the principle of State immunity and should be strictly limited and interpreted in a restrictive manner. Thirdly, exceptions should stem from a generalized practice found in a very large number of national legal systems. In that

connection, an attempt should be made to discover the underlying reasons for the limitations adopted by States either in their legislation or through agreements. To that end, greater consideration should be given to the preparatory work on legislative texts and conventions limiting State immunity. Fourthly, the nature of the act or activity should be taken into account. Immunity should remain intact, in other words absolute, in the case of acts relating to the public authority of the State. Fifthly, the exceptions to be recognized should always form residual rules, as article 13 suggested. States should always have an opportunity to stipulate otherwise if they preferred not to forgo their jurisdictional immunity. Sixthly, the exceptions should be formulated in the light of two factors, the first being the attitude of the States against which the restrictive tendency was currently applied, so as to discover in what matters they raised no objection and tacitly acquiesced, and in what other matters they did protest. In the case of the latter, it would be difficult to assert that there was a tendency to waive jurisdictional immunity and consequently recognize an exception. In that connection, he referred to *Venne v. Democratic Republic of the Congo* (1969),¹⁴ mentioned by the Special Rapporteur, *Dumont v. Colonie du Congo belge* and a case in which a Belgian professor in Zaire had instituted proceedings before the Belgian courts against the university at which he was teaching. The Government of Zaire had protested against the freezing of the university's accounts, which was decided on in the judgment. As for the second factor, it was necessary to see how States which had been denied jurisdictional immunity by foreign courts had carried out the judicial decisions in question. Had they executed them spontaneously, or had they been obliged to do so as a result of diplomatic or other pressure?

49. Sir Ian SINCLAIR, supported by Mr. FLITAN, suggested that, since the Commission was scheduled to complete its consideration of the topic of jurisdictional immunities of States by 27 May 1983, draft articles 14 and 15 should be discussed together.

It was so agreed.

50. Mr. ROMANOV (Secretary to the Commission) said that, following the statement by Mr. Al-Qaysi, he had requested the Chief of the Languages Service of the United Nations Office at Geneva to expedite the production of the summary records of the Commission's meetings. Those records formed part of the Commission's documentation and should be available on a daily basis and without delay. Moreover, he fully agreed with what Mr. Al-Qaysi had said, particularly since, for the 12 meetings held from the beginning of the session up to 19 May 1983, only 7 summary records had been distributed in French, 2 in Arabic, 3 in Chinese, 4 in English and Russian, and 3 in Spanish. The situation was thus alarming.

The meeting rose at 1 p.m.

¹⁴ Canada, *The Dominion Law Reports, Third Series* (Toronto), vol. 5 (1969), p.128.

1766th MEETING

Tuesday, 24 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta 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. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,¹ A/CN.4/363 and Add. 1,² A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 13 (Contracts of employment)⁵ (continued)

1. Mr. NI said that the topic of article 13, besides being relatively new, involved administrative and labour laws which varied from country to country or were altogether lacking in some legislations. It also involved the application of laws which were important to the economic well-being of people in the countries concerned. Few judicial decisions had been adopted thus far in a particularly controversial area, and little evidence of present-day State Practice in the matter was available. The Special Rapporteur was quite right to emphasize in his fifth report the need for care and prudence (A/CN.4/363 and Add. 1, para. 39). Indeed, the question might legitimately be asked whether there was any point in exploring a region already known for the paucity of material it offered for investigation.

2. There were three reasons justifying such exploration. First, the question of the administration of labour laws was highly important for the protection of the weaker

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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; revised text (para. 1(a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

⁵ For the text, see 1762nd meeting, para. 1.

party in an employment contract. The exercise of jurisdiction was a prerequisite for effective implementation of local labour laws, and the forum State might consider it a matter of public policy that labour relations should be regulated by its own laws when services were performed within its territory. Second, the forum State might consider it to be its duty to protect its nationals or residents. Third, exercise of jurisdiction by the forum State might encourage conformity with local labour laws and alleviate unemployment problems. It should nevertheless be made clear that, in the event of a dispute, the party to be sued was the office, agency or other establishment employing the plaintiff to perform services inside the forum State. The foreign State itself could not appear as the defendant in the action.

3. The phrase "Unless otherwise agreed" at the beginning of paragraph 1 of article 13 was necessary in order to make it optional for the parties concerned to agree on such matters as the mode of settlement of disputes, including the choice of jurisdiction or even the choice of applicable law. The phrase was also in conformity with the wording used in other draft articles on exceptions to immunity. Paragraph 2 (a) referred to proceedings relating to failure to employ an individual or dismissal of an employee, which appeared to be the main source of labour disputes of the type under consideration. Retention of that provision would leave little room for the exercise of local jurisdiction, but deletion of it might be interpreted as allowing for interference in the governmental actions of a foreign State. The question was thus a very complex one and required further consideration.

4. The crucial issue, however, was whether an exception to the rule of State immunity should be formulated at all in respect of contracts of employment. An exception from which a substantial number of cases were exempted could well become merely nominal. If there was no solid ground for formulating such an exception, it would surely be advisable to abstain from doing so, pending further developments. In that connection, he endorsed the remarks made by Mr. Evensen (1763rd meeting) and other members who, without questioning the value of the inductive approach as a means of seeking guidance from State practice, had pointed out the difficulty of drawing conclusions from what after all remained, in the present instance, a meagre amount of material. In particular, it was difficult to see how the inductive method could lead to the conclusion drawn by the Special Rapporteur in his fifth report (A/CN.4/363 and Add. 1, para. 53) that the restrictive practice in the particular case of "contracts of employment" was capable of gathering momentum. The affirmation that there appeared to be an emerging trend in favour of limitations on State immunity was even more difficult to accept in view of the scarcity of available evidence.

5. The course of denying State immunity could be embarked upon only if its advantages for the common good were crystal-clear. That did not seem to be so in the case under consideration. Retention of paragraph 2 (a) would place the majority of difficult cases outside the purview of the exception, and other easier problems relating to

employment could certainly be resolved without the need to go before the local courts. For the same reasons as those given at the previous meeting by Mr. Barboza, he doubted the necessity for draft article 13, for its provisions, if imprudently administered, would lead only to international friction and would not serve any real social purpose.

6. Mr. YANKOV said that the discussion on exceptions to State immunity had brought a new urgency to the consideration of the general problem of the nature, scope, field of application and legal implications of the principle of sovereign immunity as such. It was important that, as a result of the exceptions, the general principle should not be relegated to the status of a residual rule. In that regard, the substantive points made in Mr. Ushakov's memorandum (A/CN.4/371) deserved careful consideration. In his fourth report (A/CN.4/357, para. 10 (c)), the Special Rapporteur had listed nine possible exceptions to the general rule of State immunity, but the fifth report implied that further additions to that list might not unreasonably be anticipated. At the end of the exercise, the general principle might well be whittled down to such an extent that it would apply only to diplomatic immunities or the immunities of warships on the high seas and military forces stationed on foreign territory.

7. Concern over the possible consequences of such a development should not be regarded as a dogmatic or conservative reaction in defence of a sacrosanct principle. Rather, it reflected the wish to take account of certain important realities. There were many countries with socialist systems, as well as developing countries with a socialist orientation, in which various forms of public property, including State property, and the participation of the State in the management of the national economy played a crucial role. The national legislation and State practice of those countries could not be neglected or ignored in the preparation of a set of legal rules which was to be applied, not by homogeneous groups of States, but by the largest possible number of States with a broad spectrum of legal systems. It had to be recognized that the widely accepted rule was that of the immunity of the State, and exceptions to the rule could be made only on the basis of express consent.

8. As to draft article 13, he was appreciative of the Special Rapporteur's intention to afford effective legal protection for locally employed persons, especially those of relatively low rank. There again, however, the diversity of national legal systems had to be borne in mind; the basic conditions and legal requirements for employment, as well as the format, contents and legal implications of "contracts of employment", varied widely from country to country. In that connection, he drew attention to the practice followed in the socialist countries of Eastern Europe in general and in Bulgaria in particular.

9. Like Mr. Ni, he doubted whether, with the very limited background material available to date, the formulation of such an exception was justified. In his fifth report (A/CN.4/363 and Add. 1, paras. 29-31), the Special Rapporteur listed three essential elements pertaining to the scope of "contracts of employment" as an

exception to State immunity. There was, however, another fundamental element to be considered, namely the enforceability or practicability of the proposed provision. He agreed with Mr. Jagota (1764th meeting) that the prospects for its implementation were rather slight.

10. The expression "Unless otherwise agreed", in paragraph 1, was open to different interpretations. Either it was an expression of flexibility, in which case it was quite unexceptionable but perhaps superfluous, or it reduced still further the significance of the general principle of State immunity. His own interpretation would be that the principle of immunity should apply and that exceptions could be agreed upon by the States concerned; but the other interpretation could not be ruled out altogether. In either case, the paragraph required further clarification. With regard to paragraph 2 (a), he wondered whether an exception was warranted in a case of failure to employ an individual, in other words a situation in which there was no contract. As for paragraph 2 (d), Mr. Balanda (1765th meeting) had rightly observed that the proposed provision was somewhat unilateral.

11. For all those reasons, article 13 as a whole was not sufficiently justified. Exceptions to the general rule of the jurisdictional immunity of States could be admitted on the basis of general agreement, but they should be formulated, if at all, with great caution and prudence, so as not to end up by nullifying the principle itself. Like previous speakers, and in particular Mr. Al-Qaysi and Mr. Barboza (*ibid.*), he wished to advocate a more pragmatic approach.

12. Mr. USHAKOV said that cases in which the State acted as employer, within the meaning of article 13, were extremely rare and excluded not only cases in which local employees were recruited by an embassy, a consulate or by armed forces admitted to the territory of another State, but also instances in which such employees were recruited by a partially or totally State-controlled national corporation. A company of that kind was always a juridical person under private law, and it was the corporation, not the State, that acted as the employer. However, a State was an employer within the meaning of article 13 if its Ministry of Culture organized an exhibition on the territory of another State and, with the consent of the latter, recruited local employees who were nationals or residents of the State on the territory of which the exhibition was organized. There again, however, they were usually of the nationality of the employer State. A State also acted as an employer when it engaged employees through a government news agency such as Tass.

13. As he had pointed out in his previous statement (1764th meeting), no distinction could be made between the staff members of an embassy or a consulate in terms of whether they performed governmental functions. Nevertheless, each of them could act either in an official capacity or in a private capacity. For instance, a diplomat who bought himself a house on the territory of the receiving State was acting in a purely personal capacity. That was a distinction which the Commission had clearly made

in connection with "persons" and "organs" in part I of the draft articles on State responsibility.

14. The immunity of States in all cases, whether in connection with the employees recruited by an embassy or a consulate or a State organ, as in the examples he had cited earlier, was based on the sovereignty and sovereign equality of States. Such employees, however, did not have immunity in all instances. Embassy or consulate staff enjoyed the diplomatic immunity granted on behalf of the State, but that was not true of the employees of a State entity. The distinction would also be important in connection with draft article 14.

15. Lastly, if article 13 were kept in its present form, a State would feel obliged to employ its own nationals in other States, rather than nationals or residents of those States. Article 13 allowed for a practical solution to the issue but, from the standpoint of principle, it was none the less contrary to international law, and in fact undermined the principle of the absolute jurisdictional immunity of States. Indeed, the aim of article 13 could be achieved if the territorial State forbade other States to employ on its territory persons recruited from among its own nationals or permanent residents.

16. Mr. DÍAZ GONZÁLEZ, referring to the poetic similes used by the Special Rapporteur (A/CN.4/363 and Add. 1, paras. 17-18) and by Mr. Mahiou (1763rd meeting), pointed out that a morganatic "marriage" between the Mekong and the Thames rivers presented a number of dangers. As Mr. Ushakov had stressed in his memorandum (A/CN.4/371), the Commission should examine the present topic with great prudence and should not, for the sake of making rapid progress in preparing a set of draft articles, neglect to engage in careful consideration of all aspects of the subject-matter. In fact, it did not have sufficient basic documentation to elaborate provisions that were capable of securing the approval of the majority of States. The practice of States, which each and every State followed in keeping with its own national legislation, varied enormously.

17. The Special Rapporteur had distinguished two trends, one of which seemed to predominate, but Mr. Ushakov had demonstrated that such was not the case. Indeed, there were as many trends as there were independent States. Some States with similar laws and practices might well form a homogeneous group, but a closer look showed that sovereign States, whether old or new, were quite distinct from one another in terms of their juridical or judicial practice. Care must be taken not to single out a dominant practice and work out a legal doctrine that was well documented but completely inapplicable and unacceptable to most States. It was not a case of establishing distinctions according to the political, social or economic systems of States, but of recognizing the great diversity of State practice. It should be remembered that, in what was still nothing more than a draft convention, the Inter-American Juridical Committee was endeavouring to reconcile the extremely varied practice of its member States.

18. As Mr. Yankov had pointed out, attention should be paid to the consequences of elaborating draft articles

before the Commission first decided on the basic issues raised by Mr. Ushakov. An increasing number of countries recognized the concept of absolute sovereignty, as did Venezuela, which was not a socialist country. In the Americas, the rule was to safeguard the absolute sovereignty of the State. If the Commission did not begin by resolving that basic problem, it would be very difficult to make any headway, for the consideration of each article would necessarily mean reverting to the fundamental problem of the rule and the exceptions thereto.

19. In the circumstances, it was very difficult to express any opinion regarding draft article 13. Like other members, he considered that it was a provision of little value since, apart from the cases covered by the Vienna Conventions on Diplomatic Relations and on Consular Relations, it could be applied only in very rare instances.

20. The Spanish version of the Special Rapporteur's fifth report used the expression *contratos de empleo*, but all the laws and codes drafted in Spanish used the term *contratos de trabajo*, which had its equivalent in other Romance languages, including French, Italian and Portuguese.

21. Lastly, he emphasized that, rather than seek to bring into line two trends or determine which one predominated, the aim should be to harmonize legal systems and practices, more particularly in the light of the work that the ILO had been doing for many years in that regard.

22. Mr. KOROMA said that the Special Rapporteur was to be commended for the scientific approach he had adopted in his fifth report. The topic was assuming growing importance, owing to increasing international economic and diplomatic relations, and was therefore constantly before the law courts and legislatures of countries. It was equally stimulating for commentators and legal scholars. In the midst of such legal turbulence, the Special Rapporteur's task of progressively developing the law on the matter was, by any yardstick, a daunting one.

23. He fully realized that the Special Rapporteur's approach of drawing inferences from particular examples of case law, judicial decisions and State practice by means of the inductive method had been approved by the Commission, but there was a danger that such an approach might lead to codification and not to progressive development of the law. Again, since the vast majority of States had not taken any judicial position on the topic because it had never directly engaged their attention, the Commission might thus be legislating for one single homogeneous group of States. It should, however, be borne in mind that many States which had been taken to court in cases involving jurisdictional immunity had pleaded sovereign immunity even when judgments had been rendered against them. The attitude of those States thus reflected their national positions. Hence the rules to be formulated must be acceptable to the international community as a whole and the Commission must be guided by the principles of international law embodied in the Charter of the United Nations and attempt to

construct rules that would not derogate from those principles.

24. One rule with which everyone seemed to agree was that a State was immune from the jurisdiction of the courts of another State, a rule which had been described as a bastion of legal sanity that must be preserved in the interest of international comity. Contention had arisen, however, over the assertion that such immunity did not extend to the trading and commercial activities of States. In that connection, he paid tribute to Mr. Ni's excellent statement on that issue (1762nd meeting).

25. In his own view, developing countries engaged in international trade not for profit in the Ricardian sense but, rather, in the interests of their overall development. Such activities were nothing if not governmental. Governments imported or exported for profit simply because they alone were capable of engaging in such activities in view of the amounts of capital involved and the guarantees required. When a developing country used international trade as a means of diplomatic leverage, its intention was to achieve a national or State objective and it should not be deprived of its immunity. Any restrictions on State commercial activities would hamper the development of international trade and would be detrimental to the interests of developing countries. It would therefore be preferable for cases that arose to be handled through diplomatic channels, for, as stated by the judge in *The "Charkieh"* case (1873),

The object of international law, in this as in other matters, is not to work injustice, not to prevent the enforcement of a just demand, but to substitute negotiations between Governments, though they may be dilatory and the issue distant and uncertain, for the ordinary use of courts of justice . . .⁶

where such cases could lead to the impairment of international relations.

26. That remark also applied to draft article 13, whose purpose was to introduce a mild incentive to encourage conformity with local labour law and to improve social conditions, labour relations and employment opportunities. Nevertheless, in view of what was stated in the first sentence of paragraph 29 of the fifth report and of the provisions of article 31 of the 1961 Vienna Convention on Diplomatic Relations, it was difficult to see whose activities would be regulated by draft article 13. A partial response to that question had been given in paragraph 31 of the report, which stated that

. . . the gist of this specified area of exceptions to State immunities covers the actionability for obligations undertaken by, or binding on, a State, arising out of contracts of employment of individuals for the performance of services in another State.

Yet, if it was agreed that employment and dismissal constituted governmental acts, in other words *acta jure imperii*, and if account was taken of article 31 of the 1961 Vienna Convention, it was difficult to see where draft article 13 fitted into the topic, except, of course, as a further restriction on sovereign immunity. Application of

⁶ United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 97.

the article might therefore lead to friction in international relations.

27. The main argument generally made in favour of the restrictive theory of sovereign immunity was that, if a foreign State decided to engage in commercial or trade relations, it must comply with the rules of international commerce. Similarly, article 13 appeared to attempt to deprive foreign States of the plea of sovereign immunity if they entered into the labour-market of host States. It was, however, often stated both in domestic and international law that labour disputes were best settled not in courts of law, but through arbitration or diplomatic channels.

28. Laudable though the intention was, cases of the type under consideration were few and far between and article 13 might not even be invoked by those for whom it was intended, particularly since the required lawyers' fees might be exorbitant and attorneys might use cases involving contracts of employment with foreign States as an opportunity to bring pressure to bear upon a government entity. Moreover, the article might give rise to conflict-of-law issues, such as those of dual nationality, habitual residence and the question of the applicable law, and raise more problems than it solved. In view of the paucity of judicial decisions and lack of evidence from State practice, the Commission would be well advised to omit article 13 from the draft for the time being.

29. Mr. OGISO said that although, according to the Special Rapporteur (A/CN.4/363 and Add. 1, para. 60), the emerging trend in national legislation, international opinion and some international conventions did appear to favour the application of local labour law, it was premature to affirm that the trend would encourage the exercise of territorial jurisdiction at the expense of the jurisdictional immunities of foreign States. There simply was not enough evidence from State practice and judicial decisions to point to a tendency to limit jurisdictional immunities in matters pertaining to contracts of employment. Furthermore, an exception to State immunity made on the basis of draft article 13 might hamper relations between the foreign State and its local employees.

30. For example, his own interpretation of paragraph 2 (a) was that the foreign State was not immune from the jurisdiction of the local courts in respect of the provisions of contracts of employment relating to such things as membership of trade unions, wages and working hours, but that it was immune from such jurisdiction in respect of the dismissal of a local employee. Article 13 could thus be construed to mean that, although local employees could bring less important disputes relating to clauses of their contracts before the local courts, they were unable to protect themselves against dismissal by their foreign State employer, even though, for the employees, dismissal was the most disadvantageous measure the employer could take against them. State practice appeared to indicate that cases of dismissal should not be subject to the jurisdiction of the local courts. On the other hand, if the most drastic measure that could be taken by a foreign State employer was immune from local jurisdiction, it would be logical for immunity to apply to the other terms of con-

tracts of employment. Thus State practice with regard to contracts of employment did not seem settled enough to warrant an exception for all aspects of such contracts and the Commission should be cautious before proposing such an exception.

31. He agreed with other members that the expression "Unless otherwise agreed" in paragraph 1 should be retained, since the lack of established practice made it necessary to allow States some flexibility in concluding specific agreements relating to contracts of employment. Any doubts about including that expression in paragraph 1 could be dispelled if it was made clear that it referred to an agreement concluded by the forum State and the foreign State. As to paragraph 2 (c), it would be preferable to replace the words "a resident of the State of the forum" by the words "habitually resident in the State of the forum", in line with section 4, paragraph 2 (b), of the United Kingdom's *State Immunity Act 1978*.⁷

32. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion of draft article 13, said that he had been given ample warning at the outset that the topic was difficult, sensitive, complex and one on which opinions and positions differed considerably. As a student of Buddha, however, he had to be moderate, patient and restrained in his approach. He in turn would warn the members of the Commission that they should not claim to represent the interests or opinions of their countries either as "givers" or as "takers" of immunity, for each country was simultaneously a claimant and a recipient of immunity.

33. The inductive method, which had been touched upon in the statements of nearly all members, was useful and essential. It involved research into all sources and, in particular, the judicial practice of States, which constituted the only direct evidence available. Other indirect evidence also requiring examination included the governmental, executive, legislative and treaty practice of States and the opinions of writers. When State practice was confusing, the Commission was not duty-bound to try to codify the rules. It could only determine what the trends were and seek to clarify them. In that connection, he agreed with various members that the Commission should adopt a flexible and balanced approach with a view to harmonizing all points of view on the present topic.

34. In the five reports he had submitted, he had made a point of avoiding any reference to absolute, functional or restricted immunity. He had also avoided any distinction between *acta jure imperii* and *acta jure gestionis* because, as Mr. Ushakov had pointed out, such a distinction was impossible. He was grateful for Mr. Ushakov's constructive memorandum (A/CN.4/371), which contained many valuable lessons from which everyone could benefit. In particular, Mr. Ushakov had noted that

... immunity from foreign jurisdiction by no means signifies that the State enjoying immunity may ignore the law of another State, within that other State's sphere of jurisdiction. On the contrary, it is under an obligation strictly to abide by the other State's internal law. In particular, it may engage, within the sphere of jurisdiction of another

⁷ See 1762nd meeting, footnote 11.

State, only in such activities as are permitted by the latter. Each State is also under an obligation not to interfere in another State's domestic affairs. (*Ibid.*, para. 7.)

Mr. Ushakov had gone on to state that

... generally speaking, since the 1930s the Soviet Union has not, in practice, concluded trade transactions with foreign natural or juridical persons. Such transactions are concluded by Soviet foreign trade associations and other juridical persons under national law, which as such enjoy no immunity from foreign jurisdiction. (*Ibid.*, para. 19.)

35. Thus no problem arose in respect of trade transactions concluded by trade associations and other juridical persons under Soviet national law. But that was simply one approach to the question of trading or commercial activities, and there were many others. As Mr. Riphagen had pointed out in citing Ian Brownlie's *Principles of Public International Law*, any country could adopt national legislation and no one could object to it (1763rd meeting, para. 18). That, however, gave the Commission broad scope for harmonizing differing points of view and conflicting interests in a balanced manner.

36. With regard to the point which had been raised by Mr. Ogiso, Sir Ian Sinclair (1763rd meeting) and Mr. Lacleta Muñoz (1764th meeting) in connection with draft article 4, and which had been dealt with in the second report,⁸ he fully agreed with Mr. Ushakov that there could be no interference with conventions already in force and that, if diplomats enjoyed immunities, States must also enjoy immunities (A/CN.4/371, para. 4). The principle in question was embodied in article 31 of the Vienna Convention on Diplomatic Relations. It should none the less be noted that, under section 2, paragraph 7, of the United Kingdom's *State Immunity Act 1978*, the head of a foreign diplomatic mission in the United Kingdom could waive or submit to jurisdiction on behalf of the foreign State.

37. The Commission therefore had to spend more time on draft article 4, looking more closely at matters on which nothing was said in the Vienna Conventions on Diplomatic Relations and on Consular Relations, in the Convention on Special Missions and in the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. Draft article 6 would also have to be discussed again and redrafted in order better to reflect the views of members of the Commission. The question of enforcement raised by Mr. Jagota (1764th meeting) and Mr. Yankov would be dealt with later in part IV of the draft articles.

38. As to the wording of draft article 13, he had been instructed to indicate areas in which exceptions might possibly be made. The proviso "Unless otherwise agreed" had therefore been included at the beginning of draft articles 12 to 15 in order to allow for the requisite flexibility.

The meeting rose at 6 p.m.

⁸ *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1.

1767th MEETING

Wednesday, 25 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta 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. Ushakov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,¹ A/CN.4/363 and Add. 1,² A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 13 (Contracts of employment)⁵ (concluded)

1. Mr. SUCHARITKUL (Special Rapporteur), continuing the summary of the discussion of article 13 which he had begun at the preceding meeting, said that the article did not cover the regular officers or civil servants of the Government of a foreign State who worked within the territory of the forum State and whose contracts of employment would, in most cases, be governed by the administrative law of the foreign State, as Mr. Ushakov had rightly pointed out (1764th meeting). Rather, it dealt with locally recruited staff who were employed by the foreign State in the territory of the forum State and whose contracts of employment would normally be governed by the labour law of the forum State.

2. As was made clear by draft article 4, draft article 13 did not relate to the immunities of diplomatic or consular agents or of members of special missions or permanent delegations. The scope of its application was not, however, as narrow as might be thought, as evidenced by the many examples of the activities of foreign States in the

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem.*

⁴ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

⁵ For the text, see 1762nd meeting, para. 1.

territory of other States which had been given by members of the Commission, activities which required the employment of locally recruited staff at all levels. Draft article 13 thus applied to the immunity of the foreign State from the jurisdiction of the courts of the Forum State in matters relating not only to contracts of employment as such, but also to social security, medical insurance and termination benefits. Since the Vienna Conventions on Diplomatic Relations and on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character did not cover the immunities of States *per se*, the Commission would have to be very careful in dealing with article 4 of the draft. If embassies, consular posts, special missions and permanent delegations were to be immune from the jurisdiction of the labour courts of the forum States, that would have to be clearly stated in a new paragraph 3 of draft article 13.

3. In reply to the question why he had proposed draft article 13 if there was no clear and consistent judicial practice supporting the restriction of immunity in matters relating to contracts of employment, he would point out that it was not enough to examine judicial practice. Attention should also be given to governmental practice, national legislation and international conventions, which did offer support for restricting immunity in respect of contracts of employment. In that connection, the members of the Commission seemed to agree that the task at hand was to harmonize different points of view and conflicting interests.

4. With regard to the wording of draft article 13, he said that the meaning of the term “contract of employment” would have to be clearly explained in the commentary. The translation of that term into Spanish would, moreover, have to be looked at more closely. It would also have to be made clear that the expression “Unless otherwise agreed” in paragraph 1 referred only to a specific agreement between the forum State and the foreign State and not to an agreement between the parties to the contract of employment. Those words served as a saving clause which explained the residual rule embodied in draft article 13.

5. The words “failure to employ an individual or dismissal of an employee” had been included in paragraph 2 (a) in an attempt to maintain the balanced approach called for by the inductive method. The words “failure to employ an individual” could, however, be amended to make it clear that paragraph 2 (a) related to a breach by a foreign State of an obligation to employ a particular individual. The word “dismissal” could refer to the revocation of a contract of employment, to the termination of an employee’s services or to a refusal to re-employ or reappoint an employee. In such cases, no proceedings could be initiated against the foreign State.

6. In paragraph 2 (c), the words “a resident of the State of the forum” could be replaced by the words “habitually resident in the State of the forum”, as Mr. Ogiso had proposed (1766th meeting). The words “unless otherwise

agreed in writing” could be added at the end of that subparagraph, in accordance with Mr. Evensen’s suggestion (1763rd meeting). The text of that subparagraph took account of the question of dual nationality raised by Mr. McCaffrey (1765th meeting), although some minor changes might be needed in order to make that point clear.

7. One of the main points dealt with by paragraph 2 (d) was the question of the social security benefits to be paid to employees of foreign States and in relation to which enforcement measures could be taken by the courts of the forum State. Progressive development was necessary in that connection in order to ensure flexibility and harmonious relations between States in accordance with the theory of consent.

8. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft article 13 to the Drafting Committee.

*It was so agreed.*⁶

ARTICLE 14 (Personal injuries and damage to property) and

ARTICLE 15 (Ownership, possession and use of property)⁷

9. Mr. MALEK said that he would confine his remarks to draft article 14, which did not appear to be particularly complex. Of the various exceptions to the rule of immunity of States proposed by the Special Rapporteur, that provided for by draft article 14 was the most justified, for the reasons clearly explained in his fifth report (A/CN.4/363 and Add. 1, paras. 63–75).

10. Without going into those reasons in detail, he stressed that the exception did not violate the principle of the sovereignty and sovereign equality of States. As the Special Rapporteur had observed:

The sovereignty or governmental authority of a foreign State is not being challenged when, like any other responsible party, the State answerable for the physical damage to persons or property is called upon to come to the aid and assistance of the injured party. To be humane and merciful is not inconsistent with statehood or sovereignty. (*Ibid.*, para. 75.)

The exception in question also had the effect of preventing a denial of justice in such a case:

... The absence of competent judicial authority and lack of applicable law would leave the injured party remediless and without adequate relief or possible recourse, except at the mercy of the foreign State, which might or might not feel obliged to pay compensation ... In the interests of the rule of law and of justice, normal legal remedies should continue to be available, regardless of the public or private character of the defendant. (*Ibid.*, para. 70.)

11. Furthermore, if, as in the case of the exceptions to the rule of immunity provided for in draft article 13, State practice might seem not to establish a sufficient legal basis for the exceptions indicated in draft article 14, it never-

⁶ See the decision by the Drafting Committee concerning draft article 13, 1805th meeting, para. 59 *in fine*.

⁷ For the texts, see 1762nd meeting, para. 1.

theless disclosed an increasingly clear trend in favour of such exceptions. Thus, as the Special Rapporteur wisely pointed out:

... The problem confronting the international community is not so much *whether or not* to limit or restrict the application of State immunity, but rather *how* to allow the exercise of territorial jurisdiction in a generally accepted area. (*Ibid.*, para. 99.)

12. In the case of draft article 13, he had spoken at the 1764th meeting in favour of retaining the expression "Unless otherwise agreed" at the beginning of paragraph 1. In that specific case, he had seen no major problem in derogating from the exception whereby a State was not immune from the jurisdiction of the courts of another State in respect of proceedings relating to a contract of employment concluded in the conditions indicated in the article. That derogation might have the effect of preventing the exception provided for in draft article 13 from acquiring the character of a general uniform rule, and of restoring the rule of immunity in an area in which it was less and less readily accepted. However, it could be tolerated in order to reconcile the various views of the rule of jurisdictional immunity of States. The use of that expression at the beginning of draft article 14 was another matter. The derogation which it would allow was not justified by the reasons which he had just mentioned. The expression should be deleted if draft article 14 was to become part of the international legal order as a general uniform rule.

13. Finally, the exception to State immunity applied only subject to two territorial conditions, in which draft article 14 followed article 11 of the 1972 European Convention on State Immunity:⁸ firstly, the personal injuries or damage to property giving rise to the proceedings must be the result of an act occurring in the territory of the forum State; and, secondly, the author of the injury or damage must have been present in that territory at the time of its occurrence. It appeared that, apart from the above-mentioned Convention, State practice recognized only the first territorial condition, which could be justified without any difficulty. On the other hand, the legal basis for the second condition was hard to discern. The Special Rapporteur himself had stated:

... The restriction operates where there is State immunity, that is to say even where the agency or instrumentality of a foreign State has been acting in the exercise of governmental power, so long only as the personal injury or damage to property occurred in the territory of the State of the forum. (*Ibid.*, para. 65.)

To take a practical example, under draft article 14, would an action lie with respect to death resulting from an act occurring in the territory of the forum State where accomplices alone remained in that territory, or where death occurred at a time when the author of the tort was on the other side of the frontier?

14. Mr. EVENSEN said that, in dealing with draft article 14 on personal injuries and damage to property caused by acts or omissions attributable to a foreign State,

the Special Rapporteur had, in his fifth report (A/CN.4/363 and Add. 1), examined State practice with reference to judicial decisions, national legislation and international conventions. He had also touched upon the opinions of international legal writers, noting that, with regard to cases of personal injury and damage to property as exceptions to State immunity,

... there appears to be a growing sympathy in the thinking of contemporary authors, who are invariably supporters of a restrictive trend. (*Ibid.*, para. 96.)

15. The Special Rapporteur had stated that

... the basis for actual exercise of jurisdiction when the act or omission complained of is attributable to a foreign State cannot be found in customary international law. (*Ibid.*, para. 68.)

He had concluded, however, that

... an emerging trend is becoming more readily discernible in favour of relief being granted to individuals for the personal injury suffered or for the loss of or damage to their property. (*Ibid.*, para. 99.)

Although the basic approach to draft article 14 was acceptable, it should be borne in mind that customary law was not the sole source of the law of nations or the only guideline for the Commission's work. The emerging trend towards the exercise of jurisdiction in the cases referred to in draft article 14 might also be based on the general principles of justice and reasonableness which were reflected in the practice of a number of States and might be regarded as an expression of general public policy, to which Mr. Thiam had referred at the 1764th meeting.

16. In his report (*ibid.*, paras. 66-67), the Special Rapporteur had dealt with the concept of the *locus delicti commissi* and had expressed the opinion that jurisdiction could be exercised in cases where an act of private international law was committed in one country, but the results occurred in another country. It should, however, be pointed out that one of the conditions for jurisdiction provided for in draft article 14 was that "the act or omission which caused the injury or damage in the State of the forum" should have occurred in that territory. He was not certain that that provision would cover cases in which an act was initiated in one country, but resulted in damage occurring in another country.

17. He also had some difficulties with the last part of draft article 14, which made it a precondition for the exercise of jurisdiction that "the author of the injury or damage was present" in the State of the forum "at the time of its occurrence". It was not clear how that reservation could be justified in the present-day era of terrorism. A State or State authorities might be the author of injury or damage without being present in the forum State at the time of the occurrence of that injury or damage. It would therefore have to be decided whether acts of terrorism should be expressly mentioned as cases in which the forum State had jurisdiction.

18. The expression "Unless otherwise agreed" at the beginning of draft article 14 might give rise to misunderstandings and could be said to involve various substantive issues. For example, if the draft articles under consideration eventually led to the elaboration of a conven-

⁸ *Ibid.*, footnote 7.

tion, it would have to be decided whether article 14 applied only to the States parties to the convention or whether it should be accepted as a general rule of law. It seemed natural to assume that article 14 was intended to apply only to States parties to such a convention.

19. It would also have to be determined whether draft article 14 covered the situation in which a State made reservations to the waiver of immunity for certain types of injuries or damage. That led to the general question whether a State which signed or ratified the future convention should be allowed to make reservations to article 14, in general, or to the waiver of immunity for certain types of injuries or damage, in particular. His understanding was that the Special Rapporteur intended to make allowance for such reservations as well as for bilateral or regional conventions based on approaches that differed from the one adopted in draft article 14. That might be why the Special Rapporteur had included the expression "Unless otherwise agreed" at the beginning of draft article 14.

20. Lastly, he suggested that, in the first part of the draft article, the phrase following the words "courts of another State" should be amended to read: "in respect of proceedings relating to death or injury to persons or damage to or loss of tangible property . . .".

21. Mr. AL-QAYSI said that the purpose of draft article 14 was to determine whether jurisdictional immunity applied in respect of personal injuries and damage to property caused by an act or omission attributable to a foreign State or to one of its organs, agencies or instrumentalities, even when the act or omission was committed in the exercise of governmental power. In that connection, the Special Rapporteur had stated in his fifth report (A/CN.4/363 and Add. 1, para. 76) that judicial practice prior to the 1970s had been "neither uniform nor consistent". He had gone on to indicate (*ibid.*, paras. 77–81) that, in a number of countries where judicial practice favoured a more restrictive principle of State immunity, the exercise of jurisdiction on the basis of the distinction between *acta jure gestionis* and *acta jure imperii* had been employed to reject and to uphold State immunity in different cases. He had further noted that national legislation adopted in the 1970s had invariably touched upon the question of the "scope and extent of subject-matter jurisdiction" (*ibid.*, para. 90). Nevertheless, he had cautioned that the current practice of States "is still in its infancy and awaiting further developments" (*ibid.*, para. 91). The assumption had, however, been made that the restriction of immunity would continue to apply in future on the basis of the legislative standards contained in national legislation or international conventions on the question. The Special Rapporteur had also pointed out that:

While it is still too early to monitor opinions of writers with regard to this particular area . . . , there appears to be a growing sympathy in the thinking of contemporary authors

in favour of restricting immunity. (*Ibid.*, para. 96.)

22. Despite those findings, the Special Rapporteur had concluded that there was an emerging trend in favour of

exercising jurisdiction where there was sound subject-matter jurisdiction. There were obviously some policy considerations which supported that trend, including predictability, justified expectations, uniformity of results, convenience and effectiveness in the administration of justice. First of all, it was difficult to envisage a rigid notion of State immunity in that area at the expense of the obligation of the foreign State to respect local laws and regulations, which were designed to protect innocent victims within the territory of the forum State. The obligation to provide relief to such victims for injuries to their person or damage to their property in accordance with the *lex loci delicti commissi* was not only predictable, but also met justified expectations and resulted in uniformity. In addition, the *forum loci delicti commissi* was a *forum conveniens* and it was best equipped to assess the evidence on the question of liability and to determine the extent of compensation. Indeed, the effective administration of justice called for the exercise of jurisdiction by the court of the place where the damage had occurred, since non-exercise in such a case might result in a vacuum or subject the relief due to the injured party to the mercy of the foreign author State.

23. Draft article 14 seemed to be intended, as the Special Rapporteur indicated (*ibid.*, para. 99), to provide "whatever advice and guidance" might be needed "to harmonize and reorient the emerging trend towards a healthier direction and achieve more salutary results for all concerned". In the light of the foregoing considerations, he found that article to be, on the whole, acceptable.

24. With regard to the drafting of article 14, he observed that, if the expression "Unless otherwise agreed" were examined in the light of the last two sentences of paragraph 67 and the fourth sentence of paragraph 100 of the report, it would be clearer why the article should be cast as a residual rule. He, too, was somewhat puzzled by the last phrase of draft article 14 but, at the present stage, he was not in a position to say whether or not it was necessary to have the two conditions laid down in that provision. If the Commission's main concern was the effective administration of justice, justice should be done, whether or not the author of the injury or damage was present in the State of the forum. After all, the article aimed to provide relief for injury or damage caused by an act or omission attributable to a foreign State.

25. Turning to draft article 15, he said that the purpose of that provision was to define and delineate the scope of application of the recognized general principle of the jurisdictional immunity of a State in respect of its ownership or use of property in its possession or control. The situation in that regard was less nebulous than in other cases, as there was a well-established trend in favour of the predominant authority of the State of the *situs*. That was entirely logical, since a right of ownership or other proprietary right or interest was conceivable only within the contours of the legal system of the territory where the property was located. The authority of the State of that territory was therefore decisive in determining the question of the availability of jurisdiction.

26. Thus the case dealt with in draft article 15 was one in which there was a complete identification of the question of the applicable law with that of the applicable jurisdiction, the underlying basis being the principle of effectiveness. Indeed, rights and interests could be derived only from the *lex situs* and with the aid of the authority of the *situs*. As pointed out in paragraph 111 of the report, "sheer insistence on the principle of State immunity would only lead to chaos and absurdity" in view of the legal vacuum which would result, since the rights and interests of the extraterritorial State could be recognized and enforced only on the basis of the authority of the *situs*.

27. The exception formulated in draft article 15 seemed to be well founded in State practice—whether legislative, judicial or based on conventions—and in legal opinion. While the text of the article encompassed all the necessary elements, its wording might be simplified by the Drafting Committee. In view of the practical considerations justifying the predominant authority of the *situs*, it might also be necessary to decide whether or not the exception provided for in draft article 15 should be cast as a residual rule.

28. Sir Ian SINCLAIR said that, at a later date, he proposed to discuss the general question of the distinctions between immunity and non-justiciability and between jurisdiction and applicable law. For the time being, he would concentrate specifically on draft articles 14 and 15. In considering the legal basis for jurisdiction in cases involving personal injuries and damage to property, the Special Rapporteur had rightly placed emphasis on the *locus delicti commissi*. However, in formulating the draft articles as a whole, the Commission should not lose sight of the fact that, as the Special Rapporteur himself had pointed out in his fifth report (A/CN.4/363 and Add. 1, para. 67), other criteria were not infrequently invoked in cases of that kind. If, for the purposes of article 14, the Commission decided to take the *locus delicti commissi* as the basic connecting factor, it should remember that it was not the only one, and, at some point in its work, it should introduce into the text the element of flexibility which Mr. Riphagen (1763rd meeting) had called for, if only to take account of those jurisdictional rules applied by national courts which did not coincide neatly with the connecting factors specified in individual articles, such as article 14.

29. The Special Rapporteur's comment (A/CN.4/363 and Add. 1, para. 67) to the effect that the distinction between *jus imperii* and *jus gestionis* appeared to have little or no bearing in regard to the exception provided for in draft article 14, while justifiable in one sense, was possibly somewhat misleading in another. The judicial practice of States which had for many years applied the so-called restrictive theory, as summarized in the report (*ibid.*, paras. 77–81), showed that the grant or refusal of immunity in particular cases of the kind under examination had been made dependent on whether the act or omission related to a State act *jus imperii* or a State act *jus gestionis*. In that connection, he referred to the case

*Danish State Railways in Germany*⁹ decided by the District Court of Kiel in 1953, in which the plaintiff had instituted proceedings against Denmark for damages for personal injuries sustained as a result of the alleged negligence of the driver of an omnibus owned by the Danish State Railways but operating in Germany. The court had held that the operation of a bus service by Denmark was a commercial activity and that immunity could not be claimed in respect of activities of that nature. That was an example of a case where judicial practice had been built upon the distinction between acts *jus gestionis* and acts *jus imperii*.

30. In deliberating upon the acceptability or otherwise of draft article 14, the Commission should not exaggerate the significance of that article. The paucity of case law on proceedings against foreign States concerning death of persons or damage to or loss of tangible property was, paradoxically, attributable to the fact that other exclusions or other practical safeguards made it unlikely that such proceedings would be brought against foreign States in the local courts. For example, both in the 1972 European Convention on State Immunity¹⁰ and in the recent United Kingdom legislation, any immunity or privilege enjoyed by a foreign State in respect of anything done by or in relation to the armed forces of that State while present in the territory of another State was preserved. It was customary for status-of-forces agreements to regulate comprehensively the making of claims by local residents against the authorities of foreign armed forces present, by agreement, in the territory of the host State, and he presumed that the Special Rapporteur intended to formulate a corresponding exclusion in the draft articles.

31. Again, as already mentioned in connection with draft article 13, nothing of what the Commission was engaged in doing was intended to derogate from or affect any privilege or immunity enjoyed by members of a diplomatic mission or a consular post under the Vienna Conventions of 1961 and 1963. Those two general exclusions very considerably reduced the possible applicability of article 14. An additional practical safeguard was provided, as pointed out by the Special Rapporteur (*ibid.*, para. 73), by the fact that the areas specified as personal injuries and damage to property were mainly concerned with accidental death, personal injuries or damage to property such as moving vehicles, motor cycles or fixed objects involved in a highway collision. As the Special Rapporteur had indicated (*ibid.*, para. 72), the liability of the State, whether primary or vicarious, in most cases of motor accidents would have been covered by insurance policies required to be taken out by the local law.

32. Despite that combination of exclusions and practical safeguards, draft article 14 was nevertheless significant, if only for the reasons given by the Special Rapporteur (*ibid.*, paras. 69–70). Injured parties should not be left

⁹ *Danish State Railways in Germany* (1953) (*Monatsschrift für deutsches Recht* (Hamburg), No. 364 (1953), p. 489; *International Law Reports*, 1953 (London), vol. 20 (1957), p. 178).

¹⁰ See 1762nd meeting, footnote 7.

without the possibility of pursuing a remedy in cases in which they claimed to have suffered death or personal injury or damage to or loss of tangible property at the hands of a foreign State. It would be for the court to determine whether or not the claim was justified; the denial of immunity in such cases merely removed the procedural bar to the institution or continuance of proceedings, but it in no way signified that the State might not have a good defence to the proceedings.

33. So far as the wording of draft article 14 was concerned, he wished to propose the following alternative formulation:

“Unless otherwise agreed, 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 caused the death, damage or injury occurred wholly or partly in the territory of the State of the forum.”

The purpose of the expression “proceedings which relate to compensation for death or injury to the person . . .” was to make it quite clear that possible criminal responsibility was not the point at issue. The 1972 European Convention used the term “redress” in article 11 and the United States Foreign Sovereign Immunities Act of 1976,¹¹ in section 1605, paragraph (5), used the term “money damages”; the term “compensation” would, in his opinion, be more neutral. The phrase “injury to the person or death” had been inverted for the reason that the more significant injurious act should be mentioned first, and a further reference to “death” had been incorporated in the qualifying phrase purely as a matter of drafting. More significantly, he had included the words “wholly or partly” in the qualifying phrase, following in that respect the International Law Association’s draft convention,¹² because he believed them to be necessary in order to cover cases such as the classical one of the trans-frontier shooting or the less theoretical one of the letter bomb or other injurious mechanism sent from abroad to the territory of the forum State. Finally, he had deliberately omitted the additional phrase contained in article 11 of the European Convention about the author of the injury or damage being present in the territory at the time of the occurrence. The commentary to the European Convention¹³ did not shed much light on the genesis of that extra condition, which, in his view, added an unnecessary and undesirable complication by appearing to confer immunity on the foreign State where it might otherwise be liable vicariously for the injurious act or omission of its servant initiated outside the territory of the forum State but completed within it.

34. Turning to draft article 15, he remarked that there might be a prior doctrinal question as to whether the case

of proceedings relating to the ownership, possession and use of property in the forum State in which a foreign State had or asserted an interest represented an exception to the principle of immunity or was simply a matter of the routine application of the law of the forum State.

35. However that might be, the dominance of the *situs* as the forum in which disputes as to the ownership, possession or use of immovable property should be determined had long been recognized. Even in the United Kingdom, which, prior to the 1978 Act, had been an adherent of the so-called theory of absolute immunity, it had always been thought that, subject to an exception in the case of immovable property forming part of the premises of a diplomatic mission, immunity could not be claimed by a foreign State in respect of proceedings instituted against it and relating to any interest of the State in, or its possession or use of, immovable property situated in the territory. By the same token, and again even prior to the enactment of the 1978 Act, the English courts had always been prepared to exercise their undoubted jurisdiction in the case of the administration of trusts, the winding up of companies, bankruptcy proceedings or any other form of administration of property situated in England, notwithstanding that a foreign State might have or assert an interest in part of the property. Similar considerations would appear to justify a rule of non-immunity in respect of proceedings relating to any interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*.

36. There thus appeared to be an overwhelming weight of authority in favour of the general thrust of draft article 15, whether or not it was regarded as amounting to an exception to the principle of immunity. He would, however, propose the deletion of the words “in the State of the forum” from paragraph 1 (b) of the draft article, since in the case of movable property there could be a wide variety of connecting factors, such as the law of the domicile of the deceased or the law of his nationality. That was why no connecting factor was specified in article 10 of the European Convention on State Immunity, which corresponded in substance to the paragraph in question.

37. In addition, as a minor drafting point, he suggested that the words “the distribution of assets in connection with the estates of deceased persons . . .” in paragraph 1 (c) should be replaced by “the administration of the estates of deceased persons . . .”. The reference to the distribution of assets seemed to make the provision too narrow; the object was surely to prevent a State from invoking immunity in connection with any part of the jurisdiction exercisable by the local courts in proceedings relating to the administration of estates, trusts, bankruptcies or the winding up of companies. It was of paramount importance that the local courts should be able to discharge their protective functions effectively and should not be encumbered by any plea of immunity. He also suggested that the drafting of paragraph 1 (d) should be looked at carefully by the Drafting Committee; all the necessary elements were there, but the order in which they had been put together might prove a source of confusion.

¹¹ *Ibid.*, footnote 17.

¹² Montreal Draft Convention on State Immunity (1982); *ibid.*, footnote 8.

¹³ Council of Europe, *Explanatory Reports on the European Convention on State Immunity and the Additional Protocol* (Strasbourg, 1972), pp. 20–21.

38. Lastly, he agreed with the Special Rapporteur (*ibid.*, para. 141) that an exception had to be made to protect the inviolability of the premises of diplomatic missions. Paragraph 2 of draft article 15 might, however, be too broadly worded. The wording of the relevant conventions would have to be closely examined in order to find the right language, but it seemed clear that, as an absolute minimum, it should be stipulated that paragraph 1 (a) did not apply to proceedings concerning a State's title to or possession of property used for the purposes of a diplomatic mission.

39. Mr. USHAKOV said that, despite the Special Rapporteur's assertion that draft article 14 was not connected with the theory of limited or functional jurisdictional immunity of States, he had nevertheless been obliged, for the sake of consistency with his previous reports, to follow that theory and invoke legal decisions based on the distinction between *acta jure imperii* and *acta jure gestionis*.

40. Unlike previous speakers, he (Mr. Ushakov) considered that the conventions codifying diplomatic law, in particular the 1961 Vienna Convention on Diplomatic Relations, settled the question of the jurisdictional immunity of States. That was shown by articles 31 and 32 of the Convention, under which diplomatic agents enjoyed immunity from the criminal, civil and administrative jurisdiction of the receiving State, although the sending State could waive that immunity. It followed that the State itself enjoyed such immunity.

41. Under Soviet legislation on civil procedure, proceedings could not be instituted against a foreign State before the Soviet courts without the consent of that State. That legislation could only be interpreted as implying that the Soviet Union recognized the absolute jurisdictional immunity of other States. Conversely, when the Soviet Union agreed with another State to subject itself to the latter's jurisdiction, that meant that both States recognized the existence of the jurisdictional immunity of the Soviet Union but that they agreed to waive it. It was impossible to consider, as the Special Rapporteur had done, that the two States in such a case admitted that the exercise of the jurisdiction of the forum State was the rule. In the few trade treaties signed by the Soviet Union itself with other States—most trade agreements were merely guaranteed by the Soviet State—it occasionally expressly agreed to submit itself to the jurisdiction of those States, on the understanding that the contracting parties recognized the fundamental principle of jurisdictional immunity.

42. Draft article 14 had no legal basis in either the legislation or the practice of States. In his report (A/CN.4/363 and Add. 1, para. 68), the Special Rapporteur had noted that customary international law did not provide for the exercise of the jurisdiction of the *locus delicti commissi* when the act or omission complained of was attributable to a foreign State. There had been no contrary practice until the adoption by a few countries of legislation providing for exceptions to that rule. That legislation, however, had been opposed by some States as being contrary to contemporary international law. Con-

sequently, it was impossible to view it as representing an acceptable tendency which could be used as a basis for a draft article. In that connection, he pointed out that the case *Letelier v. Republic of Chile* (1980)¹⁴ referred to in the report (*ibid.*, para. 84) was not entirely relevant, since it concerned State activities which were unacceptable in international law.

43. Under article 41 of the 1961 Vienna Convention on Diplomatic Relations, all persons enjoying diplomatic privileges and immunities had the duty to respect the laws and regulations of the receiving State. They, as well as the sending State, were under that obligation even in the absence of jurisdiction on the part of the receiving State. If they caused damage, they must remedy it. There was no need in such a case for the receiving State to exercise its jurisdiction. In that connection, he wondered what was the exact meaning of "State" in draft article 14. He raised a hypothetical case in which he himself was legal adviser in a Soviet embassy. If, through negligence, he caused a fire in his apartment, he would clearly have an obligation to compensate the owner of the apartment. However, in accordance with the 1961 Vienna Convention, he would enjoy immunity from civil jurisdiction. Thus no proceedings would be instituted against him but the matter would be settled through diplomatic channels. Clearly, article 14 would not apply to such a case: it was not the "State" which had acted, and no action could lie against it. Another hypothetical case would be if he were legal adviser to the administration of an exhibition organized by the Soviet Union abroad and caused such a fire. In that case he would not enjoy jurisdictional immunity and an action could lie against him.

44. What, then, was the content of the concept of the State in draft article 14? If a warship of one State entered the port of another State and caused damage, there would be no question of instituting proceedings against the former State; the matter would be settled through diplomatic channels. Similarly, if the damage was caused by a maritime exploration vessel belonging to that State, an action could not lie against the latter before the courts of the territorial State. If it was a merchant navy vessel placed at the disposal of a legal entity, then the State was not concerned, even though it owned the ship. Consequently, he did not understand how an action could be brought before the courts of the forum State against another State as a result of personal injuries or damage to property. A solution of that kind would run counter to existing practice. If it was the State that was the author of the injuries or damage, it enjoyed jurisdictional immunity which was widely recognized throughout the world, and the matter was settled through diplomatic channels. If the author was a diplomatic agent and the State waived his jurisdictional immunity, proceedings could be instituted not against the State but against the diplomatic agent. All those questions should have been considered by the Special Rapporteur, who referred, in an abstract manner

¹⁴ United States of America, *Federal Supplement*, vol. 488 (1980), p. 665.

and in contradiction with practice, to the notion of a State having caused personal injuries or damage to property.

45. Contrary to the Special Rapporteur's statement in his report (*ibid.*, para. 76) to the effect that the practice of socialist countries in the matter was virtually unknown, those countries had always respected the principle of absolute jurisdictional immunity. A civil action could not lie against a State without the express consent of that State.

46. Finally, he objected to the Special Rapporteur's statement (*ibid.*, para. 96) to the effect that contemporary authors were all supporters of a restrictive trend. As he had stated in his own memorandum (A/CN.4/371), legal writers in the socialist countries were in favour of unqualified respect for the sovereignty of States. Furthermore, some authors from Western European countries shared that view.

47. In principle, he found no difficulties with draft article 15.

The meeting rose at 1 p.m.

1768th MEETING

Thursday, 26 May 1983, at 10.10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov.

Visit by the Legal Counsel

1. The CHAIRMAN welcomed Mr. Fleischhauer, Under-Secretary-General of the United Nations, on his first visit to the Commission in his capacity as the Legal Counsel and expressed the hope that Mr. Fleischhauer would participate in the discussions of the Planning Group relating to the organization of the work of the Commission and its relations with the Secretariat.

2. Mr. FLEISCHHAUER (Legal Counsel) assured the Commission that, like his predecessors, he would do his utmost to meet its needs and expectations. In particular, he would be pleased to attend the meeting of the Planning Group scheduled for the following week. In conclusion, he announced that the Secretary-General intended to address the Commission when visiting Geneva in July 1983 in connection with the session of the Economic and Social Council.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,¹ A/CN.4/363 and Add. 1,² A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/ Conf. Room Doc. 1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (continued)

ARTICLE 14 (Personal injuries and damage to property)
and

ARTICLE 15 (Ownership, possession and use of property)⁵
(continued)

3. Mr. FLITAN said that, like other members of the Commission, he asked himself to whom the draft articles were intended to apply. The answer to that question was to be found in article 1, according to which the draft applied to the immunity of one State and its property from the jurisdiction of the courts of another State, and in article 6, which stipulated that a State was immune from the jurisdiction of another State in accordance with the provisions of the draft. Some speakers had raised questions as to the scope of the concept of a foreign State exempt from the jurisdiction of another State. That concept was explained in paragraph 1 (a) of article 3 and in article 4. The former of those provisions listed the persons and State organs covered by the expression "foreign State"; the second specified that persons to whom jurisdictional immunities were recognized or accorded under a number of international codification conventions were not governed by the draft.

4. In his fifth report (A/CN.4/363 and Add. 1, para. 26), the Special Rapporteur had listed the eight limitations or exceptions to the principle of immunity set forth in article 1 which he intended to formulate in articles 13 to 20. It was legitimate to ask whether those exceptions might not render the principle devoid of content. In his view, it was necessary to see whether the exceptions were justified and to maintain only those which were essential. Those which it would at present be premature to formulate should be rejected. It was from that point of view that he proposed to examine draft articles 14 and 15.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem.*

⁴ 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; revised text (para. 1(a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

⁵ For the texts, see 1762nd meeting, para. 1.

5. With great intellectual honesty, the Special Rapporteur had provided in his report all the material which the Commission needed for a decision on whether to accept or reject each of the proposed articles. First, he had advanced certain arguments in favour of an exception for personal injuries and damage to property, as provided for in article 14. Thus the Special Rapporteur observed (*ibid.*, paras. 68–75): (a) that, in the event of such injuries or damage, it was in general the *lex loci delicti commissi* that applied, which militated in favour of the *forum loci delicti commissi* as being better qualified to adjudicate in such cases; (b) that physical injuries or damage were often suffered by innocent persons; (c) that article 14 filled a legal vacuum; without that provision, the injured party would have no access to legal remedies in order to obtain compensation; (d) that the main thrust of article 14 was the protection of the injured party; (e) that, even if the principle of jurisdictional immunity of States had been strictly observed until the present, compensation had always been obtained in one way or another and that States should therefore not regard the proposed exception to that principle as an affront; in certain cases, in particular those resulting from traffic accidents, arson or even terrorist acts, justice should not only be done but also be seen to be done; (f) that, in cases not covered by insurance, the injured party should receive compensation; (g) that the State should be humane and merciful and that its jurisdictional immunity was not lost in cases covered by article 14. However, he (Mr. Flitan) considered that the jurisdictional immunity of the State was, indeed, lost because the article provided for a real exception to the principle of such immunity.

6. On the other hand, there were other considerations which argued against article 14. First, it had to be admitted that the exception formulated in that provision restricted the scope of application of articles 1 and 6, to the point where it might legitimately be asked what was left of the principle of jurisdictional immunity. It had to be conceded that practice in the matter was not conclusive and that the proposed article was innovative in nature; in many of the cases cited, the principle of absolute immunity had been recognized. Secondly, the question should be asked whether there were good reasons for changing the existing system, which operated satisfactorily. Thirdly, the exception provided for in article 14 had the effect of creating a different legal status for sovereigns, heads of State and members of Government, on the one hand, and for diplomatic agents, in respect of whom no such exception was provided, on the other. Why should members of Government be accorded less extensive immunities than diplomatic agents? Was it normal for judicial proceedings to be instituted before a court of the territorial State if, for instance, a minister of a foreign State caused a traffic accident while visiting the country, when the diplomatic channel was considered an adequate means of making good similar damage that might be caused by a diplomatic agent? Fourthly, he did not think that the link between the *lex loci delicti commissi* and the *forum loci delicti commissi* was self-evident. The tribunals of the *locus delicti commissi* were not necessarily competent and, even if they were, they might very well

apply a law other than the *lex loci delicti commissi*. No argument in favour of article 14 could therefore be drawn from that source. Fifthly, there was no question of filling a legal void, because it was possible to imagine the system provided for diplomatic agents being applied—in other words, settlement through the diplomatic channel or otherwise application of article 31, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations, according to which

The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State.

7. Reading the report, he had had the impression that State practice actually argued against article 14. As for doctrine, the Special Rapporteur himself recognized (*ibid.*, para. 96) that it was still too early to speak of the existence of a doctrine with regard to the particular area of personal injuries and damage to property. The exceptions provided for in draft article 14 would, in his view, rob the principle of jurisdictional immunity of its content in many cases. Indeed, those exceptions actually expressed a theory, which was something the Commission should beware of, and were so extensive as to raise the question whether the draft was not ultimately intended to enshrine the exceptions rather than the basic principle.

8. In a sense, draft article 15 gave rise to the same questions as draft article 14. In his view, the drafting of the provision should follow closely that of article 31 of the 1961 Vienna Convention; the exceptions should apply only to problems involving private property. For example, the French Library in Bucharest, which was a dependency of the French embassy and the property of the French State, should come within the scope of application of the principle formulated in article 6. On the other hand, the Romanian Library in New York, which was not a dependency of the Romanian embassy in Washington, should come under an exception to the application of that principle. He took the view that article 15 should be limited to ownership, possession and use of property which was private and not official. With regard to paragraph 1 (b) of article 15, he reserved the right to raise in the Drafting Committee the question of vacant immovable property which, under different legal systems, could pass either to the State of residence or to the State of origin of the *de cujus*.

9. Mr. OGISO remarked that, with regard to judicial practice prior to national legislation in the matter of personal injuries and damage to property, the Special Rapporteur had recalled in his fifth report that the practice of States had been neither uniform nor consistent (A/CN.4/363 and Add. 1, para. 76), but that, in a number of countries where judicial practice had tended to favour a less absolute or more restrictive principle of State immunity, attempts had been made to justify the exercise of jurisdiction by competent courts of the State of the forum on the ground that the act or omission in question related to State acts *jure gestionis* or, at any rate, not to acts *jure imperii* (*ibid.*, para. 77). The Special Rapporteur had also stated (*ibid.*, para. 100) that the causes of action could arise from any activities undertaken by a foreign

State or one of its organs, agencies or instrumentalities within the State of the forum, thus implying that he was in favour of abandoning the practice referred to in paragraph 77 of the report by including acts *jure imperii* among those for which the exercise of jurisdiction by the territorial State was justified.

10. The correct interpretation to be given to draft article 14 in the light of the above-mentioned passages from the report and of paragraphs 1 and 3 of article 7, adopted by the Drafting Committee at the previous session, was not quite clear. Was it the Special Rapporteur's intention that the general principle set forth in article 7 should apply to articles 13 to 20 and that, consequently, the territorial State should refrain from exercising jurisdiction in its courts against another State in respect of acts performed in the exercise of governmental authority? That was the interpretation which he himself would regard as natural, but a different interpretation was also possible and he would appreciate further elucidation by the Special Rapporteur.

11. He was in favour of maintaining the phrase "Unless otherwise agreed" in draft article 14 in order to cover situations such as injury or damage caused by armed forces stationed in the territorial State with, of course, the latter's agreement. The usual practice was that proceedings initiated in relation to such injury or damage were covered by status-of-forces agreements, and it was desirable to avoid confusion between such agreements and the draft articles under consideration by maintaining the words in question.

12. He supported the drafting proposal made by Sir Ian Sinclair (1767th meeting, para. 33) for the inclusion of a reference to compensation in the text of article 14. The proposal was in line with the relevant provision of the United States Foreign Sovereign Immunities Act of 1976 and made it clear that the article was intended to cover civil cases only and not the criminal jurisdiction of the State of the forum.

13. Lastly, he said that draft article 15 expressed the established judicial interpretation, particularly with respect to immovable property, and was therefore acceptable in principle.

14. Mr. KOROMA, referring to the Special Rapporteur's summary of the discussion of draft article 13 (1767th meeting), said that, since very few categories of persons were covered by that provision, it was open to question whether it should be included in the draft. Moreover, if, as Sir Ian Sinclair had pointed out (1763rd meeting), draft article 13 was not intended to derogate from the Vienna Conventions on Diplomatic Relations and on Consular Relations, the categories of persons covered became even narrower. That provision could lead to unnecessary complications in international relations and might therefore be omitted altogether.

15. The purpose of draft article 14 was to examine possible limitations to State immunity in cases involving personal injuries and damage to property or, in other words, the liability of the State or one of its organs, agencies or instrumentalities to pay damages or monetary compensation in respect of an act or omission attributable

to it. The question of liability to pay monetary compensation thus lay at the heart of the matter. In his view, a State did not have to be taken to court in order to be required to pay such compensation. A just demand for compensation for injuries or damage could be made through the diplomatic channel.

16. Draft article 14 attempted to deprive a State of immunity, as the Special Rapporteur noted in his fifth report (A/CN.4/363 and Add. 1, para. 65). Since criminal proceedings were not intended by that draft article and since the objective was monetary compensation, the solution to the problem was to be found in diplomatic negotiations and insurance. It was the law of most States that all vehicles, including vehicles operated by Government agents, must be insured against accidents and personal injuries. States could even adopt legislation requiring all Government vehicles to be comprehensively insured so that an injured party would never be left claimless. The cases covered by draft article 14 and claims for monetary compensation arising therefrom should be settled through the diplomatic channel.

17. The argument against draft article 14 was all the stronger in that, on the Special Rapporteur's own admission, that provision covered very few cases and the basis for the actual exercise of jurisdiction could not be found in customary international law or in the traditional practice of States. The Special Rapporteur stated that "the question of State immunity should not be raised, or indeed need not be raised, when the causes of action are outside the jurisdiction of the courts" (*ibid.*, para. 66). Thus the jurisdiction of the courts would not be invoked if a matter was being dealt with on a Government-to-Government basis or, in other words, through the diplomatic channel. An organ, agency or instrumentality of the State would then not have to go to court to plead immunity.

18. The Special Rapporteur also stated that "an agreed basis or an unchallenged or undoubted basis for jurisdiction is obviously the *locus delicti commissi*" (*ibid.*). At present, however, plaintiffs often questioned the basis for the jurisdiction of the *locus delicti commissi*. That was one of the most vexed questions in cases relating to conflicts of laws and, in some instances, the law of the place of commission had given way to the law of the State which had the most significant relationship with the parties and the occurrence of the injuries or damage. In that connection, it had rightly been pointed out by preceding speakers that the author of injury or damage did not necessarily have to be present in the territory of the forum State at the time of the occurrence of that injury or damage.

19. He found it difficult to agree with the Special Rapporteur's view that draft article 14 could cover cases of murder or terrorism (*ibid.*, paras. 84-85) or to imagine a State pleading sovereign immunity when it was accused of murder or terrorism.

20. He noted that, although the report referred to "common-law or Commonwealth countries in . . . southern Africa" (*ibid.*, para. 89) having adopted legislation relating to sovereign immunity, the relevant footnote mentioned only South Africa, excluding all other

countries in southern Africa. Perhaps the Special Rapporteur could shed more light on that point.

21. Draft article 15 and the paragraphs of the fifth report relating to it were entirely acceptable to him. That provision should, in his view, be referred to the Drafting Committee.

22. Mr. NI, referring to draft article 14, said that the occurrence of personal injuries and damage to property would not involve a rule of public international law if there was no question of State immunity from the jurisdiction of the courts of another State. In private international law, the question of civil liability for personal injuries and damage to property was usually governed by the *lex loci delicti commissi* and that rule of the application of the law was usually accompanied by the assumption of jurisdiction by the *forum loci delicti commissi*. The question of immunity or non-immunity for acts or omissions attributable to a foreign State and causing personal injuries or damage to property in the forum State was of comparatively recent origin. The denial of immunity in such cases was intended to afford legal protection to persons and property within the jurisdiction of the forum State. As the Special Rapporteur had noted in his fifth report (A/CN.4/363 and Add. 1, paras. 78 and 80–81), most such cases involved traffic accidents and there were relatively few cases giving rise to liability for compensation as a result of acts committed against persons or their property.

23. The Special Rapporteur had rightly stated that legislation restricting immunity in the area under consideration was "still in its infancy" (*ibid.*, para. 91); he had also pointed out that

... On the whole, there has been very little evidence of State practice allowing or disallowing State immunity in respect of proceedings for "personal injuries and damage to property". (*Ibid.*, para. 76.)

The Special Rapporteur had gone on to warn (*ibid.*, para. 99) that the emerging trend in favour of granting relief to individuals for personal injury suffered could lead to confusion and disorder if the international community failed to steer that trend in a healthier direction which would have more salutary results for all concerned—the foreign sovereign States and the aggrieved individuals.

24. Although road traffic accidents occurred frequently, most of them were covered by insurance. Insurance companies were thus subrogated to the parties to an accident, who, under the laws of some countries, did not even have to appear in court. In addition to such cases, however, there was a wide range of cases which entailed the liability of foreign States or, rather, the personnel of their organs, agencies and instrumentalities in the forum State, not to mention diplomatic or consular personnel and members of the armed forces. Most cases of the latter type could be resolved through diplomatic negotiations or by amicable settlement. In fact, the use of the legal process was apt to create difficulties and even friction between States. In that connection, he noted that, in the memorandum which it had submitted to the General Assembly, at its thirty-seventh session, the secretariat of the Asian-African Legal Consultative Committee had stated that

the inclusion of personal injuries and damage to property as an exception to State immunity would open the flood-gate to litigation against foreign Governments and prove to be a constant irritant to relations between States. That memorandum, to which he had already referred (1762nd meeting), warranted careful consideration.⁶

25. Recently a suit had been brought against his country by a national of a foreign State who had claimed compensation for the personal injuries he had allegedly suffered while using fireworks manufactured by the Chinese Native Products Corporation. That suit, which had deliberately been brought against the People's Republic of China *eo nomine*, raised the very important question of jurisdiction. If a suit of that kind could be so instituted, a State in which commodities were manufactured for export to foreign countries could at any time be made the defendant in the courts of any importing State and be placed at the mercy of the would-be plaintiffs. In the case in question, physical injuries had been suffered by an individual, however negligent he might have been, and, for humanitarian reasons, an out-of-court settlement was being arranged. Many such cases could be settled through negotiation without any need to resort to compulsion by judicial proceedings. Due account should therefore be taken of the possibility of abuses, for frivolous or even malicious litigation might be instituted by unscrupulous persons in order to embarrass defendant States. The danger was that a thriving business would be created if proceedings could be conducted in accordance with the laws of the forum State.

26. Turning to draft article 15, he said that he was grateful to the Special Rapporteur for his untiring efforts to collect, analyse and carefully evaluate materials on the question of the ownership, possession and use of property. The criterion of the *lex situs* was the established rule in relation to immovable property and the competence of the *forum rei sitae* was seldom disputed. That was, however, not always the case with regard to movable property. State practice allowed actions to proceed which might involve titles or interests of a foreign State in transactions concerning immovable property situated in the territory of the forum State without granting immunity to that foreign State. The law of the United Kingdom and several of the Commonwealth countries extended the exception of non-immunity to movable property in cases involving an interest arising by way of succession, gift or *bona vacantia*. Article 10 of the European Convention on State Immunity⁷ contained a similar provision, but the régime of trust funds and their administration was not generally recognized and practised except by common-law countries. It might therefore be preferable to simplify the wording of draft article 15.

27. Mr. CALERO RODRIGUES said that, in considering the question of exceptions to the principle of State immunity, the Commission should take great care

⁶ *Ibid.*, footnote 24.

⁷ *Ibid.*, footnote 7.

not to allow the exceptions adversely to affect the principle. Thus, in examining draft article 14, on personal injuries and damage to property, the Commission must decide whether an exception was justified and, if so, why. In his fifth report (A/CN.4/363 and Add. 1, para. 68), the Special Rapporteur had clearly stated that the exception was not recognized in customary international law or the traditional practice of States. Indeed, in his research on judicial practice, the Special Rapporteur had found only one case, in Austria, in which immunity had been denied (*ibid.*, para. 81). It should also be pointed out that the Inter-American Draft Convention on Jurisdictional Immunity of States (ILC (XXXV)/Conf. Room Doc. 4) did not actually establish an exception for personal injuries and damage to property. It stated in article 6 (e) that, in proceedings for losses and damages or tort liabilities, an exception to immunity would apply only when such losses and damages or tort liabilities arose out of trading or commercial activities.

28. The Special Rapporteur had concluded (A/CN.4/363 and Add. 1, para. 99) that there was an emerging trend in favour of an exception to sovereign immunity in cases involving personal injuries or damage to property. He himself was not sure that such a trend actually existed and he had been puzzled by the theoretical and practical arguments in favour of the exception which had been presented by the Special Rapporteur (*ibid.*, paras. 69–70 and 74–75). On the one hand, he had stated (*ibid.*, para. 69) that the exercise of jurisdiction by the courts of the place where the personal injury or damage to property had occurred was probably the best guarantee of sound and swift justice, while, on the other, he had noted (*ibid.*, para. 70) that the absence of competent judicial authority and lack of applicable law would leave the injured party remediless and without adequate relief or possible recourse.

29. If the Commission accepted those arguments, they would have to apply to many other cases and not only to the particular category of exceptions under consideration. It might even be said that, on the basis of such arguments, there was no ground whatever for State immunity because, in practically every case, the best guarantee of sound and swift justice would be recourse to the courts. There were, however, good reasons for not taking States to court and he was inclined to believe that many cases of personal injuries and damage to property could be settled through channels other than the courts, including the diplomatic channel, negotiations and consultations between the injured party and the State responsible. He was therefore not in favour of the exception provided for in draft article 14.

30. Draft article 15 raised far fewer problems than draft article 14 because it was generally agreed that, in the case of immovable property, the laws and courts of the State in which the property was situated should prevail and that an exception to State immunity should apply. It should, however, be borne in mind that, if it was agreed that litigation should not involve the property of the State, the application of the exception would be considerably limited.

31. Although he would normally be reluctant to agree to

the application of an exception in the case of movable property, he could accept the very general wording of draft article 15, which subjected movable property to the jurisdiction of the local courts only in cases involving secondary matters such as succession, gift, *bona vacantia*, the administration of estates and trusts, bankruptcy and the winding up of companies. The wording of draft article 15 and, in particular, that of paragraph 1 (d) could no doubt be improved. The two safeguards provided for in paragraph 2 were useful, but it remained to be seen how the Special Rapporteur would deal with the difficult questions of attachment and execution.

The meeting rose at 1.05 p.m.

1769th MEETING

Friday, 27 May 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, 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, Mr. Yankov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,¹ A/CN.4/363 and Add.1,² A/CN.4/371,³ A/CN.4/L.3352, sect. D, ILC(XXXV)/Conf. Room Doc. 1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (continued)

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8, 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

ARTICLE 14 (Personal injuries and damage to property)
and

ARTICLE 15 (Ownership, possession and use of property)⁵
(continued)

1. Mr. LACLETA MUÑOZ thanked the Special Rapporteur for the analysis he had carried out in order to prepare draft articles 14 and 15, an analysis made difficult by the paucity of precedents in the areas covered. It seemed, however, that the precedents cited did not always correspond to the conclusions drawn in the fifth report (A/CN.4/363 and Add.1). Rather, those conclusions were based on national legislation and on the 1972 European Convention on State Immunity.

2. Draft article 14 was a response to a logical question: to whom should the private individual apply for compensation in the case of personal injury or damage to property resulting from an act, attributable to a State, occurring in the territory of another State? In its present formulation, however, the article seemed to go a little further than was needed. It applied to all State acts having injurious consequences, the sole requirement being that the author of the act was present in the territory at the time of the act's occurrence. Hence it did not relate exclusively to State acts considered wrongful under international law. In a case involving an accident in the port of Barcelona between a warship and a merchant vessel, the latter had sunk, but the warship had enjoyed jurisdictional immunity and the judgment rendered by the Spanish court had been in keeping with the legislation of the flag State. However, if article 14 in its present form had been applied, the persons in charge of the warship could have been prosecuted.

3. While he appreciated the wish to provide stronger protection for injured persons, he considered that the scope of the article should be brought within more normal limits. The passages of the fifth report dealing with article 14 were essentially concerned with traffic accidents attributable to military or diplomatic vehicles belonging to a foreign State. The most interesting precedent cited in that respect was *Holubek v. United States* (1961),⁶ in which the Austrian Supreme Court had rejected immunity, saying that it was the act performed by a State organ that should be looked at, not the motive or purpose, and that the act of the foreign State from which the claim was derived should always be investigated. It was indeed an interesting judgment, but he doubted whether it could serve as a basis for drafting an article of a general nature.

4. Draft article 15 did not give rise to any particular difficulty. It was a useful provision which drew all the necessary inferences from well-established State practice. The wording, however, and especially that of paragraph 1 (d), could be simplified. As for paragraph 2, it was not

clear whether the reference to "the inviolability of premises of diplomatic or special missions or consular premises" covered both immunity from attachment and execution and jurisdictional immunity. Unless the situation of diplomatic or special missions was precisely regulated in the draft, their immunity might be subject to the same rules as that of States. Yet the basis for diplomatic immunities, which were bound up with the functions performed, was not the same as in the case of State immunity. The jurisdictional immunity of missions went further than that of States, more particularly with regard to their property.

5. Mr. USHAKOV said that, in principle, he endorsed the idea underlying draft article 15, but the passages in the fifth report (A/CN.4/363 and Add.1) in connection with that article were open to some criticism. First, as had already been pointed out, it was a mistake to speak in general terms of the situation regarding property, since the rules for immovable property and for movable property were not the same. For example, was the law applicable to a vehicle imported by a State from its territory to the territory of a foreign State for the use of a diplomatic mission the law of the receiving State or that of the accrediting State? Again, in the matter of wills and testaments, the applicable law was not always that of the place in which the property in question was situated.

6. Secondly, the practice quoted in support of the draft article (*ibid.*, paras. 116–123) was somewhat disappointing. In *Limbin Hteik Tin Lat v. Union of Burma* (1954),⁷ the District Court of Tokyo had said:

A State is not subject to the exercise of power by another State, and therefore is not subject to the jurisdiction of another State in the matter of civil proceedings. . . . However . . . in an action concerning immovables, it is widely admitted that jurisdiction belongs exclusively to the State of the *situs*, and consequently it must be said that a foreign State may be subject to the jurisdiction of another State.

The first sentence was correct, but what was meant by "an action concerning immovables" in the second sentence? Did the phrase refer to proceedings brought in order to establish the right of the State or to an action *in rem* relating to State property? Again, the summing up by Lord Denning quoted in the report (*ibid.*, para. 118) discussed in general terms cases in which there was or was not immunity, but it did not deal with the real problem, namely establishing the rights of the State over certain property. The exceptions relating to trading or commercial activities (*ibid.*, para. 119) and the dual personality of the State (*ibid.*, para. 122) did not enter into the question. Furthermore, the competence of the courts was not always the point at issue. Sometimes it was a matter of establishing proof independently of any proceedings; for instance, a notary, not a court, might be involved in a case involving the terms of a will or testament.

7. Lastly, the basis for article 15 appeared to lie in draft article 9 (Effect of participation in a proceeding before a

⁵ For the texts, see 1762nd meeting, para. 1.

⁶ *Juristische Blätter* (Vienna), vol. 84 (1962), p. 43; text reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 203 et seq.

⁷ *International Law Reports* (London), vol. 32 (1966), p. 124; also reproduced in United Nations, *Materials on Jurisdictional Immunities* . . . , pp. 339–340.

court). Under paragraph 1 (b) of article 9, a State could not invoke immunity from jurisdiction in a proceeding before a court of another State if it had intervened in that proceeding or taken any other step relating to the merits thereof. However, paragraph 1 (b) did not apply to any intervention or step taken for the sole purpose of asserting a right or interest in property at issue in the proceeding. There was an obvious link between the two articles and, in his view, the provision forming the subject of draft article 15 should appear after draft article 9. Moreover, care should be taken never to speak of proceedings against the State, for the first issue to be resolved was whether a case involved jurisdictional immunity or an exception thereto.

8. Mr. McCaffrey said that draft articles 14 and 15 illustrated the general principle stated by Mr. Ushakov in his memorandum (A/CN.4/371, para. 7), namely that, when a State operated within the jurisdiction of another State,

... it is under an obligation strictly to abide by the other State's internal law. In particular, it may engage, within the sphere of jurisdiction of another State, only in such activities as are permitted by the latter.

The principle was entirely consistent with the one recognized in 1812 by Chief Justice Marshall in *The Schooner "Exchange" v. McFaddon and Others*,⁸ in other words, a State entered and operated in the territory of another by virtue of a licence granted to the former by the latter.

9. If the principle was applied to draft article 14, it seemed highly doubtful that, except in the case of members of diplomatic missions, such a licence would normally include permission, whether express or implied, to cause physical injury to property with complete immunity from the jurisdiction of the host State and with impunity from civil liability, something that was confirmed by the Special Rapporteur in his fifth report (A/CN.4/363 and Add.1, para. 69). It was thus most unlikely that the host State would effectively make the guest State immune from tort liability, in view of its concern for the safety and well-being of persons within its borders. Such concern would give way only to some overriding interest, for instance the wish not to impede diplomatic relations. Nevertheless, the host State's interest in providing remedies for wrongs committed within its borders did suggest that the immunity granted in order to foster diplomatic intercourse should be carefully circumscribed.

10. The acceptance of that approach by the international community was borne out by the fact that the immunity granted to members of a diplomatic mission under article 31 of the Vienna Convention on Diplomatic Relations did not extend to members of a consular post, for under the terms of article 43, paragraph 2 (b), of the Vienna Convention on Consular Relations, consular officers and employees did not enjoy immunity in respect of civil actions "for damage arising from an accident in the receiving State caused by a vehicle, vessel or aircraft". Draft article 14 merely recognized the host State's interest in redressing wrongs that occurred within its jurisdiction.

11. To confirm the point made by the Special Rapporteur concerning the role played by insurance (*ibid.*, para. 72), he pointed out that the law of the United States of America, like that of other countries, required diplomats and diplomatic missions to carry liability insurance covering the operation of vehicles, vessels or aircraft, allowed the injured party to bring an action directly against the insurance carrier and barred the latter from asserting immunity as a defence. Thus diplomats enjoyed immunity, but victims of accidents caused by them were compensated.

12. Article 14 might also be seen as a logical outgrowth of the well-established practice of many States allowing their own citizens and others to sue them domestically to recover for civil wrongs allegedly inflicted by the Government. In the United States, for example, that had long been possible under the *Federal Tort Claims Act*,⁹ which had counterparts in a number of other countries. However, under section 1605, paragraph (a), subparagraph (5) (A) and (B), of the United States *Foreign Sovereign Immunities Act of 1976*,¹⁰ to which reference had been made in the report (*ibid.*, para. 87), the foreign State retained immunity in many of the same situations as the United States Government did under the *Federal Tort Claims Act*.

13. The exception embodied in draft article 14 for torts, like that embodied in draft article 15 for property, was entirely separate from the exception provided for in draft article 12 with regard to trading or commercial activities, for as the Special Rapporteur had pointed out (*ibid.*, para. 65), the restriction operated even where the agency or instrumentality of a foreign State had been acting in the exercise of governmental power.

14. One basis for jurisdiction was obviously the *locus delicti commissi*, but due account should be taken of the Special Rapporteur's comment (*ibid.*, para. 67) that there were other possible bases under the rules of private international law. Hence the Commission should be careful not to lay down rules of jurisdiction *ratione materiae* or *ratione personae*, which might have the effect either of depriving a court of such jurisdiction when the court would otherwise have possessed it under its own rules, or of conferring immunity which would not otherwise have existed. Rather, the assumption must be that the court would have jurisdiction *ratione materiae* and *ratione personae* under its own rules if the defendant was not a State.

15. In his view, the factual contacts, or connecting factors, to be borne in mind were relevant not to the issue of jurisdiction or the choice of the applicable law but to the question of determining the host State's interest in asserting jurisdiction over the guest State, an interest that would, in certain circumstances at least, surely prevail over the competing interest of granting immunity. It was thus important to pay close attention to the factual contacts, for the added reason that their quality would also

⁸ See 1763rd meeting, footnote 10.

⁹ *United States Code, 1946 Edition*, vol. 3, title 28, chap. 20.

¹⁰ See 1762nd meeting, footnote 17.

determine whether they were recognized by the international community.

16. Draft article 14 mentioned three such contacts as prerequisites for non-immunity, namely that the act or omission should have occurred in the forum State; that the injury or damage should have occurred in the forum State; and that the author of the injury or damage should have been present in the forum State at the time the harm occurred. It was essential to appraise them in the light of the extent to which they implicated interests of the host State, to determine whether they covered the types of cases with which draft article 14 was most concerned or in which it would most frequently be invoked, and to establish whether they unduly restricted the scope of the exceptions for non-commercial torts.

17. As for the first question, some guidance might be found in the practice followed in the United States. The legislative history of the *Foreign Sovereign Immunities Act of 1976* showed that section 1605, paragraph (a), subparagraph (5), was "directed primarily at the problem of traffic accidents".¹¹ Clearly, the factual contacts contained in draft article 14 would cover that type of case. Moreover, in the United States, the individual author of the harm, and presumably the foreign State, would normally be protected by the legislation requiring insurance cover and allowing for direct action against the insurance carrier. That seemed to be a sensible way of protecting the foreign State while ensuring compensation for innocent victims; if insurance cover was lacking, however, some recourse by the victim against the responsible State should still be possible.

18. The question of whether the connecting factors unduly restricted the scope of the exception in article 14 might also be usefully approached in terms of the competing interests of the host State that he had mentioned earlier. They could easily be reconciled, at least in some categories of cases, since the international community had already acknowledged, in the Vienna Conventions on Diplomatic Relations and on Consular Relations, that the functioning of international relations would not be significantly disrupted by allowing suits relating to traffic accidents and similar occurrences to be brought against consular officers and other State personnel who were not members of diplomatic missions.

19. A more difficult question was whether the same would hold true for suits against the State itself. The national legislation so carefully assembled by the Special Rapporteur afforded strong evidence of the view held by a wide variety of States that such suits would not normally interfere with international relations to such an extent as to override the concern to provide a forum for the innocent victim.

20. It appeared that States would be interested in providing a forum for their own citizens, no matter where they had been injured by the foreign State, but an examination of the 1972 European Convention on State

Immunity¹² and the draft conventions of the Inter-American Juridical Committee (ILC(XXXV)/Conf. Room Doc. 4) and the International Law Association¹³ did not reveal a restriction whereby tort suits against foreign Governments were allowed exclusively by citizens of the forum State. On the other hand, those instruments generally required that either the act or the omission giving rise to the harm or the harm itself should have occurred in the forum State, thereby suggesting once again that traffic accidents were of primary concern. Draft article 14 imposed those conditions concurrently and further required that the author of the harm should have been present in the forum State when the harm occurred.

21. As other speakers had pointed out, it was questionable whether the occurrence of the act or omission in the forum State and the presence of the author therein were necessary or indeed desirable. Those conditions would, in effect, allow immunity both in the case of a transboundary tort and in the case of acts of terrorism. However, the State in which the harm occurred would undeniably want to provide a forum for injured parties in both instances. Therefore, the only condition or factual contact that need be mentioned in draft article 14 was the occurrence of the loss or injury in the forum State, something that could easily be accomplished by amending the article, after the words "tangible property", to read "occurring wholly or partly in the latter State".

22. With regard to the judicial practice of the United States referred to by the Special Rapporteur in his fifth report, he wished to make it clear that the first sentence of paragraph 85 should not be taken to mean that United States courts had refused to apply the non-commercial tort exception provided for in the *Foreign Sovereign Immunities Act* when the Act would have allowed them to do so. Section 1605, paragraph (a), subparagraph (5), of the Act showed that the first and third cases mentioned in paragraph 85 were specifically excluded from the non-commercial tort exemption. In the second case referred to in paragraph 85, which had involved harm suffered outside the United States, the requirement that the harm should occur "in the United States" had not been satisfied. Those were cases in which jurisdiction over the foreign State had been excluded by the terms of the Act itself, rather than examples of the courts declining to exercise jurisdiction allowed under the Act.

23. The Special Rapporteur had assembled an impressive array of national judicial decisions, national legislation and international opinion to support his conclusion that there was an emerging, if not an "emerged", trend in favour of asserting jurisdiction over foreign States in cases involving non-commercial torts. In that connection, the Commission should take care not to dismiss out of hand the evidence of that trend to be found in the draft convention of the Inter-American Juridical Committee (ILC(XXXV)/Conf. Room Doc. 4) and in the International Law Association's Draft Convention on State Immunity, which had been prepared by a highly repre-

¹¹ *United States Code Congressional and Administrative News*, 94th Congress, Second Session, 1976, vol. 5, p. 6619.

¹² See 1762nd meeting, footnote 7.

¹³ *Ibid.*, footnote 8.

sentative group of experts from countries such as Egypt, France, the Federal Republic of Germany, Greece, Japan, the Netherlands, Norway, Pakistan, the Philippines, Poland, the Soviet Union, Sweden, Switzerland, the United Kingdom, the United States of America, Yugoslavia and Zambia. The time had come for the international community to seek to channel that trend in a constructive direction and to harmonize, to the greatest extent possible, the positions of all members of the community of nations.

24. With regard to draft article 15, on ownership, possession and use of property, the Special Rapporteur had explained (A/CN.4/363 and Add.1, para. 106) that the predominant authority of the State of the *situs* was a decisive factor in determining rights in property and that it constituted another qualification of or limitation on the licence granted to the guest State by the host State. As he further explained (*ibid.*, para. 107):

... the concept of ownership and other proprietary rights or interests can only exist within the framework of the legal system of the *situs*, and such a concept is bound to be inherently absorbed within the notion of territorial sovereignty of the State of the *situs* itself.

That became evident in examining the concept or legal institution of "property".

25. While the layman would probably think of the term "property" as referring to a particular thing, whether tangible or intangible, movable or immovable, the lawyer was more likely to think of the term as referring to rights in a thing. In the case of immovables, it was universally agreed that the source of those rights was the *lex rei sitae*. Moreover, a State other than that of the *situs* purporting to determine rights in land by applying the *lex rei sitae* did so at its own peril, since the only forum with the ultimate power to make and enforce such a determination was the *forum rei sitae*.

26. In the case of immovables at least, it was thus the *situs* State which had the paramount interest in and ultimate power over the determination of rights and interests in property located within its borders, for as the Special Rapporteur had recalled (*ibid.*, para. 111):

An alternative solution or sheer insistence on the principle of State immunity would only lead to chaos and absurdity. There would be a legal vacuum, as the rights and interests of the extraterritorial authority itself would be without legal foundation, failing its own recognition of and respect for the internal law of the territorial State.

27. The same considerations generally held true for movable property, but the one situation in which the *situs* of such property was less relevant was that of the administration of the estate of a deceased person. It was desirable, for reasons of convenience, certainty and uniformity, for the law of one State, often the *lex domicilii*, to govern the distribution of the movable property of the decedent, wherever that property was located. For that reason, he was not sure that it was desirable to provide in paragraph 1 (b) of draft article 15 that a State was not immune from the jurisdiction of the courts of another State in respect of proceedings relating to "any right or interest of the State in any immovable or movable property in the State of the forum, arising by way of succession, gift or *bona vacantia*". The requirement that the property should be located in the forum State should

probably be retained because it made sense in all cases except that of succession to movable property.

28. Although he experienced little difficulty regarding the substance of the rest of article 15, he agreed with the drafting changes proposed by Sir Ian Sinclair (1767th meeting, para. 37) concerning paragraph 1 (c) and with the view expressed by Mr. Calero Rodrigues (1768th meeting) and Mr. Lacleta Muñoz that paragraph 1 (d) could be simplified in order to make it clearer. In paragraph 2, it should also be specified that article 15 did not purport to derogate from the immunities granted by the Vienna Conventions on Diplomatic Relations and on Consular Relations and by the Convention on Special Missions. The paragraph might have to be re-examined after the Commission had approved draft article 4, which also protected the immunities granted under those instruments.

29. At the present stage, he would merely question the appropriateness of the term "inviolability" in paragraph 2, since article 22 of the Vienna Convention on Diplomatic Relations seemed to permit the receiving State to take a number of measures with respect to premises used for an embassy, short of attachment or execution. For instance, it appeared to allow the receiving State to adjudicate questions such as ownership, rent and servitudes, as long as possession by the sending State was not disturbed. Perhaps paragraph 2 could be drafted to take account of that point. Lastly, he agreed with Mr. Lacleta Muñoz that a diplomatic mission might well be entitled to a broader immunity than the foreign State itself, so that it could carry out its functions with as few impediments as possible.

30. Mr. QUENTIN-BAXTER said that his silence in connection with draft article 13 had meant that he agreed by and large with the terms proposed by the Special Rapporteur for that provision, which should be viewed not from a negative standpoint as an exception to State immunity, but, rather, as a positive assertion of a useful rule relating to the extent of immunity.

31. He experienced no fundamental difficulty with draft article 15, and particularly the substance of the article as a true exception to State immunity, because in the common-law tradition it had always been regarded in that way in judicial decisions. Problems might none the less arise in respect of movable property. As Mr. Lacleta Muñoz had said, the justification for the provisions relating to such property was that the interest of the foreign State was followed from the determination by the court in respect of title. Hence there might be room for some rearrangement of the provisions relating to movable property and for deciding whether the question of the determination of title was a matter precedent to the foreign State's interest from the point of view of immunity. Paragraph 2, in one form or another, was absolutely essential to draft article 15.

32. He had greater difficulty with the seemingly straightforward content of draft article 14. Mr. Ushakov's comment in his valuable memorandum (A/CN.4/371, para. 6) that the boundary of real sovereignty lay in the sovereignty of all other States was of broad significance in

that the independence of States and their authority within their territory was derived from the law and required respect for the territorial sovereignty of other States. That problem arose again and again in every aspect of the Commission's work and was part and parcel of the task of codification and progressive development of international law.

33. In examining Mr. Ushakov's memorandum on the relative priorities of territorial sovereignty and respect for State immunities, he had been reminded of the *Lotus* case,¹⁴ in which rather similar issues had been at stake. For a minority of judges in the PCIJ, it had been a fundamental proposition that respect for territorial sovereignty demanded absolute self-denial by States in the assumption of jurisdiction over matters arising in relation to the citizens of other States. By a small majority, however, the final decision in the case had moved in the opposite direction: it had been ruled that the territorial sovereignty of the State came first and that the rights accorded to other States had to be grounded in positive rules of international law.

34. In the area under consideration, States had on the whole shown the greatest self-restraint, so that the problem of the assumption of criminal jurisdiction had not greatly worried the international community. Now that the Commission had resumed its consideration of the draft Code of Offences against the Peace and Security of Mankind, however, that problem had once again come to the fore. The question whether the draft code would contribute to universal law and order or merely cause pandemonium would depend very much on the self-restraint displayed by States in assuming jurisdiction over matters involving the citizens of other States.

35. The sovereignty of a State within its own borders became derisory if the pressures and harm to which it was subjected from beyond its borders were not under legal control. To think in terms of absolute sovereignty in, for instance, the present topic or the topic of international liability for injurious consequences arising out of acts not prohibited by international law would ultimately lead to recognition of the sovereignty of only the most powerful State, as Mr. Ushakov had rightly pointed out in his memorandum (*ibid.*, para. 5).

36. In formulating draft articles 1 to 12, the Commission had in a sense been setting the stage; but with draft articles 13 to 15 it had entered a phase in which it would be making a direct and practical contribution to solving the everyday problems encountered by diplomatic missions and other agencies of sovereign States.

37. If the Commission was unable to solve the problems underlying draft article 14, it was liable to create an obstacle that would divide international opinion. Anyone who had ever been responsible for protecting the legal interests of a foreign ministry in relation to the agencies of other States would remember only too well the pressures that had to be faced and the need for the State to give proper expression to its territorial authority in dealing

with private individuals and trying to make them understand the degree to which immunities could modify the normal rights that the law conferred on them. The duty of a foreign ministry in such matters was not a simple one. It must, on the one hand, always be concerned to hold a certain line and not to allow the immunities that were proper and necessary to develop into abuse. On the other hand, it was usually concerned to persuade the other ministries of its own Government of the need to give full weight to the demands of diplomatic, consular and sovereign immunity.

38. In view of those considerations, he could not agree with some members that the problems under consideration could be avoided simply by omitting article 14. Such a course would not increase the scope of the immunities provided for in the draft. However, it would not be wise to ignore the kind of anxieties which the question of personal injuries and damage to property produced in the minds of the representatives of what were, in most cases, small countries that did not wish to become involved with the domestic law of forum States. It would be of great comfort to foreign ministries and diplomatic missions alike to know that certain matters could be settled through diplomatic channels.

39. Article 14 must also take account of the possibility that foreign States *eo nomine* could be taken to court as defendants in all sorts of circumstances, a possibility that did not appear to cause concern in relation to draft article 15, since the question of real property was as much in the interests of the forum State as of the foreign State, or in relation to draft article 13, which adopted a very balanced approach to the duty of diplomatic missions to abide by the labour law of the forum State when they chose to engage local employees. The possibility did, however, cause concern in relation to the unexplored aspects of draft article 14. One such aspect was that the agencies of foreign States must be able to insure themselves against certain kinds of risks. The best course might therefore be for matters in dispute to be litigated in the ordinary courts, because diplomatic negotiations were notoriously a very bad substitute for an exact determination of legal rights and obligations both under municipal law and under public international law. In that connection, the provisions of legislation in the United States of America, which enabled an insurance company to sue in its own name rather than by subrogation in the name of its client and so entirely avoided the question of suits against foreign States *eo nomine*, might well serve as useful guidelines for the drafting of article 14.

40. He agreed with other members that the words "and the author of the injury or damage was present therein at the time of its occurrence" would have to be reconsidered, but he understood why the Special Rapporteur had wished to draft the article as narrowly as possible. Nevertheless, it was somewhat difficult to regard civil proceedings against a foreign Government in connection with a transboundary tort as proceedings of the kind with which the Commission was practically concerned in the present article. Article 14, like article 13, dealt with an area that touched in some ways on diplomatic and con-

¹⁴ Judgment No. 9 of 7 September 1927, *P.C.I.J.*, Series A, No. 10.

sular immunities and it was in that area, in particular, that the Commission should take care to formulate balanced provisions in order to narrow the possible grounds of dispute as to what constituted a normal relationship between a forum State and a foreign State. He therefore shared the view that the proviso “Unless otherwise agreed” should be retained, so as to take account of the likelihood that some States might choose to modify that provision.

41. Mr. RAZAFINDRALAMBO said that, in connection with draft article 13, he had expressed serious doubts (1764th meeting) regarding the inductive method and had supported that article only on the condition that the exception should be in the nature of a residual rule. His doubts were not dispelled by the passages in the Special Rapporteur’s fifth report (A/CN.4/363 and Add. 1) relating to personal injuries and damage to property. The exception proposed in that particular area was fraught with still greater consequences than were the exceptions contained in articles 12 and 13, for in the case of personal injuries and damage to property, the acts or omissions in respect of which the State was denied jurisdictional immunity constituted torts. Disputes in matters pertaining to commercial activities or the performance of contracts of employment involved a breach of some form of consensus or agreement, a breach that set in motion the mechanism which called into question the principle of jurisdictional immunity. Those considerations explained the reserved attitude of many members who had emphasized that, in State practice, the principle of immunity was virtually absolute in nature.

42. As the Special Rapporteur had stated (*ibid.*, para. 73), the areas specified as personal injuries and damage to property were mainly concerned with accidental death, personal injuries and damage to property resulting from traffic accidents, but also covered cases such as assault and battery, malicious damage to property, arson and even murder or political assassination. It had been proposed that acts of terrorism should be added to the list, which was far from exhaustive. In that connection, it should be noted that some of the acts listed by the Special Rapporteur could result from mere negligence that gave rise to tortious liability and were thus amenable to civil jurisdiction, but most of them constituted genuine penal offences of a punishable or even criminal nature. If, as the Special Rapporteur affirmed (*ibid.*, para. 71), the main thrust of the article was to protect the injured parties, there was nothing to indicate that the victim protected in the case of damage to property had to be a natural person. Unquestionably, it was also possible for a private or public juridical person to suffer damage to property.

43. In the matter of the competent jurisdiction, there were a number of conclusions to be drawn in the light of the distinction between personal injuries and damage to property. In all probability, the court which heard an action in respect of personal injury occasioned by punishable or criminal acts would be a penal court, at least in Roman-law legal systems. The author of the offence would be summoned as a principal. But the organ, agency or instrumentality of the foreign State, or

the foreign State on behalf of which the author of the act performed the functions justifying his presence in the territory of the *locus delicti commissi*, would at the same time be summoned before the penal court as having civil liability. Hence, in the judicial practice of many countries, the foreign State or one of its organs might well have to plead its privilege of jurisdictional immunity before a penal court in a penal action.

44. If it was accepted that material damage could be suffered by any person, whether natural or juridical, it also had to be recognized that the victim could also be a public juridical person. In countries with an administrative jurisdiction, suits for compensation in respect of damage to property (with the exception of traffic accidents in the French and Malagasy systems) involving a national administrative organ fell within the competence of the administrative courts. Article 14 in its present form did not protect the foreign State either from a civil suit brought before a criminal court or from a contentious suit before an administrative court of the *locus delicti commissi*. It was true that the latter hypothesis was highly theoretical, since it was more than likely that, when an organ of the forum State found itself in conflict with the foreign State, the dispute would be settled through official or diplomatic channels in the interests of friendly relations between the two States. The fact nevertheless remained that a provision which was too general and which set aside the principle of jurisdictional immunity in cases of personal injury and damage to property was liable to have more drawbacks than advantages.

45. If the exception formulated in article 14 was to be maintained, it was essential to word the article in such a way as to emphasize its residual nature. The expression “Unless otherwise agreed” should be retained or possibly replaced by a more explicit phrase. As Sir Ian Sinclair had suggested (1767th meeting), it should also be made clear that the exception was applicable only in cases of civil jurisdiction and in respect of claims for compensation or reparation for personal injury or damage to property. Furthermore, there was no need for the second territorial condition, namely that the author of the injury or damage should have been present in the territory of the forum State.

46. In the French text, the phrase *un dommage à des biens corporels ou la perte de ce type de biens* might be replaced by *un dommage matériel ou la perte de biens*, for the term *corporel* was synonymous with *physique* or *matériel*, which explained the phrase *dommage corporel ou matériel* which the Special Rapporteur himself had employed repeatedly in the report and, of course, in the title of article 14. The very general term *fait* should be replaced by *acte*, in order to convey the notion of a positive act rather than an omission.

47. With regard to draft article 15, he fully endorsed the Special Rapporteur’s conclusion (A/CN.4/363 and Add. 1, para. 124) that the judicial practice in the matter of ownership, possession and use of property appeared to be consistent in support of an exception to State immunity, although there was no prototype judicial decision on every point at issue in every existing case-law in the world.

In terms of form, the article could give the impression of having been designed as a catch-all for anything that might have been overlooked. In particular, paragraph 1 (d) could be simplified, for it was difficult to understand and the report afforded little enlightenment in that regard. Lastly, he wished to endorse the remarks made by Mr. Laclea Muñoz and Mr. McCaffrey in respect of paragraph 2 of article 15.

48. Sir Ian SINCLAIR said that, in view of the way in which the debate had developed, he felt obliged to add two further points to his earlier remarks (1767th meeting). The first was of a general nature and related to the whole rationale of the rule of the jurisdictional immunities of States. In many countries, the State itself could not be sued in its own courts and, *a fortiori*, in a foreign court. Prior to the *Crown Proceedings Act* of 1947,¹⁵ the only way in which a private individual could institute proceedings against the State in the United Kingdom had been through a "petition of right" addressed to the Crown and requesting the right to pursue a remedy to the wrongful act that was the subject of complaint. The Attorney-General, acting in his quasi-judicial capacity, had to give his consent before the petition could be heard by the courts. Thus the concept of a foreign State's immunity from jurisdiction derived, if only in part, from the fact that some States were immune from that of their own courts.

49. The second point related to the distinction, mentioned in passing at the beginning of his previous statement, between jurisdiction and applicable law. All States had rules governing the scope of their civil jurisdiction, rules that varied greatly from country to country. Some attempts were currently being made to harmonize them to a limited extent within the European Communities, but no such harmonization existed at a broad international level, nor did the task of harmonizing rules pertaining to jurisdiction form part of the Commission's mandate in elaborating draft articles on the present topic. In the United Kingdom, for example, the courts could exercise jurisdiction in respect of any matter arising from a contract made in that country; that, however, had nothing to do with the applicable law, which in the United Kingdom was the law of the contract—in other words, the law most closely connected with the contract, which might be the law of the place where the contract was made, of the place where it was executed, or of the country of nationality of a contracting party. The distinction was an important one and confusion between the two concepts should be avoided.

50. With reference to the argument advanced (1768th meeting) by Mr. Koroma, Mr. Ni and other members that the matters covered by draft article 14 could more properly be settled through diplomatic channels, long experience of dealing with dissatisfied litigants against foreign States had convinced him of the need to seek an alternative way of settling disputes of the type in question, provided, of course, that the sovereign immunity of the

foreign State in its own territory was not put at issue. In connection with the *Lotus* case, mentioned by Mr. Quentin-Baxter, it should be remembered that States generally exercised great restraint with regard to criminal jurisdiction, but often failed to do so in matters of civil jurisdiction.

51. Draft article 14 dealt with sensitive and difficult issues and should be framed to avoid giving rise to some of the problems mentioned by various members. Thus it should be made clear that the article dealt solely with civil jurisdiction, and not with criminal jurisdiction. The reference to "tangible" property already made it plain that unfair competition or commercial torts were not covered. Furthermore, a sufficiently broad range of exclusions should be provided, either in the article itself or in the form of a general provision, to avoid any possibility of conflict with other existing international conventions, which included not only the relevant Vienna Conventions, but also such instruments as the Convention on Third Party Liability in the Field of Nuclear Energy,¹⁶ the Convention on International Liability for Damage Caused by Space Objects,¹⁷ and others.

52. Mr. USHAKOV, referring to Mr. McCaffrey's remarks concerning the work of the group of experts of the International Law Association, explained that the participation of his compatriot, Mr. Bogdanov, in that work in no way signified that Mr. Bogdanov endorsed the group's conclusions. Mr. Bogdanov was in fact a firm advocate of strict preservation of the jurisdictional immunity of States.

53. Mr. NI said that, in his own experience, as in Sir Ian Sinclair's, litigants in cases involving a foreign State were often dissatisfied; but in oriental countries, and more particularly in China, they none the less appeared to be more inclined to accept compromise solutions than were litigants in the west. In his view, conciliation was simpler than, and generally preferable to, recourse to the courts. Moreover, conciliation procedures avoided the tensions and ill-feeling that would inevitably emerge if a foreign sovereign State was brought before the courts as a defendant. Most of the cases falling under draft article 14 were traffic accidents, which could usually be settled promptly through insurance cover. In other cases, which were relatively rare, conciliation procedures were always worth trying even if they required a great deal of time and patience and the conciliator sometimes ran the risk of being blamed by both sides.

54. Mr. KOROMA said that he was somewhat at a loss regarding the conclusion to be drawn from the very interesting distinction made by Sir Ian Sinclair between jurisdiction and applicable law. As he had pointed out in his earlier remarks (1768th meeting), there was an increasing tendency for plaintiffs to look for the applicable law elsewhere than in the *lex loci delicti commissi*. To invoke a different law would obviously

¹⁵ United Kingdom, *The Public General Acts, 1947*, vol. 1, p. 861.

¹⁶ United Nations, *Treaty Series*, vol. 956, p. 251, and Additional Protocol, *ibid.*, p. 335.

¹⁷ *Ibid.*, vol. 961, p. 187.

involve a new jurisdiction and the court of the new jurisdiction could hardly be expected to apply the old law which the plaintiff had cast aside. As to the suggestion that article 14 should concentrate on monetary compensation for injury or damage, he wondered whether the plaintiff might not have to establish the defendant's criminal guilt before suing him for compensation. Some elucidation of that point would be welcome.

55. Mr. USHAKOV said that, in the Soviet Union, legislation relating to civil proceedings also provided for settlement out of court and that the majority of suits brought against States were settled in that way.

The meeting rose at 1.05 p.m.

1770th MEETING

Monday, 30 May 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balandá, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (continued) (A/CN.4/357,¹ A/CN.4/363 and Add.1,² A/CN.4/371,³ A/CN.4/L.352, sect. D, ILC(XXXV)/Conf.Room Doc.1 and 4)

[Agenda item 2]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (concluded)

ARTICLE 14 (Personal injuries and damage to property) *and*

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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; revised text (para. 1 (a)): *ibid.*, p. 100; (c) arts. 3, 4 and 5: *ibid.*, p. 96, footnotes 225, 226 and 227.

Part II of the draft: (d) art. 6 and commentary thereto adopted provisionally by the Commission: *Yearbook* . . . 1980, vol. II (Part Two), p. 142; (e) arts. 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*; (f) art. 10, revised: *ibid.*, p. 95, footnote 218.

Part III of the draft: (g) arts. 11 and 12: *ibid.*, p. 95, footnotes 220 and 221; revised texts: *ibid.*, p. 99, footnote 237.

ARTICLE 15 (Ownership, possession and use of property)⁵ (concluded)

1. Mr. DÍAZ GONZÁLEZ said that, in his opinion, draft article 14 served no useful purpose, as Mr. Flitan had amply demonstrated at the 1768th meeting. The cases mentioned by the Special Rapporteur in his fifth report (A/CN.4/363 and Add. 1) were not sufficient to justify drafting an article which formulated a new exception to the principle of jurisdictional immunity of States and their property, at the risk of transforming the general rule into a residual rule. In view of the existence of the Vienna Conventions on Diplomatic Relations and on Consular Relations, there was no question of filling a legal void. Most of the cases upon which the Special Rapporteur based the proposed exception were cases of contraventions of road traffic regulations. Yet, in order to be permitted to drive a motor vehicle, it was necessary in most States to be in possession, not only of a driving licence, but also of third-party insurance. It was well known that the numerous cases of traffic accidents brought to the attention of ministries were generally settled by negotiation without any great difficulty. Hence, there was no need to provide an exception to the principle of jurisdictional immunity in a matter in which hardly any problems arose in practice, and article 14 should be deleted.

2. He experienced no difficulty regarding article 15 except, possibly, from the point of view of the translation into Spanish.

3. Mr. JACOVIDES said that his approach to the topic under consideration had not changed since he had spoken at the Commission's previous session.⁶ The views he had expressed at that time also applied to the current discussion on draft articles 14 and 15, in connection with which the Commission's aim should be to devise practical solutions and to avoid doctrinal differences of opinion.

4. Mr. MAHIOU said that he would refrain from discussing general principles, for they were sometimes difficult to reconcile. In his fifth report (A/CN.4/363 and Add. 1, paras. 68 and 99), the Special Rapporteur spoke of a recent trend towards restricting State immunity. In reality, however, that trend had been extensively debated and widely challenged, and it could more appropriately be described as but one of a number of trends in some legislations and some judicial practices.

5. Other passages in the report might have been drafted in more qualified terms in order to avoid ambiguous interpretations. In view of the judicial practice of States cited in connection with draft article 14 (*ibid.*, paras. 81–82), it would have been preferable not to assert so emphatically (*ibid.*, para. 67) that the “distinction between *jus imperii* and *jus gestionis* . . . appears to have little or no bearing in regard to this exception”. That distinction was rejected by the Special Rapporteur, but it might well be appropriate to take into consideration the

⁵ For the texts, see 1762nd meeting, para. 1.

⁶ *Yearbook* . . . 1982, vol. I, p. 78, 1711th meeting, paras. 29–32.

concept of an "act of government", a concept familiar to the case-law of countries such as France and Algeria and one that could lead to the State being exempted from all responsibility and protected from being taken to court. The Special Rapporteur affirmed (*ibid.*, para. 75) that:

The sovereignty or governmental authority of a foreign State is not being challenged when . . . the State answerable for the physical damage to persons or property is called upon to come to the aid and assistance of the injured party.

Generally speaking, that statement was perhaps correct, but the circumstances in which proceedings were instituted against a State had to be taken into account. The proceedings could also go awry and encroach on the sovereignty and authority of the State.

6. Article 14 could be maintained only if it was clarified and redrafted. More particularly, it should be made clear whether the article related exclusively to civil liability or whether it also covered criminal responsibility. Similarly, he doubted whether it was appropriate to deal with personal injury and damage to property in one and the same sentence. The numerous comments in connection with the last part of the provision, stipulating that the author of the injury or damage had to be present in the territory of the forum State at the time of the occurrence of the act or omission, also revealed that the proviso called for elucidation.

7. As to draft article 15, paragraph 1 (*d*) was concerned with a State establishing title to property before the court of another State and covered cases in which the right or interest claimed was "neither admitted nor supported by *prima facie* evidence". The question arose as to who it was that admitted or supported such a right or interest, for the process of admission or support could, unfortunately, give rise to problems in, for instance, matters pertaining to nationalization. If nationalized property was exported and a claim to title was subsequently made in connection with the property, the very principle of nationalization ran the risk of being undermined. The report did not appear to offer any solution to that aspect of the problem, yet rules on the matter were to be found in General Assembly resolutions and, in particular, in the Charter of Economic Rights and Duties of States.⁷

8. Lastly, according to the Special Rapporteur (*ibid.*, para. 112):

If a State acquires property in the form of ownership or other proprietary rights and the property, whether immovable or movable, is situated in the territory of another State, the acquisition of such property is made possible only by virtue of the application of the internal law or private law of the State of the *situs*.

The reference to private internal law was incorrect for countries such as Algeria, where the bulk of immovable property was owned by the State and its sale was regulated, at least in part, by administrative law. A solution had to be found to the special problems posed by legal systems which drew a distinction between public and private internal law.

9. Mr. JAGOTA said that draft article 14 relating to personal injuries and damage to property caused by a tortious act or omission which could be attributed to a foreign State and for which that State could be sued in certain conditions was, like draft article 13, being proposed in order to reflect an emerging trend, and it raised a number of practical problems. There was very little case-law to support the terms of the article, which had been justified primarily on the emotional grounds that innocent victims should not be left without remedy. As the Special Rapporteur had pointed out in his report (A/CN.4/363 and Add. 1, para. 75), "To be humane and merciful is not inconsistent with statehood or sovereignty", and humanity also deserved the protection of international law. The Special Rapporteur had gone on to conclude (*ibid.*, para. 99) that a trend was emerging in favour of relief being granted to individuals for personal injuries or damage to their property, but had nevertheless cautioned that the trend should not be given unlimited scope and that an international standard was needed to prevent national legislation from determining international law.

10. His own approach to the article was the same as in the case of draft article 13, primarily because he considered it essential to provide for the possibility that a foreign State could be held responsible and be sued in local courts for acts or omissions causing personal injuries or damage to property. The cases covered by draft article 14 generally involved traffic accidents caused by vehicles operated by members of diplomatic, consular or special missions. From personal experience, he had found that ministries of foreign affairs were reluctant to leave questions of liability in such matters to the courts and preferred to deal with them at the diplomatic level, their concern being to ensure the maintenance of friendly international relations. Personal injuries and damage resulting from traffic accidents involving vehicles owned by a foreign State were thus covered by compulsory insurance. In his own country, even risks of injuries or damage caused by members of the families of foreign diplomats required insurance cover, and cases were handled through diplomatic channels. Similarly, agreements between the Government of India and international organizations relating to, for example, the organization of international conferences in India always included indemnity provisions on compensation for personal injuries or damage to property.

11. It could thus be seen that, by and large, India's experience was not consistent with the provision embodied in draft article 14. However, as he had said (1764th meeting) during the discussion on draft article 13, India was learning on the rebound and, by granting consent for suits to be brought against the agencies of foreign States under section 86 of the Code of Civil Procedure,⁸ it had begun to treat the agencies of foreign States in its territory in the same way as its agencies were treated in the territories of those States.

⁷ General Assembly resolution 3281 (XXIX) of 12 December 1974.

⁸ India, Ministry of Law, Justice and Company Affairs, *The Code of Civil Procedure, 1908 (As modified up to the 1st May 1977)*, pp. 32-33.

12. If the draft set some kind of international standard for suits against foreign States or for the adoption by India of a new law on State immunity, the emerging trend mentioned by the Special Rapporteur would be useful as a background. Accordingly, he was ready to support further consideration of draft article 14, provided the exception was restrictive and conformed to the limitations described in the fifth report. The article should thus apply to State acts and should exclude acts of diplomatic, consular or special missions. In addition, it should be made clear that the article applied only to tortious acts, not to acts which attracted criminal liability, and only to damage to tangible property, as indicated in the report (A/CN.4/363 and Add. 1, para. 100).

13. The expression “Unless otherwise agreed”, at the beginning of the article, should be retained in order to reflect the practice of States, which might conclude specific agreements containing indemnity clauses. The word “tortious” should be inserted before the word “act” to show that the provision did not cover criminal liability, and the whole phrase, thus amended (“if the tortious act or omission which caused the injury or damage in the State of the forum occurred in that territory”), might be followed by the words “or had its direct effect in that territory”, the purpose being to take account of the possibility that an act might originate beyond the territory of the forum State but cause damage or injury in that State. The words “and the author of the injury or damage was present therein at the time of its occurrence” should simply be deleted.

14. Unlike draft articles 13 and 14, draft article 15 was founded on evidence from State practice. The Special Rapporteur had concluded (*ibid.*, para. 140) that, in the area of the ownership, possession and use of property, there was a general exception to State immunity established by national legislation, case-law, international conventions and international opinion. Draft article 15, whose wording was based on that of the United Kingdom’s *State Immunity Act 1978*,⁹ the United States *Foreign Sovereign Immunities Act of 1976*¹⁰ and the 1972 European Convention on State Immunity,¹¹ dealt with the question of the sovereignty of the State in which the movable or immovable property of a foreign State was located. Any foreign State which acquired property in a forum State was thus governed by the law of the forum State, came under the jurisdiction of that State, and could not claim immunity in matters relating to such property. Otherwise, extraterritoriality would apply and extraterritoriality was, as the Special Rapporteur had observed, contrary to State practice and to the principle of the sovereign equality of States.

15. Nevertheless, it would be going too far to say that draft article 15 reflected the established practice of States, which was that a foreign State acquiring property or any property right in the forum State did so under the law of

that State, and there was no extraterritoriality in respect of foreign State property. On the other hand, it was not established practice that the courts of the forum State always had jurisdiction to apply the local law in respect of a foreign State’s title to and use of property. Developments in that direction had been taking place only since 1976. The Special Rapporteur’s findings (*ibid.*, para. 105) thus afforded some evidence of an emerging trend, but his conclusions were too categorical (*ibid.*, para. 111).

16. Prior to 1976, India’s practice in proceedings relating to its title to or use of property had been to approach the ministry of foreign affairs of the State in which the property was located. The ministry would then issue a certificate of immunity recognizing title and indicating that the property belonged to India. Such a certificate would be taken by the local courts as conclusive evidence of the status of that property. Since 1976, however, certificates of that kind were no longer issued by the United States and were also being discontinued in other countries which had adopted legislation similar to the United States *Foreign Sovereign Immunities Act*. The trend now, as indicated in the report (*ibid.*, para. 105), was for the foreign State to appear in the courts of the forum State in order to prove its title to or interest in the property. If such proof could be provided to the court’s satisfaction, the foreign State could claim, and would be granted, immunity.

17. India had been very slow to accept that procedure and had refused in some cases to appear before the courts of the forum State concerned. In the past five years, however, the Government of India had been compelled to appear in the courts of other States in order to prove its title or interest in property and plead immunity. Again, it had had to rely on section 86 of the Indian Code of Civil Procedure so as to allow the same kind of suits concerning property rights to be brought against the diplomatic missions of foreign States, and it had done so by giving consent justified on the grounds of reciprocity. There was still no law regulating the jurisdiction of Indian local courts over the property of foreign States located in India.

18. Since his country was very familiar with the trend in international law that had been emerging since 1976, he was able to say that draft article 15 did reflect that trend, but that it did not reflect the established practice of States. He agreed with the substance of paragraph 1, particularly since the expression “Unless otherwise agreed” made draft article 15 a residual rule. Paragraph 1 (*d*) might be examined more closely to see whether the saving clause it embodied would cater for Mr. Mahiou’s concern about nationalization. Further consideration should also be given to paragraph 2 in order to make it clear exactly what was to be excluded from the scope of article 15 in matters pertaining to “the inviolability of premises of diplomatic or special missions or consular premises”.

19. Mr. USHAKOV emphasized that articles 14 and 15 were concerned with lawful State activities. A case in which a State placed a time bomb in the territory of another State would involve its responsibility under

⁹ See 1762nd meeting, footnote 11.

¹⁰ *Ibid.*, footnote 17.

¹¹ *Ibid.*, footnote 7.

international law and would not raise any question of jurisdiction by the courts of the other State.

20. Sir Ian SINCLAIR, referring to Mr. Jagota's comments, said that it had been the practice in the United Kingdom well before 1976 to require foreign States to provide *prima facie* evidence of their title to or claim of interest in property. In *Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia* (1954),¹² a writ *in rem* against a steamship chartered by the Government of Indonesia and used for the carriage of troops had been issued at the instance of the appellant company, which had claimed possession as the owner of the steamship. The Indonesian Government had asserted immunity on the ground that the writ had implicated a foreign sovereign State and that the Government had either been the owner of the vessel or had been in possession or control or entitled to control of the vessel. In an important ruling, Earl Jowitt had stated that

... a foreign Government claiming that its interest in property will be affected by the judgment in an action to which it is not a party is not bound as a condition of obtaining immunity to prove its title to the interest claimed, but it must produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective. ...¹³

21. Hence it had not been the practice in the United Kingdom actually to require a foreign State to prove its title to property before it could obtain immunity as a consequence of intervening in a case against a third party in order to assert its claim or interest in the subject-matter of the proceedings. The foreign State did, however, have to produce *prima facie* evidence to satisfy a court that its claim or interest was not manifestly defective.

22. Mr. JAGOTA said his point had been that, prior to 1976, the Government of his country would not have had to appear in the courts of other States in matters relating to Indian property located in those States unless such property had already been attached or seized. No such case had ever arisen, but a case involving the seizure of the cargo of an Indonesian ship had been brought before a local Indian court in 1953. The issue had been whether Indonesia should prove its title to the cargo to the satisfaction of the local court or whether the matter should be referred to the Indian Foreign Office for a decision on the question of immunity. The Foreign Office had intervened and, ultimately, the court proceedings had been discontinued.

23. In several other cases in India involving foreign States, the Supreme Court had ruled that, before proceedings could be initiated against those foreign States, the prior consent of the Government of India had to be obtained under section 86 of the Code of Civil Procedure. Such consent had not been obtained and the proceedings had been discontinued.

24. Some of the cases which he had personally dealt with in the United Kingdom and the United States had involved the question of whether India should appear before local courts to prove its title to property and plead

immunity or whether it should request the foreign ministry to intervene to protect Indian immunity in the local courts. In all such cases prior to 1976, the proceedings had been dealt with by the foreign ministries concerned. The general rule had thus been that the foreign State did not have to appear before the local courts to prove its title to property and claim immunity and that the foreign ministry could be approached for a suggestion of immunity.

25. Mr. McCAFFREY said it was generally true that a foreign State owning property located in the United States could appear in court only to make a *prima facie* showing of its interest in that property, depending, of course, on the purpose for which the property was being used.

26. Before the adoption in 1976 of the *Foreign Sovereign Immunities Act*, it had been possible to attach property of a foreign State as a basis for jurisdiction, even when the claim had not related to that property. Since 1978, however, that basis had been eliminated by the United States Supreme Court unless the dispute related directly to rights in the property; moreover, it had not been included in the *Foreign Sovereign Immunities Act*.

27. Draft article 15, paragraph 1 (d), nevertheless raised an entirely separate matter and he did not think that it would be an obstacle to the exercise of jurisdiction by courts in his country. If a foreign State had no interest in the property, that could certainly be shown by a simple court appearance. On the other hand, when a foreign State produced *prima facie* proof of its interest in the property, that would, of course, implicate it in the litigation if the purpose of that litigation was to adjudicate the rights and interest of the parties concerned. It was therefore necessary to focus on the purpose for which the property was being used because, if the rights and interests of the parties, including those of a foreign State, were being determined, the foreign State might then have its rights and interests adjudicated.

28. Sir Ian SINCLAIR said that Mr. Jagota might be perfectly right as far as United States practice was concerned, but in the United Kingdom there had never been a time when the Foreign Office had made a suggestion of immunity to a court of law. The Foreign Office was merely prepared to certify to certain facts peculiarly within its knowledge, but any certificate it gave to a court was limited to those facts and in no sense suggested that immunity should be granted.

29. In proceedings between two private parties in which a foreign State might wish to intervene to assert its title to or interest in property, the foreign State had to enter a "conditional appearance" for that purpose.

30. In the *Juan Ysmael* case, there had been a change from the pre-existing case-law because the court had held that it could not rely on the assertion by the foreign State that it had a title to or interest in the property in question. The court had had to satisfy itself that the asserted claim was not illusory or manifestly defective. That had not meant that the foreign State had had to prove its title to the property. It had merely had to make a *prima facie*

¹² United Kingdom, *The Law Reports, House of Lords and Judicial Committee of the Privy Council*, 1955, p. 72.

¹³ *Ibid.*, pp. 89-90.

showing of sufficient legal interest in the property to justify its claim of immunity.

31. Mr. SUCHARITKUL (Special Rapporteur) noted that his report had provoked a number of divergent opinions, both assenting and dissenting, as was only to be expected. Many legitimate questions had been asked, many doubts expressed and many basic problems restated. Mr. Flitan (1768th meeting) and Mr. Koroma (1766th meeting) had referred to the intellectual honesty displayed in his report, but the members of the Commission had demonstrated the same quality in their comments.

32. Mr. Ushakov (1767th meeting) had expressed doubt as to whether there was any real justification for draft article 14, in view of the fact that it would apply to so few cases. For his part, he agreed with Mr. Ushakov, Sir Ian Sinclair (*ibid.*), Mr. Razafindralambo (1769th meeting) and other members that cases involving actions by ambassadors, ministers of foreign affairs, consuls, *ad hoc* special envoys, delegates to international organizations or members of the armed forces which resulted in injury to private persons or property should be covered by existing legislation and therefore excluded from the scope of the article, as should matters involving criminal acts or penal action.

33. Mr. Ni (1768th meeting) had voiced concern that the provisions of article 14 might open a floodgate of litigation. It was true that the Commission should not appear to be encouraging litigation or malicious prosecutions in preference to the settlement of disputes by peaceful means. In that regard, Mr. Koroma (*ibid.*) and Mr. Calero Rodrigues (*ibid.*) had referred to the alternative of negotiation through diplomatic channels. However, the purpose of the article was to regulate the flow, rather than encourage a flood, of litigation.

34. Sir Ian Sinclair (1767th meeting) had noted that, in cases of damage or injury to private property or persons in one State resulting from the acts of another State, the practice was to attempt to reach an amicable settlement or, if that was not possible, to exhaust existing local remedies. Such cases had little to do with the ministry of foreign affairs of the host State. The Government of the United States had gained useful experience in that regard. From 1952 to 1976, the United States Department of State had acted not only as a foreign office, but also as a court of law, since every case involving State immunities had had to be argued before it. During that time it had heard more than 100 such cases and had finally decided that it was for the judicial authorities to deal with matters involving the determination of State immunity. In countries such as Thailand, Japan, Iraq, India and China, which had suffered from extraterritorial jurisdiction, efforts had been made to assert the independence of the local judiciary. In that regard, Mr. Thiam had rightly pointed out that jurisdictional immunity was, at best, an exception to the general rule of territorial sovereignty.

35. While he agreed with Mr. Calero Rodrigues (1768th meeting) that the argument in favour of invoking justice might be weak because it applied to each and every case involving jurisdictional immunities, such a trend

none the less existed. Under the Convention on the Privileges and Immunities of the United Nations¹⁴ and the Convention on the Privileges and Immunities of the Specialized Agencies,¹⁵ the Secretary-General of the United Nations and the Executive Heads of the specialized agencies were required to waive immunities where the assertion of them would impede the course of justice. Nor was the argument in favour of negotiation put forward by Mr. Calero Rodrigues, Mr. Koroma and Mr. Ni entirely appropriate, since the territorial State did not always come to the assistance of injured private parties, particularly when other valid legal remedies were available. Draft article 14 would in no way discourage negotiations through diplomatic channels; rather, it would expedite them.

36. It had also been argued that it would be premature to incorporate article 14 in the draft because the opinions of writers on the subject had not yet crystallized. However, at its session in Hamburg, the Institute of International Law had, on 11 September 1891, adopted draft international regulations on competence of courts in proceedings against foreign States, sovereigns or heads of State (*projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d'Etats étrangers*), article 4, paragraph 6, of which stated that the only actions admissible against a foreign State were actions for damages resulting from an offence or tort committed in the forum State.¹⁶ Consequently, draft article 14 proposed nothing new, since a hundred years earlier there had already been an emerging trend which, if anything, had later been reinforced by international conventions and national legislation. Further evidence of that trend was contained in a letter to the Legal Counsel of the United Nations dated 3 July 1979 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom, stating that the State Immunity Bill, as presented to Parliament, had been circulated to all diplomatic missions in London and that no State to which the draft legislation had been sent had offered substantial criticism of its terms.¹⁷

37. While he agreed with Mr. Ushakov that the draft article should not deal with matters which could be excluded, it should none the less be remembered that existing international instruments did not deal with all areas of activity in which questions of jurisdictional immunities of States and their property might arise, nor did they apply to all countries. Consequently, the need for further regulation was all too apparent. In any event, the existence of other international instruments was taken into account by the use of the proviso "Unless otherwise agreed". Nevertheless, he was prepared to accept the insertion of a more general provision in draft article 11.

¹⁴ United Nations, *Treaty Series*, vol. 1, p. 15.

¹⁵ *Ibid.*, vol. 33, p. 261.

¹⁶ See 1762nd meeting, footnote 9.

¹⁷ See United Nations, *Materials on Jurisdictional Immunities* . . . , p. 97.

38. Mr. McCaffrey had wondered whether the *Foreign Sovereign Immunities Act of 1976* conferred or prohibited jurisdiction by the courts, as in the recent case *Sedco, Inc. (Petróleos Mexicanos)* (1982).¹⁸ That was indeed a moot point.

39. Sir Ian Sinclair (1767th meeting) and Mr. Mahiou had expressed doubts as to whether a distinction should be drawn between *acta jure imperii* and *acta jure gestionis*. In that regard, he agreed with Sir Ian Sinclair's suggestion that perhaps the distinction should not be expressed in such categorical terms as to be misleading to those who were less familiar with the problems involved than was the Commission.

40. With reference to the observations made by Mr. Ushakov (*ibid.*), he was prepared to accept that the Soviet practice was to safeguard immunities, though as yet there appeared to be no recorded judicial decision to that effect.

41. The problem was to find some way of enlarging the scope of draft article 14, provided it remained a residual rule. As Mr. Jagota had proposed, a second paragraph might be inserted to provide greater balance, since the provisions of the draft article would not apply in the event of hostilities. For all that, the question of military hostilities lay somewhat outside the scope of the topic.

42. He was ready to accept Sir Ian Sinclair's proposal concerning compensation (*ibid.*, para. 33), excluding any reference to penal matters. On the question of diplomatic immunities, which was also dealt with in draft article 15, it was true that all matters involving accidents with warships should be dealt with later on in what was to be draft article 19. While India and the United States had effective legislation concerning compulsory insurance, such was not the case in Thailand. On one occasion, the Vice-President of the Judge Advocate's Court had been involved in a traffic accident with an official of an international organization. The court hearing the case had been informed by the Protocol Department that the official in question was included in the list of persons who were immune from the jurisdiction of the courts, and the case had been dismissed. Subsequently, however, the Ministry of Foreign Affairs had informed the court that the official in question enjoyed immunity from jurisdiction only *ratione materiae*. In that regard, he agreed with Mr. Ushakov (1767th meeting) that diplomatic, consular or other immunities were State, rather than personal, immunities. However, he also concurred with the view of Mr. Lacleta Muñoz (1769th meeting) that the matter went further than that.

43. Mr. McCaffrey (*ibid.*) had raised the question of whether diplomatic immunities were broader than State immunities. Article 31 of the 1961 Vienna Convention on Diplomatic Relations confirmed that ambassadors enjoyed immunity *ratione materiae* as well as *ratione personae*, thus covering seemingly wider areas of activity than State immunity. However, it was evident for a

Buddhist that the immunity enjoyed by diplomatic agents *ratione personae* was only temporary and did not survive their terms of office. Article 39 of the 1961 Vienna Convention was explicit on that point. A diplomat enjoyed immunity *eundo, morando et redeundo*, but no further. The sending State could at any time waive the immunity enjoyed by its diplomats, who, in turn, could not waive their immunity *ratione materiae* or *ratione personae* without authorization from the State. In any event, even during their terms of office, diplomatic representatives could be sued in the courts of the sending State. As Mr. Lacleta Muñoz had stated, the basis for diplomatic immunities was functional necessity. With regard to heads of State, the problem was more straightforward in that their visits were usually at the invitation of the receiving State and of limited duration, and they were placed in the category of internationally protected persons. However, an ex-sovereign or a former head of State could be sued in a court of another State in respect of personal or non-official acts performed during the course of his public office.

44. With reference to Mr. Jagota's observations regarding draft article 15, he admitted that the exception provided for in the draft article might not have been universally established. In the United Kingdom, assertion of title by a State had been accepted as grounds for immunity as early as 1924, and in the *Gold bars* case in 1952,¹⁹ but not in the *Hong Kong Aircraft* case in 1953.²⁰

45. In response to Mr. Mahiou's comments, he wished to confirm that article 15 was concerned with private law title according to the *lex situs* and not with questions of nationalization or State cession, which would be decided by the ICJ.

46. He experienced no difficulty in accepting the improvements to article 15, paragraph 1, proposed by Sir Ian Sinclair (1767th meeting, para. 36) and, with regard to paragraph 2, he agreed with Mr. Jagota that the concept of inviolability was wider than that of immunity. While immunity was negative in substance, in that it constituted the consent of the State not to exercise jurisdiction, inviolability represented a positive obligation on the part of the State. In addition, the question of inviolability was not entirely without consequences. In Thailand, for example, many examples could be found of embassies which were not the property of a foreign government but were rented from private individuals. If the original owner died and the heirs did not wish to continue the arrangement, the Ministry of Foreign Affairs was obliged to negotiate the matter. However, even if the individuals in question won their case, it would be impossible for them to evict the embassy staff, since they could not enter the premises.

¹⁹ *United States of America and Republic of France v. Dollfus Mieg et Cie S.A. and Bank of England* (The All England Law Reports, 1952, vol. 1, p. 572).

²⁰ *Civil Air Transport Inc. v. Central Air Transport Corp.* (United Kingdom, The Law Reports, House of Lords, Judicial Committee of the Privy Council, 1953, p. 70).

¹⁸ *United States of America, Federal Supplement*, vol. 543 (1982), p. 561.

47. In respect of an observation made by Mr. Ushakov, he pointed out that the decision of the District Court of Tokyo in the *Limbin Hteik Tin Lat v. Union of Burma* case had not been quoted in its entirety since the text was reproduced in the volume of the United Nations Legislative Series concerning jurisdictional immunities.²¹

48. Lastly, it was his impression that draft article 15 appeared to give rise to drafting rather than substantive problems.

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 14 and 15 to the Drafting Committee.

*It was so agreed.*²²

The meeting rose at 6 p.m.

²¹ See 1769th meeting, footnote 7.

²² For draft article 14, see the decision by the Drafting Committee, 1805th meeting, para. 59 *in fine*; for draft article 15, see the consideration of the text proposed by the Committee, *ibid.*, paras. 69–74, and 1806th meeting, paras. 78–87.

1771st MEETING

Tuesday, 31 May 1983, at 10.05 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc. 5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN recalled that, for part 2 of the draft articles on State responsibility, the Special Rapporteur, in his second report, had submitted a set of five articles (arts. 1–5),⁵ which the Commission, after

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem.*

⁴ 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.*

⁵ *Yearbook* . . . 1981, vol. II (Part One), pp. 100–101, document A/CN.4/344, para. 164.

consideration at its thirty-third session, had decided to refer to the Drafting Committee, but that the latter had been unable to examine them for lack of time. The Special Rapporteur, taking account of the comments made by the Commission on the first set of articles, had submitted in his third report (A/CN.4/354 and Add.1 and 2, paras. 145–150) a new set of six articles (arts. 1–6). The Commission, at its previous session, had decided to refer that second set of articles to the Drafting Committee and had confirmed its referral of articles 1–3 of the first set.

2. The texts of the draft articles referred to the Drafting Committee for consideration at the current session were the following:

Draft articles submitted by the Special Rapporteur in his second report

Article 1

A breach of an international obligation by a State does not, as such and for that State, affect [the force of] that obligation.

Article 2

A rule of international law, whether of customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation.

Article 3

A breach of an international obligation by a State does not, in itself, deprive that State of its rights under international law.

Draft articles submitted by the Special Rapporteur in his third report

Article 1

An internationally wrongful act of a State entails obligations for that State and rights for other States in conformity with the provisions of the present part 2.

Article 2

The performance of the obligations entailed for a State by its internationally wrongful act and the exercise of the rights for other States entailed by such act should not, in their effects, be manifestly disproportional to the seriousness of the internationally wrongful act.

Article 3

The provisions of this part apply to every breach by a State of an international obligation, except to the extent that the legal consequences of such a breach are prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law.

Article 4

An internationally wrongful act of a State does not entail an obligation for that State or a right for another State to the extent that the performance of that obligation or the exercise of that right would be incompatible with a peremptory norm of general international law unless the same or another peremptory norm of general international law permits such performance or exercise in that case.

Article 5

The performance of the obligations entailed for a State by its internationally wrongful act, and the exercise of the rights for other States entailed by such act, are subject to the provisions and procedures embodied in the Charter of the United Nations.

Article 6

1. An internationally wrongful act of a State, which constitutes an international crime, entails an obligation for every other State:

- (a) not to recognize as legal the situation created by such act; and
- (b) not to render aid or assistance to the author State in maintaining the situation created by such act; and
- (c) to join other States in affording mutual assistance in carrying out the obligations under (a) and (b).

2. Unless otherwise provided for by an applicable rule of international law, the performance of the obligations mentioned in

paragraph 1 is subject *mutatis mutandis* to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

3. Subject to Article 103 of the United Nations Charter, in the event of a conflict between the obligations of a State under paragraphs 1 and 2 above, and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

3. The Chairman invited the Special Rapporteur to introduce his fourth report on the content, forms and degrees of international responsibility (A/CN.4/366 and Add.1).

4. Mr. RIPHAGEN (Special Rapporteur) said that, in submitting his fourth report, he was above all seeking guidance from the Commission in order to be able to prepare further draft articles for parts 2 and 3. He recalled that the draft articles submitted in his third report dealt with the linkage between parts 1 and 2 of the draft (art.1), the prohibition of manifest disproportionality (art.2), the reservation on self-contained régimes of State responsibility (art.3), the international *jus cogens* régime (art.4), the United Nations régime (art.5) and the minimum obligations of a State in the event of an international crime (art.6).

5. The fourth report contained a number of suggestions in connection with part 3 of the draft articles concerning the "implementation" (*mise en oeuvre*) of international responsibility. He had been prompted to refer to part 3 at the current stage by his own past experience. In 1968 he had played an active role at the first session of the Vienna Conference on the Law of Treaties. The draft articles prepared by the Commission at that time had been devoted largely to circumstances in which the rule *pacta sunt servanda* did not apply. It had become clear that many Governments were unable to accept the provisions drafted by the Commission without some guarantee of an impartial procedure for the settlement of disputes. Subsequently, in 1970, he had served as a judge *ad hoc* in the ICJ when the Court had considered the *Barcelona Traction* case.⁶ In that case, almost every fact had been in dispute and, where there had been no disagreement on the facts, the two parties had drawn entirely different legal conclusions from them. Since that time, he had been involved in the preparation of the United Nations Convention on the Law of the Sea, in which it was recognized that a compulsory procedure for the settlement of disputes was part and parcel of the substantive provisions of the law of the sea.⁷ He had become increasingly convinced that there was no hope of Governments ever accepting the Commission's articles on State responsibility as binding rules of international law unless they contained a guarantee of impartial application.

6. The reason for that hesitancy on the part of States was that many of the draft articles contained in part 1⁸ were necessarily vague. For example, draft articles 11, 12 and

14, while recognizing that a State was not responsible for the conduct of a person not acting on its behalf, or for the conduct of organs of other States or of organs of insurrectional movements, nevertheless implied that a State could be held responsible for the conduct of a person acting on behalf of the State which was related to such conduct. Similarly, article 19, paragraph 2, was also necessarily vague in that, while dealing with the recognition by the international community of an internationally wrongful act as an international crime, it did not indicate how and when such recognition took place. Article 33 was also vague in opening the way for the invocation of a state of necessity as justifying the breach of an international obligation.

7. The provisions of part 2 of the draft articles would also of necessity be vague. The emphasis of part 2 must lie on the limitation of the admissible legal consequences of an internationally wrongful act. Such limitations would have to be sought in a definition of the requirements of quantitative and qualitative proportionality. Such vagueness was inevitable since the topic purported to deal with every type of breach of an international obligation, from aggression to the interpretation of treaty provisions by one State in a manner considered incorrect by another State.

8. International law was no longer limited to bilateral relationships between States, but was slowly, and often only at the regional level, taking the form of a common law of the international community as a whole or, more frequently, of a group of States. That development must be taken into account. It was absolutely futile to take the view that States coexisted in a situation of more or less permanent competition or that contact between States at the regional level was so close that their relations could not be covered by international law at all. It must be recognized that current international relations involved a number of intermediate forms of régime covering various limited fields of relationships.

9. Turning to his fourth report, he said that chapter I contained a brief account of the status of the work on the topic, while chapter II, which was the essential part of the document, presented an outline of the possible contents of parts 2 and 3 of the draft articles. In chapter II, paragraphs 31–36 contained some preliminary observations and paragraphs 37–45 dealt with the links between parts 2 and 3 of the draft. Paragraphs 46–49 dealt with the categorization of internationally wrongful acts in relation to their legal consequences, and paragraphs 50–51 dealt with international crimes and with common elements concerning their legal consequences. Paragraphs 52–56 dealt with the international crime of aggression, a question on which the Charter of the United Nations and other instruments already contained various indications. Paragraphs 57–58 concerned other fields of fundamental interest that could give rise to international crimes, while paragraphs 59–67 discussed the common elements of the legal consequences of international crimes.

10. In paragraphs 68–70, he had referred to the difficulties involved in defining aggression and borderline cases. Paragraph 71 dealt with another category of

⁶ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3.

⁷ Part XV of the Convention (*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).

⁸ See footnote 4 above.

internationally wrongful acts, namely international delicts which were not international crimes, and in paragraph 72 he had attempted to categorize international delicts by identifying three elements of their possible legal consequences. Paragraphs 73–78 related to the first element, namely the determination of the injured State or States, but no conclusions had been drawn because that element was also dealt with later in paragraphs 112–121. The second element, namely the content of the legal consequences, was discussed in paragraph 79, which distinguished between reparation, suspension or termination of existing relationships and measures of self-help or reprisal. The suspension or termination of existing relationships was, moreover, distinguished from the rule of reciprocity and from what the ICJ had termed “active intergovernmental co-operation” in its Advisory Opinion of 21 June 1971.⁹

11. Paragraphs 80–110 dealt with self-help or reprisals and the limitations thereon. The first limitation was the prohibition of reprisals involving the use of force; it was reviewed in paragraph 81, which referred back to paragraphs 52–54 on borderline cases. Paragraph 82 then dealt with quantitative proportionality, which was the subject of draft article 4, while paragraph 83 attempted to define qualitative proportionality. The idea of the existence of objective régimes had been introduced in paragraphs 84–85.

12. Perhaps the simplest way to indicate what was meant by “objective régimes” was to say that, under such régimes, States had parallel, rather than reciprocal, obligations. That distinction, in his opinion, was very important for the question of the legal consequences of the breach of such obligations. Parallel obligations existed when they protected the collective interests of all States, of a group of States or of individual persons. That point was dealt with in paragraph 86. Paragraph 87 related to the collective interests that were protected by parallel obligations, while paragraphs 88–89 dealt with the protection of human rights and paragraph 90 discussed the question of the protection of the human environment. Paragraph 91 referred to the very particular régime of diplomatic immunities, which might, in a way, also be called an objective régime, although it was a bilateral one.

13. Paragraphs 92–94 attempted to draw a distinction between reprisals and the termination or suspension of a treaty, and paragraphs 95–96 related to a fundamental change of circumstances or a state of necessity, in connection with which reference could also be made to the legal consequences of an internationally wrongful act. Paragraph 96 also described the rule of strict reciprocity.

14. Paragraph 97 took up the question of the basis for a collective decision in the case of the breach of parallel obligations. Paragraph 98 referred briefly to strict reciprocity in the case of a non-material breach. In that

connection, he recalled that the 1969 Vienna Convention on the Law of Treaties dealt with the consequences, as far as a treaty was concerned, of a material breach. However, he was of the opinion that a non-material breach could also give rise to some measure of pure reciprocity. Paragraph 99 defined the various types of objective régimes and paragraph 100 referred to collective decisions in the absence of decision-making machinery.

15. One of the other limitations on reprisals, namely prior notification, was discussed in paragraph 101. Paragraphs 102–108 dealt with possible limitations on reprisals in the case of the presence of other means of enforcement and, in particular, with the peaceful settlement of disputes. In paragraph 109, reference was made to the situation where an objective régime failed completely. That situation was also discussed in paragraph 130, which suggested that that particular case might be referred to in the draft articles.

16. Paragraph 110 dealt with active intergovernmental co-operation, which might be suspended in the case of an internationally wrongful act. Paragraph 111 mentioned the concept of reparation and referred to the second report.¹⁰ Paragraphs 112–121 came back to the question of the identification of the injured State, and in that connection paragraph 114 drew attention to the fact that, whereas most obligations under international law were abstract, the breach of an obligation was always concrete. That helped to identify the injured State. Paragraph 114 pointed out that, in the case of most obligations under general customary international law, it was easy to identify the injured State because most such obligations were merely a reflection of the sovereignty of another State that was infringed by the breach of those obligations. There was also no problem in identifying the injured State in the case of a breach of an obligation under a bilateral treaty. The main rule in that regard was that an internationally wrongful act created a new bilateral relationship between the author State and the injured State. However, there were exceptions to that bilateralism and they were discussed in paragraphs 117–121. The three types of objective régimes were defined in paragraphs 119–121.

17. In paragraphs 122–130, he had attempted to sum up the preceding paragraphs and had used language that could be easily transformed into draft articles if the Commission decided to endorse the approach he had adopted in the fourth report.

Mr. Francis took the Chair.

18. Mr. REUTER said that the topic under consideration was extremely difficult to circumscribe. If the Commission failed to overcome the problems raised by the topic, it would not be the fault of the Special Rapporteur, who had accomplished sterling work and had not tried to conceal any of the difficulties he had encountered.

⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)*, I.C.J. Reports 1971, p. 55, para. 122.

¹⁰ *Yearbook . . . 1981*, vol. II (Part One), p. 101, document A/CN.4/344, para. 164, arts. 4 and 5.

19. One important question to be resolved was whether the Commission should work towards a convention or towards a carefully drafted text that would not be formulated with a view to the conclusion of a convention proper. He was in favour of the first option because, at the current stage of codification, the method itself of preparing a convention, the concern for logic and precision in drafting, was beneficial for the work of the Commission. It mattered little whether the convention was ratified or not. In a period of reticence and discord within the international community, a convention was not systematically ratified by all States. Nevertheless, an instrument such as the Vienna Convention on the Law of Treaties, which had not been ratified by all States, was a bench-mark; it had repeatedly been cited by the ICJ and was referred to by many States. In the case under discussion, he considered it doubtful that all States, and particularly certain great Powers, would accept the obligations stemming from a convention on State responsibility, even if it had been drafted by the Commission.

20. There was a second, almost equally serious, question. In the field of international responsibility, the problem arose of recourse to armed force—aggression or armed reprisals—and consequently of the relationship between the draft under consideration and the Charter of the United Nations. In his opinion, it would be better to refrain from taking any decision that would involve tampering with the Charter. In that connection, he recalled the Definition of Aggression adopted by the General Assembly,¹¹ and questioned the value of such a text. At the legal level, the definition was virtually worthless, as in article 2 it allowed a rather defective supreme authority, the Security Council, not to follow it in some specific cases. The Commission should not lose sight of the limit placed upon its work by that text, which had been adopted at the highest level.

21. Thirdly, it would be difficult not to refer to international crimes. An even more thorny question than that of the relationship between the Commission and the supreme authorities set up by the Charter arose, namely the question of the relationship between the Special Rapporteur's present study and Mr. Thiam's first report on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/364). In that connection, he recalled that the Commission had bound itself by article 19 of part 1 of the draft on State responsibility, which it had formally adopted. For his part, he had accepted the article in the belief that it was merely a frame of reference. The Commission knew roughly in what areas international crimes would occur, but had not yet taken a position on the régime governing them. Would it be best to deal with them one by one, as would be reasonable, in which case the Commission would know what should be understood by an international crime once it had completed its work, or else to specify what the

régime of international crimes would be in relation to any particular point, in which case the results would be scanty?

22. If he had understood the Special Rapporteur's fourth report correctly, the Rapporteur had taken the view that international crimes concerned all States, whereas mere delicts concerned only one State or a small number of States. However, international crimes would supposedly have something else in common, which was that statutory limitations did not apply to them, whereas in the case of delicts the Commission would probably have to ask whether it should not accept that time could erase an international delict. The Commission knew nothing more about international crimes. For the time being, he would be tempted to leave the question to Mr. Thiam, but in the case of both Mr. Thiam's report and Mr. Riphagen's report, he was most reluctant to embark upon a general and abstract consideration of the specific problems of international crime.

23. He wished to make two further remarks on the question of method. The Commission was faced with a problem of terminology, as everyone invented his own vocabulary. He had very often felt that a difference between French and English terminology raised a tremendous problem. That was the case, for example, with "criminal offence", which had nothing to do with *crime*. In that connection, there was an astonishing confusion with regard to the measures that a State might be led to take in response to the conduct of another State. In the case of an act that followed another act, a distinction was drawn between retortion, an unpleasant measure which did not, however, violate international law, and reprisals, which constituted a violation. In that same area, other terms had appeared, such as "reciprocity". Was there a difference between reciprocity and reprisals? For its part, the United States of America had started using the word "countermeasure", which meant nothing but had established itself by being adopted by an arbitral tribunal seeking to avoid the words "reciprocal obligations" or "reprisals".¹² The ICJ had in turn taken it up in a case relating to the status of diplomats.¹³ What had become of the expression "objective régime", which had already been used by the Commission? That expression had been used for the first time in a very special case, where it had been a question of describing the régime of neutrality of Belgium, a universally applicable régime. At a later stage, won over by the arguments of Sir Humphrey Waldock, the Commission had abandoned it and had used other terms in the 1978 Vienna Convention on Succession of States in Respect of Treaties. Then there were the "integral obligations", obligations created by a treaty, which concerned all States: he had in mind the specific case of a fishing treaty which imposed quotas. A

¹¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹² Decision of 9 December 1978 in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (United Nations, *Reports of International Arbitral Awards*, vol. XVIII (Sales No. E/F.80.V.7), p. 443, paras. 80 *et seq.*).

¹³ *Case concerning United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, *I.C.J. Reports* 1980, p. 3.

State's failure to respect the limits imposed upon it in such a case entailed the same damage for all the other States concerned. In the light of these considerations, he thought the Special Rapporteur should on each occasion quote all the terms covering the same idea so as to avoid discussions arising from questions of terminology.

24. Finally, he considered it preferable to proceed from the simplest to the most complex. It was best to begin with one's strengths, in so far as one knew one's strengths and weaknesses. While respecting the Special Rapporteur's independence, he considered that it might be best first to deal with the classic matter of reparations, which was fairly familiar ground, before going on to reprisals and concluding with international crimes.

The meeting rose at 11.35 a.m.

1772nd MEETING

Wednesday, 1 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc. 5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. CALERO RODRIGUES said that, although the fourth report (A/CN.4/366 and Add.1) had been carefully prepared and reflected the Special Rapporteur's deep knowledge of international law, it was not an easy document to consider. As a legal study it was outstanding, but for practical purposes it was too complex.

2. In paragraph 32 of the report the Special Rapporteur had stated that "the present report intends to concentrate

on an *outline* of the possible contents of parts 2 and 3 of the draft articles on State responsibility and discuss the admittedly difficult choices with which the Commission is faced". As an outline or preview of the contents of parts 2 and 3, however, most of the report was disappointing, for only paragraphs 122–130 really gave any clear indications of what the Special Rapporteur intended to include in the draft articles in those parts.

3. The Special Rapporteur had stressed the importance of part 3 in his introductory statement at the previous meeting; while he had been right in saying that States would hardly be inclined to accept part 2 if they did not have certain guarantees regarding part 3, it seemed that for the time being the Commission should concentrate on part 2 and leave part 3 for later consideration. If the Commission had considered all the legal consequences of an internationally wrongful act, it would probably never have been able to agree on part 1 of the draft, which defined the elements of an internationally wrongful act attributable to a State and described the circumstances precluding wrongfulness. Similarly, the Commission would be unable to complete part 2 if it now focused on the problems raised by part 3 and constantly referred back to the problems it had had to face in connection with part 1.

4. The Commission should use paragraphs 122–130 of the report as guidelines for the content of the draft articles in part 2. Those paragraphs identified the injured State and indicated what it could and could not do. They also drew attention to problems which should, in the Special Rapporteur's view, be left aside. The question of international crimes should find its place in part 2 of the draft articles, but its consideration should be left until after the statement of the legal consequences of internationally wrongful acts that did not constitute international crimes. To begin with, the Commission would find it difficult enough to draft articles defining the legal consequences of international delicts.

5. With regard to the injured State, he was not fully convinced that it was necessary, as the Special Rapporteur had suggested in paragraph 123, to distinguish between three types of injured State: (a) a State whose right under a customary rule of international law had been infringed; (b) a State which was a party to a treaty and whose right under that treaty had been infringed; (c) a State which had not obtained satisfaction in the settlement of a dispute when a judgment or award had been given in its favour. In the case of international delicts, as distinct from international crimes, it was necessary only to identify the injured State as the State for which certain rights arose out of the new legal relationship created by an internationally wrongful act.

6. The most important element to be taken into consideration in part 2 was what the injured State could and could not do. The Special Rapporteur had specified three possibilities: the injured State could claim reparation; suspend the performance of obligations corresponding to the obligation breached; or suspend the performance of other obligations by way of proportional

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

reprisals taken only after the exhaustion of the available international legal remedies.

7. The essential element, of course, was reparation. Although the Special Rapporteur had referred in his third report (A/CN.4/354 and Add.1 and 2, para. 86) to compensation and reparation, the term "reparation", as used in the fourth report, could presumably be said to cover both *restitutio in integrum* and "reparation by equivalent or compensation". For the time being, the Commission should therefore attempt to define the possible types of reparation. It might also try to decide whether the question of the punitive consequences of international delicts should be included in the draft articles of part 2.

8. While in his view suspension of the performance of obligations corresponding to the obligation breached was reasonable, the question of suspending other obligations was more complicated. He was not sure that such suspension should be characterized as a proportional reprisal or that it should be allowed only after exhaustion of the available international legal remedies. Perhaps it was merely the idea of proportionality that was difficult to define. He would hesitate, however, to say that, in addition to its claim to reparation, the injured State might suspend only the performance of an obligation corresponding exactly to the obligation breached and might go no further until it had exhausted the available international legal remedies—unless, of course, in the connecting text between parts 1 and 2, it could be specified that the injured State would not have to wait indefinitely for an international ruling allowing it to suspend its performance of other obligations.

9. With that reservation, he considered that, on the basis of the general ideas presented in the fourth report, the Special Rapporteur could proceed to submit draft articles on the question of reparation.

10. The Special Rapporteur had also indicated, in paragraph 124 of the report, that an injured State could not suspend its performance of obligations under a multilateral treaty if that suspension would affect the rights and obligations of all the other parties. Although he agreed with the Special Rapporteur that an injured State was not entitled to infringe the rights of the other States parties to a multilateral treaty, he doubted whether it was necessary for the suspension to affect all the other parties. If the suspension affected the rights of only one other party, it should not be allowed. At first glance, he had little difficulty in agreeing with the Special Rapporteur that there should be restrictions on the right of the injured State to suspend the performance of obligations which related to protection of the collective interests of all the parties to a treaty, to protection of the interests of individuals, or to collective decision-making machinery provided for in a treaty for the enforcement of obligations.

11. He had no objection to leaving outside the scope of the draft articles in part 2 questions relating to the legal consequences of the suspension or termination of treaties and of a fundamental change of circumstances or a state of necessity, as well as matters covered by diplomatic law in

existing conventions and the question of belligerent reprisals.

12. Although it might well be true, as the Special Rapporteur had said (1771st meeting), that international law in the area under consideration was moving away from the sphere of bilateral relations towards a genuine law of nations, it was perhaps too early to deal with that approach now. The Special Rapporteur should realize that many of the doubts to which that approach gave rise would subsist even after parts 2 and 3 of the draft had been completed. In the mean time, he should propose draft articles that were as simple as possible, leaving aside controversial issues that might be interesting from a legal point of view but that would ultimately detract from the practical value of the draft.

13. Mr. REUTER, completing the comments he had made at the previous meeting, said that in his view the Commission should begin at the beginning, with the right to reparation in general, taken in its broadest sense as including both the question of *restitutio in integrum* and that of compensation. It was there that the link appeared between the classical aspect of responsibility, namely the question of reparation, and the more sensitive but secondary question of proportionality, which had already been raised several times.

14. If two States, both with shipping interests, concluded a treaty creating reciprocal rights and obligations for each of them, and one of those States did not respect the treaty, the other undeniably had the right to suspend the application of the provision or provisions of the treaty that had been breached. It was then not a matter of proportionality, but of equivalence. If only one of the two States had shipping interests and the other did not fulfil one of the obligations incumbent upon it under the treaty, the first State was entitled to suspend the performance of another of its obligations, on the grounds not of proportionality, but of equivalence.

15. In fact, the problem of proportionality, which suggested that a State could suspend the performance of an obligation that was more important than the obligation breached, was one of enforcement or, in other words, of coercion. In traditional international law, the State was entitled to prefer *restitutio in integrum*. Was it then entitled, not to take measures aimed solely at restoring the balance between obligations of which one had been breached, but rather to adopt an attitude intended to induce the offending State to perform its obligation? In one specific case,⁵ it had been alleged that France had failed to perform certain obligations arising for it from an air navigation treaty concluded with the United States of America. In accordance with its national law, the United States had decided to suspend the performance of one of its obligations to France. The question had then arisen whether there was equivalence between the fact that the United States could no longer, in certain circumstances, operate flights between its territory, Canada and Paris,

⁵ Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France (see 1771st meeting, footnote 12).

and the fact that France could no longer operate the flights between its territory, Canada and Los Angeles which provided a connection with territories for which it assumed responsibility in the Pacific. Might not the United States have claimed that what was of concern to it was performance of the treaty and that it did not wish the treaty to be truncated by the same volume of obligations on either side? In order to compel France to perform its obligations, the United States was therefore applying coercion that was more extensive than the breach committed.

16. Such indirect economic coercion must be distinguished from physical coercion, which involved the use of armed force. In his opinion, it would be worth considering whether coercion of that kind could be allowed in modern international law. In the case to which he had referred, the United States might well have considered that, apart from compensation and punitive sanctions, which might not be covered by the traditional concept of responsibility, international law did not exclude recourse to coercion. It was open to question, however, whether coercion should be linked with responsibility or whether it was a specific problem of public international law. Apart from the absolute coercion provided for in the Charter of the United Nations, namely armed force, for which there were special rules, did coercion really come under the topic of State responsibility? Although he agreed with Mr. Calero Rodrigues that the Commission should make as much progress as possible in its study of the topic, he thought it would be in the Commission's interest not to delay taking a position on the question of coercion, which was not a matter of penalties or of reparation *stricto sensu*. The position taken might affect the Special Rapporteur's task.

17. The CHAIRMAN suggested that the meeting be adjourned to allow the Drafting Committee to meet and make further progress in its work.

It was so agreed.

The meeting rose at 10.50 a.m.

1773rd MEETING

Thursday, 2 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, 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. Ushakov, Mr. Yankov.

State responsibility (continued) (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC (XXXV)/Conf. Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. FLITAN said that the Special Rapporteur had produced a fourth report (A/CN.4/366 and Add.1) of high calibre that provided much food for thought. Chapter I described succinctly the status of the work on the topic, while chapter II gave an outline of the possible contents of parts 2 and 3 of the draft articles. However, the Special Rapporteur should perhaps have discussed the draft articles proposed for part 2 in his oral introduction (1771st meeting), rather than confine himself to stating, in paragraph 31 of the report, that they were to be referred to the Drafting Committee. For his own part, he thought that the Commission itself should consider them first.

2. In paragraph 113, the Special Rapporteur compared the situation regarding responsibility under internal law and under international law, and noted that the Commission had been obliged to treat international liability for injurious consequences arising out of acts not prohibited by international law separately from the topic of State responsibility. Under internal law, an injurious act gave rise not only to the author's objective responsibility but also to his responsibility based on fault. In the present case, in order to gain a proper idea of the draft articles on State responsibility as a whole, it had to be realized that the draft produced by the Commission on that topic as such would in effect be complemented by another part based on Mr. Quentin-Baxter's study on international liability for injurious consequences arising out of acts not prohibited by international law, as well as by a draft Code of Offences against the Peace and Security of Mankind prepared by Mr. Thiam, although it was possible to regard such a code of criminal responsibility as a document apart. Accordingly, the Special Rapporteur should make sure that his work did not duplicate that of Mr. Quentin-Baxter or Mr. Thiam.

3. As for the form to be taken by the draft articles, the Commission had chosen the course of drafting a convention, but the Special Rapporteur had raised the question, in paragraph 43 of the report, whether it might not be more appropriate to speak of guidelines. Personally, he shared Mr. Reuter's point of view (*ibid.*) in all respects but one. He approved the idea of preparing a convention on State responsibility proper, but thought

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem.*

⁴ 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.*

that the question of the peaceful settlement of disputes, to be dealt with in part 3, should form the subject of a separate document, since it was not certain that all the States that accepted part 2 of the draft would accept part 3.

4. Again, the Special Rapporteur had been sparing in his comments on the content of part 3. Could not the application of peaceful means of settlement of disputes be envisaged as soon as signs emerged that a rule of international law was about to be broken or once such a rule began to be breached? Was it always necessary to wait until a breach had in fact been committed before resorting to the peaceful settlement of disputes? In internal law, for example, preventive measures were available. In his opinion, the international community expected the Commission to play a more active role in that connection. Moreover, should the task of settling disputes be left solely to the Security Council or the International Court of Justice? A careful reading of the report gave precisely that impression. Yet the Charter of the United Nations assigned a role to other bodies in that respect. Why were States reluctant to apply Article 38 of the Statute of the ICJ? Why did the Security Council so often prove ineffectual? Certain States, anxious to preserve the Security Council's prerogatives, wanted it to play the leading part, while others took the view that the other means of peaceful settlement provided for in the Charter should not be forgotten. In the Manila Declaration on the Peaceful Settlement of International Disputes which it had adopted at its 37th session,⁵ the General Assembly had mentioned other possible mechanisms for the peaceful settlement of disputes, apart from the Security Council and the ICJ. As a result, among other things, of the abusive exercise of the right of veto in the Security Council, it was now incumbent upon the General Assembly to play a greater role in that regard. The fact that it had not yet proved very effective in doing so was altogether another matter. In view of the terms of Article 33 of the Charter, he also wondered whether it might not be worth while considering the establishment of a body which, with a larger membership than that of the Security Council, would study the facts at the origin of any dispute.

5. He thought that the Special Rapporteur should pay particular attention to the tendency of States, noted in paragraph 35 of the report,

... to keep open the option of considering a breach of an international obligation as a violation of their sovereignty, entitling them in principle to any sort of demand and any sort of countermeasure. . . .

6. As stated in paragraph 36, part 1 of the draft articles⁶ had been relatively easy to elaborate and the real difficulties arose in connection with parts 2 and 3. Nevertheless, it was plain that part 1 would have to be looked at again in the light of the two other parts.

7. It was true, as affirmed in paragraph 37, that

... in most cases, a State will deny, on the grounds of the facts or of the interpretation of the applicable primary rules, that there has been on its side a non-conformity with a legal rule, an internationally wrongful act for which it bears responsibility. . . .

Consequently, the draft should comprise one part on the settlement of disputes and should envisage the establishment of a body independent of the parties to the dispute.

8. Although he agreed with the first sentence of paragraph 40, he wished to emphasize that some consideration should also be given to the possible provision, in part 3, of a procedure for the peaceful settlement of disputes to come into operation as soon as there were any signs of a breach of a rule of international law. Similarly, with regard to paragraph 44, it was essential to sound a warning against any duplication of the work on the draft Code of Offences against the Peace and Security of Mankind, and Mr. Reuter (1771st meeting) had rightly pointed to the need to speak of offences in the sense of both crimes and delicts, in keeping with article 19 of part 1.

9. He disagreed with the conclusion reached by the Special Rapporteur at the end of paragraph 52, since there was indeed every reason for the Commission to consider the question of "which measures the Security Council should take for 'the maintenance of international peace and security' and the consequences of failure to take effective measures". Conversely, he concurred with the statement in paragraph 55 that there was "no place in part 2 for an article or articles on the special legal consequences" of acts of aggression. Once again, the question of aggression was a matter to be covered by Mr. Thiam in the work on the draft Code of Offences against the Peace and Security of Mankind.

10. As to the comments in paragraph 57, the Commission must in his view certainly try to determine the legal consequences of international crimes other than aggression. *Apartheid*, for example, was one of the international crimes that endangered the maintenance of international peace and security. However, the substance of paragraph 58 posed some problems because legal writings were usually concerned with primary rules and had reservations about secondary rules.

11. Admittedly, an international crime did not necessarily constitute a threat to peace, but he had some doubts about the affirmation made in the first sentence of paragraph 61. Without wishing to go into detail, he would none the less draw attention to rules of an economic nature, such as those of the General Agreement on Tariffs and Trade, which prohibited the adoption of a measure such as a boycott.

12. As to the first question raised in paragraph 64, appropriate secondary and tertiary rules obviously did not exist, but the Commission might consider the possibility of formulating them. On the other hand, the question dealt with in the first sentence of paragraph 65 should be considered in the light of the draft Code of Offences against the Peace and Security of Mankind.

13. In paragraph 73, it might well have been a mistake to cite the example of denial by a coastal State of innocent

⁵ General Assembly resolution 37/10 of 15 November 1982, annex.

⁶ See footnote 4 above.

passage through its territorial sea, and he urged the Special Rapporteur to refrain from using such an example.

14. The special draft article on reprisals proposed at the end of paragraph 83, whether drafted in positive or negative terms, should be given particular attention by all members of the Commission. Again, the question of the objective régime referred to in paragraph 97 posed numerous problems, for if a particular group of States wanted to take a specific measure, it had to have the authorization of the international community as a whole. It was incorrect to contrast the concept of a regional objective régime with that of a universal objective régime.

15. Unfortunately, paragraph 100 was not clear and he would be grateful for some elucidation in that connection. In paragraph 106, the Special Rapporteur had expressed a judicious view but, there too, as in paragraph 102, it was necessary to reflect further on the various means for the settlement of disputes. He also wondered why paragraph 108 referred only to the absence of a "binding final decision of a court or tribunal". Furthermore, with regard to paragraphs 116–117, it was imperative to bear in mind that objective régimes could only be of a universal nature and that, if regional objective régimes in fact existed, they had to be recognized by the international community in order to be applicable.

16. Lastly, the draft articles themselves (ILC(XXXV)/Conf.Room Doc.5)⁷ enunciated the rule of proportionality, which was essential. However, the rule must be drafted in more precise terms. The word "manifestly" in draft article 2 was imprecise, for it might even suggest that an attempt was being made to introduce an idea of "appreciable proportionality" (*proportionnalité notable*) that would not be prohibited by international law, whereas that was not in fact the case.

17. Mr. REUTER said that Mr. Flitan appeared to suggest that, at least with regard to international crimes, the scope of the measures to be envisaged should be expanded somewhat to include both punishment and prevention. It was true that, under the régime of responsibility, account had to be taken of conduct that would be equivalent to preparing a crime or initiating its commission. That was an important observation which might well be borne in mind.

18. In municipal law, however, the very definition of an offence covered initiation of the commission or attempted commission of the offence in question. Accordingly, there were two possibilities. In the definition of each crime, such as aggression, *apartheid* or a serious violation of human rights, the draft could either specify the moment (preparation, attempt, commission) at which it was possible to speak of a "crime" or adopt the bolder and more dangerous solution of saying that attempted commission was part and parcel of every international crime. In addition to the two elements of an international crime that he had mentioned previously (1771st meeting), namely that an international crime was committed *erga*

omnes and could not be erased by time, there would then be the fact that an attempt to commit an international crime was a crime in itself. Hence the idea would have to be introduced that, in the case of an ordinary offence, attempted commission could not be assimilated to actual commission of the offence. In Mr. Flitan's view, a sound international régime of responsibility should provide for preventive measures. It would be remembered in that connection that the League of Nations had interpreted the Covenant as giving it the right to deal with situations likely to lead to an international dispute and to acts contrary to international law, an idea that was also found in the Charter of the United Nations.

19. In respect of the various means for the peaceful settlement of disputes, a matter on which his position differed from that of Mr. Flitan, account must be taken of the role assigned by the Charter to the Secretary-General of the United Nations, who was empowered to draw the attention of the competent bodies to certain situations. Could preventive and enforcement measures be included in the régime of State responsibility? The Special Rapporteur had viewed the question from a broad standpoint by discussing countermeasures, proportionality and reprisals, for example, which were in some respects enforcement measures. A dangerous situation that might lead to preparations for an international crime or to an attempted international crime came under the régime of prevention. In that respect, members would have to decide which points should and should not be covered in the draft. Again, in many cases the General Assembly, for example, had already had to deal with acts that had taken place either before or after the commission of an offence. Nevertheless, he was disturbed to find that the Commission was enlarging on a problem it still had not managed to encompass. He did not think that, *vis-à-vis* the General Assembly, the Commission should inflate the topic to such an extent that it became increasingly difficult to mark out the proper limits. In his view, the best course would be to split up the task by adopting various sets of self-contained articles that could be submitted promptly to the General Assembly. If the General Assembly considered that the Commission had a clear grasp of a problem that had had to be left aside, it would invite the Commission to revert to the matter.

20. Personally, he had reservations about the advisability of enunciating rules that would in effect amend the Charter, but the members of the Commission could still make suggestions in that regard. The Third United Nations Conference on the Law of the Sea had introduced an innovation by establishing a technical body to deal with matters relating to the delimitation of the continental shelf,⁸ and such an initiative in other areas might not be prejudicial to the Charter. In conclusion, he said that, in a spirit of discipline, the Commission should for the time being adopt a rigorous method of work.

⁸ Commission on the Limits of the Continental Shelf, established in accordance with the provisions of annex II of the United Nations Convention on the Law of the Sea (*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).

⁷ See 1771st meeting, para. 2.

21. Mr. FLITAN explained that he had raised the question of crimes against the maintenance of international peace and security from the point of view of incrimination—in other words, of attachment of guilt to an attempt at such crimes. He had not made any suggestion but hoped that the Special Rapporteur and members of the Commission would consider, on the basis of internal law, at what point an attempted crime could be viewed as a crime in international law.

22. He wondered, moreover, whether some form of recourse to the means afforded by the Charter—without, of course, modifying it in any way—might not be indicated in order to prevent the occurrence of a dispute as soon as preparations were made to commit a breach of a rule of international law or as soon as the breach was initiated. There again, it was difficult to make specific proposals. In referring (para.4 above) to the Manila Declaration adopted by the General Assembly in 1982, he had had in mind, like Mr. Reuter, the role that might be played by the Secretary-General, the General Assembly, the Security Council and the ICJ. In that text, the General Assembly drew the attention of States to all the means offered by the Charter for the peaceful settlement of disputes between States. In his view, questions of that kind fell within the mandate of the Commission, which was required to formulate any suggestions it might consider useful.

23. Mr. LACLETA MUÑOZ said that, by and large, he endorsed Mr. Flitan's remarks concerning the peaceful settlement of disputes. It was concern with the application of a régime of responsibility that had led Mr. Flitan to touch upon the problem of prevention. Consideration of the topic of international liability for injurious consequences arising out of acts not prohibited by international law had brought the Commission face to face with a similar problem. Indeed, the question of attempted crimes derived from that of prevention. However, while it was true that an attempt could be made to commit every crime, and the attempt itself constituted an offence, the study of attempted crime took the Commission back to the sphere of primary rules at a stage at which it should be considering secondary rules.

The meeting rose at 11.50 a.m.

1774th MEETING

Friday, 3 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add. 1-4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR

ARTICLES 15 to 19

1. The CHAIRMAN invited the Commission to consider item 3 of the agenda and called upon the Special Rapporteur to introduce his fourth report (A/CN.4/374 and Add.1-4), and, in particular, draft articles 15 to 19, which read:

Article 15. General facilities

The receiving State and the transit State shall accord to the diplomatic courier the facilities required for the performance of his official functions.

Article 16. Entry into the territory of the receiving State and the transit State

1. **The receiving State and the transit State shall allow the diplomatic courier to enter their territory in the performance of his official functions.**

2. **Entry or transit visas, if required, shall be granted by the receiving or the transit State to the diplomatic courier as quickly as possible.**

Article 17. Freedom of movement

Subject to the laws and regulations concerning zones where access is prohibited or regulated for reasons of national security, the receiving State and the transit State shall ensure freedom of movement in their respective territories to the diplomatic courier in the performance of his official functions or when returning to the sending State.

Article 18. Freedom of communication

The receiving and the transit State shall facilitate, when necessary, the communications of the diplomatic courier by all appropriate means with the sending State and its missions, as referred to in article 1, situated in the territory of the receiving State or in that of the transit State, as applicable.

Article 19. Temporary accommodation

The receiving and the transit State shall, when requested, assist the diplomatic courier in obtaining temporary accommodation in connection with the performance of his official functions.

2. Mr. YANKOV (Special Rapporteur) said that, in his second report,⁴ he had submitted draft articles 1 to 6, which constituted part I of the draft articles (General provisions).⁵ In his third report (A/CN.4/359 and Add.1), he had presented the revised texts of articles 1 to 6 (with the exception of article 2, which was unchanged), and

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ *Yearbook* . . . 1981, vol. II (Part One), p. 151, document A/CN.4/347 and Add.1 and 2.

⁵ For the texts, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 112-114, footnotes 304-309.

draft articles 7 to 14, which constituted the beginning of part II of the draft (Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag). Draft articles 1 to 14 contained in the third report had been considered by the Commission at its previous session and referred to the Drafting Committee.⁶

3. In his fourth report (A/CN.4/374 and Add.1-4), his objective, as indicated in paragraph 4, was to complete the set of provisions constituting the draft articles on the status of the diplomatic courier and the diplomatic bag. He had therefore submitted in sections II and III of the report the draft articles that completed part II, in section IV the draft articles relating to part III (Status of the diplomatic bag) and in section V those of part IV (Miscellaneous provisions). He would first present draft articles 15 to 19 on the facilities to be granted to the diplomatic courier, and then, at a later meeting, draft articles 20 to 23 on the privileges and immunities of the diplomatic courier. Subsequently, he would deal with the remainder of part II of the draft (arts. 24-30) and, finally, part III (arts. 31-39) and part IV (arts. 40-42).

4. Achievement of the object of the fourth report would be facilitated by the fact that, in previous years, the Commission had made special efforts to determine the scope and parameters of the topic and to study its implications and the possible analogies between the status of the diplomatic courier and that of other diplomatic agents. Those efforts and the discussions in the Sixth Committee of the General Assembly had been extremely helpful to him in his attempts to devise the methods to be applied and the basic approach to be followed in carrying out the task entrusted to him, which was primarily one of codification but also involved some elements of progressive development.

5. The facilities to be granted to the diplomatic courier, dealt with in draft articles 15 to 19, were the heart of the law on the status of the diplomatic courier and offered evidence of the proper functioning of the legal rules of diplomatic relations. The further development and improved effectiveness of those rules would promote international co-operation and understanding. Indeed, in the area under consideration, the principle of reciprocity was perhaps the most effective remedy, since every receiving State was simultaneously a sending State and a transit State. Thus the relationship between receiving and sending State was reversible, but the end result should always be equality and balance.

6. Every topic had particular features which offered definite indications of the methods to be applied in its consideration. The examination of some topics tended to focus on general, theoretical and even political problems, while the conceptual framework of others was pragmatic and could best be worked out through the formulation of draft provisions based on existing law. In his view, the present topic was of the latter kind, being one on which modest but practical results in the form of draft articles

could be achieved. Hence the official functions and the confidential nature of the duties of the diplomatic courier required appropriate treatment that was functional both in nature and in application. It had been and continued to be his intention to follow a comprehensive and uniform approach to the many services performed by the diplomatic courier in connection with all kinds of official missions of the sending State.

7. He had decided, at the current stage, to refer only to diplomatic couriers and bags used by States. The Commission would later be able to determine whether the draft articles could also apply to diplomatic couriers and bags used by international organizations and other entities, such as recognized national liberation movements. The main consideration on which he had based his decision was that the status of diplomatic couriers must not be fully assimilated to that of diplomatic agents, especially as one delegation in the Sixth Committee had suggested that draft articles 1 to 14 tended to imply such assimilation.⁷ He would take due account of that point and try to avoid giving any such impression.

8. In his work he had closely followed the relevant provisions of the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, 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.⁸ The functions and status of members of special missions, in particular, were similar to those of diplomatic couriers, who were on temporary assignment and could therefore not enjoy all the privileges and immunities of diplomatic agents. In comparing the status of members of special missions and diplomatic couriers, however, it was necessary to bear in mind the functional approach, the restrictions that applied and the main trends in State practice.

9. It would also be seen, on examining the Vienna Convention on Diplomatic Relations, that the status of a diplomatic courier was similar to that of the administrative, technical and service staff of a diplomatic mission, who enjoyed certain privileges and immunities in the exercise of their functions, under article 37, paragraphs 2 and 3, of that Convention. And if the Vienna Convention on Diplomatic Relations granted such privileges and immunities, it would be logical for a diplomatic courier, who was entrusted with confidential duties that might in some cases be much more important than those of the administrative, technical or service staff of a diplomatic mission, to enjoy similar privileges and immunities for the purpose of performing those duties. His general approach had thus been not to go too far in assimilating the status of the diplomatic courier to that of diplomatic staff, but at the same time to provide adequate protection for the courier in the exercise of his functions.

⁶ For the texts, *ibid.*, pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁷ *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 52nd meeting, para. 37* (United States of America).

⁸ Hereinafter called "Vienna Convention on the Representation of States".

10. He had therefore examined the main features of the facilities, privileges and immunities which might be granted to diplomatic couriers as being indispensable for the exercise of their functions and had tried to determine whether the existing rules embodied in the four conventions on codification of diplomatic law were applicable to diplomatic couriers. He had also assessed the comparability and compatibility of the status of diplomatic couriers with that of diplomatic agents, identifying common features that would offer a reliable basis for the codification and progressive development of international law on the topic. Whenever possible, he had examined the practice of States to see whether treaties, national legislation or case-law could be used to test the viability of the draft articles he was proposing. Although State practice with regard to the status of diplomatic couriers was inconclusive and limited, because Governments preferred to settle the problems that arose confidentially through diplomatic channels, there was some evidence that it followed the pattern set in the codification conventions.

11. Referring to paragraphs 6–21 of his fourth report, he said that the debate in the Sixth Committee at the thirty-seventh session of the General Assembly had given him the general impression that increased importance was being attached to the practical significance of the topic under consideration and that there was greater awareness of the need for its codification. He suggested that the points raised in the Sixth Committee regarding the actual wording and interpretation of the draft articles proposed thus far could be considered by the Drafting Committee.

12. In paragraphs 26–30, he had tried to explain the justification for draft article 15 on general facilities. In practice, the granting of facilities very much depended on circumstances, only a few of which could be determined in advance. He had therefore decided not to make article 15 too detailed or exhaustive. From a legal point of view he had considered it necessary to follow the pattern of the Vienna Conventions—in particular, article 25 of the Vienna Convention on Diplomatic Relations—and to take account of State practice, which supported the granting of general facilities to the diplomatic courier for the exercise of his official functions.

13. Draft article 16 on facilities for the entry of the diplomatic courier into the receiving State and the transit State was discussed in paragraphs 32–33, which noted, *inter alia*, that the admission of the diplomatic courier to the territory of the receiving State or the crossing of the territory of the transit State was an indispensable condition for the performance of his functions and an essential element of the principle of freedom of communication. The main obligation of receiving and transit States was thus to grant entry or transit visas to the diplomatic courier as quickly as possible, in accordance with the general régime applicable to the admission of foreigners. In that connection he had referred, in a footnote to paragraph 33 of the report, to Indonesia's practice of granting multiple entry visas; but many other examples of similar State practice were available.

14. Another essential condition for the performance of

the diplomatic courier's functions was freedom of movement and travel, which were dealt with in draft article 17 and discussed in paragraphs 34–37 of the report. That article stressed the importance of freedom of movement and travel, but also took account of the practice of States of prohibiting or regulating access to certain zones for reasons of national security. That practice, which was reflected in bilateral agreements, was mentioned in paragraph 37. One important aspect of the practice was that it operated very effectively on the basis of reciprocity.

15. Draft article 18 dealt with freedom of communication, which was considered in paragraphs 38–41 of the report. It was understood in that article that facilities relating to such freedom would be granted when the diplomatic courier was in difficulty or distress and required assistance to contact the sending State or the diplomatic mission of his destination. Although State practice in that regard was not very abundant, he thought that draft article 18 would be regarded as a practical provision and should not give rise to any difficulties for States since it applied to cases in which the diplomatic courier was travelling on official business.

16. With regard to draft article 19, he pointed out that the granting of assistance to the diplomatic courier in obtaining temporary accommodation should not be regarded as a routine obligation of the receiving State or the transit State. There might, however, be cases in which the diplomatic courier encountered difficulties during an official journey and required special assistance, as noted in paragraph 42.

17. Mr. AL-QAYSI said that the importance of the topic lay in the practical everyday difficulties that arose. The rules to be elaborated by the Commission would fill a number of gaps and amplify existing rules in the light of State practice, thereby removing a measure of uncertainty.

18. He congratulated the Special Rapporteur on the lucidity of his report (A/CN.4/374 and Add. 1–4) and on his efforts to demonstrate the practical importance of the topic. He shared the views expressed by many members of the Commission that the principles stated in the draft articles could form the basis of a complete draft, though care should be taken to maintain a proper balance between the rights and obligations of sending and receiving States. He hoped that the draft would be confined to the necessary amplification of existing rules; the Special Rapporteur had, indeed, said that his task would be essentially one of codification based on the consideration of practical needs.

19. Referring to section I of the report, which dealt with the consideration of the draft articles by the Sixth Committee at the thirty-seventh session of the General Assembly, and in particular to paragraphs 11–12 concerning the scope of the draft articles, he observed that the view of a number of representatives in the Sixth Committee, as shown by the summary records, had been that the rules to be formulated should apply *stricto sensu* only to the diplomatic courier and the diplomatic bag unaccompanied by diplomatic courier, without touching

on the question of whether the courier and the bag were being used by States or by international organizations. That would seem to be a desirable approach, since the measures of confidentiality and the exceptional circumstances which induced States to use diplomatic couriers or diplomatic bags could apply equally well to international organizations.

20. Referring to paragraph 13 of the report, he observed that the difference between the régimes established by the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations raised a problem which might not be easily solved. He wished the Special Rapporteur every success in attempting to find a solution.

21. The texts of the proposed articles were generally lucid and easily digestible, but a number of the terms used called for some comment. In draft article 15, for example, reference was made to the facilities “required” for the performance of the official functions of the diplomatic courier, whereas the relevant parts of the report referred to the facilities “necessary” for the performance of those functions. It might be preferable to replace the word “required” by the word “necessary” in the text of draft article 15, since it was for the diplomatic courier, rather than the receiving or transit State, to determine such necessity.

22. Draft article 19, concerning temporary accommodation, provided that the receiving and transit States must, when requested, assist the diplomatic courier in obtaining such accommodation in connection with the performance of his official functions. In paragraph 42 of his report, however, the Special Rapporteur emphasized that the receiving and transit States would be required to do so only in certain circumstances. If that was the case, it might be advisable to insert the words “in certain circumstances” after the word “requested” in the text of the draft article.

23. Finally, he noted that in paragraph 23, concerning the scope of the principle of protection of the diplomatic courier, it was stated that “the facilities, privileges and immunities accorded to the diplomatic courier should be the same as those of consular and other official couriers”. He wondered whether the Special Rapporteur had in fact intended to say that all those facilities, privileges and immunities should be the same.

Co-operation with other bodies

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

24. The CHAIRMAN invited the Observer for the Inter-American Juridical Committee to address the Commission.

25. Mr. GALO LEORO (Observer for the Inter-American Juridical Committee) said that his presence in the Commission was further evidence of the ties of co-operation that linked the Commission with the Committee. In January 1983, it had been the Committee’s

turn to receive Mr. Francis as representative of the Commission, who had informed the Committee of the progress of the Commission’s work on the various topics it had discussed in 1982.

26. During its sessions in August 1982 and January 1983, the Committee had considered a number of questions. It had been invited by the Inter-American Court of Human Rights to give its point of view on the scope of article 64, paragraph 1, of the American Convention on Human Rights⁹ and on the date of the entry into force of that convention for States which had ratified it with reservations, in accordance with its article 75. The Committee had continued consideration of “the forms of development of environmental law” and was considering the possibility of preparing a draft inter-American convention on that subject. It had begun consideration of “the scope of the Inter-American Juridical Committee’s competence as a legal consultative body”. At the request of the Second Inter-American Specialized Conference on Private International Law,¹⁰ the rapporteur for the question of “personality and capacity in private international law” had been requested to prepare a draft convention on the personality and capacity of legal persons. The Committee had also begun its consideration of “international maritime transportation, with special reference to bills of lading” and of “the bases for a draft convention on the international transport of goods by land”. The rapporteur for the question of “the right to information” had submitted two reports which would serve as a basis for the continued study of that question, in which UNESCO had begun to take an interest.

27. The main focus of the Committee’s attention at recent sessions, however, had been the topic of the “jurisdictional immunity of States”, which it had begun considering in 1970. On the basis of the many reports submitted to it, the Committee had prepared an Inter-American Draft Convention on Jurisdictional Immunity of States, which had been adopted in January 1983, and the English text of which had been made available to the Secretariat of the Commission (ILC(XXXV)/Conf. Room Doc.4). In preparing that convention the Committee had taken account of important texts such as the 1972 European Convention on State Immunity, the draft articles prepared by the Commission’s Special Rapporteur and the United States and United Kingdom Acts on State Immunity. The draft convention would be considered by the Third Inter-American Specialized Conference on Private International Law, which was to be held in April 1984. It was designed to fill a gap on the American continent by providing States with legal guidelines which they could follow when dealing with the sensitive problem of immunity from their jurisdiction.

28. Referring briefly to the text of the inter-American draft convention, he said that article 1 enunciated the

⁹ The “Pact of San José, Costa Rica”, signed on 22 November 1969, to be published in United Nations, *Treaty Series*, No. 17955.

¹⁰ Held at Montevideo, Uruguay, from 23 April to 8 May 1979.

general rule of the jurisdictional immunity of States, a principle given effect in America. Article 3 on *jure imperii* provided that the State was granted immunity from jurisdiction for acts performed by virtue of governmental powers and, as an exception to the general rule, article 5 on *jure gestionis* enunciated the rules applicable to acts or activities of the State which continued to be subject to the jurisdiction of the State of the forum. In addition, article 7 provided that, if the foreign State performed certain acts involving proceedings, the State of the forum was authorized to exercise its jurisdiction.

29. Although the matters referred to in article 6 as exceptions to the rule of jurisdictional immunity had not given rise to any major legal problems, the general exception relating to "trade or commercial activities of a State" had raised definition problems, and the draft convention consequently contained a kind of tautological definition. For example, the second paragraph of article 5 provided that

Trade or commercial activities of a State are construed to mean the performance of a particular transaction or commercial or trading act pursuant to its ordinary trade operations.

That definition of trade or commercial activities was based on a more restrictive criterion than that followed by Mr. Sucharitkul in the draft articles he had submitted to the Commission. The inter-American draft convention also established a link between the activities in question and the territory of the State of the forum, with a view to preventing a State from claiming jurisdictional immunity in the case of matters relating to such activities. The European Convention on State Immunity and the United States and United Kingdom Acts had also been worded along those lines, although the United States Act was more detailed. Article 6 of the draft convention established the same link for labour affairs and other matters in respect of which jurisdictional immunity could not be claimed.

30. Another important element of the draft convention was that relating to the entities and State agencies which, whether or not endowed with separate legal personality, were to be assimilated to the State and regarded as subjects enjoying jurisdictional immunity. Article 2, which listed the entities in question, did not cover the sovereign or head of State, nor companies of whose shares a majority were held by the State. Rather, the intention had been to establish the criterion that, in order to be covered by that provision, the agency or entity in question must be of national legal interest. It was thus possible that entities other than those listed might also be covered. It was in that respect that the inter-American draft convention differed from the European Convention, which was more restrictive. It should also be noted that, according to the second paragraph of article 3 of the draft convention, immunity from jurisdiction would apply equally to activities regarding property owned by the State and to assets which the State used by virtue of its governmental powers.

31. The only definition contained in the draft convention was the one relating to the trade or commercial activities of a State. States could, of course, conclude conventions to cover cases not provided for in the draft,

and agreements of that kind would take precedence over a general convention. The draft convention did not mention the consent of a State to submit to the jurisdiction of the courts of another State as an element which had the legal effect of waiving of immunity even in cases in which immunity could be claimed. Consent could be presumed in the objective cases provided for in article 7, which related to procedural acts involving acceptance of jurisdiction. It could, however, also be said that a State which deliberately availed itself of such remedies waived its immunity, and it was on that assumption that the provisions of article 7 were based.

32. Article 8 of the draft convention provided for the application of the procedural rules of the State of the forum; under article 9, a foreign State would be summoned or notified of a claim by means of letters rogatory, in accordance with a long-standing Latin-American practice.

33. The first paragraph of article 13 made a claim of immunity by a State a peremptory exception: the State which claimed immunity was not required to go into the substance of the dispute, since acceptance of that exception by the competent court would bring the proceedings to a halt. Although that paragraph also provided that a State which claimed immunity was not required to submit evidence thereof, it was understood that its claim had to be based on the law of the forum State, in accordance with the relevant provisions of the draft convention. Justification for that interpretation was to be found in the provision in article 12 that, if the foreign State claimed immunity from jurisdiction, it was free to appoint to the proceeding a special agent assisted by an attorney registered in the State of the forum. The only function of that special agent was to assist the State claiming immunity to plead its case. The first paragraph of article 13 referred to evidence, but not to the legal grounds for the case, and the second paragraph followed logically on the first, since it placed the burden of proof not on the State claiming immunity, but on the challenger. With regard to the third paragraph, he explained that, since the State claiming immunity was not required to go into the substance of the dispute, it would be difficult for the adjudicatory authority to go into the merit of the claim. Although some people might think that those provisions favoured the foreign State, the spirit of article 13 was in keeping with Latin-American legal experience.

34. Mr. BARBOZA, welcoming the mutually advantageous ties linking the Commission with the Committee, said that Mr. Galo Leoro's statement had given members of the Commission a better idea of the Committee's extensive activities and the high legal standard of its work. He had listened with particular interest to Mr. Galo Leoro's remarks about a draft convention on environmental law and had carefully followed his very useful explanations concerning the Inter-American Draft Convention on Jurisdictional Immunity of States.

35. Mr. McCaffrey said that the presence of the representative of the Inter-American Juridical Committee had helped to strengthen the liaison between

that Committee and the Commission, which had very similar functions. He congratulated the Committee on its work on the topic of the jurisdictional immunities of States and their property. The material produced by the Committee had proved very useful to the Commission in its own work on the topic, as evidenced by the references made to it by the Special Rapporteur and other members of the Commission. Co-operation between the two bodies was very important, and he would follow with close interest the work of the Committee on all the topics with which it was currently occupied.

36. Mr. DÍAZ GONZÁLEZ paid tribute to Mr. Galo Leoro, who was well known in Latin America both for his legal work and for his multilateral and bilateral diplomatic activities. His statement had been of the greatest interest. The condensation of inter-American practice regarding jurisdictional immunity contained in the draft convention introduced by Mr. Galo Leoro was evidence of the work done by the Committee since its establishment with a view to the progressive development and codification of American international law: that law had constantly gained in authority and now set an example to the whole world of the primacy of law over the use of force. Even when the American continent had been subjected to attacks by foreign Powers, it had always sought peaceful settlements and given precedence to the rule of law. In that connection, he referred to the Congress of Panama convened by Simón Bolívar in 1826, which had been the precursor of the OAS and even of the United Nations. For President Wilson, when proposing the establishment of the League of Nations, had acknowledged the 1826 agreements as his inspiration, and some articles of the League of Nations Covenant had been based on the treaty signed by the American States at Panama.

37. Mr. Galo Leoro's presence was doubly welcome, both for his own reputation and because he represented the Inter-American Juridical Committee, which had, over the years, been cultivating the Latin-American conception of law.

38. Mr. FLITAN, speaking also on behalf of Mr. Ushakov and Mr. Yankov, warmly welcomed and congratulated the representative of the Inter-American Juridical Committee. Co-operation had developed over the years between the Commission and the Committee, which worked unceasingly for the predominance of law and justice over the use of force in relations between States. Mr. Galo Leoro's detailed account of the Committee's activities showed that such co-operation should be strengthened.

39. Mr. CALERO RODRIGUES associated himself with previous speakers and said that it was extremely important to maintain the closest contact with regional bodies such as the Committee, whose fruitful work was based on Latin-American tradition. He thanked Mr. Galo Leoro for his account of the Committee's activities and for his comments on the inter-American draft convention, which would make a substantial contribution to the Commission's own work on the jurisdictional immunities of States.

40. Mr. MAHIOU said that the African members of the Commission also wished to pay tribute to the representative of the Inter-American Juridical Committee, whose statement had been all the more valuable in that the Commission was concerned with many of the same problems. The Commission's co-operation with other learned bodies such as the Committee enabled its members better to understand and grasp those problems.

41. Mr. LACLETA MUÑOZ welcomed Mr. Galo Leoro and said that he envied the Committee, which had just completed its work on jurisdictional immunity of States, whereas the Commission was still deeply immersed in that topic.

42. Mr. JAGOTA, speaking also on behalf of Mr. Al-Qaysi, Mr. Jacovides, Mr. Ni and Mr. Ogiso, thanked the representative of the Inter-American Juridical Committee for his statement on the Committee's work. A professional complementarity existed between the Commission and regional bodies, since whatever the Commission proposed must be based on an understanding of State practice in the various continents and was put to the test of soundness and practicality by the regional bodies. The information provided by the Committee concerning its work on the topic of jurisdictional immunities of States and their property had been particularly useful.

43. Mr. GALO LEORO (Observer for the Inter-American Juridical Committee) thanked the members of the Commission and, in particular, those from Latin-American countries, whose contribution to the Commission's work he commended. He suggested that even closer co-operation might be established between the Committee and the Commission and said it was regrettable that, for practical reasons, it took so long for the Commission's documents to be made available to the Committee.

44. The CHAIRMAN thanked the representative of the Inter-American Juridical Committee for having addressed the Commission and helped to strengthen the links between the two bodies. In particular, the information and materials received in connection with the Committee's work on the topic of jurisdictional immunities of States and their property, on which the Commission itself was currently working, were greatly appreciated.

The meeting rose at 1.15 p.m.

1775th MEETING

Monday, 6 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Al-Qaysi, Mr. Balandá, Mr. Barboza, Mr. Calero Rodríguez, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*)* (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

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

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. AL-QAYSI expressed appreciation to the Special Rapporteur for his fourth report (A/CN.4/366 and Add.1) on a very complex topic. The topic of State responsibility was one of vital importance, encompassing virtually all aspects of international law. Dealing as it did with breaches of the law by sovereign States and the ensuing consequences, it assumed intense practical and political significance. The speedy elaboration of the remaining parts of the draft articles was hardly an easy task, not only because of the scope of the topic but also because of the urgent need to evaluate its every component in terms of the past political behaviour and the current and future expectations of States.

2. Referring to chapter II of the fourth report, he noted that, in paragraph 32, the Special Rapporteur had stated that the aim of the report was to concentrate on an "outline" of the possible contents of parts 2 and 3 of the draft articles and to discuss the difficult choices with which the Commission was faced. Clearly, the Commission's task in making those difficult choices would not be facilitated by presentation of the substance of the choices in bulk and in highly abstract terms. In the absence of any headings or subheadings, and of a clear correlation between the conclusions and the draft articles to be submitted, the overall shape of the intended outline had become somewhat blurred.

3. In paragraph 35, the Special Rapporteur observed that there was an abundance of primary rules of conduct, but a relative scarcity of secondary rules, and a virtual absence of tertiary rules. In paragraph 36, it was stated that part 1 of the draft articles had been relatively easy to elaborate, since it concentrated on the author State, in other words on the conditions under which an act of a State existed and constituted a breach of an international obligation of that State; part 2, however, must concentrate on the "injury" to a particular State, to several

States, or to the community of States, since it dealt with new rights and obligations arising out of the commission of an internationally wrongful act, rather than out of the time-honoured basis of consent.

4. In paragraph 37, it was emphasized that, since in most cases a State charged with an internationally wrongful act would deny responsibility, on the basis of either fact or law, and since other States could "maintain their interpretations of fact and law and act accordingly", a dispute would arise. If the dispute remained unsettled, it could "give rise to an escalation of the conflict" and each move and countermove could not be "definitively appreciated legally otherwise than on the basis of a settlement of the original dispute of fact and law relating to the primary rules". In paragraph 39, however, the point was clearly made that it was hardly worth while talking about secondary rules without knowledge of the contents of the applicable tertiary rules; indeed, the secondary rules were "only a transition from the primary to the tertiary rules". The Special Rapporteur had thus set out the framework for the first choice that the Commission had to make.

5. In paragraph 45, the Special Rapporteur submitted that the Commission should give early consideration to the possible content of part 3 of the draft articles, namely the question of dispute settlement, since it would decisively influence the way in which part 2 was to be elaborated. In that connection, three options were presented in paragraphs 42–44. The first option was to isolate a number of legal questions in the articles on State responsibility and to subject them to a limited procedure for the settlement of disputes "in the perspective of a general convention on State responsibility comparable with the Vienna Convention on the Law of Treaties". However, the Special Rapporteur expressed considerable doubt as to the willingness of States generally to accept the isolation of questions relating to the interpretation and application of secondary rules from those relating to the interpretation and application of the primary rules concerned.

6. The second option was to give the final outcome of the work the form of an "endorsement of the rules on State responsibility as 'guidance' for States and international bodies". Finally, the third option, which the Special Rapporteur described as an "intermediary solution", was the acceptance of those rules by States in a convention, only to the extent that a dispute between them (which necessarily involved the interpretation and application of primary rules) was submitted to an international procedure for the settlement of disputes. That would seem to constitute a comprehensive approach to the settlement of disputes.

7. It was not difficult to perceive the plausibility of the Special Rapporteur's analysis. For example, with regard to proportionality, as envisaged in draft article 2 presented in the third report (A/CN.4/354 and Add.1 and 2),⁵ the question of who would be the judge of

* Resumed from the 1773rd meeting.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

⁵ See 1771st meeting, para. 2.

proportionality would immediately arise. If such a question were left unregulated, each State would be the judge of its own responses, and the efficacy of the rule would be adversely affected. At the same time, however, it must be admitted that it would be virtually impossible to consider the matter at the current stage or to opt for the model of dispute settlement that would best fit State responsibility until a sufficient number of draft articles had been submitted. Only then would the Commission be better able to assess, in practical terms, what was needed. For the time being, the second option, namely the "guidance" approach, was too drastic a departure from the basis on which the elaboration of the draft articles had proceeded, and was therefore unacceptable. As to the third option, he wondered whether it was realistic to believe that, at the current stage, a comprehensive procedure for dispute settlement embodied in a convention on a topic as sensitive as State responsibility would make the convention widely acceptable to States.

8. In dealing with the question of the legal consequences of the international crime of aggression, the Special Rapporteur noted, in paragraph 52 of his report, that those consequences were dealt with in the Charter of the United Nations, although in a way that left room for divergent interpretations. The report went on to state that the one legal consequence that was not in dispute was that of self-defence and that, in any event, part 3 of the draft articles would contain procedure for the implementation of State responsibility resulting from aggression. The Special Rapporteur concluded that no useful purpose could be served by elaborating on the notion of self-defence, because the Commission itself had been divided on the matter at its previous session and because no suggestion had been made that would allow the Commission to undertake the drafting of rules on the measures to be taken by the Security Council to maintain international peace and security and on the consequences of failure to take effective measures.

9. Having dismissed the legal consequences of aggression as defined in a draft convention on State responsibility prepared by Graefrath and Steiniger,⁶ the Special Rapporteur concluded, in paragraph 55 of his report, that there was no place in part 2 for an article or articles on the special legal consequences of the category of internationally wrongful acts called "acts of aggression". The Special Rapporteur maintained that in fact the failure of the most fundamental primary rule prohibiting such acts created a situation which, subject to the application of the United Nations machinery for the maintenance of international peace and security, justified any demand and any countermeasure; only the rule of quantitative proportionality and the protection of *jus cogens* remained. Those three limitations were intended to be covered by draft articles 2, 4 and 5, as proposed by the Special Rapporteur in his third report.⁷

⁶ See B. Graefrath, E. Oeser and P. A. Steiniger, *Völkerrechtliche Verantwortlichkeit der Staaten* (Berlin, Staatsverlag der Deutschen Demokratischen Republik, 1977), pp. 231 *et seq.*

⁷ See 1771st meeting, para. 2.

10. In considering international crimes other than aggression, the Special Rapporteur stated, in paragraph 58 of the fourth report, that the difficulty was that, "while the international community as a whole may well recognize certain acts of a State as international crimes, there seems to be less consensus as regards the punishment to be meted out". That assertion was based on the fact that the progressive development of international law had resulted in primary and sometimes tertiary rules on implementation, but had produced no special secondary rules different from those applying to internationally wrongful acts in general, no doubt because in those fields the primary rules concerned entities other than States, whereas the secondary rules, by definition, concerned States as such. The final conclusion of the Special Rapporteur, in paragraph 67, was that, as the Commission had recognized progressive development of international law by provisionally adopting article 19 of part 1 of the draft articles, it should carry that development to its logical conclusion by proposing secondary and tertiary rules. That conclusion was based on the premise that there was little chance that article 19 would be accepted by States generally without the fulfilment of three conditions: a legal guarantee of independent and authoritative establishment of the facts and the applicable law; a collective duty of applying sanctions; and a collective discussion and decision on the sharing of the burden of implementation.

11. In the records of the Commission's discussions on the topic at its thirty-fourth session,⁸ he had been unable to find anything that appeared to support the drastic conclusion reached by the Special Rapporteur regarding the special legal consequences of the crime of aggression, in particular self-defence. The main question under consideration had been the legal consequences of international crimes, in connection with draft article 6 submitted by the Special Rapporteur. All members who had addressed themselves to that question had been in favour of thorough, detailed and cautious consideration of the subject-matter of the draft article. They had called for further elaboration and amplification, and some had even gone so far as to suggest that a whole chapter be devoted to the subject. But while no member had underestimated the difficulties involved, none had raised the categorical doubts and disclaimers contained in the fourth report. As to the notion of self-defence, the records of the Commission's discussions revealed that five members had been clearly in favour of further elaboration, while one had stated that, since the Commission was concerned with progressive development, it should perhaps tone down references to self-defence as a remedy and emphasize the peaceful settlement of the original dispute. Another member had not regarded self-defence as punitive or afflictive, but as a measure designed to meet a threat or to guard against a danger, and had therefore wondered whether it should really have a place in part 2 of the draft articles. Finally, two members had questioned

⁸ *Yearbook* . . . 1982, vol. I, pp. 199 *et seq.*, 1731st–1734th meetings, and pp. 230 *et seq.*, 1736th–1738th meetings.

the Commission's competence to interpret the right of self-defence as provided for in article 51 of the Charter of the United Nations.

12. The question whether self-defence was a sanction or a measure was largely one of semantics. The essence of the matter was the scope, extent and limits of the right of self-defence, which was a direct consequence of the particularly grave internationally wrongful act of aggression, defined as an international crime in article 19 of part 1 of the draft.

13. With regard to the Commission's competence to interpret Article 51 of the Charter, which was clearly the prerogative of the Security Council, the substance of the matter was not the interpretation of the relevant Charter provisions in a given case, but identification of the elements of the concept as a legal consequence of an internationally wrongful act. Besides, the undisputed competence of the Security Council to determine the existence of an act of aggression under Article 39 of the Charter had not prevented the elaboration of a Definition of Aggression and its adoption by the General Assembly at its twenty-ninth session.⁹ Consequently, and in view of the fact that the Special Rapporteur, in his summing up of the previous year's discussion, had himself admitted that draft article 6 was "an attempt to start a discussion",¹⁰ the conclusion reached in the report under consideration appeared unwarranted.

14. The Special Rapporteur had not explained the grounds for his conclusion concerning the provisions that States would or would not accept, and it was open to question whether such a political conclusion should be drawn before further draft articles had been prepared and the views of Governments thereon had been sought. Moreover, even assuming that the Special Rapporteur's conclusion was correct, it was not clear whether it applied to all the categories of international crimes listed in article 19 of part 1 of the draft or only to crimes other than aggression. Given his conclusion that, having accepted article 19 as progressive development of the law, the Commission should elaborate secondary and tertiary rules on that matter, how could the Special Rapporteur rule out the definition of the legal consequences of aggression—one of which, as he appeared to agree, was certainly self-defence—when aggression was one of the international crimes referred to in that same article?

15. He respectfully disagreed with the Special Rapporteur and submitted that the Drafting Committee should carefully consider draft article 6 and elaborate on it. Moreover, article 19 of part 1 of the draft should not be tampered with for the time being. The necessary conclusions from that article must be drawn in the context of part 2, since it would look rather odd if the Commission prepared provisions on the legal consequences of the less grave internationally wrongful acts and failed to do so in the case of the most grave. Nor should the Commission leave a gap in part 2 on the assumption of there being a

link with the draft Code of Offences against the Peace and Security of Mankind. Each topic should follow its own course of elaboration, since the attempts to forge links at the current stage appeared to be predicated on political rather than technical grounds. It was for Governments and the Sixth Committee of the General Assembly to make a political assessment of the Commission's work.

16. In paragraph 72 of his report, the Special Rapporteur distinguished three elements of the legal consequences of an international delict. The first such element concerned the question of which State or States could be considered "injured" by the delict, which created new legal relationships between the author State and the injured State. In paragraph 75, the Special Rapporteur stated that in many cases there was no difficulty in legally identifying the injured State, since

... The States which are parties to the creation of the rule of international law (or, in the terminology of part 1, of the "obligation") are also parties to the primary legal relationships under that rule and, at the same time, parties to the breach ...

That was most often true in the case of bilateral treaties. But if a multilateral treaty was the source of the obligation, the problem of identifying the injured State became more difficult. Instead of pursuing the identification of the injured State, the Special Rapporteur observed that the first element was clearly related to the other two elements, namely the content of the new legal relationships and the question of a possible "phasing" in the content of those relationships. In paragraph 78, it was noted that the three "parameters" of the legal consequences might involve different States and correspond to different "phases".

17. As to the second element—the content of the new legal relationships—the Special Rapporteur distinguished three types, the first of which was reparation. In that connection, paragraph 111 referred members of the Commission to the Special Rapporteur's second report and, in particular, to draft articles 4 and 5 proposed therein.¹¹ It was also stated in that paragraph that, since those draft articles had been referred to the Drafting Committee, the Special Rapporteur would suggest improvements to their wording in that Committee. But in his third report (A/CN.4/354 and Add.1 and 2, paras. 151–153), he clearly stated that draft articles 4 and 5 as proposed in the second report had been withdrawn. Moreover, at its thirty-fourth session, the Commission had decided, on the proposal of the Special Rapporteur, to refer the new articles 1–6 and the former articles 1–3 to the Drafting Committee.¹² The status of draft articles 4 and 5 of the second report was therefore unclear.

18. In paragraph 79 of his report, the Special Rapporteur indicated that the division between the three types of content of the new legal relationships was not a sharp one, since they related roughly to "modifications" in the three fields of jurisdiction, namely the jurisdiction of the author State, international jurisdiction and the

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁰ *Yearbook* ... 1982, vol. I, p. 240, 1737th meeting, para. 34.

¹¹ *Yearbook* ... 1981, vol. II (Part One), p. 101, document A/CN.4/344, para. 164.

¹² *Yearbook* ... 1982, vol. I, p. 242, 1738th meeting, paras. 5–6.

jurisdiction of other States. While the second type of content, namely suspension or termination of existing relationships at the international level, did not seem to have been discussed separately, the third type—measures of self-help—was described as obviously “the most dubious”, since such measures necessarily involved an infringement of the rights of the author State. In that area, there were a number of limitations, such as the admissibility of reprisals involving the use of force, a question that the Special Rapporteur said was dealt with in draft articles 4 and 5 proposed in the third report. The Special Rapporteur concluded in paragraph 81 that, in the case of most internationally wrongful acts, “armed reprisals” would be manifestly disproportional in the sense of article 2 as proposed in the third report.

19. In so far as other limitations were concerned, it was stated in paragraph 83 that there was room for a special draft article dealing with reprisals, subject to the provisions of draft article 3 as proposed in the third report and provided that such a special draft article were without prejudice to the eventual adoption of a general draft article recognizing the limited possibility of derogation from the legal consequences to be defined in part 2.

20. Paragraph 84 stated another limitation on reprisals, namely that “a reprisal which is in itself another international crime can never be justified even in response to an international crime committed by another State”. The conceptual grounds for that “obvious truth” were, first, that protection of the fundamental interests of the international community was involved and, secondly, that the directly injured entities were not individual States. Both those grounds, according to the Special Rapporteur, applied *mutatis mutandis* to reprisals that were not international crimes. Such was the case with regard to the “objective régimes” defined in paragraph 99. It was pointed out that such régimes were distinguished in essence by their normative character; the parties to the régime created the collective interest which required each of them to fulfil its obligations irrespective of the fulfilment of the obligations by another party. To clarify the notion of objective régimes, the Special Rapporteur stated that, in a sense, the presence within an objective régime of machinery for effective dispute settlement or, *a fortiori*, decision-making machinery for the management of the collective interest, underpinned the normative character of the objective régime. The relevance of that concept of objective régimes in the context of reprisals was clarified in paragraph 85 of the report, where it was stated that, given the existence of primary legal relationships between States under such a régime, one of those States might, by way of reprisal, act in a manner that was not in conformity with its obligations under the régime.

21. Within the framework of that concept of objective régimes, the report discussed at some length the admissibility of reprisals in connection with various types of régime. He noted from paragraphs 89–91 that some of the conclusions reached by the Special Rapporteur were covered by draft articles 3 and 4 as proposed in the third report. However, in view of the general character of the

text of those articles and the detailed abstract legal analysis in the report, it was clear that the provisions in question fell far short of covering all the required points, particularly in the light of paragraphs 124–130, in which the Special Rapporteur attempted to sum up his conclusions.

22. Moreover, a reading of the pertinent sections of the report suggested that the Special Rapporteur considered that the draft articles so far proposed, with the addition of a draft article on reprisals, would cover the whole scope of part 2. However, the Special Rapporteur’s conclusions in paragraphs 124–130 gave a different impression, and some clarification was needed. Again, the third element of the legal consequences of an international delict, although dealt with adequately in paragraphs 102–108, was not reflected with sufficient clarity in paragraphs 124–130.

23. The Special Rapporteur was well equipped to go forward. He had received sufficient directions from both the members of the Commission and the Sixth Committee. At the end of his third report (A/CN.4/354 and Add.1 and 2, para.154), he had stated that, in subsequent reports, he intended to elaborate, in the form of draft articles, the approach set out in the third report and to present draft articles for part 3, concerning the “implementation” of State responsibility. The fourth report did not fulfil that promise. A substantial measure of progress would have been achieved if the conclusions formulated in paragraphs 124–130 of the report had been presented in the form of draft articles, the legal analysis contained in the report being used as commentaries thereto. But it seemed that the Commission would have to wait another year before knowing the direction in which it was proceeding. He fervently hoped that there was no intention of administering the last rites to an area of legal codification that was most vital from both the practical and the political viewpoints.

Co-operation with other bodies (*continued*)

[Agenda item 9]

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

24. The CHAIRMAN welcomed the Observer for the Asian-African Legal Consultative Committee and invited him to take the floor.

25. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) expressed the Committee’s regret at having been unable to be represented at the Commission’s two previous sessions. He was glad to report, however, that during the past two years, interest in the Commission’s work had been increasing in the countries of the region represented by the Committee. That had been due partly to the enlargement of the Commission, half of whose total membership was now drawn from the countries of Asia and Africa, and partly perhaps to the Committee’s own efforts.

26. The items on the Commission’s agenda that were of

particular interest to the Governments of the Asian-African region were the law of the non-navigational uses of international watercourses, jurisdictional immunities of States and their property, and international liability for injurious consequences arising out of acts not prohibited by international law. On the first of those topics, the Committee's secretariat fully endorsed the approach adopted by the Commission's second Special Rapporteur and considered that any general principles formulated by the Commission would be more readily acceptable if they were made adaptable to the needs of specific situations. The Committee intended to resume its work on the topic in order to assist the Commission and to supplement its work in areas that might not be fully covered. He requested the Commission to give top priority to the topic in view of its urgency.

27. With regard to the jurisdictional immunities of States and their property, many Governments of the region had been deeply concerned about recent legislation adopted in the United Kingdom (1978) and the United States of America (1976), which introduced a number of restrictions on sovereign immunity, whereas several developing countries in the Asian-African region continued to accord immunity from jurisdiction on traditional lines to all States. The question therefore arose whether an element of reciprocity ought not to be introduced in the application of State immunity. The provision in the United States legislation compelling a foreign Government to resort to a court of law to establish its immunity from jurisdiction had added to the difficulties experienced by developing countries. In the past practice of the United States, since 1952 a certificate or suggestion issued by the Department of State had been treated as conclusive, and that had provided a satisfactory means of resolving conflicts on questions of State immunity. Quite apart from the financial burden of litigation, the fact that the Government of a sovereign State must submit to the jurisdiction of the local courts to establish its immunity was felt by many to be repugnant to the concept of State immunity itself. It was therefore particularly important that the Commission should complete its work on the topic, so that authoritative rules and guidelines became available as soon as possible. It would also be helpful if, when formulating its recommendations, the Commission would consider whether the concept of reciprocity was appropriate in the matter of jurisdictional immunities of States and whether the determination of the issue of sovereign immunity might not be appropriately left to the executive, to be communicated to the judicial authorities in the form of a certificate or suggestion.

28. As to international liability for injurious consequences arising out of acts not prohibited by international law, a possible legal approach to the study of that topic could well be through an extension of the doctrine of the "duty to take care", *sic utere tuo ut alienum non laedas*, as a part of substantive "primary" rules. Another approach might be to develop new rules, as part of progressive development to promote international co-operation in preventing harm or damage

arising from lawful activities, in the context of the principles of the United Nations Charter and the interdependence of nations. It might perhaps be preferable to adopt that second approach in the Commission's study; but in either case it would be essential to take account of realities such as the need for industrial development in developing countries, the absence of technical expertise to detect or monitor harmful effects arising from acts that were otherwise lawful, and the fact that in some cases control of the activities in question rested with contractors or multinational agencies. The interests of the State undertaking the activity would have to be balanced against those of neighbouring States.

29. Another matter requiring consideration was whether it was necessary or practicable to develop general principles in the form of rules applicable to all types of acts which, although not prohibited by international law, might cause harm or injury to other States, since the consequences of such acts varied and their injurious effects could also vary very widely, depending on the circumstances of the case. It might be advisable to develop "primary" rules concerning the duties of States, at least in major areas such as non-navigational uses of international watercourses, outer space, environmental law, etc. The scope of the Commission's study on the topic might well have to be limited to matters relating to international co-operation in avoiding or minimizing damage through the exchange of information, consultations and other suitable procedures.

30. Turning to the Committee's current programme of work, he said that, in addition to advising Governments on matters of international law and other areas of common interest, the Committee had gradually expanded its activities in two important directions: it was supporting the work of the United Nations in a number of ways, such as preparatory work for United Nations conferences, and was focusing attention on technical infrastructure, including the legal framework for economic co-operation. In the economic field, the Committee's work related particularly to those areas where legal norms and practices were inextricably interwoven with economic considerations, such as preparation of model contracts for commodities, investment protection, the framework for co-operation in joint-venture arrangements, organization of arbitration centres, and preparation of technical studies on certain aspects of economic co-operation within the framework of the United Nations.

31. The Committee's sessions during the past 10 years had been attended by an increasing number of observer delegations from all over the world. While remaining primarily a regional forum, the Committee recognized the importance of sharing its views and experiences with other regions, especially on issues of world-wide importance. That process had been of particular value in connection with the topic of the law of the sea, which had dominated the Committee's work programme for more than a decade. At the Committee's twenty-third session, held in Tokyo in May 1983, discussions had taken place on the legal position once the United Nations Convention on

the Law of the Sea¹³ came into force, on the position during the interim period, and on the Committee's future role in implementing that Convention. The programme which had emerged from those discussions covered three major areas: assistance to Governments in the implementation of the provisions of the Convention in matters falling within national jurisdiction; studies on specific issues of practical importance to the Governments of member States; and assistance to Governments in regard to the work of the Preparatory Commission for the International Sea-Bed Authority and for the International Tribunal for the Law of the Sea. Work in the first of those areas would include exchange of information, assistance in preparing legislation or schemes for regional or subregional arrangements, and advice on the interpretation of provisions of the Convention. In the second area, the Committee intended to start with the question of delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts. In the third area, work was to be carried out in two ways: examination of the draft rules prepared from time to time by the Preparatory Commission, and formulation of a draft framework for co-operative assistance between pioneer investors and the Enterprise (referred to in article 170 of the Convention), including joint-venture arrangements.

32. A matter directly related to the implementation of the United Nations Convention on the Law of the Sea on which considerable progress had already been made was that of optimum utilization of fishery resources in the exclusive economic zone. In the light of discussions at three inter-session expert group meetings, the Committee's secretariat had formulated a tentative draft of a national legislation, a model for bilateral agreements on fishing by foreign nationals, and models for two possible types of joint-venture arrangement for fishery activities. The Government of Sri Lanka had requested the Committee to undertake a study on economic, scientific and technical co-operation in the use of the resources of the Indian Ocean and to make recommendations.

33. Another important subject discussed at the Tokyo session had been the promotion and protection of investments. The secretariat had prepared draft formulations for three different types of bilateral agreement on the promotion and protection of investments. Those model agreements had been discussed at the session and further consultations were envisaged before they were recommended for use by Governments.

34. In connection with the settlement of disputes arising out of investments and other economic or commercial matters, he reminded members of the Commission of the integrated scheme adopted by the Committee to ensure stability and confidence in economic and commercial transactions by providing adequate procedures in which North-South as well as South-South conflicts could be resolved. Two regional centres, one in Kuala Lumpur and

one in Cairo, had already been established, and the International Centre for the Settlement of Investment Disputes, in Washington, D.C., had already concluded formal agreements with the Committee on co-operation with those centres. Arrangements had also been made under the scheme for maritime arbitrations to be administered by the Tokyo Maritime Arbitration Commission.

35. A matter of almost equal importance in bringing about co-operation between countries of the Asian-African region was reciprocal assistance in honouring commitments under service and trade contracts. The Committee's secretariat had prepared drafts of two model bilateral arrangements on the service of process, the issue of letters rogatory and the recording of evidence, one relating to civil matters and the other to the issue of letters rogatory in criminal cases. Those drafts had been examined by a working group meeting in August 1982 and again during the Tokyo session. The work on that project had been undertaken in association with The Hague Conference on Private International Law.

36. Another important subject which remained on the Committee's programme was protection of the environment. An extended working group, with the participation of experts from major oil and shipping interests, had met in July 1982 and discussed the general legal framework for combating marine pollution from land-based sources and ways of dealing with emergency situations arising out of accidental oil pollution. It was intended to provide opportunities for full discussion of the 1969 International Convention on Civil Liability for Oil Pollution Damage¹⁴ and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage¹⁵ before the diplomatic conference to be convened by the International Maritime Organization in 1984 for revision of those Conventions.

37. A matter that would be of particular interest to the Commission was the promotion of multilateral conventions adopted under the auspices of the United Nations. Long periods often elapsed before such conventions could be brought into force through accession or ratification by the requisite number of States, and that frustrating situation should be remedied. Governments needed to be informed in plain language of the advantages they would derive from acceding to or ratifying a convention, and the Committee was in the process of consulting the Legal Counsel of the United Nations about the assistance it could render in that sphere as part of its arrangements for co-operation with the United Nations.

38. In conclusion, he expressed gratification at the fact that the Commission had been represented at almost every session of the Committee during the past 20 years. The Commission's continuing interest had been a source of considerable satisfaction to the members of the Committee, and he hoped that the close and increasing

¹³ *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.

¹⁴ IMCO publication, Sales No. 77.16.E.

¹⁵ IMCO publication, Sales No. 1972.10.E.

links between the two bodies would be maintained in the coming years.

39. Mr. RAZAFINDRALAMBO, speaking on behalf of the African members of the Commission, referred to the impressive activities carried out by the Asian-African Legal Consultative Committee in the field of international law. The participation of African jurists in that work might not be as extensive as it should be, but it must be borne in mind that they had entered the international arena only recently and were not yet fully informed of the Committee's activities. In the future, however, co-operation between the Committee and African jurists could only increase.

40. Mr. DÍAZ GONZÁLEZ, speaking on behalf of the Latin-American members of the Commission, thanked the Observer for the Asian-African Legal Consultative Committee for all the information he had provided on the activities of the Committee, which was not only engaged in formulation of the law, but also performed consultative functions. It had, for example, advised the Governments of the region on matters relating to the law of the sea. He himself was convinced that close co-operation between the Commission and regional committees concerned with international law benefited the United Nations as much as those committees.

41. Mr. SUCHARITKUL, speaking on behalf of the Asian members of the Commission, thanked Mr. Sen for his excellent statement and expressed the hope that the very close co-operation between the Committee and the Commission would continue in the future. The Commission deeply appreciated the Committee's interest in its work and remained keenly interested in the Committee's views and activities.

42. Mr. USHAKOV, speaking also on behalf of Mr. Flitan, commended Mr. Sen for his brilliant presentation of the Committee's work. Since the Committee's membership had been expanded, its work had assumed greater importance, not only for the countries of the region but also for the codification and development of international law. The Committee was still concerned to give priority to the consideration of items on the Commission's agenda and, conversely, it was not unusual for members of the Commission, including its special rapporteurs, to refer to the Committee's work. It was therefore in the Commission's interest to strengthen its co-operation with the Committee.

43. Mr. QUENTIN-BAXTER said that the ties between the Commission and regional bodies such as those whose representatives were attending the present session as observers were far more than merely formal. The effectiveness of law-making at the international level depended on such collaboration. The excellent work done by the Asian-African Legal Consultative Committee and the Inter-American Juridical Committee was reflected, *inter alia*, in the quality of the work of the Sixth Committee of the General Assembly and of the Commission itself. On behalf of the members of the Commission belonging to the group of Western European and other countries, as well as of his own country, which by its geographical position belonged to the region of the

Asian-African Committee, he thanked Mr. Sen for his extremely informative and interesting statement and expressed the continuing interest of those countries in the Committee's activities and the documents emanating from them.

44. Mr. JAGOTA said that he had been closely associated with the Committee since 1966 and had witnessed its gradual development from a consultative role to that of the premier intergovernmental legal group of Asia and Africa. Not only had its membership increased from the original seven or eight to well over 40, but the range of its interests and activities had grown immensely, starting with the substantial contribution it had made to the work of the Commission on diplomatic and consular law, continuing with its contribution to the codification of the law of treaties in 1968 and 1969, and reaching a climax in the work on the law of the sea, to which the Committee had devoted special attention between 1970 and 1982. In the economic sphere, too, especially in matters of economic co-operation, in protecting interests in commodity trade, in preparing model export and import contracts, in providing forums for the settlement of economic disputes and, most recently, in elaborating the legal framework for South-South co-operation, the Committee's contribution had been extremely impressive. Mr. Sen deserved a special tribute for having been instrumental in building up the Committee's activities and its mutually valuable relationship with the Commission.

45. The CHAIRMAN, speaking on behalf of the Commission as well as in his personal capacity, thanked Mr. Sen for his statement, which showed in a most gratifying manner how deeply the Committee was involved in the consideration of issues being examined by the Commission. The Committee also deserved congratulations on the vigorous manner in which it was tackling the legal aspects of economic issues affecting the countries of the Asian-African region, and on its efforts to accelerate the process of accession to, and ratification of, multi-lateral conventions by its member countries. In conclusion, he reiterated the Commission's regret at having been unable to send one of its members to the Tokyo session of the Committee, which had unfortunately coincided with the Commission's current session.

The meeting rose at 5.45 p.m.

1776th MEETING

Tuesday, 7 June 1983, at 10 a.m.

Chairman: Mr. Edilbert RAZAFINDRALAMBO

Present: Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, 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.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. USHAKOV said that he totally disagreed with the report under consideration (A/CN.4/366 and Add.1). In paragraph 32, the Special Rapporteur stated that, in response to the request made by many members of the Commission and by members of the Sixth Committee of the General Assembly, the report sought to concentrate primarily on an outline of the possible contents of parts 2 and 3 of the draft articles on State responsibility and to "discuss the admittedly difficult choices with which the Commission is faced". In actual fact, the Commission was not faced with any such choices; rather it was the Special Rapporteur for whom the choices were "admittedly difficult" and who deemed it necessary to make them. For example, the Special Rapporteur proposed not to deal with aggression and other international crimes in part 2 of the draft, at least until part 3 had been prepared.

2. In paragraph 45 of his report, the Special Rapporteur said that the Commission should give early consideration to the question of the settlement of disputes, since the prospects regarding part 3 would decisively influence the way in which part 2 was to be elaborated. He stated in paragraph 65 that

there is little chance that States generally will accept a legal rule along the lines of article 19 of part 1 of the draft articles without a legal guarantee that they will not be charged by any or all other States with having committed an international crime, and be faced with demands and countermeasures by any or all other States without an independent and authoritative establishment of the facts and the applicable law. . . .

Clearly, the Special Rapporteur took the view that the legal consequences of the crimes covered by article 19 could not be foreseen without a competent and independent authority to establish the facts and the applicable law. He added, in paragraph 66, that if such an authority reached the conclusion that an international crime had been committed, the international community of States would not agree that the matter of sanctions

should be left to the willingness of each individual State to make the sacrifices inevitably involved. That had led the Special Rapporteur to believe that the Commission, having recognized an element of progressive development of international law in provisionally adopting article 19, should carry the development to its logical conclusion by proposing secondary and tertiary rules in that respect.

3. The Special Rapporteur was of the opinion that the secondary rules depended on the existence of a competent and independent authority, and therefore favoured the formulation of tertiary rules, because he appeared to consider that such an authority did not exist and that its role could not be filled either by the United Nations in general or by the Security Council in particular. Was what the Special Rapporteur had in mind a kind of world government vested with executive powers? In the absence of such an institution, any decision taken by an authority, even a competent authority, would not be final because its application would not be guaranteed.

4. The Commission could not base itself on the Special Rapporteur's personal opinion and begin to elaborate part 3 before part 2. It was not realistic to envisage the establishment of an authority that would replace the international community, which recognized the right of States to take measures against acts of aggression and other international crimes. Moreover, it was the international community of States which, through the Sixth Committee and the General Assembly, had requested the Commission to embark on the work of preparing part 2 of the draft. In addition, when the Commission had formulated article 19 of part 1 of the draft relating to a category of particularly grave internationally wrongful acts, namely international crimes, it had taken account of existing international law and had not, as the Special Rapporteur seemed to think, been engaged in progressive development of the law. Indeed, it had been on the basis of contemporary international law that the Commission had listed a number of international crimes in article 19, paragraph 3, and had emphasized that that provision would require the formulation of secondary rules in part 2 of the draft. The position adopted by the Special Rapporteur in his fourth report was thus contrary both to the wishes of States and to the decisions taken by the Commission.

5. In summing up, the Special Rapporteur noted in paragraph 122 of the report that the draft articles should cover the legal consequences of all acts or omissions of States which were not in conformity with what was required of the author State under an international obligation, irrespective of the content and source of the obligation, and suggested that part 2 of the draft must take as its starting-point the normal situation, namely that the internationally wrongful act gave rise to new bilateral legal relationships between the author State and the injured State only. However, such a situation existed only in respect of less serious international offences. It was plain that the Commission must deal first with international crimes and determine their legal consequences; hence it could not take as its point of departure the one

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

proposed by the Special Rapporteur, whose method would cause the Commission to move backwards.

6. It was apparent from the report that proportionality should be the concept underlying all of part 2. Admittedly, the concept did exist in domestic legislation, but as a logical criterion, not a legal one. It was a well-known fact that the most serious offences had the most serious legal consequences. Even in internal law, however, the idea of seriousness was entirely relative and the legal consequences attaching to a particular offence could vary from one period of history to another. The Commission must undoubtedly take proportionality into consideration and, for example, assign more serious legal consequences to international crimes than to international delicts. Yet the Special Rapporteur had a different sort of proportionality in mind, namely that the legal consequences of any internationally wrongful act must be proportional to the material consequences of the act. They must remain within those limits and not go beyond them. In some cases, the consequences could be identical, for instance when compensation provided full reparation for physical damage, but it was inconceivable that an act of aggression which had cost the lives of 1 million human beings should have as a legal consequence the death of the same number of other human beings.

7. As Mr. Reuter had pointed out (1772nd meeting), the very existence of rights created an assumption of coercion. Obviously, however, it had to be decided what kind of coercion was allowed by international law. To that end, the Special Rapporteur had resorted both to the concept of proportionality and to that of objective régimes. The first was manifestly too vague and the second was unnecessary. There was, of course, a general objective régime, that of international law, but there were no particular objective régimes. Armed reprisals were forbidden, not by reference to the concept of proportionality or in keeping with certain objective régimes, but simply because international law did not allow them.

8. In conclusion, the Special Rapporteur's fourth report was entirely unacceptable, primarily because it was the Commission's task at the present time to draft provisions on the legal consequences of international crimes.

9. Mr. JACOVIDES said that, in a complex topic which lay at the very heart of public international law, part 2 of the draft, dealing with the content, forms and degrees of international responsibility, presented the Commission with a serious challenge. Should the Commission allow the admittedly formidable difficulties of the problem to turn it away from the trend which had clearly emerged and was fully consonant with the demands of contemporary international law, or should it go forward, tackling those difficulties as resolutely as it could and thereby discharging its responsibility with regard to the progressive development of international law? To his mind, the latter course should be adopted as a matter of principle, even though it might take longer and involve more controversy.

10. Since the adoption of the Charter of the United Nations, a number of positive developments had lent further substance to the concept of public policy in

international law. Those developments included the notion of *jus cogens*, formally accepted in the 1969 Vienna Convention on the Law of Treaties, and the notion of international crimes, one for which the Commission could claim much credit, since it had been embodied in article 19 of part 1 of the draft and was the premise clearly underlying the draft Code of Offences against the Peace and Security of Mankind, a topic recently revived by the General Assembly and referred to the Commission as a matter of urgency.

11. While he shared many of the views expressed by Mr. Reuter (1771st meeting), especially with regard to the method to be followed in connection with parts 2 and 3, the need for a commonly acceptable and precise terminology and the importance of avoiding any decision inconsistent with the equivalent provisions of the Charter, he could not agree that no attempt should be made to go beyond what was already to be found in the Charter. It was, of course, true that the Commission, like the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, the Special Committee on the Question of Defining Aggression, the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, or other bodies, had no competence or authority to change or depart from the Charter. That could only be done by a review carried out under the procedure prescribed in the Charter itself. What those committees had done, just as the Commission itself could and should endeavour to do, had been to strengthen and build upon the provisions of the Charter in the light of experience gained since 1945 and of the requirements of contemporary international law as understood by the present-day international community, the larger part of which now consisted of newly independent States that had not participated in the formulation of the Charter provisions. Their attitudes, as conditioned by their experience and understanding of international law, were relevant and must be taken into account. By recognizing that fact, the Commission would not only perform a service to the international community but also effectively counter occasional criticism to the effect that it was no longer in the mainstream of present-day international law.

12. Again, he could not agree with the view that the Definition of Aggression adopted by the General Assembly by consensus in 1974⁵ added nothing new from the legal point of view. The Definition provided a higher and stricter standard which would-be aggressors would have to reckon with, especially when the draft Code of Offences against the Peace and Security of Mankind, including the element of international criminal jurisdiction over States as well as individuals, took concrete form. The fact that the Security Council had discretionary authority, even under the terms of the Definition, to determine whether aggression had occurred in a given case and the fact that, unfortunately, the Security Council

⁵ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

not infrequently took its decisions on the basis of political considerations did not detract from the Definition's value from the legal standpoint. What international lawyers could do was to provide a legal standard and to argue the case in terms of legal considerations, hoping that such considerations would carry due weight with political bodies such as the Security Council, if not immediately, then at least in the future. To think otherwise would be to admit the futility of international law and of the Commission's efforts in the area of the maintenance of international peace and security.

13. The situation in his own country since 1974 afforded a striking example of the recent increase in the number of acts of international lawlessness and of the manifest ineffectiveness of the United Nations in preventing or remedying such acts. In his report of September 1982 on the work of the Organization, the Secretary-General had expressed the view that resolutions, particularly those adopted by the Security Council, should serve as a springboard for governmental support and determination and should motivate policies outside the United Nations, that being the essence of the treaty obligation which the Charter imposed on Member States.⁶

14. With regard to the second set of draft articles at present before the Drafting Committee,⁷ more effort and ingenuity would obviously be required before they could be given a generally acceptable form. The wording of draft article 2, dealing with the principle of proportionality, could bear some improvement, as indeed could that of draft articles 4, 5 and 6. But the principle behind each of those draft articles should be retained and, if possible, strengthened and made more specific. Some members had argued that the Commission should be modest in its objectives, that it should not undertake more than it could perform and that it should avoid duplication, especially with the draft Code of Offences against the Peace and Security of Mankind. Those observations were undoubtedly pertinent and should be accommodated as far as possible, but there should be no compromise on the issue of principle involved.

15. The concept of international crimes set forth in article 19 of part 1 of the draft after a great deal of debate should not be allowed to lose any of its meaning in part 2. Far from duplicating the work yet to be done in connection with the draft code of offences, any additional work on the basis of articles 4, 5 and 6 of part 2 of the draft on State responsibility would actually supplement it. The two Special Rapporteurs could, in fact, benefit from each other's experience. So long as article 19 was maintained in part 1—and it unquestionably should be—it had to be accompanied by provisions in part 2, and later in part 3, that would give it and the other provisions of part 1 additional substance in terms of content, form and degree. As a practical arrangement, formulations on matters such as aggression included in the draft code of offences could eventually be incorporated in the draft

under consideration, thus avoiding duplication of effort and the risk of possible discrepancy.

16. The Commission should maintain a steady course. In submitting draft articles 1–6 in his third report (A/CN.4/354 and Add.1 and 2), the Special Rapporteur had adopted the right approach and had received support in the Sixth Committee. While some flexibility could be envisaged with regard to the wording of the articles or even, as Mr. Calero Rodrigues had suggested (1772nd meeting), in terms of the priority given to the consideration of less controversial topics, the principle of State responsibility itself should not be compromised or downgraded. Public policy dictated by the higher common interests of the international community was a concept which had definitely emerged in public international law. It helped small and weak nations against the arrogance of the powerful. It was there to stay, and the Commission, with its new enlarged membership, must not fail to cultivate and safeguard it.

17. Mr. BALANDA said that the report under consideration reflected the profound thinking of the author. Unfortunately, some difficulties arose because the report did not contain any draft articles and the terms employed were not always defined. It was, for example, open to question whether countermeasures included self-defence, state of necessity, reprisals and retortion, which were quite separate concepts, and whether self-help differed from self-defence, reprisals, retortion and reciprocal measures. Moreover, the concept of regional or bilateral objective régimes, one which the Special Rapporteur had recognized as being somewhat vague, was not based on generally accepted criteria. From a reading of paragraph 99, some doubts might also arise about the idea of a rule of international law determining the objectivity of a régime and about the *si omnes* clause. That was also true of the term *quid pro quo* and of parallel obligations and self-enforcement measures.

18. Paragraph 35 of the report pointed out that, compared with primary rules, there were relatively few secondary rules. In that connection, he noted that the Commission had focused primarily on the main obligation to which an internationally wrongful act gave rise, namely the obligation of reparation, which had been stressed by the international decision in the *Corfu Channel* case.⁸ In general, the Commission had also confined itself to the consequences for the author State of an internationally wrongful act and had not dealt with the relationships that might arise between that State and other States.

19. In paragraph 37, the Special Rapporteur maintained that, in most cases, a State would deny, on the ground of the facts or of the interpretation of the applicable primary rules, that it had breached a legal rule or committed an internationally wrongful act for which it bore responsibility. Plainly, the draft articles could not remain silent on the procedure for the settlement of disputes, which called for positive rules. The question arose as to whether the settlement of disputes would be optional or compulsory, and whether States would be bound to use

⁶ Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 1 (A/37/1), p. 3.

⁷ See 1771st meeting, para. 2.

⁸ I.C.J. Reports 1949, p. 4.

the machinery provided for in the draft or whether they would have the option of using the settlement procedure they deemed most appropriate. However, in present-day international society, which was characterized by the affirmation of State sovereignty, the consent of States would always be necessary. It was not clear whether the draft would in fact propose new settlement machinery.

20. On the question of whether the draft should take the form of a convention or of an instrument containing only guidelines, it would inevitably be necessary to count on the good will of States and their co-operation and to bear in mind the fact that their conduct was dominated by the idea of sovereignty, which always required their consent. The determination of all States to respect a legal instrument that reflected their will was thus more important than the form of the draft.

21. The Special Rapporteur noted that international crimes had a minimum common element, namely their *erga omnes* character. International crimes required other States to adopt an attitude of solidarity with the injured State against the author State. Was it then necessary to include in the draft a general régime of international responsibility for international crimes and to propose rules to take account of the legal consequences of each international crime, and if so, in which context? Although the Commission had not yet defined the concept of an international crime in the draft on State responsibility or in the draft Code of Offences against the Peace and Security of Mankind, it was tempting to propose an examination of the nature of each international crime and its consequences. In order to avoid any overlapping with the draft code of offences the draft articles on State responsibility, which had enunciated the concept of an international crime in article 19 of part 1, should establish the applicable general régime and leave it to the draft code to deal only with the legal consequences of crimes which might endanger the peace and security of mankind. The draft on State responsibility should therefore set forth at least some basic rules on responsibility for international crimes, for they too could obviously give rise to State responsibility.

22. As the Special Rapporteur had acknowledged, the primary rules necessarily called for secondary, and even tertiary, rules. It seemed possible to establish a general régime of international responsibility for international crimes, since the Special Rapporteur himself had succeeded, provisionally at least, in identifying four of their common elements. Other common features could probably be identified as well. There would then be two separate, but complementary, drafts, namely the draft on State responsibility, which would contain all the primary and secondary rules, including those relating to international crimes, and the draft code of offences, which would establish a regime for offences against the peace and security of mankind.

23. In the system for the punishment of international crimes, in each of the drafts, it would not be appropriate to draw on all the concepts of internal criminal law and go so far as to incorporate the concept of an attempted crime, at least so far as States were concerned. An

internal law system was a self-contained unit and made it possible better to assess the precise circumstances in which an act had been committed or which might have prevented a person from committing an act he had intended to commit. At the international level, it would undoubtedly prove necessary to discard the narrow concept of territoriality, which was a feature of internal criminal law, so that the concept of an attempted crime, at least as far as international crimes by States were concerned, could not be retained, for it was difficult in such cases to assess the element of intent. The final outcome, namely the completed act, should be the primary concern to the international community.

24. In part 2 of the draft, the Special Rapporteur intended to leave aside the question of aggression, which he regarded as belonging to the category of international crimes, and suggested that it should be studied as part of the draft code of offences. Aggression, however, was a prime example of an act that incurred the international responsibility of the author. For all that, it did not appear to fit into the category of acts that should be covered by the draft code, which should relate exclusively to serious offences that might endanger the peace and security of mankind. Paragraph 58 of the report drew attention to the difficulty that arose out of the fact that the international community as a whole did not unanimously agree on the punishment to be meted out for international crimes. Surely the reason was that, as far as international crimes were concerned, States had divergent interests. Some might have close relations with the author State and would thus adopt a less severe attitude towards it.

25. Another difficulty involved in the punishment of international crimes was the weakness of existing machinery for the settlement of disputes. Not only was the consent of the State concerned necessary, but the structure of some of the bodies for the settlement of international disputes did not always inspire sufficient confidence in all States. That was true in the case of the Security Council, whose structure was at the origin of the Manila Declaration on the Peaceful Settlement of International Disputes.⁹

26. As to the obligation of States to assist an injured State by taking countermeasures, it was affirmed in paragraph 62 of the report that such support concerned the relationship between those States and presupposed a form of common appreciation of the existence of a right to take countermeasures. In his opinion, a common appreciation of that kind should be founded on international solidarity and on the co-operation that States were duty-bound to extend to the victim of an international crime, rather than on the existence of a right itself. Again, it was open to question whether a State's failure to provide assistance to an injured State constituted a wrongful act that might give rise to the responsibility of the recalcitrant State. In present-day international society, however, such a duty of solidarity could not really be expected to take definite shape.

⁹ General Assembly resolution 37/10 of 15 November 1982, annex.

27. The impression gained from reading paragraph 63 of the report was that the rule of quantitative proportionality did not apply in the case of international crimes falling within the jurisdiction of United Nations bodies. The question was, however, whether the specific nature of international crimes was enough to warrant derogation from the principle of proportionality. He certainly agreed with the Special Rapporteur's conclusion in paragraph 67 that, since the Commission had provisionally adopted article 19, it must move forward. Nevertheless, in order to be effective, parts 2 and 3 of the drafts must be realistic. Innovations could of course be introduced, but they must be justified.

28. Paragraphs 72–78 discussed a problem which took on great importance, particularly in the case of compensation, namely identification of the injured State when some States were expected to display international solidarity, for example under a multilateral treaty. In paragraph 73, a distinction appeared to be drawn between three categories of international obligations, but until a more precise definition of each category had been worked out, obligations of prevention could be left aside and only the two generally recognized categories, namely obligations of conduct and obligations of result, should be borne in mind. In the case of a dispute which created new legal relationships between the author State and the injured State, which State or States could be regarded as injured? A distinction had to be made between the source that established the legal link between the various States and the basis for their obligations. It was precisely the injury suffered as a result of a wrongful act that established a legal relationship between the victim and the author. For the other States, the obligation would usually be based on a treaty. In the case of international crimes, the duty to display solidarity would follow from the very nature of those crimes.

29. With regard to identifying the injured State, even if the primary rule was of treaty origin, there would in fact be only one injured State or group of States. However, he did not concur with the view that all the members of the group of injured States should be regarded in equal terms, in other words without differentiating between the nature of the origins of their obligations, for such an approach would be tantamount to saying that, in a case of compensation, for example, each member of the group was entitled to benefit therefrom. According to that view, the author State of an internationally wrongful act would in no way be entitled to take counter-reprisals against third States which had intervened to fulfil their obligation of solidarity. The legal régime of self-defence should also be taken into account in the draft because the principle had already been recognized in part 1. In that connection, too, the Commission should endeavour to develop international law.

30. The Special Rapporteur should specify what was meant by reprisals, particularly as compared with retortion, instead of classing all such concepts under the heading of countermeasures. However, the Commission should be careful about excluding the whole question of reprisals from the draft articles because, if it did so, the

text would obviously contain loopholes. Indeed, it seemed impossible not to deal with that question as part of the general régime of State responsibility, for reprisals were a common practice in international relations. Accordingly, it would be of great interest to know what kind of reprisals were authorized, for what kinds of acts, and what their scope was, particularly when a group of States had a common interest. It was plain that a provision on reprisals was essential in order to limit the possible sources of conflict.

31. The value of the idea of phasing measures and of reprisals being inadmissible if other means of enforcement were available, particularly procedures for the peaceful settlement of disputes (para. 102), was conjectural and would depend on each particular case. The fact that procedures always existed for the peaceful settlement of disputes had no effect on the actual conduct of States, which were fully aware that the Charter of the United Nations invited them to settle their disputes peacefully, although they might in practice react differently, depending on the size of the stakes, and would not engage in any kind of phasing. That comment also applied to the concept of proportionality put forward by the Special Rapporteur. He (Mr. Balanda) had not yet been able to determine whether a State measured its reaction precisely in terms of the extent of the wrongful act which had injured it, something which should be borne in mind to avoid proposing rules that were not sufficiently realistic.

32. His conclusion for the time being was that, if the draft was to be of any use, it must not overlook any matter either closely or remotely related to the system of State responsibility, including self-defence and international crimes—which would, however, have to be dealt with separately from aggression as such.

33. Mr. LACLETA MUÑOZ welcomed the Special Rapporteur's fourth report (A/CN.4/366 and Add.1), which not only contained an outline of the possible contents of parts 2 and 3 of the draft articles, but also afforded an overview of the topic, although it would have been preferable if the Special Rapporteur had submitted draft titles and articles accompanied by commentaries. The report none the less went to the heart of international law, which was usually criticized for its lack of effectiveness and its lack of binding force. The oral introduction (1771st meeting) had also enabled members to gain a better grasp of the substance of the report.

34. Close attention was paid to the relationship between primary, secondary and tertiary rules, in which connection he shared the views expressed in paragraph 37 of the report, which had then gone on to analyse in paragraphs 38–42 the problem of the settlement of disputes and its limitations. It was indeed desirable to establish machinery for the settlement of disputes, inasmuch as article 19 of part 1 of the draft covered the concept of an international crime. In paragraph 40, the Special Rapporteur had none the less indicated that the settlement of disputes might be limited to the determination of the legal consequences of a wrongful act, in other words to the determination of the applicable

secondary rules. Yet it was difficult to deal separately with those questions and the questions of the existence and unlawful nature of a wrongful act, which required the interpretation and application of the relevant primary rules. What he had in mind in that regard was Article 36, paragraph 2 (c) and (d), of the Statute of the ICJ. Accordingly, it could well be asked whether the Commission would refrain from dealing with international crimes in its draft. In his opinion, it should certainly not give in to that temptation. The concept of an international crime had been a major step forward in the development of international law and in the institutionalization of the international order. Classical international law was based on sovereignty and autonomy, as internal law had been at an early stage in its development, and the establishment of international organizations of a universal character following the two world wars had reflected the desire to place limitations on that situation.

35. Thus States were clearly forbidden by the Charter of the United Nations to use or threaten to use force to settle their disputes. The tragic thing was, however, that the institutional machinery to prevent and punish the use or threat of use of force had not worked as well as it should have. Did the Commission want to improve on it? In his own view, neither Article 33 nor Article 36 nor Chapter VII of the Charter was satisfactory, since they called for a limitation on sovereignty at inappropriate times. That was nevertheless the only solution for the future. For all that, the Commission should not go so far as to make proposals which might lead it to take a position on a possible revision of the Charter. It must realize what article 19 of part 1 represented and, as Mr. Reuter had suggested (1771st meeting), proceed in stages. It must first try to codify the classical international law of international responsibility, as it had done in part 1, and analyse the rights and obligations arising out of an internationally wrongful act in the shape of draft articles that could serve as a basis for a convention.

36. Paragraphs 46–49 of the report raised the question of whether, by providing for secondary rules, the legal nature of the primary rules which had been breached could be disregarded. In his opinion, it was not possible to do so. The Commission might nevertheless make a relatively simple classification by distinguishing between general rules and conventional rules. In connection with international crimes, between which no distinction should be made in the draft, in view of Mr. Thiam's study on the topic, he supported the ideas expressed in paragraph 60 and drew attention to a translation error in the last sentence of paragraph 58 of the Spanish text, which spoke of *delitos* rather than *crímenes*.

37. Paragraphs 122–126 contained the essential elements on the basis of which the draft articles might be formulated. He endorsed the comments made by the Special Rapporteur in the first sentence of paragraph 126, but the idea expressed in the first sentence of paragraph 127, namely that it would be advisable to “reserve” the special régimes of diplomatic law and belligerent reprisals, raised some doubts in his mind. Parallelism and reciprocity in the case of diplomatic law, in other words

the possibility of declaring *persona non grata* a diplomatic agent who abused his privileges, did not make it possible to reserve the special régime of diplomatic law. Indeed, it was precisely in the area of diplomatic relations that classic examples of wrongful acts and reparation were to be found. It was also incorrect to maintain that the possibility of declaring a diplomatic agent *persona non grata* and breaking off diplomatic relations ruled out the need to determine other legal consequences. Those questions could be dealt with in the rules that applied to injury and reparation. Similarly, he experienced some doubts about the statement that the obligation to respect human rights was limited by the requirement of “military necessity”. Lastly, he agreed with the substance of paragraph 129, in which the Special Rapporteur had referred to the concept of “fault” and suggested that any obligation of a general nature should not be included in the draft articles.

38. Mr. JAGOTA said that the fourth report (A/CN.4/366 and Add.1) contained a number of conclusions with which he could not agree, but unlike other members of the Commission, he did not believe it was the Special Rapporteur's intention to suggest that difficult cases entailing State responsibility should not be dealt with in part 2 of the draft. A number of elements, such as the concept of an international crime and various types of delicts, had already been dealt with in part 1, but draft article 6 of part 2,¹⁰ an article that also dealt with the question of international crimes, had been referred to the Drafting Committee. At no time had the Special Rapporteur suggested that article 6, or indeed any other draft article, should not be referred to the Drafting Committee or that the question of the legal consequences of international crimes should not be considered.

39. Just as part 1 dealt with identification of the author State, so part 2 must deal with identification of the injured State, the new relationship arising out of the commission of an internationally wrongful act, the rights of the injured State or States or of the international community, and the rights of third States. The report might have been easier to follow, however, if the Special Rapporteur had presented his thoughts in the form of draft articles accompanied by commentaries, based in particular on case-law and State practice. After all, the topic was not an academic one, but one that had a very close bearing on everyday reality.

40. As to the final shape to be given to the work on the topic, the draft articles would be clearer and more effective if they were presented in the form of a draft convention, rather than simply as guidelines. Even if such a convention was not adopted by an international conference, its provisions could none the less be applied. In that regard, the Special Rapporteur had cited the example of the Vienna Convention on the Law of Treaties, which had been invoked by the ICJ itself and had been followed in practice by States which had not yet signed or ratified it.

¹⁰ See 1771st meeting, para. 2.

41. With regard to the relationship between parts 1 and 2, the linkage established in draft article 1 presented in the Special Rapporteur's third report¹¹ should be maintained and, as far as possible, be made substantive by identifying in part 2 the legal consequences of the various types of internationally wrongful act already defined in part 1. While some rearrangement might be undertaken for the purpose of explaining the new legal relationships that would arise and the variety of possible responses on the part of the injured State, it might not be desirable to rearrange the internationally wrongful acts themselves, or to define new types of internationally wrongful acts which differed qualitatively from those identified in part 1. In any event, questions regarding items which had been omitted from part 1 and items that would be more relevant to part 2 could be considered in the course of the second reading of part 1.

42. In respect of the relationship between part 2 of the draft and part 3, concerning the "implementation" of international responsibility, the Special Rapporteur was of the view that the compulsory dispute-settlement procedure should encompass not only part 2 but also part 1; he also maintained that draft articles on the question of State responsibility, particularly if they were broad in scope, would not be acceptable to the international community as a whole unless provision was made for a procedure whereby a third party would assess whether an allegation that an internationally wrongful act had been committed was correct and whether the response to the act had been proportional. However, it was not clear from the report whether the Special Rapporteur considered that no part of the draft articles would be acceptable without such a provision, or simply the part relating to international crimes or other questions of interest to the international community as a whole. Hence, it was suggested that, in order to permit universal acceptance of the draft articles on State responsibility, it would be better to indicate immediately the kind of dispute-settlement procedure to be provided for in the draft.

43. In that connection, the Special Rapporteur thought that a broad indication by the Commission of the particular type of dispute-settlement procedure would be helpful in refining the content and scope of part 2. His own view was that identification of certain aspects of the dispute-settlement procedure would indeed facilitate consideration of the more difficult concepts, such as those relating to international crimes, or other aspects involving injury to peoples or to the interests of the international community as a whole, but it should not be a pre-condition for developing those concepts and the legal consequences of wrongful acts connected therewith. For example, the concept of the resources of the sea-bed as the common heritage of mankind had emerged during the elaboration of the United Nations Convention on the Law of the Sea. If the Convention did not enter into force, that concept would not disappear simply because no institution existed to reaffirm it. He would suggest that the Commission should concentrate first on the content of

part 2 of the draft articles and, when it came to deal with part 3, revert to consideration of the concerns expressed by the Special Rapporteur and determine the aspects that should be linked with part 2.

The meeting rose at 1 p.m.

1777th MEETING

Wednesday, 8 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

State responsibility (continued) (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE
SPECIAL RAPPORTEUR (continued)

1. Mr. JAGOTA, continuing the statement he had begun at the previous meeting, said that one of the most important contributions made to the topic of State responsibility by the Special Rapporteur in his preliminary report⁵ had been the categorization of internationally wrongful acts as a background against which to identify the injured party—be it an individual State, a group of States, or the world community as a whole—and to define the obligations of the injured State and the legal framework within which those obligations were to be identified and performed.

2. In dealing with the question of the content of international obligations, the Special Rapporteur had

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

⁵ *Yearbook* . . . 1980, vol. II (Part One), p. 107, document A/CN.4/330.

¹¹ *Ibid.*

given particular attention to countermeasures or reprisals. Indeed, the three main elements of the fourth report (A/CN.4/366 and Add.1) could be said to be the categorization of wrongful acts and identification of the injured State; the concept of objective régimes relating thereto; and the question of the legitimacy of reprisals. The Special Rapporteur had pointed out that the more serious internationally wrongful acts were already dealt with by existing law or by other régimes. He recommended that the Commission should deal with such questions only in general terms within the framework of the articles and should not elaborate them in part 2. He suggested that the Commission begin by considering the normal case of new bilateral relationships between the author State and the injured State arising from internationally wrongful acts and the exceptions thereto, as set out in paragraphs 122–130 of the report.

3. The Special Rapporteur had categorized internationally wrongful acts as “international crimes” or *jus cogens* violations; acts defined as internationally wrongful under objective régimes of a universal character—which might or might not be international crimes—or under objective régimes of a regional character; and internationally wrongful acts of a purely bilateral nature.

4. With regard to the identification of the injured party, the Special Rapporteur noted that that party could be an individual State, a group of States or other entities—as in the case of matters involving the violation of human rights or the denial of self-determination—or the international community as a whole.

5. In discussing the legal consequences of internationally wrongful acts, the Special Rapporteur had suggested that the Commission should not consider the more serious categories, such as international crimes, which he divided into crimes of aggression and other crimes, and to which a large part of his fourth report was devoted. He understood the Special Rapporteur to be saying that it would not be desirable for the Commission to become involved in indicating the consequences of acts of aggression, since the question was already dealt with in draft articles 2, 4 and 5 as proposed in his third report (A/CN.4/354 and Add.1 and 2).⁶

6. With regard to international crimes other than acts of aggression, the Special Rapporteur noted that secondary and tertiary rules were either non-existent or less well developed than in the case of acts of aggression. Nevertheless, there were elements common to all international crimes, and a number of those elements were identified in paragraphs 59–62 of the fourth report.

7. In paragraph 67, the Special Rapporteur appeared to be suggesting that it would be desirable for the Commission to elaborate the legal consequences of the crimes other than acts of aggression identified in article 19 of part 1 of the draft. In other words, the Special Rapporteur appeared to take the view that the Commission should begin its elaboration of the legal

consequences of internationally wrongful acts by considering the normal, rather than the more serious, cases. That suggestion should be acceptable to the Commission. At the same time, it was not necessarily true to say that all the legal consequences of acts of aggression or other international crimes were well known. Even if that were the case, it would be useful for the Commission to articulate them, in general terms, in part 2 of the draft articles. In so doing, the Commission would not be duplicating the work on the draft Code of Offences against the Peace and Security of Mankind, or become involved in the interpretation or amendment of the Charter of the United Nations, or be elaborating provisions that were not easily acceptable to the world community. Members of the Commission were fully aware of the issues involved and were capable of developing the legal consequences of international crimes, including acts of aggression, in the form of a general legal framework. Indeed, the Commission had a duty to do so. Such an undertaking would involve defining the major obligations of the aggressor State, the rights and obligations of the injured State and the obligations of third States.

8. In that regard, he suggested a list be drawn up specifying the obligation of the aggressor State to stop its aggression, withdraw from the foreign territory, restore normalcy and the *status quo ante*, pay reparation and guarantee non-repetition of its acts; the right of the injured State to individual or collective self-defence and to take legitimate countermeasures pending appropriate measures, including collective security action, by the United Nations; and the obligation of third States not to recognize the effects of the aggression, not to give assistance to the aggressor State and to support the action taken by the United Nations to maintain or restore the peace.

9. It should also be mentioned that one of the legal consequences of aggression would be the attribution of criminal responsibility to specific States. Finally, a reference should be made to the situation, contemplated by the Special Rapporteur in paragraph 130 of the report, in which the whole régime for the maintenance of international peace and security failed and the situation could not be regulated by law.

10. The Commission should also elaborate the legal consequences of violations of objective régimes to the extent that such violations were not covered by those régimes, whether global or otherwise. In that regard, he agreed with the Special Rapporteur that, in developing such régimes, the emphasis was usually placed on primary, rather than secondary or tertiary, rules.

11. He congratulated the Special Rapporteur on his classification of reprisals, in which he identified prohibited reprisals, such as the use of force. But, in that connection, he wondered whether the use of force would be prohibited for all purposes: for example, would a people subject to a colonial régime have the right to use force in order to achieve self-determination? Although, as the Special Rapporteur had pointed out, that question was already considered in the Declaration on Principles of

⁶ See 1771st meeting, para. 2.

International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,⁷ the Commission should nevertheless give it careful consideration. He also agreed with the Special Rapporteur that the Commission should specify which reprisals were prohibited, which were regulated and which were legitimate. In that connection, the Special Rapporteur referred to the question of the exhaustion of available remedies or the possible implementation of a “phasing” procedure prior to the taking of countermeasures. In his own view, the injured State was fully entitled to take appropriate countermeasures pending the exhaustion of available remedies and provision should be made for that possibility.

12. He had no objection to taking the normal situation as the starting-point for part 2 of the draft articles, as proposed in paragraph 122 of the report, provided that the Commission reverted to the consideration of more serious cases later. It was impossible to ignore the provisions of draft article 19 of part 1 of the draft and the legal consequences of the internationally wrongful acts identified there.

13. Referring to paragraph 124 of the report, he observed that where an objective régime was self-contained and itself provided for enforcement measures, the question arose whether the collective security measures provided for were adequate and whether provision should be made for legal measures of self-protection to be taken pending the implementation of such security measures.

14. With regard to the right of the injured State, referred to in paragraph 126, to suspend a multilateral treaty and to invoke a fundamental change of circumstances or a state of necessity as a ground for non-performance of its obligations, he believed that such measures were not countermeasures as such, but legal consequences of a different nature. Consequently, the draft articles should include a saving clause similar to article 73 of the Vienna Convention on the Law of Treaties. He would reserve his position pending the drafting of that clause. He would also reserve his position with regard to the content of paragraph 127 of the report.

15. Finally, he fully agreed with what was stated in paragraph 129; and, with regard to the situation contemplated in paragraph 130, he wondered whether the injured State would be free to take any measures it deemed necessary, or whether it would still be subject to the rule of proportionality.

16. Mr. KOROMA said that, since the Special Rapporteur had indicated in paragraph 31 of his fourth report (A/CN.4/366 and Add.1) that he would try to adapt the draft articles proposed in his third report (A/CN.4/354 and Add.1 and 2) to meet the suggestions made in the Commission and in the Sixth Committee of the General Assembly, the current discussion should perhaps have been held only after that adaptation had taken place.

17. The Special Rapporteur had nevertheless felt obliged to respond to the request made by the Commission and the Sixth Committee for an outline of the contents of parts 2 and 3 of the draft articles and to concentrate on possible injuries to a State, a group of States or the international community of States as a whole, and on the new rights and obligations arising out of an act or omission not in conformity with a primary rule of international law or not having the consent of the injured State or States. The Special Rapporteur was also seeking guidance on the draft articles to appear in parts 2 and 3. His need for guidance was well founded, since judicial decisions and publicists had, on the whole, not tended to categorize either the occurrence or the consequences of wrongful acts or to relate specific types of legal consequence to specific types of wrongful act.

18. The Special Rapporteur had not only raised the right questions in his report, but had also provided the answers. It was entirely correct that an internationally wrongful act of a State entitled the injured State to reparation and gave rise to the international responsibility of the author State. The aim of part 2 of the draft was to examine the content, forms and degrees of international responsibility, which would vary according to whether the breach committed constituted an international crime or an international delict.

19. In his own view, the legal consequences of an internationally wrongful act should be categorized by reference to the rules which established the rights and obligations of the injured State and the author State. It should then be the object of part 2 to restore the rights of the injured State within the framework of the rule of reasonable proportionality stated in draft article 2 as submitted in the Special Rapporteur's third report.⁸ That was the approach which the Commission should adopt in codifying and developing the law relating to part 2 of the draft.

20. The issue was, of course, very complicated and there were many categories of legal consequences. The Special Rapporteur had therefore made a distinction between international crimes, which were considered to be *erga omnes*, and international delicts, and had drawn attention to the complexities involved in that categorization. Although such complexities did exist, he believed that the Special Rapporteur was fully capable of making the categorization along the lines suggested.

21. While he agreed that the legal consequences of the international crime of aggression, to which reference was made in the Charter of the United Nations, left room for divergent interpretations, that was generally true of almost every régime. For example, the inherent right to self-defence was recognized in international law, but the circumstances in which it could be invoked had been hotly contested since the drafting of the Charter. With a view to determining the parameters of the right to self-defence as it related to State responsibility, preventing it from being used as a shield rather than as a sword and assisting the international community in taking a decision on it in the

⁷ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁸ See 1771st meeting, para. 2.

interests of international peace and security, he had proposed at the Commission's previous session that it should attempt to define in detail the circumstances in which the right to self-defence could be invoked.⁹ He still believed that, in the light of article 19 of part 1 of the draft, a rule relating to that right was a prime and useful candidate for elaboration in the context of State responsibility. Account should, of course, be taken of the proportionality limits set in draft article 2: force, when used, must be reasonably proportional to the danger to be averted. The fact that there was no consensus on the right to self-defence should not discourage the Commission from endeavouring to formulate rules relating to it.

22. On the question of whether the Commission should formulate rules on the legal consequences of international crimes, the Special Rapporteur had expressed the view that, while the entire international community might well recognize certain acts as international crimes, there seemed to be less consensus about the penalties to be meted out. In his own view, however, one useful purpose of the fourth report was to focus the attention of States on that important problem and help them to agree on the sanctions for such crimes.

23. The Special Rapporteur had requested the Commission to decide whether it would draw up a convention or guidelines on part 2 of the topic. The answer to that question would be determined by the quality of the draft articles the Commission produced; the existence of common elements in all international crimes would certainly facilitate the process of elaborating those draft articles.

24. He shared the Special Rapporteur's view that one way of making article 19 of part 1 acceptable to States would be to propose secondary and tertiary rules as a concomitant. The primary rules had been stated in part 1: the secondary rules relating to the legal consequences of international crimes should now be set out in part 2 and the tertiary rules on implementation of the secondary rules in part 3. The borderline cases referred to by the Special Rapporteur could be decided during the formulation of those rules, taking account of the fact that the right to self-determination was *jus cogens* and that armed reprisals were prohibited by the Charter of the United Nations.

25. In paragraph 79 of his report, the Special Rapporteur indicated that international delicts could give rise to three types of new legal relationships, namely reparation, suspension or termination of existing relationships at the international level, and measures of self-help to ensure the maintenance of rights—all of which were designed to remove the consequences of the wrongful act and to restore the relationship which had existed before the wrongful act was committed. Since such new relationships were predicated on the legal consequences of internationally wrongful acts, the rules relating to them should be elaborated later. On the whole, he agreed with the conclusions reached by the

Special Rapporteur in paragraphs 122–130 of his fourth report.

26. Sir Ian SINCLAIR, after emphasizing the high intellectual quality of the Special Rapporteur's fourth report (A/CN.4/366 and Add.1), said that he proposed to make a number of general comments on the issues it raised, in ascending order of difficulty.

27. The question of the legal consequences of an internationally wrongful act which was not an act of aggression, or otherwise characterized as an international crime in article 19 of part 1 of the draft, was relatively simple. He entirely agreed with the views put forward by the Special Rapporteur in the first four sentences of paragraph 73 of the report; in the broadest of all possible senses, it could be said that every State had an interest in all rules of international law being observed. The real question, however, was whether a State was qualified to present itself as an injured State in respect of damage not inflicted upon itself or any of its nationals.

28. The question of the legal consequences of what were described as international crimes in article 19 of part 1 of the draft was far more difficult and controversial. Whereas, in the development of the concept of *jus cogens*, the consequence of its violation had formed an integral part of the rule proposed by the Commission, the exact opposite was true of article 19. Although that article derived some of its intellectual inspiration from the notion of *jus cogens*, it was singularly and ominously silent about the wider consequences of what were asserted to be international crimes. When formulating part 1 of the draft, the Commission had been able to avoid consideration of the legal consequences of the provision it was preparing, but now the issue could no longer be avoided. The very notion of a separate and distinct category of international crimes, at least as forming part of the law of State responsibility, was of course highly controversial. It was by no means clear to whom the State was responsible, or how the aggravated degree of State responsibility resulting from the breach of certain fundamental obligations was to be defined. As for the related notion of obligations *erga omnes*, the key issue, at least in the context of the law of State responsibility, was which State or group of States, if any, could be considered as injured. The separate opinion of Judge Sir Gerald Fitzmaurice in the *Barcelona Traction* case¹⁰ was of special interest in that connection. He personally remained unconvinced that the materials at the Commission's disposal were sufficient to justify the confident assertion that the concept of the injured State could be dispensed with in the case of a breach of an obligation *erga omnes* and that every State without exception could be regarded as having an equal legal interest in the matter.

29. His attitude to the elements of special legal consequences said to attach to all international crimes, as listed in paragraphs 59–61 of the report, was also one of considerable scepticism. In particular, for reasons already stated, he had strong reservations about the proposition

⁹ Yearbook . . . 1982, vol. I, p. 234, 1736th meeting, para. 30 and p. 238, 1737th meeting, para. 24.

¹⁰ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 65.

in paragraph 59, and he shared some of Mr. Flitan's doubts (1773rd meeting) about the third alleged "common element" referred to in paragraph 61. His reservations about the statement in paragraph 60 were less serious in nature, though he did not think that it was axiomatic that the United Nations had "jurisdiction" in relation to all the international crimes listed in article 19.

30. With regard to the fourth common element, described in paragraph 62, he was prepared to accept that a legal consequence of an international crime was to create duties of solidarity between all other States. Some of those duties might have to be formulated in negative terms, such as the duty not to lend support to the author State. Whether a positive and unqualified legal duty was imposed on all States to support the legitimate countermeasures of the directly injured State might be rather more questionable and might depend on the nature of the international crime involved. But that other States had a right to take such measures in support of the victim State seemed beyond dispute. That point could perhaps be made more clearly.

31. On the question of reprisals, he agreed with Mr. Reuter (1771st meeting) that the term might be a misnomer, since reference was evidently being made to the more nebulous notion of countermeasures. The Special Rapporteur's submission in the first sentence of paragraph 97 hinged on the interpretation given in that context to the term "objective régime". He had considerable doubts about the definition suggested by the Special Rapporteur in his oral introduction (*ibid.*, para. 12), namely that the distinguishing feature of objective régimes was that they involved parallel obligations for States rather than reciprocal obligations, and that they were designed to protect the collective interests of States or individual persons. The traditional concept of objective régimes as being, essentially, régimes of a territorial or quasi-territorial nature was still relevant in the context of the law of treaties. The distinction which the Special Rapporteur was proposing seemed somewhat akin to that between integral-type treaties and reciprocal treaties, or between so-called *traités-lois* and *traités-contrats*, a distinction which the Commission had discussed at some length in the context of its work on the law of treaties but which had not been embodied in its final set of draft articles, or indeed in the Vienna Convention on the Law of Treaties itself, possibly because the distinction was simply too difficult to draw.

32. If the purpose of the reference to objective régimes was to ensure that whatever secondary and tertiary rules operated within the framework of such a régime should be safeguarded, he would unhesitatingly agree. The rules in part 2 should clearly operate as residual rules, which might be displaced by more specific rules accepted by the parties concerned within the framework of any treaty or other régime by which they might be bound. He was not convinced, however, that it would be in the general interest to do more than merely "reserve" any special secondary or tertiary rules on the consequences of a breach of an international obligation which might form part of a particular regional or universal régime, whether

characterized as an objective régime or not. An attempt to embody in part 2 a distinction between objective régimes and other régimes would give rise to serious problems of demarcation. The General Agreement on Tariffs and Trade was a case in point: it would be interesting to know whether the Special Rapporteur regarded it as an objective régime in the sense in which that term was employed in the fourth report.

33. In paragraphs 33–45 and again in paragraphs 65–67, the Special Rapporteur referred to the need for a meaningful mechanism for the settlement of disputes as a pre-condition for the effective application of whatever primary or secondary rules might be embodied in parts 1 and 2 of the draft. He wholeheartedly endorsed that view. Given the scarcity of secondary rules relating to the legal consequences of internationally wrongful acts, a self-contained and viable draft on the general law of State responsibility would necessarily have to contain adequate and satisfactory procedures for the settlement of disputes. However, any dispute-settlement procedure to be written into the draft would have to be without prejudice to existing rules on settlement applicable between the parties to the particular dispute. That being said, he shared the doubt expressed in paragraph 42 as to the willingness of States to accept—having regard to the very broad scope of the draft—the isolation of questions relating to the interpretation and application of secondary rules from those relating to the primary rules concerned.

34. He agreed with the view expressed in paragraphs 54–55 that there was no place in part 2 for an article or articles on the legal consequences of acts of aggression. The reasons advanced by the Special Rapporteur for reaching that conclusion were convincing; the Commission would be exceeding its mandate by venturing into that field more than was necessary in order to articulate the general principles of State responsibility. While he understood the contrary view, as expounded, in particular, by Mr. Al-Qaysi (1775th meeting) and Mr. Koroma, he thought the Commission's work would be unnecessarily prolonged if it were to tackle such highly sensitive topics as the scope of the right of self-defence. Without adopting a definitive position on the matter, he was inclined to agree with the suggestion made by Mr. Jagota (para. 8 above) that a simple list of the consequences of aggression for the aggressor State, the rights of the directly injured State and the duties of third States might be incorporated in part 2. In no circumstances, however, should the Commission attempt to elaborate on the scope of the concept of self-defence.

35. He shared the view expressed by previous speakers that it would be inappropriate for the Commission to take up the proposal outlined in paragraph 64, especially as a committee for the specific purpose of reviewing the Charter had already been set up. Lastly, he had some misgivings about the statement contained in the first sentence of paragraph 125, particularly in connection with the case mentioned under (b) in paragraph 124. The condition thus formulated was very general and could be seriously misconstrued unless explained further.

36. Mr. NI said that the Special Rapporteur was to be congratulated on the scholarly and masterly fashion in which he had prepared chapter II of his fourth report (A/CN.4/366 and Add.1). In emphasizing the importance of the relationship between the various parts of the draft for a comprehensive evaluation of his work as a whole, the Special Rapporteur had adopted the right approach.

37. The importance of the topic could not be over-emphasized, for the law of State responsibility encompassed virtually all aspects of international law and had great practical significance in present-day international relations. In codifying the legal consequences arising from international responsibility, the Commission should keep in mind the need to prevent internationally wrongful acts and to eliminate and remedy their consequences, though it was not suggested that prevention as a primary rule should be considered a subject for codification at the present stage. If, as the Special Rapporteur suggested in his summing-up in paragraph 122, part 2 of the draft articles should take as its starting-point the normal situation, in which the internationally wrongful act entailed new bilateral legal relationships between the author State and the injured State only, that did not mean that part 2 was to be entirely confined to that situation. As had been pointed out time and again in the Sixth Committee of the General Assembly, it was not to the international community's advantage to be over-considerate with the author State.

38. Referring to the question of the legal consequences of an international delict and the three aspects listed in paragraph 72, he remarked that the identification of the injured State did not give rise to any difficulty in the case of bilateral relations. But where a delict had effects reaching beyond the bilateral level, as in the case of a multilateral treaty, the question of which State or States were to be considered as injured depended on whose interest had been adversely affected. It was a question of fact, which should be determined in the light of the circumstances of each case.

39. With regard to the content of the new legal relationships, the Special Rapporteur had distinguished three types of relationship in paragraph 79; but that list was not exhaustive and the relationships were not supposed to be parallel. As to self-help measures, the limitations and restrictions were such as to leave the injured State without any effective means of protecting its legitimate interests in time.

40. The adoption of article 19 in part 1 of the draft articles had been considered an important step forward in the development of international law in that area. While the Special Rapporteur was of the opinion, in paragraph 65, that there was little chance that States would accept a legal rule along the lines of article 19 without a legal guarantee of independent and authoritative establishment of the facts and the applicable law, he nevertheless concluded in paragraph 67 that the Commission, having recognized the progressive development of international law in provisionally adopting article 19, should carry that development to its logical conclusion by proposing secondary and tertiary rules. The Special Rapporteur was

to be highly commended for reaching that conclusion despite the complexity of the problems involved.

41. With regard to the elements of special legal consequences common to all international crimes mentioned in paragraphs 59–62, he agreed with the Special Rapporteur that, although not all international crimes would entail the same legal consequences, at least a minimum common element applicable to all crimes on the basis of the solidarity of all States other than the author State should be established.

42. The Special Rapporteur's conclusion, in paragraph 55, that there was no place in part 2 for an article or articles on the special legal consequences of the category of internationally wrongful acts called "acts of aggression" did not seem acceptable. The crime of aggression, being a serious breach of an international obligation of essential importance for the maintenance of international peace and security, as provided in article 19 of part 1 of the draft, should have a corresponding provision in part 2 relating to its legal consequences. The fact that provisions applicable to international crimes which could also apply to aggression were already in existence was no valid reason for failing to allocate a special place to the legal consequences of the crime of aggression in the draft articles on State responsibility. And if aggression—which was considered one of the most heinous crimes—was excluded from part 2 simply because the matter was closely connected with another topic, namely the draft Code of Offences against the Peace and Security of Mankind, then other international crimes, such as those envisaged in article 19, paragraph 3, which might have their counterparts in the draft code of offences, might suffer the same fate. If aggression was to be distinguished from other international crimes because of its *erga omnes* character, other international crimes, such as the establishment or maintenance by force of colonial domination, slavery, genocide or *apartheid*, might be excluded for the same reason. Nor was the fact that the same offence might be made accountable in two or more international instruments a reason for excluding it from any of the instruments concerned. It was not a question of avoiding duplication, but of achieving co-ordination. The Special Rapporteur's conclusion, albeit limited to the legal consequences of acts of aggression, was inconsistent with his view, stated in paragraph 67, that the progressive development embodied in the adoption of article 19 should be carried to its logical conclusion.

43. As to the principle of proportionality applicable to countermeasures, he assumed that its object was to ensure that action taken in response to an internationally wrongful act did not have consequences more serious than the wrongful act itself, and which were not justified by the circumstances of the case. The matter could be considered more closely during the process of drafting.

44. The abundance of detail and diffuseness of the outline made it rather difficult to grasp. Not enough emphasis appeared to have been placed on the important question of reparation. In the case concerning the *Factory at Chorzów* (Merits), the PCIJ had said that "reparation must, as far as possible, 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.”¹¹ Means of reparation applied in practice and suggested by publicists included restitution, compensation, declaration of the true legal position, injunction, interim measures of protection, imposition of punitive damages, affirmation of rights, and satisfaction, which might include apology or guarantee against repetition. Some of those means were commonly applied, while others, such as assessment of punitive damages, were not considered legitimate. A discussion of the problem would not be out of order.

45. The terminology used in the report in discussing countermeasures was somewhat confusing: the terms “reprisal”, “self-help” and “countermeasure” seemed to be employed interchangeably. All in all, it would be helpful if the material were arranged more systematically and treated in less abstract terms.

46. Mr. BARBOZA noted that the Special Rapporteur’s fourth report (A/CN.4/366 and Add.1) contained a wealth of material and provided much food for thought; but before any definite opinions could be arrived at, it would be necessary to wait until the ideas set forth had been put into concrete form in draft articles. Since other members had analysed the report in detail, he would comment only on the points that had particularly engaged his attention.

47. With regard to the advisability of dealing with international crimes in part 2 of the draft, he did not altogether share the concern expressed by some members of the Commission. The inclusion of article 19 in part 1 of the draft militated in favour of provisions on the legal consequences of international crimes. That was the view taken by the Special Rapporteur, although he would leave aside the case of aggression. In that connection, he (Mr. Barboza) referred to the draft Code of Offences against the Peace and Security of Mankind,¹² to the Definition of Aggression adopted by the General Assembly¹³ and to two provisions in the second set of draft articles submitted by the Special Rapporteur in his third report (A/CN.4/354 and Add.1 and 2):¹⁴ article 5 and paragraph 2 of article 6. Furthermore, Article 41 of the Charter of the United Nations determined what measures could be taken by the Security Council following an act of aggression. The solution suggested by Mr. Jagota, which was to include a list of the legal consequences of international crimes, including aggression, in part 2 of the draft, thus seemed to merit consideration. Those legal consequences would constitute the general legal framework for all international crimes. It should be noted that some members considered that the draft Code of Offences against the Peace and Security of Mankind, in its new version, should not

contain secondary rules. Consequently, it was indeed in part 2 of the draft articles on State responsibility that the legal consequences of crimes such as aggression and crimes against the peace and security of mankind should be dealt with.

48. In his fourth report, the Special Rapporteur had laid much emphasis on part 3 of the draft articles. He considered it was hardly worth while talking about secondary rules unless one knew the contents of the applicable tertiary rules. On the one hand, he emphasized the special importance of establishing the facts: it was the facts, not the consent of States, that would determine the new rights and the new obligations. On the other hand, he maintained that if States knew the rules of application, they would know the extent to which they could accept the consequences identified in part 2. On the first point, he thought the Special Rapporteur was partly right, though the problem of the settlement of international disputes, and in particular their compulsory settlement, was practically insoluble in international law. Whenever any multilateral treaty was drawn up, that question always gave rise to difficulties. Consequently, the Commission could not make the wording of part 2 of the draft depend on how the problem of implementation was solved. On the second point, he observed that States would probably accept certain legal consequences more readily if they knew the content of the tertiary rules, but that the converse was equally true: they would more readily accept certain forms of compulsory settlement of disputes if they knew exactly what they were committing themselves to. All things considered, it would be better for the Commission to take up the drafting of part 2 at once.

49. In speaking of international crimes, both Mr. Flitan and Mr. Reuter (1773rd meeting) had referred to the concept of “attempt”. The idea of making the attempt to commit an international crime an offence was an interesting one, which was associated with prevention but which involved recourse to the mechanisms of responsibility. If the Commission adopted that course, however, it should confine itself to particularly serious crimes.

50. With regard to reprisals, and more particularly armed reprisals, the Special Rapporteur referred, in paragraph 81 of the report, to the prohibition contained in the 1970 Declaration on Principles of International Law¹⁵ and in draft articles 4 and 5 as proposed in his third report. He added, however, that in the case of most internationally wrongful acts, armed reprisals would be manifestly disproportionate in the sense of article 2 as proposed in that report. He probably had in mind the case in which a State carried out armed reprisals in response to a wrongful act not involving recourse to force. But despite certain doctrine according to which use of force was permissible in response to use of force, it should be emphasized that armed reprisals were absolutely pro-

¹¹ Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17*, p. 47.

¹² See 1755th meeting, para. 10.

¹³ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

¹⁴ See 1771st meeting, para. 2.

¹⁵ See footnote 7 above.

hibited by contemporary international law, whether they were disproportional or not.

51. In paragraph 83, the Special Rapporteur also referred to draft article 3 as proposed in his third report, under which the legal consequences of a breach could be prescribed by the rule or rules of international law establishing the obligation or by other applicable rules of international law. He concluded that a provision more detailed than that article should be devoted to reprisals. What he had to say about objective régimes seemed to be correct, but it would be necessary to know the wording of the relevant articles before forming any definite opinion on the matter.

52. In paragraph 90, the Special Rapporteur mentioned the case of reprisals constituting a breach of rules relating to the environment. He stated that reprisals consisting in a breach of such rules seemed to be inadmissible even in response to a similar breach by another State. In the Special Rapporteur's view, the case was covered by draft article 4, as proposed in his third report. He also suggested that certain special régimes, particularly those relating to diplomatic law and armed reprisals, should be reserved. So far as armed reprisals were concerned, he (Mr. Barboza) reserved his position. With regard to diplomatic law, he could not agree with the Special Rapporteur that it constituted an exception, since there were parallel obligations. While it was true that a State A could declare *persona non grata* the diplomatic agent of a State B which had declared *persona non grata* a diplomatic agent of State A, no State could resort to a reciprocal measure in the case of a serious breach of diplomatic immunity.

Organization of work (continued)*

53. The CHAIRMAN reminded the Commission that, at its 1755th meeting, it had approved the tentative programme for the organization of work (ILC(XXXV)/Conf.Room Doc.3), on the understanding that it would be applied with the necessary flexibility. He suggested that, after completing consideration of item 1 of the agenda, the Commission should take up item 3: "Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier". Item 5 of the agenda would be taken up after that, some time after 20 June.

It was so agreed.

The meeting rose at 1.05 p.m.

* Resumed from the 1760th meeting.

1778th MEETING

Thursday, 9 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS
later: Mr. Edilbert RAZAFINDRALAMBO

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

State responsibility (continued) (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. BARBOZA, continuing the statement he had begun at the previous meeting, said that in the case of the United States embassy staff held hostage in Tehran, the United States could not, by way of reprisal, have taken the same kind of action as that to which it had been subjected. He stressed the need to take account of the purpose of reprisals, which were sometimes only a means of exerting pressure to induce the State which had committed the wrongful act to adopt certain conduct, for example to agree to arbitration. In that connection, he mentioned one of the few relevant legal precedents, namely the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*,⁵ which was mentioned in paragraph 103 of the fourth report (A/CN.4/366 and Add.1). In that case, the United States had confined itself to threatening France with the suspension of an Air France flight to California, thus taking reprisals whose purpose was to persuade France to agree to arbitration.

2. Reprisals could also be of a preventive nature, for example when, as a guarantee of payment of compensation, a Government froze the funds of another Government located in its own territory. Finally, the purpose of reprisals could be to punish and discourage any repetition of a wrongful act. Any case could involve a

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

⁵ See 1771st meeting, footnote 12.

combination of those characteristics, but one often predominated. Account should also be taken of the fact that, in cases such as those of the embassy staff hostages and the Air Service Agreement, the injury continued for some time and that affected the nature of the reprisals. In the case of persuasive or preventive reprisals, the prior exhaustion of available remedies could not be required: for example, if a State claiming compensation did not freeze the foreign funds in time, it might not be able to do so later. On the other hand, that condition would have to be fulfilled for the taking of reprisals which were dissuasive and thus in the nature of sanctions.

3. With regard to proportionality, he believed there could be greater flexibility for persuasive and preventive reprisals than for punitive reprisals. Reprisals of the first two types depended on a number of factors, including the possibility of resistance by the Government against which they were taken and the possibility of its being determined to maintain its position. The State which took reprisals did not know exactly how far it need go in order to obtain the desired effect. On the other hand, reprisals in the form of sanctions must be proportional, and that was where the *lex talionis* came into play. That was not a cruel law, as was often thought, but one which imposed limitations on the desire for revenge.

4. In draft article 2 proposed in his third report (A/CN.4/354 and Add.1 and 2),⁶ the Special Rapporteur had used a negative formulation for proportionality, on which he (Mr. Barboza) had already commented the previous year.⁷ Although the opinion he had expressed needed qualification in regard to persuasive and preventive reprisals, the fact remained that positive wording would be preferable in all cases. Furthermore, draft article 2 was very general; it did not deal with reprisals as such, but with the consequences of internationally wrongful acts. The provision could apply to self-defence as a legal consequence of an internationally wrongful act such as aggression. But in the case of self-defence, the element of proportionality must be interpreted very strictly. The state of necessity imposed on the State attacked, which entitled it to resort to self-defence, must not lead it to go further than necessary in the countermeasures it took. Not to accept that rule would be contrary to the principle of refraining from the use of force. In his view, draft article 2 was not sufficient to regulate the question of proportionality as applied to self-defence. The response to an act of aggression must not depend on the seriousness of the wrongful act; the means employed must be proportional to the need to foil the attack. It was therefore necessary to ensure that certain provisions of the draft articles did not suggest an indirect and inappropriate definition of the notion of self-defence.

5. In paragraphs 43–44 of the report, the Special Rapporteur had considered three possibilities for the final form of the draft articles. They might be adopted as a

general convention, lead to the endorsement of rules serving as guidelines for States and international organizations, or take the form of a convention establishing an international procedure for the settlement of disputes. He himself would prefer the first possibility, because there would be a serious gap in international law if the topic of State responsibility was not duly codified. It would be regrettable if the Commission wasted the efforts it had made in previous years.

6. Mr. QUENTIN-BAXTER said he fully endorsed the approach adopted by the Special Rapporteur in his fourth report (A/CN.4/366 and Add.1). If the report was difficult to read, that was because its subject-matter represented a completely new dimension in the work of the Commission. Rather than attempt to discuss any of the technical details in which the report abounded, he proposed to examine some of the broader issues involved.

7. Many of the problems implicit in the report could be expressed in terms of relationships. The first relationship which required consideration was that between State responsibility and two other topics on the Commission's agenda: the draft Code of Offences against the Peace and Security of Mankind and international liability for injurious consequences arising out of acts not prohibited by international law. Those three topics were interrelated to the extent that they all responded to a deep desire of the international community to strengthen the framework of the law at a time in history which could be described as transitional in the sense that, on the one hand, the concept of international organization had developed and achieved unprecedented importance, while, on the other hand, the prospect of world government was still remote.

8. The international community's undoubted interest in the draft Code of Offences against the Peace and Security of Mankind, which might at first sight appear surprising in a divided world, was in fact the expression of its desire for a manifesto going beyond the degree of solidarity at present provided by the international order. A similar desire was reflected in the call for the establishment of a new economic order, as well as in other United Nations projects and activities which, until recently, had remained outside the sphere of the Commission, such as the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and that of the Special Committee on the Question of Defining Aggression, many aspects of the United Nations Conference on the Law of the Sea and, at an earlier stage, the General Assembly's own work on self-determination and on human rights. Today, the Commission's agenda included a number of items on which the elements of policy and law were mixed in sometimes perplexing proportions. State responsibility was one of those items, and parts 2 and 3 of the draft articles on that topic were as innovative as anything the Commission had yet had to tackle.

9. The different attitudes adopted within the international community towards part 1 of the draft articles were well known. Some went so far as to question the value of the work as such. He himself regarded part 1 as a very great achievement in response to the desire of the

⁶ *Ibid.*, para. 2.

⁷ *Yearbook* . . . 1982, vol. I, p. 219, 1734th meeting, para. 8.

world as a whole for a better grasp of the law in the area covered. Yet part 1 was concerned only with the bare bones of the problem, whereas what the Commission now had to do in parts 2 and 3 was to produce the living tissue.

10. With regard to the relationship between parts 2 and 3, he agreed with the Special Rapporteur that to attempt to dispose of part 2 first and then proceed to part 3 would be a mistake. In the modern world, attitudes regarding the consequences of State responsibility were inevitably conditioned by the means available for implementing the law. He agreed with several previous speakers that the only course open to the Commission was to try to draft part 2 in a preliminary way, in the full knowledge that it would eventually have to revert to part 2 in the light of part 3, and to part 1 in the light of parts 2 and 3.

11. A further relationship which had to be considered was that between part 2 and chapter V of part 1, relating to circumstances precluding wrongfulness. The view had been put forward that self-defence was too important an act to be regarded as a preclusion; nevertheless, it had been included in chapter V of part 1 and would undoubtedly have to be treated in greater depth in part 2. The same was true of the subject of countermeasures, which was dealt with in a rather shallow fashion in what was perhaps the weakest article of part 1 (article 30).

12. The main difficulty which had arisen in connection with part 1 and, more particularly, with article 19—a difficulty which the Commission would surely experience to a still greater degree when preparing parts 2 and 3—was that of relating law and policy. The fact of the matter was that the Security Council possessed the ultimate power to decide on legal questions concerning its own operation. That being so, attempts to strengthen the role of law in the political sphere inevitably suffered from a certain circularity and were never entirely free-standing; moreover, such attempts received very little support from the work of publicists or from State practice. Nevertheless, for the reasons already given, those attempts were not unimportant and should be pursued.

13. The doubts which he had initially entertained concerning the inclusion of an article on proportionality in part 2 had now been entirely dispelled. He also accepted the concept of “objective régimes” proposed by the Special Rapporteur, which should be understood to encompass a wide variety of mechanisms ranging from very concrete ones, such as membership of the United Nations, to the rather loose arrangements which States might enter into in their mutual relations. He was considering introducing a similar concept into his own topic of international liability for injurious consequences arising out of acts not prohibited by international law.

14. Like many earlier speakers, he believed that the Commission’s present Statute did not authorize it to venture into the sphere of law relating to the United Nations Charter, and that it should exercise the greatest circumspection in dealing with matters covered by Charter provisions, such as acts of aggression or the right to self-defence. He agreed with the Special Rapporteur’s view that, as a first step, the Commission should concern itself with “normal” examples of State responsibility for

international delicts, along the lines proposed in paragraphs 122 *et seq.* of the report. At the same time, it should be made absolutely clear that, having dealt with international delicts, the Commission fully intended to move on to the more serious matter of international crimes.

15. Mr. MAHIU explained that his professional commitments had prevented him from commenting on the Special Rapporteur’s third report (A/CN.4/354 and Add.1 and 2) in 1982. The fourth report (A/CN.4/366 and Add.1) testified to its author’s perfect knowledge of the various legal systems. It was rich and complex and required several readings before all the subtleties of the arguments put forward by the Special Rapporteur became fully apparent.

16. With regard to method, it might have been expected that the Special Rapporteur would deal more specifically in his fourth report with the consequences of responsibility, since the Commission’s task was to formulate draft articles on the basis of international practice. True, he had referred to some international instruments and to a few judicial precedents, but he might have gone further in that direction to support his arguments.

17. In paragraphs 37–42, 45 and 65–67, the Special Rapporteur had considered the question of the relationship between parts 1 and 2 of the draft and had dealt, in particular, with the problem of settlement of disputes. Although there was undoubtedly also a relationship between parts 2 and 3 of the draft, the Commission need not necessarily find solutions to the problems raised in part 3 before dealing with part 2. The Special Rapporteur’s reasoning followed a progression. In paragraph 37, he stated the problem; in paragraphs 38–39, he raised the question of whether it was worth drafting part 2 before part 3; in paragraph 40, he suggested that part 3 might usefully establish a procedure for the settlement of disputes; and, in paragraph 45, he affirmed that the Commission should give early consideration to the question of settlement of disputes. Finally, in paragraph 65, he said there was little chance that States would accept, in part 2, a legal rule along the lines of article 19 of part 1 without knowing the contents of part 3. The drafting of part 2 thus depended on that of part 3.

18. Everyone knew that the concept of aggression was difficult to grasp and that the Definition adopted by the General Assembly⁸ had its limitations. That Definition was followed by a provision which empowered the Security Council to determine that acts other than those specified constituted aggression under the provisions of the Charter. But the Security Council was a body whose role and composition were sometimes contested and which in any case was not independent. Hence, he saw some justification for doubts about how the problems of responsibility were to be solved, though he did not think that the drafting of part 2 should therefore be made

⁸ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

conditional on the existence of a competent and independent authority. Moreover, it might be better to provide several mechanisms than only one. The 1982 United Nations Convention on the Law of the Sea contained primary, secondary and tertiary rules and set up very complete machinery for the settlement of disputes, which permitted recourse to the ICJ, to the International Tribunal for the Law of the Sea, to the special arbitral procedure set up by the Convention itself or to *ad hoc* arbitration.⁹ Similar machinery might well be proposed for State responsibility and it would then be unnecessary to postpone the drafting of part 2.

19. In paragraphs 54–55, the Special Rapporteur had dealt in considerable detail and, at times, not unambiguously with the exclusion of the legal consequences of international crimes, including aggression. In paragraph 54, he stated that most of those consequences fell outside the scope of the draft articles. In paragraph 55, he reached the conclusion that there was no place in part 2 for an article or articles on the special legal consequences of certain international crimes. In paragraph 67, however, he expressed the view that, since the Commission had recognized the progressive development of international law by provisionally adopting article 19 of part 1, it should carry that development to its logical conclusion by proposing secondary and tertiary rules. In his own view, it seemed obvious that the Commission should identify the legal consequences of the various internationally wrongful acts, whether delicts or crimes, and even the most serious crime, namely aggression.

20. The question of whether the Commission should establish a régime of international responsibility that was identical to the régime of responsibility in internal law was dealt with in paragraph 113 of the report, where the Special Rapporteur had questioned whether it was possible to formulate a rule of general and abstract international law under which every “fault” would entail a duty to make reparation. In fact, any approximation of international law to internal law gave rise to more problems than it solved. At the national level, the existence of legislative and judicial authorities made it possible to establish a coherent and complete legal system. In matters of responsibility, judicial decisions played a major, if not an essential, role. Any comparison with international law would thus presuppose solution of the problem of implementation at the international level. Since that problem had not been solved, however, internal law could only be taken as a general guide and must not be followed too closely.

21. Paragraph 39 raised the problem of the consent of a State to countermeasures. The wording of that passage was too general: it meant that consent could not be challenged unless it was invalid or contrary to a rule of *jus cogens*. That point would require further explanation. In paragraphs 43–44, the Special Rapporteur had dealt with

the question of the outcome of the Commission’s work on the topic and had referred to a draft convention, guidelines or an intermediary solution. The Commission’s terms of reference were quite clear, however, and for the time being its task was to prepare draft articles to serve as the basis for a convention.

22. Paragraphs 54 and 65–66 raised the question of the relationship between the topic under consideration and the one dealt with by Mr. Thiam. It was clear that, if care was not taken, those studies might overlap, whereas in fact they were complementary; for Mr. Riphagen was studying the question of offences in general and, hence, of responsibility in general, while Mr. Thiam was dealing with some particular offences and, hence, with more limited responsibility, namely criminal responsibility. Moreover, the topic under consideration was the responsibility of States, whereas the other topic related mainly to the responsibility of individuals, although even that was open to question. Lastly, the possible penalties were not the same; those applicable to States went to the heart of international law, while the others were governed more by internal law. Thus, for the time being, the two drafts did not overlap as much as might have been feared.

23. The notion of an objective régime also called for further explanation by the Special Rapporteur. He himself would have nothing against that notion if it would help the Commission in its work, but if it was likely to raise difficulties he doubted whether it would serve any useful purpose. There were several types of objective régime: conventional or customary, multilateral or bilateral, universal or regional. Was it not difficult ground to cover? In paragraph 85, the Special Rapporteur himself had described that notion as being somewhat “nebulous”. It was nevertheless clear that the problem was an important one in view of the consequences of such régimes, which were examined in several paragraphs, in particular paragraph 97, of which he cited the first sentence. In paragraph 99, the Special Rapporteur stated that an objective régime could be identified by its normative character, the existence of a collective interest, the fact that the parties to the régime were bound to fulfil the obligations it imposed even if another party failed to do so, and the existence of machinery for the settlement of disputes and decision-making. Of those four elements, only the third was peculiar to objective régimes; it was, in fact, the decisive criterion from which all the consequences must be drawn. For the time being, he reserved his position on those consequences, which ought to be specified.

24. Paragraphs 102–103 dealt with reprisals in connection with the notion of objective régimes and the existence of machinery for the settlement of disputes. The first sentence of paragraph 103 suggested that the possibility of settlement of a dispute by an impartial body would rule out reprisals. But the concept of reprisals was not clear and it had various aspects.

25. Among the points in the report that might lead to positive results, he referred to paragraphs 46–50, which stated the legal consequences the Commission should study. Paragraphs 59–62 would provide a useful working

⁹ Part XV and annexes V–VIII of the Convention (*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).

basis, but it was mainly paragraphs 75–76, 79, 114 and 122–123 that went to the heart of the problem and would constitute a foundation for the edifice to be built. In that connection, he welcomed the views expressed by Mr. Jagota (1777th meeting) on the consequences of State responsibility, namely reparation, the suspension of relations, the breaking off of relations and armed or unarmed reprisals.

26. He noted that some of the terms used in the report were rather ambiguous and made it difficult to understand the propositions advanced. He was not sure that he had understood the distinguishing differences between countermeasures, reprisals, reciprocity and retaliation. Those terms should be defined more clearly, showing the different situations to which they applied. For example, if the diplomats of a sending State were subjected to unlawful measures, that State could take not only reciprocal measures, but also measures of retaliation; and the more dangerous case of reprisals might also arise.

27. He had no definite ideas on the method of work to be adopted but he thought the main point was to examine, with regard to both crimes and delicts, all the consequences of the relations between the injured State and the author State and of their relations with third States.

28. Mr. REUTER, associating himself with the tributes paid to the Special Rapporteur by members of the Commission, said that Mr. Jagota's analysis (*ibid.*) of the report had been particularly lucid, clear and forceful. He himself would comment only on methods of work and on the substance of the problem, which was the question of aggression.

29. He had always known that the Commission would devote much time and effort to the questions of international crimes and aggression, since at the current session it had before it the reports of Mr. Riphagen and Mr. Thiam, although, for the time being, it knew nothing about Mr. Thiam's future reports. Two considerations made him think that the Commission should begin by studying the general régime of delicts and then consider that of crimes, before going on to the particular case of aggression, which would, of course, have all the legal consequences of the first two categories of wrongful acts. Although its Statute did not require it to reach agreement in every case, it was a fact that the Commission had always reached compromises on the drafts it prepared. In the present case, it would be more difficult to agree on the consequences of aggression than on those of other international crimes, and more difficult to agree on the consequences of crimes than on those of delicts. The Commission should therefore begin with the question on which positions were the least clear-cut. The Sixth Committee would probably forgive the Commission for not agreeing on the question of aggression and, despite the difficulties to which he had just referred, he thought the Commission should begin by considering that question. He hoped that at its next session the Commission would have before it simultaneously reports by Mr. Riphagen and Mr. Thiam and that those reports would be submitted on time. He emphasized the need to

co-ordinate the study of those two reports; that was a task which the Commission, a technical body, could not avoid.

30. With regard to aggression, he believed that as things stood at present only the United Nations had the right to establish that an act of aggression had been committed and to determine its legal consequences. Did the States parties to the dispute also have that right, with all the ensuing legal consequences? Some held that they did, and it was a fact that State sovereignty remained one of the pillars of the international order. But he could not help noting that, for the past 25 years, the world had been continually torn by armed conflicts and the United Nations had never established that such acts had been committed. What was even more important was that no State which was a party to a dispute and which had established that an act of aggression had occurred had ever drawn the logical consequences of that act. Ideological differences of opinion might, of course, have prevented the Security Council from finding that an act of aggression had been committed, but it must be recognized that, in many armed conflicts, the legal position was not clear and that a State might, in good faith, consider that another State was the aggressor.

31. What was more important than anything else was not so much the sanctions to be imposed as the restoration of peace. In many cases, it would be disastrous for the United Nations to establish that aggression had occurred. The States concerned had often shown great wisdom and had limited the advantages they could have derived from their military superiority. That being so, he agreed that the United Nations could establish that an act of aggression had occurred, with all the ensuing consequences such as reparation or sanctions, but he could not agree that the same consequences followed from determination of such an act by one of the States parties to a dispute. If the Commission had to provide for strict measures to punish aggressors, it must not treat a finding by the United Nations in the same way as a finding by a State. Did any member of the Commission believe that resort to arms automatically showed which State had been attacked? As to the problem of self-defence, he wondered what the critics of the United Nations proposed as a substitute for that institution.

The meeting rose at 12.55 p.m.

1779th MEETING

Friday, 10 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, 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. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov.

State responsibility (continued) (A/CN.4/354 and Add.2 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. OGISO congratulated the Special Rapporteur on a detailed report on a topic that was difficult because it encompassed almost every aspect of international legal relations. The fourth report (A/CN.4/366 and Add.1) would none the less have been easier to understand, and would perhaps have facilitated the Commission's discussion, if it contained draft articles on which members could make their observations.

2. In paragraph 80 of the report, the Special Rapporteur rightly emphasized that reprisals were generally considered as admissible only in limited forms and in limited cases, and that the nature of the internationally wrongful act and the nature of the right of the author State infringed by the reprisals were relevant in that context. While he was in general agreement with that statement, it might have been more satisfactory to define the limitations more clearly, since reprisals were rendered legitimate only in so far as they were intended to uphold the rights of the injured State under international law and were a form of self-help. Clearly, they were open to abuse by virtue of the fact that it was the injured State itself which determined, in the first instance, their admissibility and extent. The Commission should bear that factor in mind and exercise caution in drafting the relevant articles. Indeed, draft articles that were not sufficiently precise could act as an invitation to escalate countermeasures and eventually deprive of all meaning the concept of the international legal order.

3. The Special Rapporteur went on to express doubts as to the existence of any clear-cut rule on armed reprisals, pointing out in paragraph 81 that, inasmuch as armed reprisals were prohibited, the prohibition would be covered by draft articles 4 and 5 as proposed in his third report (A/CN.4/354 and Add.1 and 2).⁵ However, the

draft articles in question did not seem sufficiently explicit in that regard. Under the United Nations régime, the use of force, except when based on a decision or recommendation by the competent United Nations organs, was admissible only under the provisions of Article 51 of the United Nations Charter, which dealt exclusively with the question of self-defence and reprisals as a form of self-help. If a special draft article on reprisals was to be inserted in part 2 of the draft, as suggested by the Special Rapporteur, it should stipulate clearly that armed reprisals were not admissible. On the matter of belligerent reprisals, the Special Rapporteur had exercised caution and reached the sound conclusion, in paragraph 88, that that particular field should be excluded from the scope of part 2 of the present draft. Clearly, it would be more appropriate to deal with belligerent reprisals under the law relating to armed conflicts.

4. Paragraph 77 of the report discussed the difficulty of identifying the injured State in the event of an alleged breach of an obligation arising from a multilateral convention, the inference being that, in principle, reprisals were an admissible response to a breach of a treaty obligation, including breaches of multilateral conventions, in so far as the consequences of the reprisals did not affect objective régimes. This conclusion was expressed elsewhere in the report, but the Special Rapporteur also submitted that the difficulty of identifying which State was the victim of a breach of a multilateral treaty obligation was a real one, given the intricate network of rights and obligations established by such conventions. Moreover, in reality, States did not first consider whether a treaty established an objective régime before they proceeded to negotiate inter-treaty relationships. Personally, he considered that the introduction of the concept of objective régimes, which had no established content under international law, would simply create confusion in the draft articles and in State practice, inasmuch as the criteria proposed did not seem sufficiently practical. Indeed, the complex legal relationships existing under multilateral treaties could tend to increase the difficulty of ascertaining the proportionality of reprisals and the concept of objective régimes would thus make it even more imperative to provide for a dispute-settlement procedure in part 3 of the draft.

5. With regard to regional objective régimes, it should be noted that some of them, whether or not they were called objective, had close links with universal régimes, as in the case of regional arrangements or agencies for matters relating to the maintenance of international peace and security, as provided for in Article 52 of the Charter. However, it had to be remembered that no collective decision by the States parties to a regional régime could render admissible any reprisals of a type not allowed under the relevant universal régime.

6. In view of the importance of exercising the utmost caution, the Commission might wish to consider whether proportionality should be the sole substantive requirement for reprisals to be made admissible in cases of breaches of obligations arising from bilateral treaties, for example. Perhaps other procedural requirements, such as

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

⁵ See 1771st meeting, para. 2.

the exhaustion of other dispute-settlement procedures before taking reprisals, or advance notification of such measures, should be considered. Procedural mechanisms of that kind could help to avoid the escalation of counter-measures.

7. He was not sure that the tests of proportionality referred to in paragraph 123 of the report, namely that reprisals should be "not clearly disproportionate" or not "manifestly disproportional", were suitable. They would tend to widen the area of admissibility, since the extent of proportionality was determined in the first instance by the State initiating the act of reprisal. The concept of proportionality traditionally used in international law would be preferable.

8. It should always be borne in mind that the basic difference between the concept of armed reprisals and the concept of self-defence was that self-defence was a lawful act under customary international law and under the Charter of the United Nations, whereas a reprisal was an act which became lawful solely for the purpose of upholding the rights of the injured State.

9. As to the implementation of international responsibilities and the settlement of disputes, the Special Rapporteur had expressed doubts in paragraph 42 of the report regarding the willingness of States to accept that questions relating to the interpretation and application of secondary rules should be isolated from the interpretation and application of the primary rules concerned. If that was so, the Commission would be faced with the problem of harmonizing any dispute-settlement procedures in part 3 of its draft with those already existing under multilateral or bilateral treaties setting out primary rules. One solution to the problem would be to respect the dispute-settlement procedures established by existing bilateral or multilateral treaties and to provide that the arrangements in part 3 would apply only when procedures were not to be found in existing régimes.

10. Lastly, he shared the view expressed in paragraph 65 of the report that it was unlikely that States would accept a legal rule along the lines of article 19 of part 1 of the draft articles in the absence of an independent and authoritative establishment of the facts and the applicable law. That applied equally to cases involving other internationally wrongful acts. The history of the United Nations included many cases in which the Security Council had failed to establish even the facts of a dispute before considering the substantive aspects, for reasons that were all too well known.

11. Mr. RAZAFINDRALAMBO said that, in the opening paragraphs of chapter II of the fourth report (A/CN.4/366 and Add.1), the Special Rapporteur pointed out that parts 2 and 3 of the draft were to be concerned with secondary and tertiary rules. However, the first sentence of paragraph 39, which had already caused other members of the Commission to voice serious reservations, suggested that, for the time being, the Special Rapporteur intended to proceed no further with the study of secondary rules and to concentrate instead on the elaboration of provisions on the implementation of

international responsibility, in other words part 3 of the draft. Naturally, no one disputed the special importance of matters relating to the specific implementation of secondary and tertiary rules of State responsibility. Indeed, when a similar problem had arisen in respect of the draft Code of Offences against the Peace and Security of Mankind, virtually every member of the Commission had acknowledged the need to provide for effective implementation measures. Moreover, who would venture to reproach the Special Rapporteur for stressing, in paragraph 37, the importance of a settlement of the original dispute based on fact and law relating to the primary rules? Nor could it be denied that no State would agree to the existence of an internationally wrongful act being established unilaterally by a single State. However, he doubted whether a statement of those obvious truths necessarily led to the conclusion, as submitted by the Special Rapporteur in paragraph 45, that the Commission "should give early consideration to the question of the settlement of disputes". Even from a purely methodological standpoint, there was no obvious reason, at the present stage, for discontinuing the elaboration of part 2 of the draft. Such an attitude could be seen as incompetence on the part of the Commission and would be poorly received by the General Assembly.

12. Moreover, part 3 was not necessarily a sort of *sine qua non* for the viability of part 2. It was hardly necessary to point out that the implementation of State responsibility was already governed by a host of institutional and treaty procedures for the settlement of disputes. The Special Rapporteur himself had referred, in that connection, to the settlement machinery provided for in the Charter of the United Nations. Everyone was aware of the crucial role played by the ICJ in applying and interpreting the principles of international law, and of the remarkable contribution of international arbitration bodies, an apt illustration of which was provided by the Special Rapporteur in paragraph 103 in connection with countermeasures. Would the traditional machinery, which had thus demonstrated its ability to function properly, if not always effectively, be unsuitable in the present instance? The Commission could not avoid that kind of problem indefinitely and it must find a satisfactory solution when the time came.

13. In any event, the Commission should for the time being set about making the choices and providing the guidelines that the Special Rapporteur needed in order to continue his work. Yet it was difficult to see how the Commission could assist the Special Rapporteur, in view of the fact that his fourth report chiefly covered elements relating to part 2 of the draft. He did not recall having heard anything in the course of the discussion that would help to give some idea of the forms and procedures for dispute settlement to be dealt with in the future part 3.

14. In connection with international crimes, the Special Rapporteur implicitly acknowledged, in paragraphs 50-51 of the report, the need for a "categorization" both of internationally wrongful acts and of international crimes, adding at the same time that "one might at least establish a minimum common element . . . applicable to all crimes

and based on the . . . mutual solidarity of all States other than the author State". Hence, it was surprising to see that the Special Rapporteur reached the conclusion, in paragraph 55, that aggression should not be covered by an article in part 2. The act of aggression was particularly odious, but it was cited in article 19 of part 1 merely as one example of a grave violation of an obligation of essential importance for the maintenance of international peace and security. In 1950, the Commission itself had defined it as a "crime against peace", in the same category as war crimes and crimes against humanity.⁶ Why then should aggression be singled out from other international crimes? Moreover, in listing the common elements of international crimes in paragraphs 59–62 of the report, the Special Rapporteur did not suggest any exception to the rule, and draft article 6 as proposed in the third report (A/CN.4/354 and Add.1 and 2)⁷ implicitly covered acts of aggression. It was perfectly understandable that, at the previous meeting, Mr. Reuter had said that he had no objection to the question of aggression being dealt with in the draft. For his own part, he did not wish to dwell on the question of self-defence, which was simply one aspect of the question of aggression and came under the heading of countermeasures, since he agreed with the members who had already commented in that regard.

15. The report discussed at considerable length the subject of identification of the injured State and, in doing so, introduced the concept of the "objective régime". Indeed, it was difficult to pinpoint the concept of the injured State. The nature of the problem was set out in paragraph 75, but not until paragraph 123 were any answers provided. Nevertheless, he would willingly subscribe to the definition contained in that paragraph and would endorse the enumeration of the rights and obligations attributed to the injured State by the Special Rapporteur. However, in order to maintain a balance, why not at the same time give a definition of the author State, or even of the third State? The Commission knew only too well where the unproductive exercise of establishing definitions which were too precise, yet also necessarily incomplete, could lead. The simplest solution might be to follow the example of the Special Rapporteur, who in draft articles 1, 2 and 6 confined himself to setting out the rights and obligations of the parties to the primary legal relationship and to the new secondary legal relationship. Any clarifications needed could be provided in the form of commentaries.

16. As to paragraph 79, concerning the content of the new legal relationships arising out of international delicts, he experienced doubts regarding the category of internationally wrongful acts to which the three types of relationship contemplated (reparation, suspension or termination of existing relationships, and measures of

self-help) applied. The first sentence of paragraph 84 did little to dispel those doubts. In effect, the types of relationship envisaged appeared to be common to all internationally wrongful acts, whether they were regarded as crimes or delicts. As had already been pointed out, the unitary nature of the concept of responsibility should not be forgotten. It was that basic characteristic that accounted for the similarities underlying the three topics assigned to Mr. Riphagen, Mr. Thiam and Mr. Quentin-Baxter as Special Rapporteurs.

17. He shared Mr. Mahiou's view (1778th meeting) that the topics of State responsibility and the draft Code of Offences against the Peace and Security of Mankind could be regarded as constituting two sides of the same coin and as representing, *mutatis mutandis*, two forms of responsibility leading to civil action and criminal action, respectively. In the first case, the injured State was entitled to demand reparation, whereas the second case called for the imposition of punishment. On the basis of that fundamental distinction, it was possible to define sufficiently clearly the scope of the two forms of responsibility and to reduce the risks of duplication to a reasonable extent, although some degree of overlap seemed inevitable, and even desirable, if only in the matter of establishment of the facts.

18. Lastly, he hoped that the views expressed during the discussion would enable the Special Rapporteur to make headway and to submit, at the following session, a structured and complete set of articles constituting part 2 of the draft.

19. Mr. McCAFFREY congratulated the Special Rapporteur on his penetrating, thoughtful and very useful report (A/CN.4/366 and Add.1), which provided a sound basis for a quantum leap forward in the Commission's work on the consequences of State responsibility.

20. In paragraph 45 of the report, the Special Rapporteur submitted that the Commission should give early consideration to the question of dispute settlement, in other words to the possible content of part 3 of the draft. Indeed, there were a number of reasons for doubting the efficacy of parts 1 and 2 in the absence of some mechanism for determining whether an internationally wrongful act had in fact been committed. The whole enterprise presupposed a breach of a primary rule but, in most cases of any significance, no State would admit to having committed such a breach. A State accused of having committed an internationally wrongful act would not accept the demands and countermeasures of the allegedly injured State on the basis of the latter's unilateral determination that such an act had been committed. Similarly, the allegedly injured State would not agree that it could make demands and take countermeasures solely on condition that the alleged author State acknowledged that it had committed an internationally wrongful act.

21. As the Special Rapporteur had pointed out in paragraph 65, that situation was illustrated by the fact that it had proved necessary to include procedures for the settlement of disputes in the Vienna Convention on the Law of Treaties in connection with the invocation of *ius*

⁶ Principle VI of 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 (*Yearbook* . . . 1950, vol. II, pp. 376–377, document A/1316, paras. 110–124).

⁷ See 1771st meeting, para. 2.

cogens as a ground for invalidating a treaty. Consequently, the dispute-settlement procedure to be provided for in part 3 should not focus solely on the legal consequences of an alleged internationally wrongful act, thereby assuming that such an act had occurred. Rather, the procedure would have to begin by determining whether an internationally wrongful act had actually occurred. The elaboration of such provisions in part 3, while it might await the completion of part 2, seemed essential for the efficacy of the draft articles as a whole.

22. As to the ultimate form of the draft articles, the Commission normally envisaged its work as a process of codification and progressive development of law, rather than as an attempt to produce instruments that would be acceptable to States, regardless of whether or not they reflected current or developing international law. Observers also took such a view of its work. Accordingly, it might be futile to opt for nothing more than endorsement of rules on State responsibility as "guidance" for States and international bodies. However, States were more likely to accept parts 1 and 2 of the draft if they knew that the rules contained therein could not be used against them unless they submitted to a dispute-settlement procedure. Therefore, while the first option, namely that of a general convention, would be the normal outcome, it none the less might be worth considering whether the Commission should recommend that the final form of the draft articles should be as rules to be accepted in a convention, the option mentioned in paragraph 44 of the report.

23. It was pointed out in paragraph 46 that neither judicial decisions nor the teachings of publicists went into the details of the legal consequences of internationally wrongful acts. Consequently, it fell largely to the Commission to construct a system into which all the seemingly myriad combinations of wrongful acts and effects that comprised the topic of State responsibility could be fitted. The report represented an admirable effort to achieve that aim. The Special Rapporteur had begun by making a basic distinction between international crimes and international delicts, a distinction which reflected the one originally drawn in article 19 of part 1 of the draft.

24. However, the utility and accuracy of the term "international crime" in the present topic was questionable. While the term might be appropriate in the context of the draft Code of Offences against the Peace and Security of Mankind, which dealt with crimes against humanity and war crimes, it should be remembered that the purpose of the distinction between international crimes and international delicts was to help determine the consequences of an internationally wrongful act for the author State, the victim State and third States. An international crime, unlike an international delict, was of fundamental importance and therefore had legal consequences not only for the injured State but also for the international community as a whole. Hence, it was that *erga omnes* character which was the main distinguishing feature of international crimes.

25. In a celebrated dictum in its Judgment of 5 February

1970 in the *Barcelona Traction* case,⁸ the ICJ had spoken, not of international crimes, but of "obligations of a State towards the international community as a whole", as distinct from "those arising vis-à-vis another State . . .", and had observed that: "In view of the importance of the rights involved, all States can be held to have a legal interest in their protection . . ." Given the fact that part 2 also sought to define for whom the legal consequences of an internationally wrongful act ensued, it might be preferable to draw a distinction between obligations which were *erga omnes* in character and those which were not. That was essentially the approach proposed by the Special Rapporteur in distinguishing, in respect of international delicts, the "normal" bilateral situation from objective régimes. Moreover, since the Commission had rightly decided to avoid the formulation of primary rules, it should not become embroiled in the intractable political issues entailed in determining which norms of international law created obligations *erga omnes*. In his view, even draft article 19 of part 1 had fallen victim to that temptation because it cited examples of situations from which an international crime could result, although the commentary made it clear that the nature of such serious breaches was a matter to be determined by the international community as a whole.⁹ Consequently, the Commission should specify, in part 2, the consequences of various categories of internationally wrongful acts, but it should resist any temptation to specify the consequences of breaches of individual primary rules.

26. In paragraphs 59–62 of the report, the Special Rapporteur identified four elements common to all international crimes. The first and most important element, namely the *erga omnes* character of the breach, none the less involved a somewhat blurred concept that should be brought more sharply into focus if the concept itself was to be of any real value for the purposes of part 2. A number of questions remained unanswered. For example, who was to establish whether a given act amounted to an international crime, and how was that to be established? Secondly, did the *erga omnes* character of the breach mean that any State could take unilateral enforcement measures?

27. With regard to the first question, the commentary to article 19 of part 1 of the draft made it plain that the international community as a whole was to determine whether a particular act amounted to an international crime, and that international community consisted, not simply of a majority of States, but of all the essential components of that community. The commentary was also instructive with regard to the method to be adopted for making that determination, since it affirmed that the existence of an international crime should always be established by an international instance, either the Security Council or the ICJ. With regard to the second

⁸ *Barcelona Traction, Light and Power Company, Limited, Second Phase*, I.C.J. Reports 1970, p. 32, para. 33.

⁹ *Yearbook . . . 1976*, vol. II (Part Two), p. 119, para. (61) of the commentary to article 19.

question, the organized international community had exclusive jurisdiction over the situation, as stated in paragraph 60 of the report. That was the only practical way of preventing the chaos that would ensue if enforcement powers were left in the hands of individual States. That same idea was expressed in paragraphs 63–64 of the report, although it should be added that the international community as a whole should empower specific organs of the United Nations not only to decide on specific countermeasures in respect of international crimes but also to determine first the existence of the breach of an international obligation.

28. The third common element, namely that the duty not to intervene in the internal affairs of a State did not apply in cases of international crimes, was consistent with the second element, namely that intervention was allowed only after the existence of a grave breach of an international obligation had been established by an international instance, under United Nations auspices and using United Nations machinery. To allow any State to take reprisals or enforcement measures against a perpetrator would be to allow large States to intimidate, and intervene in the affairs of, small ones. That interpretation was substantially borne out in paragraph 61 of the report.

29. A disturbing possibility was that it would be for each individual State to determine whether or not the measures it proposed to take were prohibited by either general rules of customary law or treaties governing relationships between the author State and the other State, or group of States. In any event, to leave such a loophole would be to extend an invitation to States to resort to unilateral enforcement measures on the grounds that such countermeasures were not prohibited by rules of international law other than the inapplicable duty not to intervene in the internal affairs of States. Consequently, he would propose that the principle should be confined to intervention through the United Nations, in accordance with Chapter VII of the Charter.

30. The fourth common element of international crimes, the duty of solidarity, which seemed to follow on from the first two common elements, consisted of two aspects: the negative aspect of not lending support to the author State, and the positive aspect of support for legitimate countermeasures by other States. The Special Rapporteur accorded appropriate recognition to the limitations of the positive aspect of that duty by concluding, in paragraph 62 of the report, that the duty to support countermeasures was valid only within the framework of some form of international decision-making machinery.

31. As to acts of aggression, which formed a special category, he agreed with the Special Rapporteur that the legal consequences of aggression lay outside the Commission's competence because they were dealt with in the United Nations Charter. Nevertheless, the case made out by Mr. Jagota (1777th meeting) for spelling out in very simple fashion in part 2 the basic consequences of aggression for the author State, the injured State and third States was worthy of consideration. In the first

place, as Mr. Jagota had observed, certain consequences existed quite separately from the Charter; in the second place, as Mr. Reuter had said (1778th meeting), the Security Council was rarely able to agree whether an act of aggression had been committed and, if it did agree, whether any action should be taken. In the meantime, of course, the hostilities continued. Hence, it might be useful to consider drawing up a list of rights and obligations that would in no way encroach on the system and the machinery provided for in the Charter and would be wholly without prejudice to the competence of the Security Council to determine the existence of an act of aggression under Article 39.

32. The author State's duties might include the following: to stop the aggression, to withdraw its forces, to restore the *status quo ante*, to make reparation and to guarantee non-repetition. The rights of the injured State could include the right to individual and collective self-defence, as allowed under Article 51 of the Charter, and the right to take other legitimate countermeasures, short of the use of force. In that connection, he agreed with Mr. Jagota that the Commission should not elaborate upon or attempt to define those rights, particularly in view of the commentary to article 34 of part 1 of the draft,¹⁰ which applied with equal force to part 2. Lastly, the duties of third States would be not to recognize the results of the aggression as legal, not to assist the aggressor State and to support any collective measures taken under the Charter. Many of those rights and duties were also included in the draft convention on State responsibility prepared by Graefrath and Steiniger¹¹ and were listed in paragraph 53 of the report; the last two measures mentioned in that paragraph, however, should be excluded from the draft articles, as they fell within the scope of another topic under consideration by the Commission.

33. The question of "other international crimes" raised in paragraph 57 of the report, namely whether and to what extent the Commission should try to indicate the legal consequences of such crimes, was relevant because mere qualification of an act as an international crime did not mean that the legal consequences were necessarily the same as for all other international crimes. Graefrath and Steiniger had been correct in largely assimilating other international crimes to aggression, since they declared that Chapter VII of the Charter was applicable to such situations; but the Commission might also consider drawing up a list of legal consequences similar to that proposed by Mr. Jagota in connection with acts of aggression (1777th meeting, para. 8), although many of the "other international crimes" might not involve a "victim" State. As a minimum, it should be clear that the injured State could not do more than take protective measures and that, in the absence of United Nations sanctions, third States should also refrain from taking affirmative steps in respect of the author State. That also

¹⁰ *Yearbook* . . . 1980, vol. II (Part Two), pp. 52 *et seq.*

¹¹ See 1775th meeting, footnote 6.

applied to what the Special Rapporteur described in paragraph 70 of the report as "borderline" cases of aggression. Lastly, it should be specified that the third common element, mentioned in paragraph 61, would not be applicable in respect of any international crime without the sanction of a United Nations organ.

34. In the matter of international delicts, the question of which State or States could be deemed to have been injured was influenced to a considerable extent by the content of the new legal relationships. The distinction drawn by the Special Rapporteur between "normal" situations, covered by what was referred to in paragraph 114 as the "main rule", and situations involving objective régimes, covered by the exceptions to the main rule discussed in paragraph 115, was in his opinion the most outstanding feature of the fourth report and would be very helpful in preparing part 2 of the draft. Regardless of whether the term "objective régime" eventually found its way into the draft articles, the concept was a useful one and could well be employed in the commentary in order to explain the general principles outlined in the Special Rapporteur's summing-up. Such an explanation could usefully be added to the points made in paragraphs 99-100, which the Special Rapporteur should be encouraged to develop further. The system outlined in paragraphs 112-115 for determining the injured State and the circumstances in which other States could be regarded as interested and for establishing that collective measures were justified was equally useful and should be pursued and refined further.

35. Generally speaking, he agreed with the analysis of the content of the new legal relationships and the various limitations on the use of reprisals and concurred with the view that the subject of protection of human rights in armed conflicts should not be dealt with separately in part 2. On the other hand, he was not entirely convinced by the statement in paragraph 89 that reprisals in breach of other objective régimes relating to human rights, although obviously inadmissible, were already covered by draft article 4.¹² Unfortunately, it was by no means clear that all human rights violations were encompassed by article 4, and a separate provision precluding reprisals which violated human rights might serve a useful purpose.

36. In the case of international delicts, two questions arose in connection with a possible "phasing" in the content of the new legal relationships. Could the author State avoid reprisals by offering to submit to a dispute-settlement procedure? Could the injured State engage in reprisals only if it simultaneously offered to submit the dispute to a settlement procedure? He took Mr. Barboza's point (1778th meeting) that the phasing obligation was not always appropriate, since a State might be forced to take conservatory measures, and that the principle needed to be further refined, but tended to agree with the Special Rapporteur that self-help should be disallowed, or at least suspended, if the alleged author State agreed to submit the matter to an impartial body.

Such a body could order interim measures to protect the injured State, and the latter could always suspend the operation of a treaty or, where applicable, invoke the doctrine of reciprocity.

37. Lastly, it was to be hoped that the summing-up section of the report (paras. 122-130) would be presented in the form of draft articles. He agreed with most members that the Commission would be well advised to begin with the simplest case, that of the "normal" situation involving a bilateral international delict, and work progressively through international delicts involving objective régimes until it finally reached the question of international crimes, which, as he had suggested at the outset, could most appropriately be dealt with in terms of international obligations *erga omnes*.

38. Mr. KOROMA said that, in the light of Mr. Ogiso's remarks, he wished to point out that the question of *locus standi* under multilateral régimes was an important one and required further elucidation if certain wrongful acts were not to go unpunished. Whether the interests of a State had been injured by an act of another State and whether the act of the author State defeated the primary purpose and object of the multilateral régime were matters of fact which would have to be determined in each particular instance. In the case of a trusteeship agreement, for example, not only the trustees' interests were involved; the international community as a whole had an interest in ensuring the maintenance of the régime. To his mind, the link between the multilateral régime and the wrongful act was not adequately dealt with in the report and should be discussed in greater depth.

39. As to the distinction between armed reprisals and self-defence drawn by Mr. Ogiso, the Commission's report should make it completely clear that armed reprisals were categorically prohibited under modern international law and could not be resorted to even in the name of self-defence.

40. Lastly, the Definition of Aggression adopted by the General Assembly in resolution 3314 (XXIX) enumerated the acts which were qualified as acts of aggression, but left the ultimate decision to the Security Council. If the Security Council was unable to decide, the Definition was hardly to blame. For his part, he considered the Definition to be a good one and deprecated any tendency to belittle or deride it.

41. Mr. CALERO RODRIGUES said that he wished to correct an erroneous impression he might have conveyed earlier (1772nd meeting). He was by no means opposed to the Commission dealing with the question of international crimes and had suggested that the consequences of international delicts should be dealt with first merely to simplify and facilitate the work that lay ahead. Indeed, unlike the Special Rapporteur, he thought that acts of aggression should at least be mentioned in the draft articles.

The meeting rose at 12.45 p.m.

¹² See 1771st meeting, para. 2.

1780th MEETING

Monday, 13 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Ushakov, Mr. Yankov.

State responsibility (continued) (A/CN.4/354 and Add.1 and 2,¹ A/CN.4/362,² A/CN.4/366 and Add.1,³ ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

Content, forms and degrees of international responsibility (part 2 of the draft articles)⁴ (continued)

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. MALEK said that he wished first to make some general comments on the Commission's method of examining the topics entrusted to it. The Commission had been studying the topic of State responsibility since 1969, and he thought that a "procedural" reform might be necessary to enable it to do more work, faster and even better. During the eight weeks allotted to it at each session to begin or continue consideration of half a dozen topics, the Commission made every effort to be able eventually to submit to the General Assembly, after a certain number of years, a set of draft articles on each topic which reflected the often widely different views of States. Year after year, despite the difficulties of that task, the Commission went to work firmly intending to make the desired progress in the study of each of the topics before it. Thus it had to change six or seven times from one topic to another in approximately eight weeks, taking up a new report each time.

2. The reports submitted to the Commission were always of the highest scientific standard and some were very voluminous. Each member of the Commission had to study them carefully in order to make his comments. The reports submitted during any particular session differed not only in their purpose, but also in the way they were conceived, written and presented, in the terms used and in the scientific and philosophical approach of their

authors. They also differed as to the language in which they were originally drafted. He thought it might be high time to think seriously about setting clear, specific and even rigorous conditions for the date of distribution and the date of consideration of each report. In spite of the difficulties inherent in the situation, it could certainly be affirmed that the Special Rapporteur system provided for in the Commission's Statute and applied without interruption from the beginning had proved most effective and should not be changed or replaced. The success of the Commission's work was undeniably based on the numerous reports of the Special Rapporteurs.

3. In his opinion, the report under consideration (A/CN.4/366 and Add.1) was certainly of very high quality, even though he had had difficulty in understanding some of the problems it raised. The reason why he was one of the last to speak on that report was that he had thought it necessary to proceed with caution and had preferred first to know the opinions of the other members of the Commission. Even so, the questions raised in the report were too complex for him to be able to take a firm position on them yet. They required personal research by members of the Commission, for which there had not been enough time since the report had been circulated. Most of those questions had been discussed by other members of the Commission, so he would comment only on the problems he thought it essential to solve before the draft articles could be formulated. He would state his views on other important problems when further draft articles had been submitted to the Commission.

4. At the previous session, he had said he did not understand why draft article 6, as proposed in the third report (A/CN.4/354 and Add.1 and 2),⁵ was limited to the consequences it referred to, although it dealt with the legal consequences of a wrongful act characterized as an international crime, and had asked whether the Special Rapporteur planned to take account of other consequences in another provision of the draft.⁶ Those questions had been answered in the report under consideration, in which the Special Rapporteur dealt at length with international crimes, including aggression, and stressed, in paragraph 51, that the *erga omnes* character of international crimes was in no way a decisive factor in the distinction between the legal consequences of that category of crimes and the legal consequences of an international delict. Noting that it was very unlikely that all international crimes would entail the same legal consequences, the Special Rapporteur suggested the establishment of a minimum common element applicable to all crimes and based on the solidarity of all States other than the author State; that was the subject-matter of draft article 6. The Special Rapporteur had pointed out that the legal consequences of aggression were stated in the United Nations Charter, which although it dealt with them in a way that was open to different interpretations, nevertheless clearly established the inherent right of self-defence as one of those consequences.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ 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.*

⁵ See 1771st meeting, para. 2.

⁶ *Yearbook* . . . 1982, vol. I, p. 207, 1732nd meeting, para. 9.

5. The Special Rapporteur considered that the existing procedure for the implementation of State responsibility resulting from aggression belonged in part 3 of the draft; but he himself had doubts about the extent to which part 3 could cover that procedure, because the Special Rapporteur appeared to think that part 2 should not refer to the legal consequences of aggression, which were dealt with in the Charter, or for that matter to most other legal consequences not dealt with in the Charter. In paragraph 53 of the report, the Special Rapporteur had drawn on a document of great theoretical importance to identify a number of questions, most of which would not, in his opinion, come within the scope of the draft articles, namely the termination of bilateral treaties concluded between the aggressor State and the victim State, the suspension of other bilateral and multilateral treaties, the sequestration of property of the aggressor State, internment of its nationals, guarantees against repetition of aggression, reparation of all damage, non-recognition of any result of aggression as legal, permanent and universal criminal jurisdiction over persons responsible for the planning or commission of aggression and the duty to extradite such persons on request to the victim State. In the Special Rapporteur's opinion, the topic related not so much to the internationally wrongful act of aggression as to the resulting state of war. Some of the questions mentioned by the Special Rapporteur might be dealt with in the draft Code of Offences against the Peace and Security of Mankind currently under consideration;⁷ part 2 of the draft would cover only the questions of guarantees against repetition of aggression, reparation of damage and non-recognition of the result of an internationally wrongful act as legal, which in his view were not confined to aggression or to international crimes in general.

6. Like many other members of the Commission, he had great difficulty in agreeing with the Special Rapporteur's conclusion, in paragraph 55, that there was no place in part 2 of the draft for an article or articles on the legal consequences of acts of aggression. During the discussion it had been said that part 2 of the draft could not deal with the legal consequences of aggression unless the Commission received express instructions from the General Assembly. He did not know whether the Commission had been given instructions to deal with aggression in part 1 or not to deal with it in part 2. In any event, he considered that article 19 of part 1 made no substantive distinction between the international crimes, including aggression, which it was intended to cover. Thus, although the legal consequences of aggression, including the right of self-defence, were dealt with in the United Nations Charter, it was difficult to see why they should not be covered in part 2. Some people seemed to think that the Charter stood in the way of all progress. Although it referred to the right of self-defence, it threw no light on the conditions for the exercise of that right, which had consequently become a means of protection available to the aggressor. Many General Assembly resolutions, adopted by consensus,

dealt with the fundamental principles of international law embodied in the Charter, with a view to defining their meaning and determining their content. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁸ was a significant example.

7. For more than half a century, there had been stubborn opposition to any definition of the notion of aggression, which, like that of self-defence, was dealt with in the Charter. Aggression had been regarded as a concept in itself, as a philosophical idea not susceptible of definition. It had been argued that a definition of aggression would be useless and that it would entail a dangerous interpretation of the Charter. Yet aggression had been given a definition⁹ which, whatever its shortcomings, might one day prove very useful. One of its major defects was precisely the fact that it took account of the right of self-defence only by reference to the relevant provisions of the Charter. In any event, that definition had never been an obstacle to the application of the Charter, in particular the provisions relating to the prohibition of the use of force and to the machinery for the implementation of the system of collective security established by the Charter.

8. Although he proposed to exclude the legal consequences of aggression from part 2 of the draft, the Special Rapporteur was in favour of including the legal consequences of international crimes other than aggression; that category of crimes was covered by draft article 6, as submitted in the third report. In paragraph 57 of the fourth report, the Special Rapporteur had inquired to what extent the Commission should try to determine the legal consequences of those other international crimes and to define the content of the new rights and obligations of States other than the author State. His categorization of international crimes was not based on contemporary international criminal law, which derived as much from the international agreements concluded since the Second World War as from subsequent progress made at the international level in the punishment of serious crimes under international law, namely crimes against peace, war crimes and crimes against humanity; it was based, rather, on article 19 of part 1, which besides covering aggression, in connection with the maintenance of international peace and security, related to a number of fields in which a serious breach of an international obligation of essential importance for any one of those fields was characterized as an international crime. Those fields included the safeguarding of the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. He himself saw no major objection to determining the legal consequences of international crimes which fell within those fields, so long as the

⁷ See 1755th meeting, para. 10.

⁸ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

enumeration was not exhaustive. The common elements of such crimes, which the Special Rapporteur identified in paragraphs 59–62, might serve as a basis for appropriate provisions in part 2.

9. He fully shared the view expressed (1773rd meeting) by Mr. Flitan and Mr. Reuter and supported with certain reservations by Mr. Barboza (1777th meeting) that an attempt to commit an international crime should have the same legal consequences as the crime itself. It should be remembered that the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity¹⁰ assimilated to the crimes to which it applied complicity or participation in, and direct incitement to, their commission. That Convention also applied to the representatives of any State authority who tolerated the commission of any of those crimes. The same was true of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹¹

10. If article 19 of part 1 was taken as a basis for identification of the international crimes whose legal consequences were to be determined in part 2, the scope of part 2 would be considerably reduced, even if it included the legal consequences of aggression. For example, in regard to the safeguarding of the human being, which was mentioned in article 19, part 2 would deal only with the legal consequences of *apartheid*, slavery and genocide. He hoped that *apartheid* would disappear completely in the near future, but did not know how many countries still practised or tolerated slavery; it was gratifying to note that, since the end of the Second World War, the crime of genocide had not been committed. While the many crimes against peace could be counted, crimes against humanity could not: untold numbers of them were committed every day throughout the world. But all the crimes in that category would not be covered by part 2 if it was governed by article 19, which listed only a few of them. The concept of a crime against humanity was well established in contemporary international law; it included *apartheid* and genocide, which were particularly serious cases, as stated in quite a number of relatively recent international instruments. For example, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provided that no statutory limitation applied to crimes against humanity as defined in the Charter of the Nürnberg International Military Tribunal and confirmed by General Assembly resolutions 3(I) and 95(I), to eviction by armed attack or occupation, to inhuman acts resulting from the policy of *apartheid*, or to the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. That definition was, of course, defective because it had been politically influenced, but it clearly showed that *apartheid* and genocide were regarded as falling within the concept of a crime against humanity.

11. He did not see how the draft articles on State responsibility could omit crimes against humanity as a

separate concept when, together with other international crimes of equal gravity, they formed the basis for the draft Code of Offences against the Peace and Security of Mankind which the Commission was considering. By what reasoning could an odious crime be defined differently in legal texts prepared by the same deliberative body? It had been stated, rather enigmatically, that the two drafts did not have the same purpose and that the draft now under consideration related to the responsibility of States, whereas the draft code of offences would deal only with the responsibility of individuals. But he doubted whether the draft code could remain limited to the responsibility of individuals; and he did not see why the definition of a crime should differ according to the subject of law to which it applied. How would the crime of genocide be defined otherwise than in the Convention on the Prevention and Punishment of the Crime of Genocide if that Convention was amended so as to engage only the responsibility of States? In that connection, it should be borne in mind that serious international crimes entailed both national and international responsibility, for States and for individuals. They were mainly "State crimes", but State crimes committed only by individuals. They could not be committed by individuals without orders from or the tolerance of a State, or by a State without the collaboration or assistance of an individual.

12. If it was true, as Mr. Ushakov had said (1776th meeting), that draft article 19 was based on existing international law and in no way involved progressive development, why did that provision deal with the crimes it was intended to cover in such a way that it might be questioned whether there really was a category of war crimes and crimes against humanity, which was the main subject-matter of contemporary punitive international law?

13. Referring to Mr. Reuter's comments (1771st meeting), he observed that article 19 had been formally accepted but not finally adopted by the Commission. He doubted whether it could be said that nothing was yet known about international crimes except that they were not subject to statutory limitations. That exception had been made only because serious international crimes were sufficiently well known, both in technical and in historical terms; it followed from their very nature and had been made law as a result of certain *de facto* situations. The revolt of world public opinion against one country's idea that the statutory limitations provided for in its internal law applied to international crimes committed during the Second World War had been the decisive factor in confirming the principle that such crimes should never go unpunished. The world had suffered enough from international crimes to know their characteristics and how to prevent and punish them. Although the formulation of laws by the international community still involved many more difficulties than legislation at the national level, it did not follow that what was possible at one level was impossible at the other. The international community could not wait until there was a consensus to take action against the substantial increase

¹⁰ United Nations, *Treaty Series*, vol. 754, p. 73.

¹¹ *Ibid.*, vol. 78, p. 277.

in international crime that had occurred since the Second World War. It had been suggested that the Commission should begin by solving the easiest problems and then deal with the others only by stages. He would prefer the two categories of problems to be dealt with simultaneously for fear that, when the time came to solve the major problems, it might be too late to solve anything at all.

14. He agreed with Mr. Reuter (1778th meeting) that the draft articles could deal with acts of aggression provided that identification of such acts was not left to the discretion of States but entrusted to an independent authority. That position was based on distrust of States acting individually and on doubts about the effectiveness of the system of collective security established by the Charter. Perhaps the Special Rapporteur could indicate whether he intended to include guarantees of that kind in part 3 of the draft.

15. Part 2 of the draft should have as its basis the internationally wrongful act as contemplated in part 1; it should take account of the most serious international crimes, including aggression. Article 19 should be amended and adapted to contemporary international law, which classed crimes against humanity as serious international crimes. The right of self-defence, which was the basic consequence of aggression, should be the subject of a separate provision in part 2 defining its scope and limitations, if only for guidance. The use of force as a preventive measure in the exercise of the right of self-defence should be regarded as an abuse of that right having the same legal consequences as an act of aggression. Lastly, the principle of proportionality should be formulated as clearly and rigorously as possible. The Special Rapporteur was probably in the best position to propose solutions to all those problems in the form of draft articles.

16. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur's fourth report (A/CN.4/366 and Add.1) testified, like the previous reports, to its author's wide knowledge of the subject. But the abstract nature of much of the document made it difficult to understand and necessitated several readings. Moreover, the Spanish version at least contained many neologisms.

17. The first question that arose was the purpose of the report. As several members had remarked, to go back on the decisions taken when preparing the first six draft articles would be a retrograde step. In its report to the General Assembly on its thirty-second session, the Commission had recognized that in drafting the articles of part 2 it should proceed on the basis of the articles of part 1 adopted in first reading.¹² Of course, as several members of the Commission had emphasized, those articles had only been adopted provisionally and the Commission was free not only to revise and amend them, but even to appoint a new special rapporteur who would go over the work again from the beginning. It was nevertheless perfectly clear that the Commission had

decided, with the General Assembly's approval, that part 2 of the draft, and possibly part 3, should be based exclusively on part 1. The Special Rapporteur, motivated no doubt by excessive intellectual honesty, had endeavoured to show that part 2, dealing with the legal consequences of a wrongful act, was much more difficult than part 1. But it was quite natural to try to determine those consequences, since every breach of an obligation must have a corresponding sanction.

18. On the question of aggression, he wondered whether the Commission could go much further than the definition adopted by the General Assembly in 1974 without a review of the Charter. He did not agree with Mr. Reuter (1778th meeting) that the task of determining when an act of aggression had taken place would be better left to the Security Council than to States. No doubt that would suit the countries which had a right of veto in the Security Council, but it would not satisfy small countries. If the United Nations was no longer to be founded on the legal inequality of States, the Charter must be revised. Great discretion was exercised in speaking of aggression, to which the terms reprisals or countermeasures were often applied. It was stated that reprisals or countermeasures should be proportional to the wrongful act which warranted them. The difficulties began when it was attempted to define the notion of a countermeasure. It was supposed to be a measure taken to counteract action which had injured the interests of whoever took the countermeasure in order to defend themselves or to obtain reparation or satisfaction. The difficulties increased when it had to be determined what "proportionality" was and whether it was the injured State which should assess it. Quite recently a State had considered itself entitled to expel seven officials of another State following the expulsion of only one of its own officials by that State.

19. He therefore stressed the necessity of adapting the Charter to the needs of the international community, rather than to those of the "little entente" which divided the world in two; but that would be a difficult task and was outside the Commission's terms of reference.

20. Some speakers had said that the draft articles related only to individual responsibility resulting from an act of aggression. But it had been clearly established during work on part 1 of the draft that punishment of the leaders of a State which waged a war of aggression or organized genocide did not discharge that State from the responsibility it had incurred by the wrongful act. When determining the sanctions to be applied, the Commission should refer to article 19 of part 1, in which it had categorized international crimes and international delicts. The concept of an international crime presupposed the possibility of applying measures of prevention and reparation simultaneously. Given the structure of contemporary international law, the concept of responsibility was moving more towards reparation than towards sanctions. Not only did sanctions have to be defined, but they had to be proportional to the wrongful acts which gave rise to them.

¹² *Yearbook* . . . 1980, vol. II (Part Two), p. 62, para. 41.

21. Lastly, the Commission should not take up part 3 of the draft before it had dealt with part 2. As to the form of the draft, a recommendation could only be made when the Commission submitted a definitive set of draft articles to the General Assembly.

22. Mr. RIPHAGEN (Special Rapporteur) said that the debate had been extremely rich in both instructive and constructive matter. Not all the guidance he had received pointed in the same direction, but the contours of a possible consensus had become a little clearer. Some mild reproaches had been addressed to him for not incorporating any draft articles in his fourth report. There had been two reasons for that omission: first, the practical reason that the Drafting Committee had so far adopted only one of the draft articles submitted in the second and third reports and referred to it by the Commission, and was unlikely to do much more in that direction at the present session; second, the broader reason that the issue appeared to call for general consideration beyond, as Mr. Quentin-Baxter (1778th meeting) had put it, the bare bones of a legislative text. The fact that the fourth report had given rise to such a wealth of response seemed *a posteriori* to justify that approach, but in any event he undertook to include some draft articles in his next report to the Commission.

23. All speakers had agreed that the task before the Commission was a formidable one. The topic of State responsibility, which covered virtually the whole field of international law, presented an awe-inspiring challenge. Most speakers had appeared to believe that the Commission should squarely face that challenge and, for the time being at least, continue to work along the lines of preparing a draft convention. Some speakers, it was true, such as Mr. Reuter, Mr. Calero Rodrigues, Sir Ian Sinclair and Mr. McCaffrey, had been more hesitant than others, but the general opinion seemed to be that the attempt should be made, especially as the General Assembly had expressly asked for draft articles. Whether those articles were eventually embodied in a convention or not, their mere existence would inevitably influence future State practice and they would serve as a reference text for international, judicial and other organs.

24. On the question of the links between parts 1, 2 and 3, he had never suggested that part 3 should be drafted before part 2; indeed, his fourth report already contained some proposals for inclusion in part 2. Most speakers had made some mention of part 3, the attitude towards it adopted by Mr. Ushakov being perhaps the most negative. Mr. Calero Rodrigues, Mr. Al-Qaysi, Mr. Barboza and Mr. Jagota had reserved their positions, and the remaining speakers had, in various degrees, recognized the importance of part 3 for the preparation of some articles in part 2. Mr. Mahiou and Mr. Flitan had suggested that different machinery for implementation might be devised for different cases. He favoured that idea and shared the view expressed by a number of speakers that the Commission should go further than Graefrath and Steiniger had done in articles 11 and

12 of their draft convention on State responsibility.¹³

25. No general tendency had emerged on the question of the sequence to be followed in preparing part 2. Mr. Reuter, Mr. Calero Rodrigues, Mr. Lacleta Muñoz and several other members had expressed themselves in favour of starting with the “normal” situation referred to in paragraph 122 of the report and then proceeding to the more difficult questions of reprisals and international crimes. Mr. Ushakov and Mr. Flitan had spoken in favour of starting with international crimes, and several other speakers had been willing to accept any sequence provided that international crimes were not omitted altogether. In his view, the lack of a consensus on that point was not a major obstacle to progress, since it was clear that all aspects would have to be dealt with, whatever the sequence chosen.

26. In the early part of the discussion there had appeared to be a sharp divergence of views on whether an article or articles on the legal consequences of aggression should or should not be included in part 2. In that connection, he rejected the charge of inconsistency between paragraphs 55 and 67 of the report. Paragraph 55 referred *expressis verbis* only to aggression, while paragraph 67 was concerned with other crimes. Half way through the debate, Mr. Jagota had shown a possible way of reconciling the two views by suggesting (1777th meeting, para. 8) that part 2 might deal with the legal consequences of aggression in a general way, without going into detail. Several speakers had warned against any attempt to interfere with the régime of the United Nations Charter, while others had been less hesitant in that respect and had favoured elaborating the scope of self-defence and the circumstances in which it could be invoked. He personally continued to believe that aggression and self-defence were at the extreme frontiers of the topic of State responsibility, if not outside it altogether. Aggression was much more than a mere breach of an international obligation, and self-defence was much more than a mere legal consequence of such a breach. That view did not preclude a reference to those notions being made in part 2, but seemed to militate in favour of treating them differently from other international crimes and their legal consequences.

27. The question of “objective régimes” had been raised by many speakers. That term should probably not appear in the draft articles and, indeed, did not appear in paragraphs 124–125 of the report, where an attempt was made to define such régimes. The history of the term was as Mr. Reuter had described it (1771st meeting), but the context in the present case was altogether different, the point at issue being the admissibility or otherwise of reprisals taken by a party to an objective régime. The fact that the Commission had rejected the concept in the very different context of the law of treaties did not, therefore, appear to be decisive. Some speakers had seemed inclined to accept the concept in the context of identification of the injured State and the admissibility of

¹³ See 1775th meeting, footnote 6.

particular reprisals; others had expressed some doubts about it; and yet others had rejected the concept altogether. Some speakers had said that the special position of such régimes could be covered by article 3 as proposed in the third report (A/CN.4/354 and Add.1 and 2).¹⁴ In his view, the translation of paragraphs 124–125 of the fourth report into draft articles might help to reduce those differences of opinion.

28. With regard to the question of reprisals, from his preliminary report¹⁵ onwards he had distinguished between reprisals, which were internationally wrongful acts, and retortion measures, which were not prohibited by international law. Reprisals were thus synonymous with countermeasures as that term was used in article 30 of part 1; they were measures aimed at forcing another State to fulfil its obligations. Several speakers had quite rightly advocated caution regarding the admissibility of reprisals, and Mr. Reuter doubted whether part 2 should say anything at all about armed reprisals. The problem as a whole was connected with that of part 3 and with the question of objective régimes, and he fully intended to look at it again, taking particular account of the remarks made by Mr. Barboza (1778th meeting) and Mr. McCaffrey (1779th meeting) to the effect that the fourth report omitted to deal with measures of a “conservatory” nature.

29. Referring to individual comments by members, he agreed that the first sentence of paragraph 127 of his fourth report, reading “It would seem advisable also to reserve the special régimes of (a) diplomatic law, and (b) belligerent reprisals”, was not entirely clear. That sentence was not meant to exclude the legal consequences of the violation of every rule of diplomatic law from the scope of part 2 since, as had rightly been said, it was essential to cover reparation and other legal consequences in the draft. Rather, his intention had been to convey the idea of inadmissibility of certain reprisals, in particular those involving violation of diplomatic immunity.

30. Several members had referred to the relationship between the topic of State responsibility and the draft Code of Offences against the Peace and Security of Mankind—a relationship which depended on whether the code would deal with the criminal responsibility of States as such. In his view, irrespective of how such responsibility was qualified, it was essentially a matter of the legal consequences of an internationally wrongful act by a State, and that in turn was essentially a matter between States. He agreed, however, that provided there was co-ordination it was more or less irrelevant under which of the two topics the matter was treated.

31. Proportionality had again been the subject of much comment and he continued to think that something should be said about it in part 2 of the draft. Even the Definition of Aggression¹⁶ left it open to the Security

Council not to treat as aggression acts covered by the Definition if, for instance, they were not of sufficient gravity, which was a matter of proportionality. In any event, the relevant article had been referred to the Drafting Committee and could be discussed there.

32. He agreed with Mr. Ni (1777th meeting) on the need to pay more attention to reparation. As suggested in paragraph 111 of the fourth report, members might wish to refer in that connection to articles 4 and 5 as proposed in the second report,¹⁷ both of which had also been referred to the Drafting Committee.

33. Mr. Balanda had asked (1776th meeting) whether the rule of proportionality should be valid in the case postulated in the second sentence of paragraph 63, which read: “It is of course also conceivable that such countermeasures might then go beyond those mentioned in paragraph 61 above and encompass measures otherwise specifically prohibited by other rules of international law . . .” It had not been his intention to deal with proportionality in that paragraph, the sole purpose of which was to point out that, in the event of an international crime, the international community could conceivably also indicate what measures should be taken. It was also conceivable, in principle, that some element of proportionality would still be present.

34. Mr. Jagota had asked (1777th meeting) whether, in the event of the breakdown of a régime, as envisaged in paragraph 130, the rule of quantitative proportionality would be applicable. The answer to that question was in the affirmative. It should also be noted that the paragraph contained an error: the reference to “the regional objective régime” should be amended to read “the objective régime”.

35. Although Sir Ian Sinclair (*ibid.*) had expressed doubts about the duty to support countermeasures, he would presumably not disagree with the last sentence of paragraph 62, which read: “In short, the duty to support countermeasures is valid only within the framework of some form of international decision-making machinery.” Sir Ian had also disagreed with the first sentence of paragraph 125, reading: “In the case mentioned in paragraph 124, all other States parties to the multilateral treaty are considered to be injured States in respect of the breach of those obligations by one of them.” It should be borne in mind, however, that that paragraph referred solely to the three cases of objective régimes referred to in paragraph 124.

36. He fully agreed with Mr. Mahiou (1778th meeting) that there was no analogy between the topic of State responsibility and the internal law of torts; that, indeed, was the point which paragraph 113 of the report sought to make. Referring to paragraph 39 of the report, and in particular to the passage reading:

. . . No State can accept demands and countermeasures of another State based on the establishment by the other State alone of the existence of an internationally wrongful act of the first-mentioned State. No State can accept either that its demands and countermeasures in

¹⁴ See 1771st meeting, para. 2.

¹⁵ *Yearbook* . . . 1980, vol. II (Part One), pp. 123 *et seq.*, document A/CN.4/330, paras. 79–96.

¹⁶ See footnote 9 above.

¹⁷ *Yearbook* . . . 1981, vol. II (Part One), p. 101, document A/CN.4/344, para. 164. See also 1771st meeting, para. 2.

relation to another State should be based only on the agreement of the other State as to the existence of an internationally wrongful act of that other State.

Mr. Mahiou had asked whether the agreement of the other State would be invalid. That, however, was not really the point, which was that it was difficult to accept a unilateral determination of a breach by another State, or to accept that nothing could happen unless States agreed that there had been an internationally wrongful act. That was why the whole question of settlement of disputes as relating to the breach of a primary obligation was of fundamental importance.

37. He agreed with Sir Ian Sinclair and Mr. McCaffrey that the terms “breach *erga omnes*” and “obligation *erga omnes*” were in fact misnomers and that further elaboration of the notion of *erga omnes* was required.

38. Mr. Malek had referred to certain shortcomings in article 19 of part 1, particularly in regard to crimes against humanity. That point could be reconsidered when the Commission came to the second reading of part 1 of the draft.

39. Mr. Díaz González had suggested that the Security Council was not well suited to the task of determining effects and legal consequences. There again, members might wish to discuss the point when the Commission came to consider the relevant draft articles.

40. The CHAIRMAN, noting that the Commission had concluded consideration of item 1 of its agenda, said that the Special Rapporteur and the Drafting Committee would take due note of the views expressed during the debate.

*It was so agreed.*¹⁸

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued)* (A/CN.4/359 and Add.1,¹⁹ A/CN.4/372 and Add.1 and 2,²⁰ A/CN.4/374 and Add.1-4,²¹ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR²² (continued)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

¹⁸ For consideration of the texts proposed by the Drafting Committee, see 1805th meeting, paras. 26–56, and 1806th meeting, paras. 29–61.

* Resumed from the 1774th meeting.

¹⁹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

²⁰ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

²¹ *Idem*.

²² For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320–330.

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) and

ARTICLE 19 (Temporary accommodation)²³ (continued)

41. The CHAIRMAN reminded members that the Special Rapporteur had introduced his fourth report (A/CN.4/374 and Add.1–4) at the 1774th meeting. He invited comments on articles 15 to 19 as contained in section II.A of the report.

42. Mr. FLITAN warmly congratulated the Special Rapporteur on his fourth report (A/CN.4/374 and Add.1–4) and on his excellent introductory statement. He himself did not think that the topic entrusted to Mr. Yankov was any less important than the topics considered earlier; his four reports made a substantial contribution to the codification and progressive development of international law, and the draft articles under consideration could do much to promote co-operation between States.

43. Since he had been unable to take part in the Commission's discussions on the topic at the previous session, he intended to make a number of comments. He did not share the view expressed by several representatives in the Sixth Committee of the General Assembly that the topic under consideration was “one of the areas of international law least in need of immediate attention or codification” (A/CN.4/L.352, para. 188). Most representatives had welcomed the Commission's work on the topic and wished to see it continue that work on a priority basis (*ibid.*, para. 189). It was the Commission's duty to comply with the Sixth Committee's wishes. There was no basis for the view that the draft articles were “excessively detailed in places” (*ibid.*, para. 190), because the topic warranted thorough study and the Special Rapporteur had to deal with all the questions that arose in connection with his work.

44. The Special Rapporteur and the members of the Commission should give careful consideration to the question of the scope of the draft articles, which was discussed in paragraphs 11 and 12 of the fourth report. He himself shared a view expressed in the Sixth Committee that interest in the draft articles would be heightened if they covered couriers and bags used for official purposes by international organizations. Although he was not proposing that the status of couriers and bags used by international organizations should be assimilated to that of couriers and bags used by States, he did not think that they should be excluded from the draft articles. That was not a question to be decided by the Drafting Committee, but by the Commission itself.

45. Although he fully agreed with the explanations concerning the term “diplomatic courier” which the Special Rapporteur had given at the beginning of paragraph 18 of his report, he thought it might be necessary to include a special provision specifying the meaning of that term. The Special Rapporteur's suggestion, in paragraph 19, that the commentary to the draft articles should indicate when the diplomatic

²³ For the texts, see 1774th meeting, para. 1.

courier's functions ended, was not satisfactory. That point should be made clear in the text of the draft articles. He observed that it was because of a drafting problem that one representative in the Sixth Committee had expressed doubts about the need for article 14, paragraph 2 (*ibid.*, para. 209). The wording of that provision should be amended to make it clear that the sending State had an option, not an obligation, to replace a diplomatic courier declared *persona non grata*.

46. Draft article 9 had already been referred to the Drafting Committee, but it should be more carefully considered by the Commission. His own country had no experience of the practice of two or more States appointing the same person as a diplomatic courier. In his opinion, that possibility was in conflict with the importance attaching to the inviolability of the diplomatic courier and, for the few States which engaged in the practice, it represented a kind of abandonment of their sovereignty. The article should therefore be deleted. At its previous session, moreover, the Commission had agreed not to include in its draft articles provisions which would not be generally applicable.

47. The other draft articles were useful, but draft article 18 could give the impression that it overlapped with draft article 4. The Commission should therefore examine that provision more closely to see whether it was really necessary. Another question that arose in regard to article 18 was that of who decided whether it was necessary to facilitate the communications of the diplomatic courier. The words "when necessary" called for some clarification. He proposed that they should be replaced by the words "if the diplomatic courier so requests". In the French text of draft article 19, the word *aident* should be replaced by the words *doivent aider*; a more satisfactory formulation than the words "in connection with the performance of his official functions" should also be found. Finally, he suggested that the last phrase of draft article 17, "or when returning to the sending State", should be deleted. He reserved the right to speak again when the addenda to the fourth report had been circulated in French.

The meeting rose at 6.05 p.m.

1781st MEETING

Tuesday, 14 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, 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. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1-4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*continued*)

1. Mr. CALERO RODRIGUES said that he agreed in principle with the course adopted by the Special Rapporteur and considered it very useful to set forth in draft article 15 the principle that the receiving State and the transit State should accord general facilities to the diplomatic courier. In regard to draft article 17, however, he wondered whether it would not be advisable to set some limitation on the freedom of movement. As it was now worded, the article accorded virtually the same freedom of movement as that accorded to diplomats under article 26 of the Vienna Convention on Diplomatic Relations; but diplomats generally had a wider mission and should thus have wider freedom of movement than the courier.

2. As to draft article 18, he saw no reason to confine the missions with which the courier could communicate to those situated in the territory of the receiving or transit States. There might be cases in which, for practical reasons, the courier should be in communication with one of his country's missions in a country other than the receiving or transit States. That possibility could be provided for by ending with the words "and its missions" and deleting the last part of the article. He did not agree with Mr. Flitan (1780th meeting) that article 18 duplicated the terms of article 4.

3. Lastly, he noted that whereas article 18 provided that facilities for communication should be accorded "when necessary", article 19 provided that facilities for accommodation should be granted by the receiving State and the transit State "when requested". As the intent was the same in both cases, the terms in question should be aligned.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁵ For the texts, see 1774th meeting, para. 1.

4. Sir Ian SINCLAIR said that the tapestry woven by the four conventions on diplomatic law was composed of the ambassador and his staff, the consul and his staff, the permanent representative to international organizations, and the special mission, and somewhere in the background stood the figure of the diplomatic courier. It was the task of the Commission to give that figure more definition, not to undo and remake the whole tapestry.

5. The general observations which he had made at the previous session remained valid and he still wondered whether the relatively few problems that arose in the law on the matter warranted the extensive treatment proposed. His remark was not a reflection on the Special Rapporteur but rather on the significance of the topic as compared with others on the agenda.

6. In general, there had been somewhat unequal treatment of the diplomatic courier *ad hoc*, a useful institution as attested to by State practice. Occasionally, the diplomatic courier *ad hoc* appeared to have been forgotten, for instance in paragraph 1 (3) of article 3, where presumably there should have been a reference to the diplomatic courier *ad hoc* after the words "diplomatic courier". Likewise, in draft article 10 a reference should have been made to the nationality of the diplomatic courier *ad hoc*. In United Kingdom practice, the same rule applied to the nationality of the diplomatic courier *ad hoc* as to that of the diplomatic courier *stricto sensu* and he would be quite content if the necessary references were simply inserted in paragraphs 1, 2 and 4 of draft article 10. Those points, however, could be dealt with in the Drafting Committee.

7. In the main, he had no difficulty with the content of draft article 15. The Special Rapporteur, in his oral introduction (1774th meeting), had none the less mentioned that he had sought inspiration in the Convention on Special Missions, for there was some analogy between diplomatic couriers and special missions in that the task of both was temporary. It might therefore be advisable to add, at the end of draft article 15, the phrase "having regard to the nature and task of the diplomatic courier". Article 22 of the Convention on Special Missions contained a similar qualification, no doubt for the reason the Special Rapporteur had indicated.

8. No real problem of principle arose in connection with draft article 17, but article 26 of the Vienna Convention on Diplomatic Relations, article 34 of the Vienna Convention on Consular Relations, article 27 of the Convention on Special Missions and article 56 of the Vienna Convention on the Representation of States used the phrase "zones entry into which is prohibited or regulated for reasons of national security" rather than "zones where access is prohibited or regulated for reasons of national security". The Commission should keep to that hallowed formula, if only to avoid possible misinterpretations. By the same token, the phrase "or when returning to the sending State", at the end of the article, could be deleted. It added nothing to the meaning and could lead to misguided interpretations of the other conventions which contained no corresponding language.

9. Such difficulty as he did experience lay more in draft

articles 18 and 19 and he very much doubted whether either was really necessary. So far as article 18 was concerned, the diplomatic courier by definition would carry the bag of the sending State to its diplomatic or other missions in the receiving State and would therefore naturally have access in the receiving State to the official communications of the sending State's missions. Hence it was open to question whether there was any need to make special provision for an obligation on the receiving State to assist the diplomatic courier to communicate with the authorities of the sending State or its missions. In the case of the transit State, paragraph 2 of draft article 4 already appeared to cover much the same ground. If some eventuality had not been covered—if, for instance, a diplomatic courier in transit needed to communicate by telephone or telex with the sending State's mission in the receiving State to warn it of an unexpected delay—the matter could surely be dealt with in the commentary to draft article 15, on general facilities.

10. Similar considerations applied in the case of draft article 19. The possible provision of temporary accommodation for the diplomatic courier surely fell within the scope of the obligation on both receiving and transit States to accord the diplomatic courier the facilities required for the performance of his official functions. Mention could certainly be made in the commentary to draft article 15 of the possible need to assist the diplomatic courier, upon request, in obtaining temporary accommodation. If that was done, it did seem that articles 18 and 19 could be dispensed with in the overall interest of the economy of the draft.

11. Mr. NI congratulated the Special Rapporteur on the progress he had achieved in the study and codification of the status of the diplomatic courier and the diplomatic bag and noted that the objectives set out in paragraph 4 of the fourth report (A/CN.4/374 and Add.1-4) provided an encouraging basis for further work. Given the complexity of modern international relations, the topic under discussion was assuming growing importance and the formulation of appropriate articles would serve to promote the development of co-operation.

12. The existing provisions on freedom of communication were fragmentary and disparate and the draft articles should therefore aim at systematization and amplification. As a guiding principle, account should be taken of the requirements of secrecy for the sending State and security for the receiving and transit States, safe and speedy delivery of the diplomatic bag, compliance with the laws of the receiving and transit States, and the need to prevent any abuse of rights on the part of either the sending State or the receiving State. The pragmatic approach adopted by the Special Rapporteur was particularly appropriate for a topic that was concerned with practical problems.

13. The position of the diplomatic courier had been assimilated to or compared with that of a diplomatic agent, a member of a special mission, or a member of the administrative, technical or service staff. Such assimilations or comparisons were not entirely without foundation but, in formulating the draft articles, attention

should be focused on the special role played by the diplomatic courier and not on his rank in the diplomatic service. The importance of freedom of communication between States and their missions abroad, which was a fundamental principle of international law and a prerequisite for the normal functioning of those missions, could not be over-emphasized. It was the diplomatic courier who performed that important task of communication. His position was unique and differed from that of any other member of the diplomatic staff. Consequently, it might be inappropriate to base the status of the diplomatic courier on any undue assimilation to any other diplomatic personnel. In view of the importance of his duties, the diplomatic courier should be afforded the requisite facilities to fulfil his task, and that idea was the guideline for draft articles 15 to 19.

14. In draft article 15, the word "required" should be replaced by the word "necessary", since the diplomatic courier could determine what was necessary in the light of the given circumstances, whereas the word "required" could give rise to different interpretations. Also the legal meaning of the word "facilities" called for clarification. In that connection, it had been said that "facilities" would necessarily cover certain rights and obligations of a general nature to facilitate the performance of the functions of the courier or the bag or more specific matters such as obtaining accommodation, the issue of visas, transportation and so on. The latter items were, of course, specifically dealt with in draft articles 16 to 19.

15. In regard to draft article 16, it would be preferable, in paragraph 2, to replace the words "if required" by "where required" and the phrase "as quickly as" by "as expeditiously as". As to draft article 19, it was very unlikely that the diplomatic courier would not obtain temporary accommodation in the receiving or transit State, and the Special Rapporteur had himself expressed the view (1774th meeting) that assistance to the diplomatic courier in that connection should not be regarded as a routine obligation on the receiving State or the transit State. In the event of some real urgency, the receiving or transit State would be under an obligation, under article 15, to accord the facilities required.

16. Mr. KOROMA said that, as a result of the Special Rapporteur's skilful handling of the topic, the doubts regarding its codification had been largely dispelled. The Special Rapporteur had rightly continued to adopt a pragmatic approach and reminded the Commission that the functions of the diplomatic courier were to facilitate communication between a Government and its missions abroad. Equally important, however, was the need for confidentiality in such communication. That point, the very essence of the matter, was dealt with in draft article 15, which provided that the receiving and transit States were to accord the diplomatic courier such facilities as were required, or necessary, for the proper performance of his official functions. An underlying element was the principle of reciprocity, one that was particularly important and relevant because it struck the necessary balance between the receiving and sending States.

17. In his opinion, the Special Rapporteur should extend the study to include diplomatic couriers and diplomatic bags of international organizations and entities other than States which used them for the same reason as States, namely to facilitate communication and ensure confidentiality. That reason became even more valid when the entity in question enjoyed widespread recognition and representation abroad.

18. He agreed that the status of the diplomatic courier should not be assimilated to that of the diplomatic agent, but two points were worth noting. First, in certain cases the courier himself was a diplomatic agent and therefore enjoyed all the privileges and immunities of such an agent; second, and particularly important, the contents of his bag were confidential and inviolable. Thus there was every reason for a diplomatic courier to enjoy the same privileges and immunities, not only when he was himself a diplomatic agent but also in order to ensure the confidentiality and inviolability of the bag. Clearly, strong arguments could be adduced for not unduly curtailing the immunities and privileges of the diplomatic courier, who in some cases needed them even more than did the diplomatic agent himself.

19. As to draft article 17, one of the prerequisites for the effective functioning of the diplomatic courier was speed: the diplomatic courier should be able to use the most expeditious and direct means to carry out his functions and the article should be worded in such a way that it did not impede communication or make the courier's task more difficult than necessary. He therefore agreed with Sir Ian Sinclair's suggestion that use should be made of the wording employed in the Conventions on Diplomatic Relations and on Consular Relations. The fact that those Conventions were now part of international law would prevent any abuse or discrimination that might defeat the purpose and functions of the diplomatic courier.

20. Since draft article 18 was intended to apply in the event of *force majeure* or if a courier was in difficulty, he agreed with Mr. Flitan (1780th meeting) that the receiving and transit States should facilitate communications with the sending State "if the courier so requests" rather than "when necessary". In the final analysis, the test of reasonableness could be expected to apply and, if a diplomatic courier was in serious difficulty and made an appropriate request to a transit State or to the receiving State, those States should be under an obligation to extend the necessary assistance to enable him to communicate with his mission or State. That again was in keeping with the underlying principle of reciprocity. Lastly, he endorsed draft article 19, relating to the obligation to provide temporary accommodation.

21. Mr. DÍAZ GONZÁLEZ congratulated the Special Rapporteur on his fourth report (A/CN.4/374 and Add.1-4) and said that he fully supported the four principles stated in paragraph 23 and on which draft articles 15 to 19 had been based, for they were fully in keeping with State practice. It was thus quite obvious that, in the course of performing his task, the diplomatic courier must enjoy the same facilities, privileges and immunities as diplomatic agents.

22. Although the substance of the draft articles was entirely satisfactory, the wording called for a few comments. In the case of article 16, paragraph 1, he was not sure that the word "official" was really necessary, since the functions of the diplomatic courier, who represented a State, were always official. In the Spanish text of paragraph 2 of that article, the words "con la mayor rapidez posible" should be replaced by the words "a la brevedad posible", which would be more correct. He agreed with Sir Ian Sinclair that the wording of draft article 17 should be based on that of the corresponding provisions of the four conventions on codification of diplomatic law. The last phrase of draft article 18, which read "situated in the territory of the receiving State or in that of the transit State, as applicable", was unnecessary and should be deleted because it had already been made clear that the missions in question were the same as the ones referred to in article 1.

23. As to draft article 19, rather than assist the diplomatic courier to obtain temporary accommodation, the receiving State and the transit State should accord him all the necessary facilities to obtain temporary accommodation for the duration of his stay in their territory in the performance of his functions. Draft article 19 should therefore be reworded as follows:

"The receiving State and the transit State shall accord the diplomatic courier all the necessary facilities to obtain temporary accommodation for the duration of his stay in their territory in the performance of his functions."

24. Mr. USHAKOV said he hoped that the Commission would be able to complete its first reading of the draft articles at the following session or even at the current one. Draft articles 15 to 19 proposed by the Special Rapporteur in his fourth report (A/CN.4/374 and Add.1-4) were based on the principle embodied in article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, namely that the diplomatic courier was protected by the receiving State in the performance of his functions. Although he supported those five draft articles in principle, he thought that, as in the case of article 27 and other articles of the Convention on Special Missions, the diplomatic courier should be accorded only such privileges, immunities and facilities as were necessary for the performance of his functions. The titles of draft articles 17 and 18, in particular, were too vague and suggested that the diplomatic courier enjoyed the same freedom of movement and the same freedom of communication as did the members of permanent diplomatic missions, whereas the diplomatic courier benefited from freedom of movement and communication only to the extent necessary for the performance of his functions. The text of draft article 16 was perfectly clear and acceptable but its title, like those of articles 17 and 18, was not specific enough. On the other hand, the title of draft article 19 was sufficiently explicit. Once the Commission had considered the five draft articles, it could in his opinion refer them to the Drafting Committee for improvements in their wording.

Tribute to the memory of Mr. Emmanuel Kodjoe Dadzie, former member of the Commission

25. The CHAIRMAN said that it was his sad duty to report with deep regret the death in March 1983 of Mr. Emmanuel Kodjoe Dadzie, who was a member of the Commission from 1977 to 1981.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Emmanuel Kodjoe Dadzie.

26. Mr. JAGOTA said that, for many years, it had been his privilege to know Mr. Dadzie, who had been noted for his erudition and many human qualities. Mr. Dadzie had made a significant contribution to the awareness of international law in Africa and to the strengthening of Asian-African solidarity. He had also made an important contribution in the field of refugee law. The Commission had lost a distinguished colleague and Africa a great scholar.

27. Sir Ian SINCLAIR said that he had learned with distress of the untimely death of Mr. Dadzie. All would mourn the loss of a notable figure in the international legal world.

28. Mr. NJENGA said that the death of Mr. Dadzie was an irreparable loss for Africa. He asked that sincere condolences be conveyed to Mr. Dadzie's family on behalf of the Commission.

29. Mr. CASTAÑEDA, speaking also on behalf of the Latin-American members of the Commission, paid tribute to the memory of Mr. Dadzie. At the meetings of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, for example, he had had an opportunity to appreciate the intelligence, broad culture and intellectual honesty of that distinguished jurist, whose human qualities and sense of humour had earned him everyone's warm respect and affection.

30. Mr. USHAKOV, speaking also on behalf of Mr. Flitan and Mr. Yankov, said that Mr. Dadzie had been a great diplomat and a distinguished African jurist who had represented his country in Moscow for many years and had made a valuable contribution to the success of the major codification conferences. He requested the Chairman to convey condolences to Mr. Dadzie's family.

31. Mr. SUCHARITKUL said that Mr. Dadzie's work would live on and people in Asia and Africa would continue to benefit from his contribution to refugee law.

32. The CHAIRMAN assured members that he would convey condolences to Mr. Dadzie's family on behalf of the Commission.

The meeting rose at 11.30 a.m.

1782nd MEETING

Wednesday, 15 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, 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, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1-4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*continued*)

1. Mr. BALANDA said that, in his excellent report (A/CN.4/374 and Add.1-4), notable for its clarity, the Special Rapporteur had been right to apply the same comprehensive and uniform approach to couriers and bags of every kind. The main argument in favour of that approach was that, despite the variety of entities that were likely to use a diplomatic courier or a diplomatic bag, the role of the courier and the bag—namely to act as a safe link—was the same in all cases and justified the establishment of a special régime of protection and the granting of guarantees. The empirical and pragmatic method of work had already proved to be valuable in the study of other topics and appeared to be suited to the formulation of the present draft articles, which to his mind were wholly necessary.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁵ For the texts, see 1774th meeting, para. 1.

2. The Special Rapporteur had hinted at the need to engage in the progressive development of international law by stating in paragraph 5 of the report:

. . . In many instances it would be necessary to go beyond the existing rules in an attempt to overcome certain loopholes and suggest new provisions which would more adequately correspond to the dynamics of contemporary official communications.

One area in which that need was apparent was the scope of the draft, which should cover the couriers and bags of international organizations and other entities, such as national liberation movements, which had legal personality in modern international law. There was no sound reason not to take account of the existence of increasingly close links between States and international organizations and between international organizations and of the fact that groups of people had freely embarked on the course of self-determination provided for in the Charter of the United Nations.

3. Since the independent nature of the draft and the comprehensive nature of the status of couriers and bags called for uniform rules, it would not be advisable to follow the example of the different régimes for diplomatic bags and consular bags established in article 27, paragraph 3, of the Vienna Convention on Diplomatic Relations and article 35, paragraph 3, of the Vienna Convention on Consular Relations. Similarly, no distinction should be made between a professional or full-time diplomatic courier and a diplomatic courier *ad hoc*, as the Special Rapporteur noted in paragraph 25 of the report.

4. The Special Rapporteur had rightly pointed out that the privileges and immunities to be accorded to the diplomatic courier and the diplomatic bag, as well as their scope, should be based on a fair balance between the requirements of respect for the confidential nature of the bag and those of the security and other legitimate interests of receiving and transit States.

5. Draft articles 9 and 12, submitted in the third report (A/CN.4/359 and Add.1), related to the appointment of the same person by two or more States as a diplomatic courier and to the commencement of the functions of the diplomatic courier, respectively. Following the example of article 39 of the Vienna Convention on Diplomatic Relations, the Special Rapporteur expressed the opinion in paragraph 19 of the fourth report that, for the receiving or the transit State, the functions of the diplomatic courier should be considered to commence the moment he entered their territory, since it was from that moment on that he enjoyed the facilities, privileges and immunities to which he was entitled. However, in order to extend the scope *ratione temporis* of the diplomatic courier's privileges and immunities, it might well be necessary to consider, as did legal writings, that the enjoyment of privileges and immunities commenced the moment the diplomatic courier left the territory of the sending State or that of the State in which the permanent mission or consular post of departure was located. In diplomatic practice a diplomat could be declared *persona non grata* when he was preparing to return to his post, without being in transit in the territory of any State, simply because it

was implicitly recognized that he enjoyed privileged status as soon as he left his country. Again, the practice whereby the same courier was appointed by more than one State was not widespread, but it did exist and it served as a justification for draft article 9, the scope of which should none the less be expanded in order to take account of the possibility that States might also adopt the economical solution of using one and the same diplomatic bag. In discussing draft article 12, the Drafting Committee should take account of the articles now under consideration.

6. An article such as draft article 15, on general facilities, was wholly justified because the diplomatic courier required assistance in order to perform his functions in the territory of the transit or receiving State. In paragraph 26 of the report, the Special Rapporteur stated that the diplomatic courier must be able to perform his duties "without undue difficulties". Such precise wording might nevertheless be dangerous, because it could be interpreted to mean that the receiving or transit State did not have to assist a diplomatic courier who encountered difficulties which that State regarded as normal. For all that, a genuine duty to accord general facilities, which as pointed out in paragraph 27 "could be granted by the central or the local authorities", did exist. Although the wording of draft article 15 was more precise than that of article 25 of the Vienna Convention on Diplomatic Relations, he thought that it should contain a few examples of facilities, particularly in connection with entry into the territory of the receiving State and the transit State and freedom of movement and communication.

7. As in the system established by the Conventions on Diplomatic Relations and on Consular Relations, the diplomatic courier's freedom of movement had to be adapted to the security requirements by which such freedom might be restricted. What was stated in paragraph 38 of the report with regard to freedom of communication was inappropriate because it might suggest that such freedom existed only in respect of the diplomatic courier's communications with the authorities of the sending State or its missions on his route or included in his way-bill. Clearly, the diplomatic courier should be able to communicate freely with the authorities of the sending State or with its missions wherever they were located.

8. In the text of draft article 16, which stated a basic requirement, the word "in" in paragraph 1 should be replaced by the words "in connection with". Again, the principle of non-discrimination enunciated in draft article 6 was understood, but it might also be stated in draft articles 15, 17 and 18. The phrase "or when returning to the sending State" at the end of draft article 17 was not necessary. For the sake of symmetry and to avoid any confusion, the word "official" might be added before the word "communications" in draft article 18, since the functions of the diplomatic courier were described as being "official" in all the other articles under consideration. In the case of draft article 19, the question of accommodation should be linked to the status of the

diplomatic courier, not to "the performance of his official functions", as stated in that provision.

9. Lastly, subject to the drafting problems to which he had drawn attention, the substance of the new draft articles was acceptable. He would like the scope of the draft to be expanded to take account of the need for the development of international relations and was in favour of applying a uniform régime to the diplomatic courier and the diplomatic bag, including the diplomatic courier *ad hoc*, subject to reservations which would take account of the particular features of the diplomatic courier *ad hoc*. In view of its autonomous nature, the draft should not make any distinction in the legal régime governing couriers and bags between diplomatic, consular or other relations, for in the final analysis all couriers and bags served the same purpose.

10. Mr. MALEK said that the report under consideration (A/CN.4/374 and Add.1-4) did not call for many comments. It was clear and dealt with a topic involving a set of rules which were very firmly established in international law and did not give rise to any major problems of application, at least in normal circumstances, for which reason doubts had been expressed in the past about the need to codify the topic. Henceforth, that need could not be questioned.

11. Subject to the useful drafting suggestions that had been made, the draft articles under discussion were acceptable but it would be noted that the term "transit State", defined in draft article 3, paragraph 1 (6), as "a State through whose territory the diplomatic courier and/or the diplomatic bag passes *en route* to the receiving State", was used in preference to "third State", the term employed in article 40 of the Vienna Convention on Diplomatic Relations, in article 54 of the Vienna Convention on Consular Relations, in article 42 of the Convention on Special Missions and in article 81 of the Vienna Convention on the Representation of States. He therefore wondered whether the Special Rapporteur had some special reason for using the term "transit State" and whether it might not be interpreted restrictively, thereby giving rise to problems of application.

12. Moreover, draft articles 15 to 19 laid down obligations for the transit State, but the obligations were in fact decided by the sending State. For example, a State could demand a transit visa for its diplomatic courier to enable him to enter the territory of various other States yet disregard its relations with those countries or their location. Normally there would be no difficulty, but if a problem did arise it would not be possible to determine the limits on the obligations set out in those draft articles. Article 42, paragraph 4, of the Convention on Special Missions did set limitations by providing that the third State was bound to comply with its obligations in respect of couriers, among other persons, only if it had been informed in advance, either in the visa application or by notification, of the transit of the courier and had raised no objection. It would be interesting to know the Special Rapporteur's opinion on that point.

13. Mr. JAGOTA said that, unfortunately, he had not been able to attend the meetings at which the topic had

been discussed at previous sessions and he wished first to make comments of a general nature and refer to some of the earlier draft articles.

14. The subject, although of undoubted importance to the smooth running of international relations, was restricted in scope and it was therefore reasonable to hope that the Commission's objective could be achieved quite speedily. Moreover, much of the subject was already covered in State practice and in existing multilateral conventions in the preparation of which the Commission had played a significant role, namely the Vienna Conventions on Diplomatic Relations and on Consular Relations, the Convention on Special Missions and the Vienna Convention on the Representation of States.

15. However, the General Assembly considered the topic important enough to have assigned the Commission the task of preparing a separate set of draft articles, and the best way of fulfilling that task was to keep the text of the draft articles as simple, clear, brief and functionally oriented as possible. A set of articles that was too long and caused the protocol divisions of foreign ministries too much work might make Governments reluctant to accept the new formulations at all. The central aspects of the topic which had to be borne in mind were, first, the need to ensure freedom of communications between States and their diplomatic missions, consular posts, special missions, missions to international organizations and delegations to international conferences and, second, the question of the inviolability of the diplomatic bag.

16. With regard to the scope of the draft articles, the terms "diplomatic courier" and "diplomatic bag" were not employed in all the relevant international conventions; the Vienna Convention on Consular Relations, for example, referred to the "consular courier" and "consular bag", while the Convention on Special Missions and the Vienna Convention on the Representation of States spoke simply of "the courier" and "the bag". It was now being suggested that the terms "diplomatic courier" and "diplomatic bag" should be used in respect of communications between States and their missions, regardless of category. The first question was whether such a step would constitute a useful and desirable development of present usage and would help to promote the freedom of communication between States and their missions. If that was generally felt to be the case, he would raise no objection.

17. The title of part II of the draft articles implied that there was a difference between the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship to whom a diplomatic bag had been entrusted but did not elaborate on the difference. He took it that the question would be clarified in connection with the consideration of further draft articles.

18. Another question relating to the scope of the draft was that, under the terms of article 2, the articles would not apply to communications between international organizations *inter se* or between international organizations and States. Opinions on that score, both within the Commission and in the Sixth Committee of the General Assembly, were divided. Some members of the

Commission and some Governments considered that the scope should be extended to cover not only international organizations but also national liberation movements. Reason and logic, as well as the internal practice of many States, seemed to militate in favour of that view, yet the subject was a delicate one and such a course might make the draft less universally acceptable. As a matter of practical expediency, he was prepared to agree to the more restrictive application; however, he would welcome it if the Commission was to agree that the scope of the draft articles should be expanded.

19. As to the point raised by Mr. Malek about the use of the terms "transit State" and "third State", he took the difference between those terms to be that a third State was one through which the diplomatic courier passed in cases of *force majeure* and fortuitous events. That interpretation was borne out by paragraph 4 of the fourth report (A/CN.4/374 and Add.1-4). In that connection, he was not opposed to paragraph 1 (6) of article 3, but wondered whether the words "*en route*" might not be construed to exclude the return journey. From that point of view, the paragraph might need to be redrafted. The text of article 12 could also be improved by replacing the words "he is crossing the" by the words "he enters" and by deleting the words "depending upon which of these events occurs first". As for paragraph 2 of article 14, he agreed that the meaning would be made clearer if the word "shall" was replaced by "may", although in his opinion the word "shall" was not necessarily mandatory.

20. Draft articles 15 to 19 could perhaps be merged into a single article, in view of the need for concision which he had mentioned earlier. Subject to that possibility, he experienced no difficulty with articles 15, 16 or 19; it did not seem to matter greatly whether article 15 spoke simply of "functions" or of "official functions", since reference had to be made in any case to article 11, defining the functions of the diplomatic courier. Article 17 could be slightly improved along the lines suggested by Sir Ian Sinclair (1781st meeting, para. 7) and others; for his part, he considered that the point made in the last sentence of paragraph 37 of the fourth report could be incorporated by altering the words "courier in the performance" to read "courier for the speedy and efficient performance". Lastly, he shared Sir Ian Sinclair's doubts regarding article 18, which appeared to cover very much the same ground as did paragraph 1 of article 4. If article 18 was maintained, however, he would be in favour of retaining the words "when necessary", the purpose of which was convincingly explained in paragraph 39 of the report.

21. Mr. CASTAÑEDA said that, after studying the excellent fourth report (A/CN.4/374 and Add.1-4), his only criticism was that the Special Rapporteur had drafted too many articles, doubtless out of a concern for perfection. Several members of the Commission had suggested that some articles might be deleted and Mr. Jagota had noted that certain conventions already dealt with related matters and that another international instrument which was too detailed might pose unnecessary difficulties of interpretation for foreign ministries.

The Commission should therefore confine itself to drafting strictly complementary provisions.

22. The five draft articles under consideration dealt with the extent of freedom to be enjoyed by the diplomatic courier and with his status, which depended more on the functions he performed than on his rank in the professional hierarchy. A diplomatic courier should enjoy facilities that closely resembled those of an ambassador, to the extent required for the performance of his functions.

23. Because of its general nature, draft article 15 was essential, but it should prove possible to include in it the contents of the articles that followed, for he was not sure that the matters covered in those other articles warranted separate provisions. From the point of view of legislative technique, it would probably be preferable to expand draft article 15.

24. Article 16, paragraph 1, related to one of the facilities, namely entry into the territory of the receiving State and the transit State, which had to be accorded to the diplomatic courier in order to enable him to perform his official functions. Equally obvious was the obligation established for the receiving State and the transit State in article 16, paragraph 2, to issue entry or transit visas to the diplomatic courier. Hence it was questionable whether those facilities really needed to be dealt with in a separate article.

25. The same comment held true in respect of article 17, on freedom of movement. The reservation concerning "zones where access is prohibited or regulated for reasons of national security" would not necessarily prevent the contents of article 17 from being included in article 15.

26. Sir Ian Sinclair (1781st meeting) and Mr. Jagota had expressed the view that article 18 might not be necessary. The question of communication by the diplomatic courier with the sending State and its missions was of course essential, but article 18 might not be indispensable in the light of article 4, which could, if required, be amended. If, for all that, article 18 was to be retained, the words "as referred to in article 1" should be deleted, as Mr. Calero Rodrigues (*ibid.*) had suggested.

27. Lastly, the issue of temporary accommodation dealt with in article 19 was regarded by some members as so obviously a part of the general facilities to be accorded that, despite its importance, it did not have to be dealt with in a separate article.

28. Mr. MAHIOU said that he agreed with the method of work set out in paragraph 4 of the report (A/CN.4/374 and Add.1-4) and endorsed the Special Rapporteur's functional approach. That approach took account of developments in international communications and technological advances that facilitated the diplomatic courier's communications yet also made it possible to monitor them and breach the requisite confidentiality. The Special Rapporteur was also concerned to strike a balance between the requirements of the confidential nature of the bag and the safety of the courier, on the one hand, and the security requirements of the receiving State and the transit State, on the other.

29. Although he fully supported the principles enumerated in paragraph 23 of the report, on which the Special Rapporteur had based the wording of his draft articles, he was not sure that it was necessary to draft so many detailed provisions. Some members had indicated that one or another of the articles overlapped with provisions in another part of the draft or with the provisions of conventions governing relations among States or relations between States and international organizations. A distinction should none the less be made between provisions which were self-evident and provisions which had to be spelt out in the draft now being prepared. Moreover, codification inevitably involved some repetition and it could well be useful to restate some existing provisions. The Special Rapporteur also drew attention in paragraph 5 of his report to the need to go beyond existing rules and try to eliminate certain loopholes and suggest new provisions. Hence it was from the standpoint of progressive development of international law that decisions had to be made on whether the proposed articles were justified. In his own opinion, great care must be taken before combining some of the proposed provisions.

30. Like other members of the Commission, he did not think it logical to deal separately with the couriers of international organizations. International organizations differed from States, but their diplomatic couriers and bags should not be dealt with in a separate draft convention, particularly since the current draft appeared to require some consolidation and related to a subject that was actually rather limited. Moreover, article 27 of the Vienna Convention on the Representation of States might not be enough to cover all possible cases.

31. Polemics must be avoided in dealing with the question of other entities, particularly national liberation movements, which did exist, were recognized by the United Nations and maintained relations not only with international organizations but also with the States that had recognized them. Accordingly, there could be no question of forcing other States to accord special privileges to those movements.

32. Draft articles 15 and 16 were acceptable and he could endorse article 17, since the diplomatic courier's freedom of movement was of a functional nature only and could not be likened to that of a diplomatic agent who was posted in the receiving or host State. Draft articles 18 and 19 raised a dual problem of harmonization. First, it would be necessary to bring article 18 into line with article 4, and second, to harmonize articles 18 and 19 with each other, for they contained the words "when necessary" and "when requested", respectively. With regard to temporary accommodation, as dealt with in draft article 19, diplomatic couriers usually solved that problem themselves, but the difficulties they might encounter in some cities at certain times of the year were not to be underestimated.

33. Mr. McCAFFREY said that the Special Rapporteur's fourth report (A/CN.4/374 and Add.1-4), like his earlier reports, was extremely readable and well researched and had succeeded in awakening interest in

the topic. The fact that the Sixth Committee of the General Assembly had been divided as to the feasibility of preparing draft articles on the topic seemed to dictate a cautious approach and the Commission would perhaps be advised to keep three general criteria in mind. Was there a gap in the existing law? Was there a need to fill that gap? Was there general agreement on the law as manifested by State practice? Clearly, the scope of the draft articles should be kept within manageable proportions and he agreed with the view expressed in the Sixth Committee that the topic was one of the areas least in need of immediate attention or codification (A/CN.4/L.352, para. 188).

34. Again, bearing in mind that the law in that area was relatively well settled, it might be appropriate for the Commission to recommend that the draft articles should ultimately take the form of a General Assembly resolution, something which would have the advantage of avoiding any possible conflict with the existing codification conventions. The main problem appeared to be not a lack of law but rather an abuse of existing rules that were accepted almost universally, if only in principle. That point was recognized in paragraphs 7-8 of the report. Accordingly, one of the main tasks would be to ascertain whether the abuses could be minimized by elaborating draft articles that would complement the existing law.

35. He had considerable doubts as to whether the Special Rapporteur's uniform approach was desirable or indeed warranted by the existing state of the law as accepted by State practice. In paragraph 25, for instance, the Special Rapporteur stated that the "examination of the facilities, privileges and immunities should be carried out in accordance with the already established concept of a comprehensive and uniform treatment of all kinds of couriers and couriers *ad hoc*". Although the Special Rapporteur had plainly decided to opt for that approach, the extent to which it had been accepted by the Sixth Committee was uncertain. For example, some representatives were of the view that

... whereas the current draft articles apparently assimilated diplomatic and consular communications, at least for some purposes, the applicable standards for the protection of those communications were treated separately in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations. It was stressed therefore that the recognized different standards of treatment should not be undermined by their treatment in a draft on the status of the diplomatic bag. (*Ibid.*, para. 191.)

The Special Rapporteur had pointed out in that respect that the different standards applied principally to the diplomatic bag. It would none the less be advisable for the Commission to consider the degree to which similar considerations should apply to different types of courier or whether all couriers could justifiably be lumped together. The need for action in that respect was underlined, first of all, by the fact that the standards of protection for different types of courier varied because the balance between the sending State's need for secrecy and the receiving State's interest in security could also differ, depending on the case involved. In that instance, the functional approach was indeed required. Moreover, if it was true that different standards might apply in respect of

the régime covering the bag, there was all the more reason to follow the same course in relation to the different kinds of courier. Secondly, the law in that area had not been uniformly developed and accepted. For example, in the case of special missions, the Convention on Special Missions was not yet in force. Although 21 States out of the requisite 22 were now parties to the Convention, ultimately some degree of broader acceptance, such as that enjoyed by the Conventions on Diplomatic Relations and on Consular Relations, would be required. Once again, it was necessary to be cautious about treating the courier of a special mission in the same way as, for example, a diplomatic courier. The Commission should thus consider whether the different types of courier should enjoy only the privileges and immunities that were necessary for the performance of their respective functions.

36. In the matter of whether the topic should be extended to cover entities other than States, he agreed with the suggestion in paragraph 12 of the report that, at the present stage, the draft should be confined to couriers and bags used by States. There was good reason for that approach for, as pointed out in the Sixth Committee (*ibid.*, para. 193), international organizations were not in a position to guarantee reciprocity, which was one of the most important elements of diplomatic law. Furthermore, if the Commission extended the scope of the topic it would be venturing into uncharted waters, which meant that it would take longer to reach its ultimate destination, namely completing the task in hand. For that reason, the draft articles should be kept simple and within manageable bounds in terms of number and scope.

37. It should be noted that paragraph 2 of article 3 might also apply to such persons as a consular courier, which would amount to an extension of the existing law. That point merited careful consideration by the Drafting Committee. As for paragraph 2 of article 14, he appreciated the purpose of that provision but considered that the Drafting Committee should clarify the last phrase of the English text, which was ambiguous.

38. Much of the difficulty with the wording of draft articles 15 to 19 stemmed from a lack of clarity as to whether they involved obligations of conduct or obligations of result, within the meaning of articles 20 and 21 of part 1 of the draft on State responsibility.⁶ Clarification of that point would make it easier to use an appropriate form of language. There was clearly an obligation of conduct on the part of the receiving State to co-operate and make a reasonable effort to ensure that the facilities in question were available. It was not, in his opinion, an obligation of result. Two basic principles were involved: (a) the receiving State and the transit State should not obstruct the courier, and (b) they should co-operate and assist him so far as was reasonable in the light of his functions. There again, the functional approach was indicated.

39. In draft article 15, the word "necessary" was preferable to the word "required", since the former would

⁶ Yearbook . . . 1980, vol. II (Part Two), p. 32.

avoid the implication that it was for the courier to decide what was required. Also, it might be useful to define in the commentary what was meant by “facilities”, for it was not altogether clear what the term referred to.

40. In paragraph 2 of draft article 16, the expression “if necessary” would be more accurate than “if required”. The words “shall be granted” also seemed questionable and should be examined by the Drafting Committee; and Mr. Ni (1781st meeting) had been right to say that the word “quickly” should be replaced by the term “expeditiously”, which conveyed the idea more accurately.

41. He agreed with Sir Ian Sinclair (*ibid.*) that the phrase in draft article 17 reading “zones where access is prohibited or regulated for reasons of national security” should be brought into line with the corresponding phrase in the codification conventions referred to in paragraph 36 of the report. In addition, the phrase “shall ensure freedom of movement” sounded almost like an obligation of result and he would like to know if that was in fact the intention.

42. In general, he wondered whether so many articles were really needed to cover the area of facilities. That was particularly true in the case of draft articles 18 and 19, which seemed to be self-evident. Possibly the principles they set out could be embodied in one of the preceding articles. Lastly, quite apart from questioning the need for draft articles 18 and 19, he would agree on the desirability of harmonizing their language and that article 18 and article 4, both of which dealt with freedom of communication, should be brought into line with each other.

43. Mr. LACLETA MUÑOZ, speaking in his personal capacity and not as the Chairman of the Drafting Committee, said that the Special Rapporteur had dealt thoroughly with the topic assigned to him and had drafted articles in clear and precise terms. The Special Rapporteur had also been receptive to the comments made by members of the Commission and the Sixth Committee.

44. He shared the concern of other members who feared that there might be a temptation to make the set of draft articles excessively lengthy and suggested that the Commission should reduce the number of articles and concentrate more on the problems that had a direct bearing on the status of the diplomatic courier and bag. It was not necessary to settle every single detail of cases that might lend themselves to erroneous interpretations merely in order to ward off bad faith. Nevertheless, there was no doubt that the draft articles would be useful, particularly if the political will existed to apply them and if, for example, the text took the form of an additional protocol to an existing instrument.

45. In regard to the excessively detailed provisions of the draft articles, there was no need to deal with the appointment of the diplomatic courier. Contrary to the procedure in the case of diplomatic staff, the receiving State and the transit State were not notified of the appointment of a courier. It was enough for the courier to have an official document attesting to his status. In order to indicate that the receiving State and the transit State had to assist the courier, the Commission might use

wording along the following lines: “When necessary, the receiving State and the transit State shall accord appropriate facilities.”

46. In his opinion, it could well be possible to combine articles 15 to 19 into one or two articles. No problem arose in the case of articles 18 and 19, or even article 17, because it was obvious that if the courier could not reach the place at which he was to hand over the bag he could not perform his functions. That was one of the problems with which the Drafting Committee should deal.

ARTICLES 20 to 23

47. The CHAIRMAN invited the Special Rapporteur to introduce draft articles 20 to 23, which read:

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.

48. Mr. YANKOV (Special Rapporteur) drew attention to section II.B of his report (A/CN.4/374 and Add.1-4), which was subdivided into two parts, one dealing with the inviolability of the diplomatic courier and the other with immunity from jurisdiction. In the light of the functional approach which underlay the whole draft, it had been decided in the matter of inviolability to concentrate on three main points: the personal inviolability of the courier in the performance of his functions (art. 20), the inviolability of the temporary accommodation of the diplomatic courier (art. 21) and the inviolability of the means of transport used by the diplomatic courier (art. 22).

49. The personal inviolability of the diplomatic courier stemmed from a long-standing rule of international customary law, and a brief survey of the history of its development was given in paragraphs 48-62 of the report. As stated in paragraph 47, there were three main constituent elements: (a) the person concerned was not liable to arrest, detention or any other form of restriction on his freedom; (b) the receiving State should treat him with due respect and take all appropriate measures to prevent any attack on his person, freedom or dignity; (c) persons who committed such attacks should be prosecuted and punished by the receiving or the transit State. The third of those three elements was possibly a new one and had been suggested as a measure of prevention and enforcement. It was the logical outcome of the application of the basic rule of freedom of communication, which was supported by State practice, and of the obligation on the receiving or transit State to protect the person of the courier. The latter point was amplified in paragraphs 63-67 of the report. Functional necessity was the underlying principle of the personal inviolability of the diplomatic courier and it was reflected in the terms of draft article 20.

50. With reference to the inviolability of the temporary accommodation of a diplomatic courier and of his personal means of transport, it would be noted that article 30 of the Vienna Convention on Diplomatic Relations provided that the private residence of a diplomatic agent should enjoy the same inviolability as the premises of the mission, and that article 37, paragraph 2, of the same convention extended that immunity to members of the administrative and technical staff of the mission who were not nationals of the receiving State. There seemed to be no compelling reason why such treatment should not be accorded to the diplomatic courier. In that connection, paragraph 73 of his report mentioned the three essential elements of the rule of inviolability of the temporary accommodation of the courier, elements on the basis of which draft articles 21 and 22 were proposed, and paragraph 78 dealt with exceptions to the third element, namely immunity from inspection and search. The rules

applying to the vehicles used by the diplomatic courier were the same as those which applied to his temporary accommodation and had been embodied in draft articles 21 and 22 with a view to securing a proper balance between confidentiality, inviolability, security and public order.

51. The bulk of the report was, of course, concerned with immunity from jurisdiction, which included immunity from criminal, civil and administrative jurisdiction. In that connection he had endeavoured, as stated in paragraph 81, to follow the guidelines adopted for the topic of jurisdictional immunities of States and their property, so as to ensure harmony between the main trends of the two topics.

52. Under article 31 of the Vienna Convention on Diplomatic Relations, the immunity of the diplomatic agent from criminal jurisdiction was absolute, but certain exceptions to immunity from civil and administrative jurisdiction had been determined by functional necessity. In that connection, however, he would suggest that, for the reasons stated in paragraphs 90-91 of the report, the Commission should be guided by article 60 of the Vienna Convention on the Representation of States, which was based on article 31 of the Vienna Convention on Diplomatic Relations.

53. With regard to the expression "in respect of all acts performed in the exercise of his official functions" in paragraph 2 of draft article 23, which was based on paragraph 1 of article 60 of the Vienna Convention on the Representation of States, he pointed out that, as stated in paragraph 110 of the report, the functional approach presupposed that immunity was accorded to the courier not *in propria persona* but by reason of his function; it was therefore limited to official acts. The method of distinguishing between an official act *per se* and an act which, though performed by an official of the sending State, did not come within the scope of his official functions was dealt with in paragraphs 111-112. Paragraphs 113-116 discussed the question of who was entitled to determine the nature of the act and considered the various doctrines in that connection.

54. Immunity from measures of execution was dealt with in paragraphs 118-123 and was reflected in paragraph 3 of draft article 23. Another element of immunity was exemption from the obligation to give evidence as a witness. A provision to that effect had been included in paragraph 4 of draft article 23, having regard to the fact that a courier remained in the receiving or transit State for a short period only and that his main task was speedy delivery of the bag; any measures involving an obligation to give evidence could hamper his function.

55. The question of an action for damages arising from an accident caused by a vehicle used or owned by the courier was dealt with in paragraphs 128-135 of the report and was reflected in paragraph 5 of draft article 23. It was an important issue and he would appreciate advice and comments on it.

56. Paragraph 6 of draft article 23, which dealt with the sending State's jurisdiction over its own courier, stated the obvious but it had been included in all other similar

conventions. The rationale behind it was both legal and practical, the main purpose being to protect any possible victims who might wish to have recourse to the jurisdiction of the sending State in order to protect their legitimate interests.

The meeting rose at 1.15 p.m.

1783rd MEETING

Thursday, 16 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stravropoulos, Mr. Sucharitul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1–4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 15 (General facilities)

ARTICLE 16 (Entry into the territory of the receiving State and the transit State)

ARTICLE 17 (Freedom of movement)

ARTICLE 18 (Freedom of communication) *and*

ARTICLE 19 (Temporary accommodation)⁵ (*concluded*)

1. Mr. SUCHARITKUL said that the Special Rapporteur was to be congratulated on his flexible and practical approach to a topic which, though it might at first sight appear to be unimportant, proved on reflection to merit the Commission's close attention.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320–330.

⁵ For the texts, see 1774th meeting, para. 1.

2. The history of the diplomatic courier and diplomatic bag was by no means confined to modern times. He would remind members that, as far back as the thirteenth century, Thailand, or Siam as it had then been known, had exchanged missions and technical co-operation with China; later, in the early seventeenth century, it had sent diplomatic missions to the Netherlands and subsequently to France. At one time the developing countries of Asia and Africa had made less use of couriers than the more affluent countries, but there had since been a reversal of that trend and many countries now used diplomats and even ambassadors to carry diplomatic mail.

3. The Special Rapporteur had struck the right balance in his draft articles between the interests of the sending State in protecting the confidentiality of its documents and the need of the receiving State to keep the immunities and privileges it granted to a minimum. The topic needed codification even though some parts of it were governed by the four existing codification conventions and even though there was some duplication where privileges and immunities were concerned.

4. In that area of the law, two opposing trends were discernible. On the one hand, there was the ever-growing list of beneficiaries of State immunity and the ever-widening scope of privileges and immunities. In that connection, the Special Rapporteur had rightly advocated that, even though the contents of the diplomatic bag and the consular bag might differ, the treatment accorded to the diplomatic courier and the consular courier should be the same as far as the performance of their functions and the inviolability of the bag were concerned. On the other hand, there was a tendency to restrict privileges and immunities by confining them to what was justified by functional necessity. On that basis, a diplomatic courier would not be entitled to the same privileges and immunities as a diplomatic agent, the difference in treatment being partly due to the temporary nature of the courier's immunity. It was essential, however, to take account of the principle of reciprocity, which would serve to protect the proper functions of the diplomatic courier.

5. The Special Rapporteur had rightly adopted a cautious approach and had sought to prevent any improper use of privileges and immunities by including in the draft such provisions as those contained in article 14 (Persons declared *non grata* or not acceptable) and in article 23, paragraph 5, under which the diplomatic courier would not be exempt from the civil and administrative jurisdiction of the receiving or transit State in respect of an action for damages arising from an accident caused by a vehicle used or owned by him.

6. The draft articles were clear and concise; it remained for the Commission and the Sixth Committee of the General Assembly to make such adjustments as might be necessary to render them more generally acceptable. On the whole, they were acceptable to him except for certain points of drafting which could be dealt with by the Drafting Committee.

7. Mr. NJENGA, thanking the Special Rapporteur for his comprehensive report (A/CN.4/374 and Add. 1–4),

said that codification of the topic was of the utmost importance for guaranteeing freedom of communication between sending States and their missions abroad: that freedom was a fundamental principle of international law and it was ripe for codification. The fact that the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was partly dealt with in the four existing codification conventions was no justification for not elaborating a separate convention on it, with a view not only to codification, but also to progressive development of the law. Such a convention would also serve to unify the provisions scattered throughout the four existing conventions, while taking account of State practice.

8. He did not agree with the statement in paragraph 12 of the report that, at this stage of the work on the topic, its scope should be confined to the couriers and bags used by States, as proposed in the third report (A/CN.4/359 and Add.1, paras. 16-18). The practice whereby international organizations sent their official and confidential correspondence in bags was well established. OAU, for example, sent confidential conference documents to Member States by diplomatic courier to ensure expeditious and safe despatch. That was very necessary in Africa, where postal communication was, for the most part, extremely slow. There was thus no reason why the draft articles should not cover such communications between international organizations and their Member States, or even between an international organization and its missions. Admittedly, there was a safeguard clause in draft article 2, but the rules referred to in paragraph 2 (b) of that article did not exist: that point merited careful examination before the draft articles were completed. The scope of the draft should not be unduly restricted, otherwise it might later prove necessary to recast it. He considered that, since the draft articles were concerned with guaranteeing freedom of communication, the fact that an international organization was unable to guarantee reciprocity, as some representatives had stressed in the Sixth Committee (A/CN.4/L.352, para. 193), would not cause States to suffer any injury.

9. He saw much merit in extending the scope of the draft articles to cover communications by recognized liberation movements such as SWAPO, ANC and PLO, which had established diplomatic missions recognized by the United Nations and many of its Member States. So long as adequate measures were taken to ensure that only legitimate objects were conveyed by couriers and bags, he could see no justification for denying the necessary protection of confidentiality to the communications of recognized liberation movements.

10. He fully supported the functional approach adopted by the Special Rapporteur and did not share the view that the draft articles were unduly inclined to assimilate the diplomatic courier to the staff of diplomatic missions. As had already been pointed out on many occasions, the diplomatic courier was himself a diplomat: accordingly, so long as the privileges and immunities related to protection of his mission, there was no reason to curtail the protection given him.

11. As to the commencement and the end of the functions of the diplomatic courier, which were dealt with in draft articles 12 and 13, he accepted the statement made in paragraph 19 of the fourth report concerning the moment at which those functions began, but he did not think that the Special Rapporteur had quite covered the point about the need to extend protection for the return journey, failing which the courier might be subject to intimidation once he had delivered the bag.

12. With regard to draft articles 15 to 19, he agreed that the object of those articles was to ensure that the courier was protected by the receiving or transit State and enjoyed certain rights requiring freedom of movement in their territory. He also believed, however, that the five articles could be combined into one or two articles without losing their thrust; the Drafting Committee might wish to explore that possibility. In draft article 15, it would help to clarify the term "facilities" if the words "and requested" were added after "required". In draft article 17, it should be made clear that such freedom of movement as was accorded would attach to the performance of the courier's functions. He therefore supported Mr. Jagota's proposal (1782nd meeting) that it should be accorded for the purpose of the safe and expeditious delivery of the bag and the courier's return to the country of origin. That, again, was a point for the Drafting Committee to consider.

13. With regard to draft article 18, he agreed that the last part of the text, after the words "as referred to in article 1", should be deleted since it was unduly restrictive. The diplomatic courier might, for instance, need to communicate with a third State; there might be no mission in the transit State and he might be in need of urgent assistance from a mission in a neighbouring country.

14. Lastly, he did not think that the significance of draft article 19 should be underestimated, especially where less affluent cities were concerned. Indeed, he would even be inclined to favour an obligation on the receiving State and the transit State to provide, rather than assist in obtaining, temporary accommodation.

15. Mr. YANKOV (Special Rapporteur), summing up the discussion on draft articles 15 to 19, thanked members for their valuable comments, which would greatly assist him in his work. With regard to the feasibility of codifying the topic, he wished to state for the record that the Commission had followed the recommendations of a series of resolutions of the General Assembly, in particular resolution 31/76 of 13 December 1976, to which he had referred in his preliminary report,⁶ and resolutions 33/139 and 33/140 of 19 December 1978, in both of which the General Assembly had noted with appreciation the work done by the Commission. In paragraph 5 of section I of resolution 33/139, the General Assembly also recommended that the Commission "should continue the study, including those issues it has already identified, concerning the status of the diplomatic

⁶ *Yearbook* . . . 1980, vol. II (Part One), pp. 232-233, document A/CN.4/335, para. 7.

courier and the diplomatic bag not accompanied by diplomatic courier . . . with a view to the possible elaboration of an appropriate legal instrument . . .”. Those resolutions had provided the basis for General Assembly resolution 37/111 of 16 December 1982 which, in paragraph 3, gave the Commission clear instructions.

16. As to reactions in the Sixth Committee of the General Assembly, his own impression was that, while there had been some reservations, there had been a marked trend in favour of dealing with the topic. Mr. McCaffrey (1782nd meeting) had quoted some extracts from the topical summary of the discussion in the Sixth Committee (A/CN.4/L.352) but they had been taken from the statements of one delegation only; of course, the minority view also had to be respected and he, as Special Rapporteur, had endeavoured to bear that in mind.

17. It had rightly been said that, although the issues involved were fairly well covered by existing law, there was none the less room for some degree of elaboration or amplification. Apart from the comments made on points of drafting, which would assist the passage of the draft articles through the Drafting Committee, a number of matters had been raised, particularly in regard to method, which called for careful consideration. Several members had stressed that codification and development of the law on the topic under study would make an important contribution to international co-operation and understanding. The views expressed by those who did not fully subscribe to that opinion also served a useful purpose, in that they emphasized the need to find a balance and not be over-ambitious in the work of codification. That approach was to be advocated in the task of basing the structure and content of the draft on the solid foundation of the four existing codification conventions, while adopting a flexible and pragmatic attitude that took account of functional necessity. The point had been convincingly argued by a number of speakers.

18. With regard to the uniform approach, he had at first endeavoured to introduce the idea of an “official” courier and an “official” bag, but when that did not find favour he had reverted to the more traditional, and perhaps more reliable, notion of the diplomatic courier. A point had been raised regarding the use of the terms “diplomatic courier” and “diplomatic bag” and the extension of those terms, under draft article 3, paragraph 2, to cover consular couriers and consular bags. It was well known that, if a bag was partly used for a consular mission, States preferred to call it a diplomatic bag because of the difference between the stipulations of article 27 of the 1961 Vienna Convention on Diplomatic Relations and those of article 35 of the 1963 Vienna Convention on Consular Relations. An examination of more than a hundred consular conventions signed by States parties to the 1963 Vienna Convention had shown that the standard provision specifying complete inviolability was usually applied, rather than article 35 of the 1963 Vienna Convention. He intended, however, to introduce a safeguard clause into the draft articles under which, in case of doubt or dispute, the bag would be returned unopened, in accordance with the main trend of State practice.

19. He would appreciate the Commission’s guidance regarding any differentiation of inviolability. In general, however, he believed that the uniform approach would be best, and some further precision could perhaps be introduced into the articles at the Drafting Committee stage. His main concern had been to achieve a balance between the legitimate interests of the sending and receiving States and the Commission must judge how far he had succeeded.

20. With regard to the final form the draft articles should take, as Special Rapporteur he could not comment on the suggestion that they should be embodied in a resolution of the General Assembly; but as a member of the Commission he could not agree that subject-matter of such importance should be consigned to a document which did not have legally binding force.

21. The main question raised during the discussion was that of the scope of the draft articles, in particular whether they should apply to international organizations and entities other than States, such as liberation movements. The general view was that, by the very nature of things, the draft would be incomplete if entities other than States were not covered. As they stood, the draft articles would apply to a bag conveyed between a State and an international organization but not a bag conveyed between two international organizations. There were some customary rules, since communications between international organizations had been operating smoothly up to the present without any multilateral convention, but he would appreciate the Commission’s guidance on the matter. Its opinion could then be put to the General Assembly. In that connection, he noted for the record that, as stated in a footnote to paragraph 11 of his report, the representative of France in the Sixth Committee had said that “any attempt to extend the provisions beyond the diplomatic courier and the unaccompanied diplomatic bag *stricto sensu* might jeopardize the success of an undertaking which his delegation viewed with great favour”.⁷ As he had not been present at the meeting at which that statement had been made, he would welcome members’ comments on it.

22. His own suggestion would be to keep a possible extension of the scope of the draft articles in mind, but not to take a decision at the present stage unless the Commission had strong reasons for doing so. It was necessary to proceed with great caution so as to avoid creating any difficulties that might hamper progress. As a member of the Commission, his view was that the scope of the draft articles should be extended to cover entities other than States, but as Special Rapporteur it was his duty to take account of trends and conditions conducive to a solution of that problem.

23. Questions relating to the status and functions of the diplomatic courier had been raised by several members of the Commission in connection with draft articles 1 to 14. He agreed with Mr. Ni, Mr. Castañeda, Mr. Koroma

⁷ Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee, 38th meeting, para. 21.

and others that the diplomatic courier was not assimilable to a diplomatic agent or to any other existing category of officials. The only purpose of employing such analogies had been to facilitate the preparation of basic rules applicable to any specific situation.

24. A number of speakers, including Mr. Flitan, Sir Ian Sinclair, Mr. Njenga and Mr. Jagota, had referred to the articles dealing with the commencement and end of the functions of the diplomatic courier. The reason why draft article 12 defined those functions as commencing from the moment the diplomatic courier entered the territory of the transit or receiving State rather than from the moment of his appointment by the sending State was that, from the point of view of the receiving or transit State, the precise moment of that appointment was immaterial.

25. In reply to Mr. Njenga's point concerning the courier's protection on the return journey, he observed that, in practice, a courier rarely returned empty-handed. However, the possibility of his doing so should of course be provided for. His reasoning on the subject was set out in his third report (A/CN.4/359 and Add.1, paras. 116 and 123).

26. As to the question of the difference, if any, between the regular or ordinary diplomatic courier and the diplomatic courier *ad hoc*, raised by Sir Ian Sinclair (1781st meeting), it should be noted that in terms of the volume and significance of their work, couriers *ad hoc* were nowadays no less important than regular couriers; the only difference was that the regular courier whose functions came to an end in a foreign country assumed the status of a diplomatic agent, whereas the courier *ad hoc* in the same situation became an ordinary alien.

27. In regard to the use of the word "shall" in article 14, paragraph 2, he pointed out that when a diplomatic courier was declared *persona non grata*, the sending State generally had no choice but to send another diplomatic courier to the receiving State; that was why he had preferred the stronger word "shall" to the weaker "may". The choice of wording could be left to the Drafting Committee.

28. On the question of multiple appointments dealt with in article 9, his studies had shown instances in which States with very good mutual relations used that method for economic or other practical reasons. In principle, he believed that the article should be retained, but if the Commission decided otherwise he would not insist.

29. On the question of the distinction between the terms "transit State" and "third State", raised by Mr. Malek (1782nd meeting), he observed that the earlier conventions did not employ the concept of "transit State" because they were mainly concerned with permanent missions, so that the basic relationship was between the sending State and the receiving or host State and the role of the transit State was only occasional and incidental. The position with regard to the diplomatic courier was entirely different; he was, by definition, a travelling official and the routine performance of his functions almost always involved a transit State. The reasons why he had chosen to describe as a "transit State" a State through whose territory the diplomatic courier had to

pass when travelling to or from the receiving State were given in his second report.⁸ The term "third State" was used exclusively for States which were not included in the courier's original itinerary, but which he had to cross in unforeseen circumstances.

30. As to the comments made by members of the Commission on articles 15 to 19, subject to decisions to be taken by the Drafting Committee he was prepared to accept many of the suggestions made, including Mr. McCaffrey's suggestion (*ibid.*) of the phrase "shall, where appropriate or necessary" for use in article 16, Mr. Ushakov's suggestion (1781st meeting) that the titles of the articles might be improved and Mr. Calero Rodrigues' suggestion (*ibid.*) that the phrase "where necessary and upon the request of the courier" should be employed in articles 18 and 19. He was not opposed to the suggestion made by several speakers that article 15, being extremely short, might be merged with one or several of the articles immediately following it, so long as none of their provisions was dropped or substantially modified.

31. On the other hand, he could not agree with Mr. Flitan (1780th meeting) and Mr. Castañeda (1782nd meeting) that article 18 merely duplicated article 4 and should therefore be deleted. A connection between the two articles certainly existed, but article 18 had a specific practical meaning which should not be lost; one of the matters it covered was the priority postal facilities which might sometimes have to be granted to a courier. All other points raised in the debate could be discussed in the Drafting Committee.

32. The CHAIRMAN proposed that draft articles 15 to 19 be referred to the Drafting Committee.

It was so agreed.

ARTICLE 20 (Personal inviolability)

ARTICLE 21 (Inviolability of temporary accommodation)

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

ARTICLE 23 (Immunity from jurisdiction)⁹ (*continued*)

33. Mr. YANKOV (Special Rapporteur), supplementing the introductory remarks on articles 20 to 23 which he had made at the previous meeting, referred members to paragraphs 81 *et seq.* of his fourth report, dealing specifically with article 23. The approach he had adopted in drafting the article was a strictly functional one. With regard to measures of execution, full account had been taken of the fact that, while in theory the provisions of article 31 of the Vienna Convention on Diplomatic Relations were applicable to the diplomatic courier, in practice the diplomatic courier could not make full use of the rights available to a diplomatic agent.

34. In conclusion, as several speakers had emphasized the need for concision in connection with articles 15 to 19,

⁸ Yearbook . . . 1981, vol. II (Part One), p. 187, document A/CN.4/347 and Add.1 and 2, paras. 198-200.

⁹ For the texts, see 1782nd meeting, para. 47.

he wished to point out that the texts of articles 20 to 23, given the complexity of the matters dealt with, were already as brief as possible.

The meeting rose at 1 p.m.

1784th MEETING

Friday, 17 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffery, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stravropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/359 and Add.1,¹ A/CN.4/372 and Add.1 and 2,² A/CN.4/374 and Add.1–4,³ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁴ (*continued*)

ARTICLE 20 (Personal inviolability)

ARTICLE 21 (Inviolability of temporary accommodation)

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

ARTICLE 23 (Immunity from jurisdiction)⁵ (*continued*)

1. Mr. USHAKOV said that he had no comments to make on draft article 20, which was based on the corresponding provisions of the four conventions on codification of diplomatic and consular law adopted under the auspices of the United Nations.

2. On the other hand, there was little justification for paragraph 3 of draft article 21 or paragraph 2 of draft article 22, which derogated, respectively, from the

principle of inviolability of the temporary accommodation of the diplomatic courier and from that of inviolability of the individual means of transport used by the diplomatic courier. Apart from the diplomatic bag, the only objects which would normally be found in the diplomatic courier's temporary accommodation or in his private vehicle were his personal effects. In the event of grave suspicion, those effects could be inspected or searched when the courier entered the territory of a State, as provided in the case of diplomatic agents. Thereafter, the diplomatic courier was free to acquire other property in the territory of the State he had entered and no further inspection or search should take place.

3. He found draft article 23 entirely satisfactory, and particularly welcomed paragraph 5, waiving immunity from civil and administrative jurisdiction in respect of an action for damages arising from a traffic accident caused by the courier's vehicle, if such damages were not covered by insurance.

4. Mr. LACLETA MUÑOZ said that the inviolability of the diplomatic courier was not in doubt, since it was provided for in all the four codification conventions. In paragraphs 63–64 of his report (A/CN.4/374 and Add.1–4), the Special Rapporteur mentioned two incidents in which Spain had been involved. One of them raised a problem not dealt with in the draft articles—that of the diplomatic courier's baggage not covered by the certificate relating to the diplomatic bag. It was clear from the context, however, that in the event of grave suspicion the diplomatic courier's personal baggage could be inspected. Far from suggesting that a statement to that effect be incorporated in articles 21 and 22, he would prefer those articles to be condensed. All the provisions relating to the inviolability of the diplomatic courier's person, his temporary accommodation and his means of transport derived from the inviolability of diplomatic correspondence. It was that inviolability, above all, which should be safeguarded. Furthermore, it should be noted that paragraph 3 of article 21 and paragraph 2 of article 22 were identical in scope.

5. As to immunity from jurisdiction, it was true that it was not provided for in the conventions on codification of diplomatic and consular law, but the Special Rapporteur's analysis of those instruments and the conclusions he had drawn from it were convincing. It was right to provide for that immunity, which was based largely on the inviolability of the diplomatic courier, in a provision such as article 23. Moreover, the Special Rapporteur had been right to proceed on the basis of article 60 of the Vienna Convention on the Representation of States, though in his own view the result would have been the same if the diplomatic courier had been treated as a member of the administrative or technical staff of a mission. From a purely presentational point of view, paragraph 5 of article 23 should perhaps appear as paragraph 3 of the article. Lastly, in regard to paragraph 4, according to which the diplomatic courier was not obliged to give evidence as a witness, he wondered whether it would not be useful to provide that in the event of a traffic accident the diplomatic courier nevertheless

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320–330.

⁵ For the texts, see 1782nd meeting, para. 47.

had a duty to give evidence or make a statement even if the damages were covered by insurance, in order to help establish the facts and, where necessary, assist the insurance company in obtaining a judgment.

6. Sir Ian SINCLAIR said that any critical observations he might make in no way detracted from his appreciation of the excellent work done by the Special Rapporteur. Before commenting on draft articles 20 to 23, he wished to address himself briefly to the question of whether the scope of the draft articles should be extended to cover couriers and bags of international organizations and national liberation movements. Like Mr. Jagota (1782nd meeting), he recognized that there might be arguments in favour of such a step, but he was also aware that it would inevitably complicate the Commission's task and delay the submission of the draft articles to the General Assembly. He reminded members that a similar extension of the scope of the Vienna Convention on the Law of Treaties had already taken 10 years and had not yet been completed. On reflection, and in the light of considerations of a pragmatic nature, he believed that the scope of the draft articles should not be extended, at least for the time being.

7. His general approach to the draft articles under examination was very similar to that outlined by Mr. Jagota and Mr. Castañeda (1782nd meeting). The object was to identify areas in which practical problems had arisen and then to regulate those areas, bearing in mind the duties of the diplomatic courier and especially the peripatetic nature of his activities. It was in that connection that he questioned the provision at the end of paragraph 2 of article 20 requiring the receiving or transit State to prosecute and punish persons responsible for any infringement of the diplomatic courier's person, freedom or dignity. As the Special Rapporteur himself had pointed out in paragraph 66 of his report (A/CN.4/374 and Add.1-4), no such obligation was embodied in the four existing codification conventions; the reason for that was undoubtedly the difficulty, or indeed impossibility, of taking the required action without violating the regulations governing due process in many countries, including the United Kingdom. The diplomatic courier was, in the colloquial English phrase, here today and gone tomorrow, and under article 23, paragraph 4, he was to be exempt from the obligation to give evidence as a witness. In those circumstances, the blanket obligation to prosecute would not be acceptable to countries where any discretion was vested in the prosecuting authorities. That major difficulty apart, article 20 was satisfactory.

8. Articles 21 and 22, on the other hand, could in his view be omitted altogether. As the Special Rapporteur acknowledged in paragraphs 72 and 77 of his report, couriers were normally housed in the premises of the mission and used the mission's means of transport. The possibility of the courier's staying in an hotel in the receiving State or a transit State was rather remote. In the United Kingdom, a diplomatic courier was met on arrival by an official clerk of his mission and the bag was deposited in the mission's premises. Information about the practice followed in other countries would be

welcome, but the likelihood of both the courier and the bag being accommodated at an hotel seemed so remote that it could be discounted. He therefore suggested that articles 21 and 22 be deleted, although should article 21 be retained, some provision ought to be included authorizing officials of the receiving or transit State to enter the accommodation in case of fire or other emergency.

9. As to article 23, although the report did not cite a single case in which an attempt had been made to arrest or serve process on a diplomatic courier, he was in principle prepared to accept the need for an article on immunity from jurisdiction based on article 60 of the Vienna Convention on the Representation of States. With regard to paragraph 4 of article 23, he shared the views expressed by Mr. Laclea Muñoz; he suggested that the provision should be qualified by some phrase such as "concerning matters involving the exercise of his official functions". At the same time, the obligation to give evidence as a witness should not, of course, delay the courier in the performance of his duties.

10. Mr. QUENTIN-BAXTER said that the probable fate of any new set of provisions depended on a number of factors. In the case of the draft articles under consideration, the first test was clearly the security of the receiving and transit States as against the security of the communications of the sending State. A second important test was that of administrative efficiency. The volume of inter-departmental consultations in which the legal officer of a foreign ministry would have to engage before advising his government whether or not to ratify the proposed convention should be kept to a minimum. For example, the provisions of article 21 might well give rise to difficulties in securing the co-operation of police commissioners and several other departments.

11. A third important test was the ease with which the proposed new code could be applied. The draft articles would be found more immediately attractive, and their ratification would be encouraged, to the extent that they were modelled on the Vienna Convention on Diplomatic Relations; but an additional provision not found in that convention, such as the provision in article 20, paragraph 2, referred to by Sir Ian Sinclair, represented a new burden which might not be easily accepted. In his view, the appropriate occasion to consider such a provision would be in the context of a review of the Convention on Diplomatic Relations, rather than in the narrower context of draft articles on the status of the diplomatic courier. As Mr. Castañeda had said (1782nd meeting), the question of whether the draft articles proved really useful and acceptable to States would depend above all on their simplicity and on the ease with which they could be incorporated into existing State practice. Some reduction in scale without serious loss of substance was desirable. He agreed with Sir Ian Sinclair that the cases dealt with in articles 21 and 22 were unusual and that administrations might be reluctant to adopt yet another obligation in respect of such remote contingencies.

12. In article 23, the parallel with the Vienna Convention on the Representation of States, though undeniable, was not complete; a courier's activities were

different from those of conference delegates, who came to a country for an assigned purpose and for a specific period of time. While making no recommendation on the wording of article 23, he wished once more to stress the desirability of reducing the bulk and complexity of the proposed rules.

13. Mr. CALERO RODRIGUES commenting on the general question of the scope of the draft articles, said he appreciated the Special Rapporteur's reasons for suggesting that at the present stage of work on the topic its scope should be confined to couriers and bags used by States. The question should, however, be left open pending a final decision at a later stage. With regard to the point about the Vienna Convention on the Law of Treaties made by Sir Ian Sinclair, he believed that a great deal of time might have been saved if the problem of extending the scope of the convention to international organizations had been dealt with during the preparation of the draft.

14. A number of previous speakers had criticized the draft articles for going into too much detail. In principle, he was in favour of concision; there would be little point in proposing draft articles that merely repeated what was already to be found in existing conventions. A purely practical topic such as the one under consideration called for an instrument stating the rules as precisely as possible. Unnecessary overburdening of the text should, of course, be avoided, but so should excessive brevity.

15. Like Sir Ian Sinclair, he doubted the need for the last phrase in paragraph 2 of article 20; indeed, the usefulness of the paragraph as a whole seemed questionable and he would be satisfied if only paragraph 1 were retained. Articles 21 and 22 did not give rise to any difficulties other than drafting problems, with the possible exception of the point made by Sir Ian Sinclair concerning access to temporary accommodation in an emergency. Article 23 was admittedly rather long, but every one of its provisions appeared to be necessary. Paragraph 4 could be improved along the lines suggested by previous speakers. In conclusion, he expressed the hope that the Special Rapporteur would continue to submit draft articles that were as easy to comment on as those under consideration.

16. Mr. REUTER said that the Special Rapporteur deserved great credit for his ability to defend his own ideas and convictions while at the same time taking due account of those of others. The reason why he (Mr. Reuter) had taken little part in the discussion so far was that he was not well versed in the subject, which seemed to him to involve uncertainties on fundamental issues. The approach adopted should be based more on practice than on principles. Thus, besides the law, some knowledge of fields such as those of information or intelligence would be useful, in order to strike a balance between the needs of international relations and those of State security.

17. It could hardly be doubted that the Commission should examine the question of diplomatic couriers of international organizations. At the present time international organizations were experiencing too many difficulties in that field for the matter to be left aside. It had happened, for example, that the headquarters agreement

of an international organization contained no provision on the protection of its archives. He himself believed that such protection was covered by a general rule of customary law. Since the diplomatic courier of an international organization carried documents which might become archives, it was understandable that what he was carrying should be protected. But the very notion of an international organization was not always clear; how elastic that notion was could be seen from the fact that the courts of a major country had hesitated to recognize the status of an intergovernmental organization as an international organization when asked for authorization to institute proceedings against it. Furthermore, the need to protect the diplomatic courier arose from the fact that he carried secret documents; but that was not necessarily so where international organizations were concerned. Some international organizations had so little to hide that, rather than use a courier's bag, they preferred to employ private firms which provided safe and quick delivery. When considering the question of international organizations, the Commission should therefore take account of their extreme diversity.

18. In regard to recognized national liberation movements, he pointed out that States Members of the United Nations did not consider themselves bound by the position adopted by the United Nations on the recognition of States or Governments. By the same token, the status which the United States might grant to certain liberation movements was not binding upon Member States, and some of them would not recognize it. Thus the question of national liberation movements did not lend itself to generalizations any more than that of international organizations.

19. In reply to a question put to him indirectly by the Special Rapporteur, he explained that personally he was strongly in favour of intensive development of peaceful international relations; but he had found that many Governments were anxious about the facilities that might be accorded for the development of international relations. In particular, those Governments were not in favour of extending the régime of immunities. Whereas in the past it had not been unusual for a diplomat to carry mail, the draft articles had the effect of turning mail-carriers into diplomats. It might therefore be supposed that some Governments would be reluctant to accept a draft which had the effect of increasing the number of persons enjoying immunities, of which they would no doubt make good use, but which they could also misuse. Some representatives in the Sixth Committee of the General Assembly had told him privately that they found the Commission too much inclined to take majority decisions, so that plenipotentiaries at conferences had ready-made sets of draft articles put before them on a "take it or leave it" basis. He therefore appealed to the Commission to act with the same open-mindedness and moderation as the Special Rapporteur, in order to secure the widest possible measure of support. It was to be hoped that the draft articles would be made into a convention but, even if they were not, there could be no doubt that a well-prepared and unambiguous draft had a good chance of being followed in practice.

20. Mr. FLITAN emphasized that the matters which the Special Rapporteur had examined in his report (A/CN.4/374 and Add.1-4) with so much competence and care should be approached from the point of view of reciprocity. For every sending State could also be a receiving State or a transit State. After all, it was the idea of reciprocity that formed the basis for immunity from jurisdiction. A State granted such immunity to the agents of another State only in order that its own agents might in turn enjoy immunity.

21. Several members of the Commission had rightly pointed out that the draft had the effect of assimilating the diplomatic courier to a diplomatic agent or a member of a mission. Such assimilation was perfectly justified by the diplomatic courier's functions.

22. For the reasons stated by the Special Rapporteur in paragraph 77 of the report, he argued that draft articles 21 and 22 be retained. However rare might be the situations to which those articles were applicable, they were nevertheless of some use. Referring to Mr. Ushakov's remarks on article 21, paragraph 3, and article 22, paragraph 2, he suggested that those provisions could be explained by the fact that the Special Rapporteur had opted for almost complete assimilation of the diplomatic courier to a diplomatic agent.

23. Unlike Mr. Calero Rodrigues, he was not in favour of simply deleting paragraph 2 of article 20. That paragraph stated an important principle which should be placed at the very beginning of the article. Referring to article 23, he stressed the need for paragraph 4, according to which the diplomatic courier was not obliged to give evidence as a witness. That provision was modelled on article 60 of the Vienna Convention on the Representation of States and helped to make the courier's assimilation to a diplomatic agent more complete.

24. Lastly, for the reasons given by Mr. Calero Rodrigues, he thought the Commission should examine the question of couriers of international organizations. There was no denying that certain documents of international organizations were confidential and that those organizations were experiencing difficulties with their transport. The question of State couriers and that of couriers of international organizations should not, however, be placed on the same footing. Nor should the question of national liberation movements be overlooked.

25. Mr. BALANDA expressed his appreciation of the way in which the Special Rapporteur had conducted his study and, in particular, of the analytical survey provided to remind the Commission of the atmosphere in which the Vienna Conventions on Diplomatic Relations and on Consular Relations had been elaborated. Not having participated in the work leading up to the signing of those two instruments, he had found the survey most helpful for an understanding of the Special Rapporteur's ideas.

26. As he had said earlier (1782nd meeting) he believed that the draft should deal with the diplomatic courier and diplomatic bag both of international organizations and, initially, of recognized liberation movements; for the

Commission must not ignore certain realities of the contemporary world.

27. He wondered why the Special Rapporteur insisted so much on the functional nature of the protection granted to the diplomatic courier, particularly in paragraphs 44, 53, 70, 75, and 79 of his report (A/CN.4/374 and Add.1-4). Since all privilege was founded upon the importance of a function, he did not understand such insistence. For instance, the privileges granted to diplomatic agents, consular agents and persons exercising certain functions in international organizations were intended to protect their functions as such. Of course, the diplomatic courier performed his functions for a shorter time than the diplomatic agent. But whether the point at issue was accommodation, means of transport or conveyance and delivery of the bag, it was always the importance of the function that justified the granting of a special régime to the diplomatic courier. In itself, the protection to be accorded to the diplomatic courier's person, accommodation and means of transport should be comparable to that enjoyed by diplomatic agents.

28. In his first statement he had argued in favour of the uniform approach. The practice of States themselves, as reported in paragraph 55, supported that approach, showing that although the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations provided for different régimes, the status accorded to the two types of courier in practice was sometimes the same.

29. He fully endorsed the principle advocated in the report, namely that the personal inviolability of the diplomatic courier should extend to his accommodation and his means of transport. In that connection, the principle of just balance between the legitimate interests of the sending State and those of the receiving or transit State should be taken into account. He was reminded of an incident which had occurred in his country involving a diplomatic agent, but which could equally well have involved a diplomatic courier. A foreign diplomat travelling by air to Kinshasa, where he was accredited, had been obliged for technical reasons to stop over at Kisangani, where he had fraudulently procured gold and diamonds. The Kisangani police, knowing that the diplomat was to take a plane the next day, had not intervened, but had alerted the police authorities at Kinshasa, who had taken appropriate measures. In such cases it was necessary to protect the public order of the receiving State. He therefore endorsed the restrictions on, and exceptions to, the inviolability of the diplomatic courier's accommodation and means of transport proposed by the Special Rapporteur.

30. He also endorsed the statement, made in paragraph 63, of the report, that the receiving and transit States were under the obligation to prosecute and punish persons who violated the diplomatic courier's person. That rule was set out in draft article 20, paragraph 2, which was based on article 27, paragraph 5, and article 29 of the Vienna Convention on Diplomatic Relations. However, the Special Rapporteur had introduced an innovation by turning what had previously been accepted only in theory

into a positive rule. Inviolability of the diplomatic courier's person meant due respect for his dignity and an obligation for the receiving State and the transit State to protect him. If any wrongful act was committed against a diplomatic courier, the authorities were required to prosecute and punish the person responsible.

31. For the reasons stated in paragraphs 97-98, he agreed with the Special Rapporteur that the diplomatic courier should be granted full immunity from criminal jurisdiction, but that his immunity in civil and administrative matters should be restricted.

32. With regard to draft article 20, which mentioned arrest or detention, he wondered whether paragraph 1 also covered the idea of prosecution. Was the diplomatic courier required to obey a court summons? At that stage of proceedings there was no question of arrest or detention. It might be advisable to add the word "prosecution" in paragraph 1, even though the provision as it stood was modelled on article 27, paragraph 5 of the Vienna Convention on Diplomatic Relations. As to exemption from giving evidence, he approved of the Special Rapporteur's proposal but wondered, in connection with paragraphs 124-125, whether it should not be stated, at least in the commentary, that the diplomatic courier could waive his immunity in that respect, either of his own accord or if authorized to do so by the sending State.

33. He had no comments to make on the essential ideas expressed in draft article 23 and understood the Special Rapporteur's intentions; the Drafting Committee might perhaps be able to refine the wording of the article.

34. Mr. PIRZADA said he fully agreed that, notwithstanding certain difficulties, the draft articles should be extended to cover international organizations and national liberation movements. He favoured the use of the term "recognized movements" which had received wide support.

35. In view of the content of paragraphs 72 and 77 of the report (A/CN.4/374 and Add.1-4) and of the views of some members, he would keep an open mind on draft articles 21 and 22. With regard to draft articles 20 and 23, he agreed in general with Sir Ian Sinclair. If paragraph 2 of draft article 20 was to be deleted, he would have no further comment; but if it was to be retained, the final phrase reading "and shall prosecute and punish persons responsible for such infringements" should be deleted, since it could lead to complications regarding the giving of evidence by the diplomatic courier.

36. As to draft article 23, he noted that paragraph 1 gave the diplomatic courier absolute immunity from the criminal jurisdiction of the receiving State and the transit State. *Prima facie*, however, he was inclined to think that such immunity should at least be restricted to acts performed in the exercise of the official functions of the diplomatic courier. If a diplomatic courier committed a serious offence, such as murder or rape, should he really have absolute immunity? The Commission might wish to consider that point. The immunity from civil and administrative jurisdiction conferred by paragraph 2 was restricted to acts performed in the exercise of the diplomatic courier's official functions. Again, however,

difficulties could arise in connection with the giving of evidence by the courier, and there seemed to be some conflict on that point between paragraphs 2, 4 and 5 which the Commission would do well to consider.

37. The CHAIRMAN, noting that there were no further speakers, said that the Commission would revert to item 3 later in the session.

The law of the non-navigational uses of international watercourses (A/CN.4/348,⁶ A/CN.4/367,⁷ A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

**DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR**

38. Mr. EVENSEN (Special Rapporteur) said he intended to present briefly at the next meeting the 39 draft articles of the outline for a draft convention proposed in his report (A/CN.4/367) on the law of the non-navigational uses of international watercourses, which would provide the Commission with a basis for a thorough exchange of views. He would then introduce chapter I of the draft, which consisted of five articles. Article 1 defined the term "international watercourse system" and the four other articles reproduced, more or less word for word, the first articles adopted by the Commission in 1980.⁸

The meeting rose at 12.50 p.m.

⁶ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

⁷ Reproduced in *Yearbook* . . . 1983, Vol. II (Part One).

⁸ 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.*

1785th MEETING

Monday, 20 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

**DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (continued)**

1. The CHAIRMAN invited the Special Rapporteur to introduce his first report on the law of the non-navigational uses of international watercourses (A/CN.4/367).
2. Mr. EVENSEN (Special Rapporteur) said that the topic under consideration had been before the Commission for some 10 years and that he had been preceded as Special Rapporteur first by Mr. Kearney, who had submitted a report at the Commission's twenty-eighth session in 1976,³ and subsequently by Mr. Schwebel, who had submitted three reports, the first at the thirty-first session in 1979,⁴ the second at the thirty-second session in 1980,⁵ and the third at the thirty-fourth session in 1982. Although the Commission had never taken action on Mr. Schwebel's third report (A/CN.4/348), which contained 11 draft articles in addition to the six already provisionally adopted by the Commission in 1980,⁶ that admirable report would continue to provide valuable source material. He had relied on it extensively in preparing the report now before the Commission (A/CN.4/367), but considered that the treatment of the 11 articles proposed by Mr. Schwebel was somewhat unusual as far as treaty texts were concerned and he also took a slightly different view of the substance of the matter.
3. The first point to be borne in mind was the special nature of the topic, which involved not only legal questions but also a delicate political aspect. Each international watercourse had its own special characteristics and its own set of problems, but all international watercourses had features in common and followed general laws that must inevitably leave their imprint on the administration and management of international watercourse systems in general. It was essential to recognize those common features yet accept the limitations that arose out of the unique characteristics of each watercourse. In principle, therefore, he agreed with the approach advocated by Mr. Schwebel in his second report, namely that system agreements should where necessary be drawn up for the detailed regulation of given watercourse systems, something which in no way precluded a modern framework convention laying the

foundations for system agreements of that kind.⁷ It was interesting to note that the Observer for the Asian-African Legal Consultative Committee had recently endorsed that view (1775th meeting).

4. In formulating the draft articles he had borne in mind the need to view the questions involved as a whole, rather than in isolation, given the delicate political nature of the topic. He had also considered that an initial text would help to make the discussion more specific. Only from the reaction to the actual wording of the draft articles would he be able to judge whether he had struck the right balance. Furthermore, there was a growing demand for an appropriate text, as had been apparent from the debate in the Sixth Committee of the General Assembly at its thirty-seventh session (A/CN.4/L.352, sect. F.1). A preliminary discussion of a tentative draft would thus shed light on many of the issues involved. His suggestions were of a preliminary nature only and were made with a view to securing the Commission's guidance. On that basis he had presented 39 draft articles in his report, although further articles might obviously be necessary.

5. The 39 proposed articles constituted the following outline for a draft convention.

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention

1. An "international watercourse system" is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States.

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.

Deltas, river mouths or other similar formations with brackish or salt water forming a natural part of an international watercourse system shall likewise be governed by the provisions of the present Convention.

2. To the extent that a part or parts of a watercourse system situated in one system State are not affected by or do not affect uses of the watercourse system in another system State, such parts shall not be treated as part of the international watercourse system for the purposes of the present Convention.

Article 2. Scope of the present Convention

1. The present Convention applies to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems 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. System States

For the purposes of the present Convention, a State in whose territory components/part of the waters of an international watercourse system exist(s) is a system State.

Article 4. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention to the characteristics and uses of a particular international watercourse system or part thereof.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Yearbook* . . . 1976, vol. II (Part One), p. 184, document A/CN.4/295.

⁴ *Yearbook* . . . 1979, vol. II (Part One), p. 143, document A/CN.4/320.

⁵ *Yearbook* . . . 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

⁶ Articles 1 to 5 and X. The texts of these articles and the commentaries thereto appear in *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

⁷ *Yearbook* . . . 1980, vol. II (Part One), p. 169, document A/CN.4/332 and Add.1, para. 65.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 5. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system 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, pursuant to article 4 of the present Convention.

CHAPTER II. GENERAL PRINCIPLES:
RIGHTS AND DUTIES OF SYSTEM STATES

Article 6. The international watercourse system—a shared natural resource. Use of this resource

1. To the extent that the use of an international watercourse system and its waters in the territory of one system State affects the use of a watercourse system or its waters in the territory of another system State or other system States, the watercourse system and its waters are, for the purposes of the present Convention, a shared natural resource. Each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource.

2. An international watercourse system and its waters which constitute a shared natural resource shall be used by system States in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5.

Article 7. Equitable sharing in the uses of an international watercourse system and its waters

An international watercourse system and its waters shall be developed, used and shared by system 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 watercourse system and its components.

Article 8. Determination of reasonable and equitable use

1. In determining whether the use by a system State of a watercourse system or its waters 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 watercourse system concerned. Among such factors are:

(a) The geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse system concerned;

(b) The special needs of the system State concerned for the use or uses in question in comparison with the needs of other system States, including the stage of economic development of all system States concerned;

(c) The contribution by the system State concerned of waters to the system in comparison with that of other system States;

(d) Development and conservation by the system State concerned of the watercourse system and its waters;

(e) The other uses of a watercourse system and its waters by the State concerned in comparison with the uses by other system States, including the efficiency of such uses;

(f) Co-operation with other system States in projects or programmes to attain optimum utilization, protection and control of the watercourse system and its waters;

(g) The pollution by the system State in question of the watercourse system in general and as a consequence of the particular use, if any;

(h) Other interference with or adverse effects, if any, of such use for the uses or interests of other system States including, but not restricted to, the adverse effects upon existing uses by such States of the watercourse system or its waters and the impact upon protection and control measures of other system States;

(i) Availability to the State concerned and to other system States of alternative water resources;

(j) The extent and manner of co-operation established between the system State concerned and other system States in programmes and projects concerning the use in question and other uses of the international watercourse system and its waters in order to attain 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 system States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

If the system 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 system causing appreciable harm to other system States

A system State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights or interests of other system States, unless otherwise provided for in a system agreement or other agreement.

CHAPTER III. CO-OPERATION AND MANAGEMENT IN
REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

Article 10. General principles of co-operation and management

1. System States sharing an international watercourse system shall, to the extent practicable, establish co-operation with regard to uses, projects and programmes related to such watercourse system in order to attain optimum utilization, protection and control of the watercourse system. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

2. System States should engage in consultations (negotiations) and exchange of information and data on a regular basis concerning the administration and management of such watercourse and other aspects of regional interest with regard to watercourse systems.

3. System States shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the measures and objects provided for in the present Convention.

*Article 11. Notification to other system States.
Content of notification*

1. Before a system State undertakes, authorizes or permits a project or programme or alteration or addition to existing projects and programmes with regard to the utilization, conservation, protection or management of an international watercourse system which may cause appreciable harm to the rights or interests of another system State or other system States, the system State concerned shall submit at the earliest possible date due notification to the relevant system State or system States about such projects or programmes.

2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other system State or States to evaluate and determine as accurately as possible the potential for appreciable harm of such intended project or programme.

Article 12. Time-limits for reply to notification

1. In a notification transmitted in accordance with article 11, the notifying system State shall allow the receiving system State or States a period 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 or programme and to communicate its reasoned decision to the notifying system State.

2. Should the receiving system State or States deem that additional information, data or specifications are needed for a proper evaluation of the problems involved, they shall inform the notifying system State to this effect as expeditiously as possible. Justifiable requests for such additional 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 paragraph 1 of this article for the proper evaluation of the situation in the light of the available material.

3. During the time-limits stipulated in paragraphs 1 and 2 of this article, the notifying State may not initiate the project and programme referred to in the notification without the consent of the system State or system States concerned.

Article 13. Procedures in case of protest

1. If a system 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 system 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, system agreements or other relevant agreement or arrangement.

3. In cases where paragraph 1 of this article applies and the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State shall not proceed with the planned project or programme until the provisions of paragraph 2 have been complied with, unless the notifying State deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm to the notifying State or other system States.

4. Claims for damage or harm arising out of such emergency situations shall be settled in good faith and in accordance with friendly neighbourly relations by the procedures for peaceful settlement provided for in the present Convention.

Article 14. Failure of system States to comply with the provisions of articles 11 to 13

1. If a system State having received a notification pursuant to article 11 fails to communicate to the notifying system 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 system 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 system State shall not be responsible for subsequent harm to the other system 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 system State or States.

2. If a system 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 system States as a result of the project or programme in question.

Article 15. Management of international watercourse systems. Establishment of commissions

1. System States shall, where it is deemed advisable for the rational administration, management, protection and control of an international watercourse system, 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 decision-

making procedures for the purposes of promoting optimum utilization, protection and control of the international watercourse system and its waters.

2. To this end system 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 system or systems;

(b) To propose and institute investigations and research concerning utilization, protection and control;

(c) To monitor on a continuous basis the international watercourse system;

(d) To recommend to system States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse system;

(e) To serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by system 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 system States.

Article 16. Collection, processing and dissemination of information and data

1. In order to ensure the necessary co-operation between system States, the optimum utilization of a watercourse system and a fair and reasonable distribution of the uses thereof among such States, each system State shall to the extent possible collect and process the necessary information and data concerning, *inter alia*, water levels and discharge 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. System States shall to the extent possible make available to other system States the relevant information and data mentioned in paragraph 1 of this article. To this end, system States should to the extent necessary conclude agreements on the collection, processing and dissemination of such information and data. To this end, system 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. System 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 system State requests from another system State information and data not covered by the provisions of article 16 pertaining to the watercourse system concerned, the other system 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 system State should by the most rapid means available inform the other system State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to a shared watercourse system—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 system State or States.

Article 19. Restricted information

1. Information and data the safeguard of which a system State considers vital for reasons of national security or otherwise need not be disseminated to other system States, organizations or agencies. A system State withholding such information or data shall co-operate in good faith with other system States in furnishing essential information and data to the extent practicable on the issues concerned.

2. Where a system State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other system 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,
REGULATION AND SAFETY, USE PREFERENCES,
NATIONAL OR REGIONAL SITES

Article 20. General provisions on the protection of the environment

1. System States—individually and in co-operation—shall to the extent possible take the necessary measures to protect the environment of a watercourse system 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. System States shall—individually and through co-ordinated efforts—adopt the necessary measures and régimes for the management and equitable utilization of a joint watercourse system 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 system States.

3. System 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 system.

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 system 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 watercourse system 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 system 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 system and surrounding areas.

Article 23. Obligation to prevent pollution

1. No system State may pollute or permit the pollution of the waters of an international watercourse system which causes or may cause

appreciable harm to the rights or interests of other system States in regard to their equitable use of such shared water resources or to other harmful effects within their territories.

2. In cases where pollution emanating in a system State causes harm or inconveniences in other system States of a less serious nature than those dealt with in paragraph 1 of this article, the system State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The system 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 system State shall be under no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State. System 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 system States for protection against pollution. Abatement and reduction of pollution

1. System States of an international watercourse system shall 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 watercourse system in question and with a view to the adoption of the measures and régimes necessary in order to provide adequate control and protection of the watercourse system and its environment against pollution.

2. The system States concerned shall, when necessary, conduct consultations and negotiations with a view to adopting a comprehensive list of pollutants, the introduction of which into the waters of the international watercourse system shall be prohibited, restricted or monitored. They shall, where expedient, establish the procedures and machinery necessary for the effective implementation of these measures.

3. System States shall to the extent necessary establish programmes with the necessary measures and timetables for the protection against pollution and abatement or mitigation of pollution of the international watercourse system concerned.

Article 25. Emergency situations regarding pollution

1. If an emergency situation arises from pollution or from similar hazards to an international watercourse system or its environment, the system State or States within whose jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all system States that may be affected by the emergency together with all the relevant information and data which may be of relevance in the situation.

2. The 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 system 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 State or States where the emergency arose.

Article 26. Control and prevention of water-related hazards

1. System 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 system 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. System 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 system.

Article 27. Regulation of international watercourse systems

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 system. 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. System States shall co-operate in a spirit of good faith and good-neighbourly relations in assessing the needs and possibilities for water system regulations with a view to obtaining the optimum and equitable utilization of shared watercourse resources. 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 regulations, works and measures and on the defrayal of the costs for such watercourse regulations.

Article 28. Safety of international watercourse systems, installations and constructions

1. System States shall employ their best efforts to maintain and protect international watercourse systems and the installations and constructions pertaining thereto.

2. To this end, system States shall co-operate and consult with a view to concluding agreements concerning:

(a) Relevant general and special conditions and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of international watercourse systems;

(b) The establishment of adequate safety standards and security measures for the protection of the watercourse system, its shared resources and the 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. System States shall as far as reasonable exchange information and data concerning the safety and security issues dealt with in this article.

Article 29. Use preferences

1. In establishing systems or régimes for equitable participation in the utilization of an international watercourse system and its resources by all system States, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question.

2. In settling questions relating to conflicting uses, the requirements for and the effects of various uses shall be weighed against the requirements for and effects of other pertinent uses with a view to obtaining the optimum utilization of shared watercourse resources and the reasonable and equitable distribution thereof between the system States, taking into account all considerations relevant to the particular watercourse system.

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 system.

4. When a question has arisen with regard to conflicting uses or use preferences in an international watercourse system, system States shall, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing works on installations, constructions or other watercourse projects or measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue.

Article 30. Establishment of international watercourse systems or parts thereof as protected national or regional sites

1. A system State or system States may—for environmental, ecological, historic, scenic or other reasons—proclaim a watercourse system or part or parts thereof a protected national or regional site.

2. Other system States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such system State or States in preserving, protecting and maintaining such protected site or sites in their natural state.

CHAPTER V. SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means

1. System 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 impairs the right of States Parties (system States) 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 32. Settlement of disputes by consultations and negotiations

1. When a dispute arises between system 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 joint commissions established for the administration and management of the international watercourse system 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 parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry of qualified 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, the tasks entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board of Inquiry shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry 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

1. If a system 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 system 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.

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 system 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 system 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

Without prejudice to article 4, paragraph 3, the provisions of the present Convention do not affect conventions or other international agreements in force relating to a particular international watercourse system or any part thereof, to international or regional watercourse systems or to a particular project, programme or use.

6. The draft took the form of a framework agreement. It included articles setting forth mandatory provisions based on extensive State practice, general principles of international law, and the provisions of the Charter of the United Nations, while other articles were a reflection of the progressive development of international law in matters pertaining to the problems inherent in the use, management and administration of international watercourse systems. At the same time, the draft contained provisions that were to be regarded not as mandatory rules but as recommendations on the way in which riparian States should organize, jointly or unilaterally, the management and administration of such resources.

7. He had taken account of certain basic principles, the first of which was the obligation on States to engage in negotiations in the event of disputes. That obligation had been recognized by the ICJ in 1969, in the *North Sea Continental Shelf* cases,⁸ as one of the methods to be used for the peaceful settlement of international disputes; it was set forth in draft article 4, paragraph 3, and in a number of the subsequent articles. The terms of article 4, paragraph 3, were reproduced verbatim from article 3, paragraph 3, as provisionally adopted by the Commission in 1980.⁹

8. A second basic principle, and one which was a corollary to the obligation to negotiate, was that system agreements should apply whenever necessary or appropriate. The obligation to negotiate, however, could not be extended into an obligation to conclude system agreements, since that would be counter-productive if it were laid down as a principle of law. The Commission might none the less wish to consider whether States should be obliged to submit a dispute over the management and administration of an international watercourse to appropriate peaceful settlement procedures that would provide for speedy, effective and binding solutions. Such a bold course had been taken in the 1982 United Nations Convention on the Law of the Sea.¹⁰

9. A third principle related to the concept of an international watercourse system as a shared natural resource—a concept that was of paramount importance for the administration and management of such a system. It was also a vital and living example of the interdependence of States and their activities. The concept was embodied in draft article 6 but permeated the rest of the draft. In many respects an international watercourse system had to be treated as an integrated whole and the concept of a shared natural resource must necessarily be kept in mind. In that connection, he expressed his appreciation to Mr. Stavropoulos for his note on the UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (A/CN.4/L.353).

⁸ Judgment of 20 February 1969, *I.C.J. Reports* 1969, p. 47, para. 86.

⁹ *Yearbook* . . . 1980, vol. II (Part Two), p. 112.

¹⁰ See part XV and annexes V–VIII of the Convention (*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).

10. Certain other principles, which he would term "legal standards", had also been applied throughout the draft. Riparian States would be required to observe those standards, although a measure of discretion would be allowed in applying them. One such standard, incorporated in draft articles 6–8, related to "reasonable and equitable participation" in or sharing in a "reasonable and equitable manner" the watercourse system and its uses. A similar formulation—"fair and reasonable distribution"—had been used in draft article 16. Another standard, incorporated in draft articles 7, 19, 27 and 29 for example, was that problems connected with the management and administration of an international watercourse, and negotiations and differences of views in that regard, had to be resolved "on the basis of good faith and good-neighbourly relations". It afforded a very accurate yardstick of the delicate yet practical task of managing and administering a shared natural resource. A third standard, which was incorporated in draft articles 7, 10, 15, 27 and 29 and embodied elements of both fact and law, related to the attainment of "optimum utilization" in management and administration. A fourth basic standard related to the requirement that States should refrain from uses and activities that caused "appreciable harm" to the rights or interests of neighbouring States. The formulations "causing damage", "causing substantial damage" and "causing appreciable damage" were used in a number of conventions, but "appreciable harm" was preferable, since "harm" was more neutral than "damage" in describing the effects of objectionable acts or practices. That principle was reflected in draft articles 9, 11, 20, 23 and 29.

11. Lastly, a principle of fundamental importance was the obligation to co-operate in the joint management and administration of an international watercourse system, a legal obligation that stemmed from the broader and somewhat elusive principles of good-neighbourly relations and the principles laid down in the Charter of the United Nations in Articles 1 and 2 and also Chapter VI, under which Member States undertook to settle their international disputes by peaceful means and in good faith. The principle of co-operation in the joint management of watercourses enjoyed wide support in the practice of States, although it obviously had to be made conditional upon what was practical, reasonable and necessary in each instance.

12. In chapter I of the draft, articles 2–5 reproduced, apart from some minor adjustments, the first four articles provisionally adopted by the Commission in 1980.¹¹ In response to requests made in the Sixth Committee of the General Assembly, he had endeavoured to formulate a definition, or explanation, of the term "international watercourse system" in the new draft article 1. The definition ought to be concrete and avoid an approach based on the concept of the drainage basin, a concept that would not be acceptable as the starting-point for the draft convention. The purpose of such a definition should not be to create a superstructure from which legal principles

could be extracted, since that would defeat the object of drafting principles that were sufficiently flexible to be adapted to the special features of individual international watercourses. For similar reasons, he had not itemized the constituent elements of an international watercourse system: in his view, the terms "international watercourse system" and "system States" were sufficiently comprehensive to provide the necessary guidance. By the same token, the word "components" was preferable to the word "part" in draft article 3, which set out the definition of system States. He would be particularly interested in having the Commission's comments on the proposed definition in draft article 1.

13. Chapter II, which related to general principles governing the rights and duties of system States, consisted of draft articles 6–9. Apart from minor changes, draft article 6 reproduced draft article 5 as provisionally adopted in 1980¹² and provided that the waters of an international watercourse system should be considered as a shared and shareable natural resource. Draft articles 7–9 then sought to provide some guidelines in the delicate matter of applying the principle laid down in draft article 6. He had tried to display some caution, as would be apparent from the use in draft article 7, for example, of the words "in a reasonable and equitable manner", "good faith", "good-neighbourly relations" and "optimum utilization". In amplification of the legal standards laid down in draft article 7, draft article 8 contained a list, which was not exhaustive, of the factors that might be relevant in determining an equitable sharing in the uses of an international watercourse system and its waters. The list was intended to serve solely as an example of certain factors frequently encountered in bilateral and multi-lateral system agreements; article V of the Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966¹³ contained a similar enumeration. Paragraph 2 of draft article 8 reiterated the obligation to negotiate "in a spirit of good faith and good-neighbourly relations" and also provided that, if the States concerned had not been able to solve the problems of an equitable sharing of uses, they should resort to other peaceful settlement procedures provided for in chapter V of the draft.

14. Draft article 9 laid down one of the most important principles in the draft, namely that a system State should refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States. It was a principle that was generally applicable not only in the utilization of international watercourse systems but also in the broader relationships between neighbouring countries and it was assuming ever-growing importance in an era of high technological development. The intention was that the principle as laid down in draft article 9 would be wider and more general in scope than

¹² *Ibid.*, p. 120.

¹³ ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.* (the text of the Rules is reproduced in part in *Yearbook* . . . 1974, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405).

¹¹ *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

had previously been the case, in that it would apply to watercourse systems as well as to their waters.

15. Chapter III contained provisions on co-operation and management procedures in regard to international watercourse systems. It was self-evident that co-operation would normally be essential, and it was also being increasingly recognized that such international co-operation would have to be institutionalized both by setting up the necessary organs for the watercourse in question and by entrusting multilateral organizations and, more and more, the United Nations family of organizations, with tasks relating to such shared resources. On the other hand, too broad or too rapid a transfer of responsibility to institutions could lead to the creation of supranational authorities which would be unacceptable to many Governments. He had of course tried to take account of those somewhat conflicting concerns.

16. Thus, in draft article 10, the general principle was tempered by a caveat in paragraph 1 to the effect that co-operation in the management and administration of a watercourse system should be established "to the extent practicable", and a second sentence had been added specifying that such co-operation "shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States". Paragraphs 2 and 3 of draft article 10 provided for regular consultation and exchange of data and information and the establishment of joint commissions or other co-operative institutions or agencies. Measures of that kind had been included in a number of agreements and had proved indispensable for the efficient administration of particular international watercourses.

17. One essential aspect of international co-operation involved notification of programmes planned by one system State that might cause appreciable harm to the rights and interests of another system State. The relevant provisions were to be found in draft articles 11–14 and the basic elements derived from established principles of international law, such as the obligation to act in good faith and in keeping with good-neighbourly relations, the obligation not to cause appreciable harm to neighbouring States and the obligation to solve outstanding issues exclusively by peaceful means.

18. A significant matter with regard to the co-operation and joint management of international watercourse systems was the clear trend in State practice and in the work of the United Nations family of organizations towards institutionalization of the requisite machinery, something that frequently involved the establishment of joint commissions and the collection, processing and exchange of information and data on a regular basis. Since those issues were highly relevant, he had dealt with them in some detail in draft articles 15–19.

19. Chapter IV, consisting of draft articles 20–30, covered a number of environmental aspects relating to watercourse systems. The provisions of draft articles 20–25 were not confined to the international watercourse system as such but extended to the surrounding area forming an ecological whole with the system concerned.

Those draft articles laid down legal obligations that stemmed from established principles of international law.

20. He wished to draw special attention to the definition of pollution contained in draft article 22, and it would be seen from the wording of draft article 23, on the obligation to prevent pollution, that he had rejected the distinction sometimes made between "existing" pollution and "new" pollution. If pollution caused appreciable harm to other States, a distinction between old and new sources of such harm did not seem justified.

21. Draft articles 26 and 27 dealt with protection of the environment of a watercourse from a different point of view. Article 26 imposed an obligation on States to co-operate in preventing or mitigating hazardous water-related conditions by introducing joint measures and régimes. The list of such hazards in paragraph 1 was not meant to be exhaustive, although it obviously included the more important ones. Since floods and drought were among the worst scourges that afflicted man in many regions of the world, he wondered whether more emphasis should not be placed on flood control and measures to combat drought by imposing an obligation not only on system States to engage in co-operation but also on the appropriate international organizations and indeed on mankind as a whole to provide the necessary assistance in abating those scourges, which were particularly damaging to the developing world. He would be grateful for any guidance the Commission could give him on those issues.

22. Draft article 27 included among the measures to regulate international watercourse systems the "storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works" and paragraph 2 provided that system States should co-operate in a spirit of good faith and good-neighbourly relations in preparing the appropriate plans for such regulations.

23. As for draft article 28, relating to the safety of international watercourse systems, installations and constructions, he had much sympathy for the suggestions in Mr. Schwebel's third report (A/CN.4/348, paras. 393 *et seq.* and draft article 13) regarding a draft article on protection of watercourses in the event of armed conflict. However, he had grave doubts about the wisdom of including such a provision in the present draft, for it might easily be construed as an attempt to change or extend the content of the two 1977 Geneva Protocols on the protection of victims in armed conflicts,¹⁴ which had been agreed after lengthy and delicate negotiations. The end result might be to create unforeseen difficulties for the Commission's work on a difficult topic. For that reason he had hesitated to include an appropriate provision in the draft, but the Commission's guidance in the matter would be very welcome. However, it was essential to include

¹⁴ Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977. Protocol I relates to the protection of victims of international armed conflicts; Protocol II relates to the protection of victims of non-international armed conflicts (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

provisions relating to the establishment of safety standards, operating manuals and maintenance procedures for installations and constructions pertaining to watercourse systems, and draft article 28 was therefore confined to those matters.

24. Draft article 29, relating to use preferences, laid down a general principle in paragraph 1 that no specific use or uses should have automatic preference over other uses, except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question. Historically, navigation had been the use on which interest had been focused in early agreements between States, but the emphasis had shifted away from navigational issues in recent years. The basic point draft article 29 sought to make was that system States must negotiate in good faith in order to settle problems relating to conflicting uses. In that connection, paragraph 4 of the article provided that, when such a question arose, system States should, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing work on watercourse projects that would aggravate solutions to the question at issue. In such situations, the general principles laid down in chapter II, and particularly in draft article 8, would of course be applicable. In his opinion, draft article 30, providing for the establishment of international watercourse systems or parts thereof as protected national or regional sites, also had its place in the draft. Other system States and regional and international organizations should assist the country concerned in maintaining such sites in their natural state.

25. In chapter V, relating to the settlement of disputes, he used as a natural point of departure the obligations laid down in Articles 2 and 33 of the United Nations Charter. Having examined a large number of multilateral and bilateral treaties, he had concluded that the provisions of part XV and annexes V–VIII of the 1982 United Nations Convention on the Law of the Sea¹⁵ were highly relevant, although they should not always be applied uncritically to international waterways. The 1949 Revised General Act for the Pacific Settlement of International Disputes,¹⁶ the 1957 European Convention for the Peaceful Settlement of Disputes¹⁷ and other regional arrangements of a general nature likewise afforded useful guidance.

26. In chapter V of the draft, article 31 set out the unconditional obligation laid down in Articles 2 and 33 of the United Nations Charter that system States as well as other States Parties must settle their disputes by peaceful means. The provisions of the article were virtually identical to those of article 279 of the United Nations Convention on the Law of the Sea. Draft article 32 went on to prescribe consultations and negotiations as a first and general means of peaceful settlement and also as a legal obligation. Draft article 33 elaborated on that basic procedure by providing that the parties to a dispute might

agree to appoint a Board of Inquiry or a special mediator or mediators to assist them, although the provision was based on the agreement of the parties and was not drafted as a legal obligation.

27. Draft articles 34–36 were concerned with conciliation as an expeditious and relatively inexpensive settlement procedure. The fact that the recommendations of a conciliation were not binding could be advantageous politically, since it relieved the Government concerned of some of the burden of complying with too stringent a judicial solution and, at the same time, meant that it did not suffer any loss of face. Unlike article 297 and annex V, section 2, of the United Nations Convention on the Law of the Sea, draft article 34 did not provide for compulsory conciliation. He would be grateful to learn from the Commission whether it considered that compulsory conciliation should be provided for on a general basis or only for specific issues pertaining to the management and administration of an international watercourse system.

28. Draft articles 37 and 38 dealt with adjudication by the ICJ, other international courts or a permanent or *ad hoc* arbitral tribunal. He had not deemed it advisable to make the provisions of those articles compulsory, although articles 286–299 of the United Nations Convention on the Law of the Sea did provide for compulsory procedures entailing binding decisions in a large number of conflicts involving the interpretation or application of the Convention. For all that, there were a number of exceptions. Compulsory jurisdiction by the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea was also provided for under articles 186 *et seq.* of the Convention in connection with disputes arising out of activities in the international Area. In his view, those provisions involved a special approach to certain problems of the Convention and he doubted whether any useful analogy could be drawn between them and the present draft.

29. However, the Commission on the limits of the Continental Shelf, set up under article 76 and annex II of the Convention, afforded an interesting example of one specific type of settlement procedure. In drawing up the outer limits of the continental shelf, coastal States had to submit all the particulars, together with supporting scientific and technical data, to that Commission, which was then required to submit its recommendations regarding the delimitation to the coastal State concerned and to the Secretary-General of the United Nations. Those recommendations were not final and binding on the coastal State concerned but article 76, paragraph 8, of the Convention stipulated that the limits of the shelf established by a coastal State on the basis of those recommendations should be final and binding. On the other hand, article 9 of annex II to the Convention also expressly provided that the actions of the Commission on the Limits of the Continental Shelf should not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts. Annex II further provided that that Commission should consist of 21 members elected by the United Nations for a five-year term. The Convention presupposed that that Commission

¹⁵ See footnote 10 above.

¹⁶ United Nations, *Treaty Series*, vol. 71, p. 101.

¹⁷ *Ibid.*, vol. 320, p. 243.

would have special expertise in the question of delimitation of marine areas and continental shelves in particular. Although it was not analagous to the problems arising in connection with the management and administration of an international watercourse system, the question of the establishment of an expert body or commission to make recommendations to system States in cases of disputes deserved consideration and he would welcome the Commission's views on the matter.

30. Lastly, it would be gratifying to learn from members whether he had omitted any essential issues, what their reactions were to his general approach to the topic and to the general principles he had outlined, whether he had struck a reasonable balance between the various interests, whether chapter V on settlement of disputes was too detailed, and whether provisions should be included for a compulsory conciliation procedure. In addition to a more general discussion on those points, members might wish to devote some time to considering specific articles. For the time being, however, he would suggest that the Commission should concentrate on chapter I of the draft, which consisted of draft articles 1–5.

31. The CHAIRMAN said that, since draft articles 2–5 reproduced virtually word for word the articles already provisionally adopted by the Commission,¹⁸ members might wish to focus attention on draft articles 6–9.

32. Sir Ian SINCLAIR, supported by Mr. KOROMA, suggested that the Commission should proceed to a general discussion of the report as a whole and, within that framework, should discuss the content of draft article 1, which laid down a definition of the terms “international watercourse system”, and of draft article 6, which established that an international watercourse system was a shared natural resource.

It was so agreed.

33. Mr. EVENSEN (Special Rapporteur) said that, in formulating a definition of the term “international watercourse system” in draft article 1, he had endeavoured to be as specific as possible and to avoid a doctrinal approach. For that reason he had omitted any reference to the river basin. He also deemed it advisable to omit any enumeration of the constituent elements of such a system. Accordingly, the first clause of the article contained the bare statement that an “international watercourse system” is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States”. The second clause in paragraph 1 had been included in express terms, since it was important to make clear that the types of watercourses in question were frequent occurrences in many parts of the world. The third clause in paragraph 1 had been inserted to take account of the fact that, while a watercourse system normally had mainly a fresh water component, deltas, river mouths or other similar formations containing brackish or salt water formed a natural part of the system. Paragraph 2 of the draft article was self-explanatory.

34. He would await members' reactions to draft article 1 before introducing draft article 6.

35. Mr. STAVROPOULOS said that, in 1970, the General Assembly had recommended that the Commission should take up the study of the law of non-navigational uses of international watercourses with a view to its progressive development and codification.¹⁹ Since that time, three Special Rapporteurs had submitted five reports, including the present one, six articles proposed by the second Special Rapporteur in his second report had been provisionally adopted by the Commission, and 11 additional articles had been submitted in the second Special Rapporteur's third report (A/CN.4/348). Only now, however, was the Commission beginning to deal with the substance of the topic.

36. In paragraph 39 of his report (A/CN.4/367), the Special Rapporteur stated that he had studied the previous Special Rapporteur's third report (A/CN.4/348) with the greatest admiration and respect. The same could be said of the report under consideration, for it too commanded admiration and respect and was a truly monumental achievement. It contained a complete draft convention consisting of 39 articles, together with appropriate comments. Both the previous and the present Special Rapporteur had attempted to maintain a delicate balance between rules which would be too detailed to be generally applicable and rules which would be so general that they would not be effective. They had followed the General Assembly's recommendation to engage in codification and progressive development of the law on the topic and both of them had endeavoured to present principles of international law which had or were acquiring the character of custom. The Special Rapporteur, greatly assisted by the previous Special Rapporteur's third report, which had closely followed the Helsinki Rules adopted in 1966 by the International Law Association,²⁰ and by other sources, had also innovated in many cases in order to make the draft articles more accessible and to express different views on substance. On the whole, the present report could not fail to facilitate the Commission's task.

37. Chapter I of the draft contained the introductory articles, the first of which gave an explanation or tentative definition of the term “international watercourse system”. In presenting that definition, the Special Rapporteur had relied on the relevant note adopted by the Commission in 1980.²¹ In its simplicity, that definition was quite adequate for the purpose it was intended to serve. It clearly described what was involved, but did not attempt to suggest a doctrinaire approach. As the Special Rapporteur had rightly pointed out, draft articles 2–5 were the natural starting-point for the topic, since they defined the scope of the draft and introduced the important and valid concept of “system States”.

38. Chapter II of the draft was, to his mind, the most important chapter of all. It reflected the prevailing

¹⁸ See footnote 6 above.

¹⁹ General Assembly resolution 2669 (XXV) of 8 December 1970.

²⁰ See footnote 13 above.

²¹ *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 90.

principles of international law that applied to the rights and duties of the co-riparian States of an international watercourse system. Thus an international watercourse system must be regarded as a shared resource to be used and distributed in an equitable manner among the system States concerned; a watercourse and its waters must be developed, used and shared by system States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations; and activities with regard to an international watercourse system which caused appreciable harm to other system States were prohibited. Those general legal principles were binding upon system States unless otherwise provided for in the draft or in system agreements.

39. Chapter III of the draft enunciated the general principles of co-operation and management in regard to international watercourse systems and set out a number of important provisions in that regard, as did chapter IV, relating to environmental protection and use preferences. Chapter V dealt with the matter of settlement of disputes, and the sole article in chapter VI reproduced an article that had already been provisionally adopted by the Commission.²²

40. He disagreed with the Special Rapporteur's decision not to provide in the draft for a procedure for the compulsory settlement of disputes, something that was strange in view of the right and proper emphasis placed on consultations and negotiations. In the absence of such a procedure, what would happen if one or more system States proved recalcitrant and ignored the principle of good faith and the spirit of good-neighbourliness, with the result that all reasonable attempts to negotiate were unsuccessful? In such a case, it might not be possible to establish equity or to prevent further complications.

41. The Special Rapporteur had stated that, although he was in favour of compulsory international court procedures, he had deemed it inadvisable to introduce compulsory jurisdiction. Such a realistic approach was understandable, for it was based on the current practice of the international community, but he found it regrettable that the Special Rapporteur had not tried to establish speedy, effective and binding procedures. It was gratifying, however, that the Special Rapporteur had suggested in his oral introduction that, in some cases, the draft should follow the example set in the United Nations Convention on the Law of the Sea. At least one of the methods for the settlement of disputes referred to in the draft, namely conciliation, should be compulsory if one of the parties to the dispute requested it. Of course, the recommendations of a conciliation commission would not be binding on the parties to the dispute. A compulsory conciliation procedure might prove to be politically acceptable and of great value in some cases.

42. Theoretically, States could be divided for the purposes of the topic under consideration into three groups: neutral States, upstream States and downstream States. The Special Rapporteur came from an upstream

State and was to be congratulated on producing a very balanced report worthy of someone who was neutral. On the basis of that report, the Commission should now proceed with a sense of equity and fairness to attempt to satisfy all competing interests and to prevent "vetoes" from any side in the hope of improving, rather than worsening, existing conditions.

43. Mr. EL RASHEED MOHAMED AHMED said that he agreed with the Special Rapporteur's practical approach. The need existed for a draft convention to codify the existing law of the non-navigational uses of international watercourses, but the Commission should none the less take care to avoid establishing excessively detailed provisions that would not be generally acceptable to States.

44. One of the international watercourse systems which had not been mentioned by the previous Special Rapporteur was the Nile, which had been governed by legal rules since the time of the Pharaohs. The 1959 Agreement between the United Arab Republic and the Sudan for the full utilization of the Nile waters²³ related primarily to agricultural uses and a Permanent Joint Technical Commission had been set up under the Agreement of the co-riparian countries.

45. The geographical definition of an international watercourse system proposed in draft article 1 should not give rise to any controversy and the Special Rapporteur was quite right to point out that a definition of international watercourses based on a doctrinal approach to the topic would be counter-productive. Similarly, he could support the view expressed by the second Special Rapporteur and quoted in the present report (A/CN.4/367, para. 19) that there was no need to make a distinction between the use of the watercourse and the use of the water of the watercourse. Furthermore, the obligation on States to negotiate in good faith to settle disputes was based on solid legal grounds to be found in State practice and international precedents. In that connection, he agreed with Mr. Stavropoulos that conciliation should be compulsory, as was provided for in the Convention on the Law of the Sea.

46. Subsystem agreements were obviously necessary, particularly in the case of long rivers, as pointed out in the report (*ibid.*, para. 27). That was entirely true in the case of the Nile, for example. However, on the question of the right of co-riparian States to participate in the negotiation and conclusion of system agreements, it was not desirable to establish the condition that a State's use and enjoyment of the waters of the international watercourse system in question must be affected "to an appreciable extent" (*ibid.*, para. 31). The words "to an appreciable extent" were imprecise and would not serve as a reliable guideline. In his opinion any of the co-riparian States should be entitled to participate in the negotiation and conclusion of a system agreement.

47. He agreed with the Special Rapporteur's approach to the important matter of water resources and installation safety (*ibid.*, paras. 45-46) but was opposed to the

²² Art. X (Relationship between the present articles and other treaties in force) (*ibid.*, p. 136).

²³ United Nations, *Treaty Series*, vol. 453, p. 51.

decision not to take account of questions pertaining to the law of armed conflict, which had been dealt with in draft article 13 as proposed by the previous Special Rapporteur (A/CN.4/348, para. 415). Moreover, provisions on use preferences might not be acceptable in the case of long rivers, such as the Nile, in connection with which the agreements concluded by Egypt and the Sudan, for example, related mainly to agricultural uses.

48. Lastly, if draft article 1, paragraph 2, was worded positively, draft article 6 could be reduced to a single sentence, reading: "An international watercourse system is a shared natural resource."

49. Mr. REUTER said it was probably the first time in the Commission's history that a Special Rapporteur had, in his first report (A/CN.4/367), outlined the essentials of his thinking and submitted a complete set of draft articles. The report under examination bore witness to the author's constructive attitude, his clarity and his caution. Indeed, the Special Rapporteur was displaying caution firstly because it was a natural quality that had earned him a justified reputation at major and lengthy international conferences; secondly, because the largest possible measure of agreement should be achieved on a particularly difficult and delicate subject; and lastly, because it was preferable that members of the Commission should acquaint the Special Rapporteur with their points of view on the principal difficulties before he adopted a position. The result was that several of the proposed texts side-stepped difficulties rather than resolved them. He (Mr. Reuter) proposed to state his views on what he regarded as an accessory issue, that of the relationship between the law on international watercourses and the law on armed conflicts, and then to make a general comment from which other observations would derive.

50. The Special Rapporteur was right to have refrained from going into the question of the law of armed conflicts. The problems that might result from armed conflicts in the matter under consideration were all too easy to imagine, but the Commission did not have to concern itself with all the possible uses of the waters of international watercourses for destructive military ends. In that connection, he recalled that towards the end of the Second World War certain belligerents had striven to destroy some very important hydraulic installations in order to cause a major catastrophe. Fortunately, the two 1977 Protocols to the 1949 Geneva Conventions²⁴ had now been ratified by some 25 States.

51. The general comment from which other observations would derive concerned the balance in the draft between law and what might be termed "non-law". For a long time, Governments had on occasions inserted in treaties certain wishes or affirmations which involved no obligation and had no legal character. The Hague Conventions of 1899 and 1907 and the 1982 Convention on the Law of the Sea were cases in point. As an expert not representing a Government, he had no sympathy for draft provisions that involved no obligation. He was in favour of excluding not only recommendations, but also

the use of the conditional. The reason why the Convention on the Law of the Sea contained wishes expressed in the conditional was that the Governments that had adopted the Convention had thought it good enough for those States that had been completely passed over in the apportionment of the advantages under that instrument. Personally, he would be against any article drafted in the conditional. Similarly, he would be opposed to any phrase such as "as far as possible" or "if Governments so desire", which would transform an article into a purely potestative clause. He had nothing against an international conference expressing certain wishes, or the Commission suggesting in a report that a conference might do so; but when drafting articles the Commission should state the actual rules it believed it was in a position to state. Admittedly, some rules might seem rather vague, but even the very general rule that States should co-operate with one another implied an obligation, one which, however vague, forbade complete refusal to co-operate. A distinction should therefore be drawn between formulations which were very general but contained a small element of obligation and those which contained none at all. Draft articles which included formulations of the latter kind should be rewritten. In the case of obligations expressed in very vague terms and bordering on non-law, the Commission should consider whether it could not go a little further and spell out their precise meaning.

52. The more general the obligations laid down by the Commission in the draft, the greater would be the need for a third party to intervene in resolving disputes. It did not seem possible to impose a general obligation requiring compulsory settlement for each and every dispute; otherwise the Commission's work would be paralysed by disagreements from the start. It would be better to proceed in the same way as for the law of the sea and try to identify some straightforward or fundamental cases for which an attempt might be made to provide for the compulsory settlement of disputes.

The meeting rose at 6.05 p.m.

1786th MEETING

Tuesday, 21 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

²⁴ See footnote 14 above.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

**DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)**

1. Mr. REUTER, continuing the statement he had begun at the previous meeting, said that in regard to the central concept of an international watercourse system, the Special Rapporteur had not departed from the course set by the Commission and by his predecessors. The question arose, however, whether the replacement of the concept of a drainage basin by that of a watercourse system was a matter of substance or of form. There were two concepts of an international watercourse system, one corresponding exactly to that of a drainage basin and the other entirely different from it. Paragraph 1 of draft article 1 defined the former concept and paragraph 2 the latter, which was a functional concept. The system defined in paragraph 1 was one "ordinarily consisting of fresh water components, situated in two or more system States". It might perhaps be advisable to add that those components were in communication with one another, which was self-evident.

2. In a definition which had become famous, Gidel had defined the sea as the system of salt waters in free and natural communication.⁴ In the case of an international watercourse, the components could be in either natural or artificial communication. If the Rhine and the Danube, each of which constituted an international watercourse within the meaning of the terminology adopted in the report, were joined by a canal, they would together form an international watercourse system. That first concept of a watercourse system was thus not very different from that of a drainage basin; it had physical character, both geographic and hydrological. But it was with the second concept, that of a system whose components were interdependent with respect to a certain problem, that the Special Rapporteur was chiefly concerned. As he had said in his oral introduction (1785th meeting), an international watercourse could be broken down into several systems.

3. At the very general level of pollution, it could be considered that a system as defined in article 1, paragraph 1, also formed a system within the meaning of paragraph 2. For example, pollution by the Federal Republic of Germany of the canal joining the Danube to the Rhine would have repercussions extending from the North Sea to the Black Sea. A functional system would be affected.

Moreover, a river crossing the territory of three States could be considered, from the point of view of paragraph 2, as constituting a system of components situated in the territory of each of those States, or a system consisting only of components situated in the territory of two of those States. In the event of generalized pollution caused by one State, it was the system extending over the territory of all three States which should be considered. On the other hand, if the intermediate State used the water of the watercourse for irrigation purposes and only the interests of the downstream State were affected, the system to be considered was that extending over the territory of those two States only.

4. The Special Rapporteur had drafted paragraph 1 of article 1 bearing in mind the concept of the drainage basin, which he had discarded in paragraph 2. The reason why the term "system" was used in both cases was that the mechanisms he proposed raised difficult problems. For it could not be asserted that the true concept of a watercourse system was the functional concept which included only the States concerned, without saying who was to determine which those States were. In the system of notifications which a State had to submit to other States before undertaking certain projects (art. 11), it was that State itself that determined which States were concerned. It was no doubt because he was aware of the difficulty that the Special Rapporteur prudently referred in article 11 to "the relevant system States" without specifying whether the word "system" should be understood as in paragraph 1 or as in paragraph 2 of article 1. His own impression was that the concept in paragraph 2 should be adopted, since the Commission seemed reluctant to employ too broad a geographic concept which could involve too many States, thus reducing the chances of agreement.

5. However that might be, a preliminary question arose, which called for an obligatory decision procedure: that of the circle of interested States. It was a question of fact which should not raise insurmountable difficulties. In preparing the draft articles on the law of treaties, the Commission had met with a similar problem when considering whether there was a right to participate in the negotiation of general multilateral treaties; but it had been able to leave that problem aside, without solving it. In the present case, however, the right to participate in the negotiation of an agreement, and subsequently in the agreement itself, was an aspiration of most of the international community, and particularly of the developing countries. Indeed, those countries could not agree to questions affecting the general interests of mankind being settled without their participation.

6. With regard to article 6, he entirely agreed with the views expressed by Mr. El Rasheed Mohamed Ahmed. The drafting of the article was completely tautological. If no principles or rules of international law on shared resources existed at present, the concept of shared natural resources should not be employed. If such principles and rules did exist, it would be preferable to adopt the simple formulation suggested by Mr. El Rasheed Mohamed Ahmed (1785th meeting, para. 48) and say that the international watercourse system was governed by the

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

⁴ G. Gidel, *Le droit international public de la mer*, vol. I, *Introduction - La haute mer* (Chateauroux, Mellottée, 1932), p. 40.

principles and rules common to the shared natural resources. The note presented by Mr. Stavropoulos (A/CN.4/L.353) showed that there was a trend favourable to principles and rules on shared natural resources, although the draft principles of conduct prepared by UNEP concerning shared natural resources had been received without much enthusiasm. He thought the Commission should avoid questions such as that of the existence of principles and rules common to shared natural resources such as international watercourses, atmospheric space, the ozone layer and the regions of space occupied by geostationary satellites. The wording proposed by Mr. El Rasheed Mohamed Ahmed seemed to be sufficiently close to the wishes of the developing countries, although it should be made clear in the commentary to article 6 that the law was developing and that the Commission considered it preferable not to go further into the question.

7. Although they were not formally under consideration, he wished to make some comments on articles 7 and 8, which concerned equity. He wondered whether the factors relevant to equity, a non-exhaustive list of which was given in article 8, should not be supplemented by the general principle to which they were subordinated. It was desirable that the provision should permit of an arbitration procedure. Referring to the concept of optimum utilization which the Special Rapporteur had introduced on several occasions in the draft articles, he observed that with regard to the uses of hydroelectric energy, the Economic Commission for Europe had advised States to examine their problems as though frontiers did not exist.⁵ At a second stage they would have to consider compensation, which might or might not be linked to the international watercourse system in question. For instance, if it was thought best to build only one hydroelectric power plant on an international watercourse, the compensation granted to co-riparian States other than the State in whose territory the plant was built could either take the form of electric power supplies or be of an extraneous nature. The introduction of such a directive into article 8 might facilitate the procedure for settlement by a third party which was favoured by some people.

8. The draft articles under consideration sometimes raised problems of injury and responsibility which needed elucidation. For instance, in article 23 the Special Rapporteur seemed to introduce the notion of serious harm and to draw certain conclusions from it. If the gravity of the harm was ultimately to be taken into consideration, the draft articles as a whole should be re-examined from that point of view. Also, should a distinction not be made between damage caused to present utilization and damage to potential utilization? Furthermore, the concept "appreciable harm" could be considered from either the physical or the functional point of view. If the temperature of the water of a river rose by one degree after it had been used as a coolant, the

resulting physical change was appreciable; but could it be said that harm had been done to a use of the water? It was also necessary to distinguish harm caused to uses, which the Special Rapporteur appeared to include among injuries to interests, from harm caused to the territory of States, which could lead to real disasters. Was it not conceivable that certain works, although lawful, could entail an exceptional risk and that, in the event of damage, compensation would be required? But that question pertained to two other topics which the Commission was studying.

9. On the question of settlement of disputes, the Special Rapporteur had been reluctantly obliged to adopt an attitude of extreme reserve. He described the possible solutions, but suggested none. He did, however, propose a mechanism of notification and protest, to which he attached effects, in particular by instituting an obligation to negotiate, which was not accompanied by any obligation to contract. Although mitigated by the notion of urgency, that system, which favoured downstream States, would be unacceptable to upstream States. The downstream State could not indefinitely oppose projects planned by the upstream State, although it was understood that the latter did not enjoy complete freedom in that respect. The least that could be required was to go a little further than mere negotiation.

10. When preparing the draft articles on the law of treaties, the Commission had not gone beyond the provisions of article 65, on the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty; but that article did contain two valuable elements, namely a period of delay and a statement of reasons. In his opinion, a delay period should also be provided in the case under consideration, so that the projected work could not be carried out for a certain time following a protest. Moreover, in the event of failure of the negotiations, States should indicate the reasons therefor. International conventions on nuclear tests and nuclear weapons were moving towards a solution of that kind, since the most recent of them provided that States parties to the instrument could not withdraw from it without stating the reasons for their decision. Personally, he would be prepared to accept an arbitration procedure for all the articles of the draft, including article 8, but he was aware that many members would oppose it. The solution might therefore be to provide for negotiations of a rather less simple kind, for example negotiations conducted with the assistance of an international organization. It was thanks to the intervention of the World Bank that, despite the difficulties involved, the negotiations between India and Pakistan had been crowned with success.⁶ Hence he favoured a system of negotiation "mediated" or "assisted" by an international body. The Commission should also consider whether it ought not to adopt an intermediate solution permitting a State which complied with the recommenda-

⁵ See, for example, the recommendations of the ECE concerning the hydroelectric development of international rivers, in *Yearbook* . . . 1974, vol. II (Part Two), pp. 330-331, document A/CN.4/274, paras. 337-343.

⁶ See the Indus Waters Treaty 1960 between India, Pakistan and IBRD, signed at Karachi on 19 September 1960 (United Nations, *Treaty Series*, vol. 419, p. 125).

tion of an impartial body to carry out its project without settlement of the dispute.

11. The CHAIRMAN suggested that, for the time being, the Commission should discuss the broad issues raised in the report under consideration (A/CN.4/367). At the end of the discussion, it could either consider the changes made by the present Special Rapporteur in draft articles 1-3 as submitted by the previous Special Rapporteur and provisionally adopted, or request the Drafting Committee to do so.

12. Mr. KOROMA said that, when the Commission had first been requested to consider the non-navigational uses of international watercourses, his reaction had been that the law of that topic, like the law of the sea, should already have been codified. After further reflection and research, however, he had come to the conclusion that, in the light of technical developments and the increasing uses to which international watercourses were being put, it was no accident that the Commission should have been requested to formulate new law on the subject.

13. It was a well-known fact that the economic and social development of mankind had been closely linked with river systems. Some of the world's greatest civilizations had taken shape and flourished on the banks of great rivers, which had provided water for domestic uses and navigation and had also come to be used for trade and the establishment of contacts with other civilizations. It had even been asserted that the first real application of international law in Africa had been the elaboration of fluvial law and the establishment of the régimes for the Congo and Niger Rivers.

14. At present, international watercourses were used for a wide variety of activities, including the production of hydroelectric, mechanical and nuclear power, irrigation, fishing, waste disposal and navigation, and their role in the economic development of the developing countries was assuming increasing importance. For example, at the Summit Meeting of Heads of State and Government of the member States of the Niger River Commission in January 1979, it had been stressed that "the economic development of the member States of the Commission depends to a crucial extent on the development of their river basins". With a view to promoting economic development, efforts had been made to integrate various river basins in Africa and to establish riparian associations, for example for the Mano, Niger and Senegal Rivers and for Lake Chad.

15. The increasing uses of international watercourses had, however, entailed serious consequences and, in some cases, had given rise to disputes between riparian states relating to pollution, water shortages or flooding. In essence, the problem was that of reconciling and harmonizing the various interests involved in the use of a particular watercourse by two or more system States and ensuring that the resource it represented was used without causing appreciable harm. It was thus with a view to avoiding or settling problems before they could worsen into disputes that the Commission had been requested to elaborate general principles applicable to the non-navigational uses of international watercourses.

16. To that end, the Special Rapporteur had presented an eminently readable and useful report (A/CN.4/367). The pragmatic approach he had adopted had enabled him to achieve a technical victory in combining a large number of complex principles into an integrated whole or "framework agreement" which could, when necessary, serve as a basis for specific regional agreements. As the Special Rapporteur had rightly pointed out (1785th meeting), the elaboration of a framework agreement was a delicate political task, in which account must be taken of the unique nature and legal circumstances of each international watercourse and of the interaction of the sovereignties of the States concerned. There were, however, features common to all international watercourses and it was to those features that the Special Rapporteur had applied general principles in devising a régime for the administration and management of international watercourses and for the peaceful settlement of any disputes that might arise concerning them.

17. The outline for a draft convention submitted by the Special Rapporteur (A/CN.4/367, para. 65) was both comprehensive and symmetrical and would provide an excellent basis for the Commission's discussions. As expected, the Special Rapporteur had attempted not only to codify the law of the topic entrusted to him, but also to develop it on the basis of the general principles of international law embodied in the Charter of the United Nations. He had accordingly proposed that an international watercourse system should be regarded as a shared natural resource whose reasonable and equitable use was to be regulated by negotiation and consultation, and that activities connected with a watercourse system which might cause appreciable harm to any of the system States should be prohibited.

18. The Special Rapporteur had been right not to try to define an international watercourse, for such a definition would be controversial. The terms "international watercourse system" and "system States" were comprehensive enough to cover all the elements involved in any given case and neutral enough for riparian States not to think that their interests were being neglected in framework agreements. Those terms would serve as a solid foundation on which future proposals could be built.

19. He fully agreed with the rationale offered by the Special Rapporteur (*ibid.*, paras. 87-92) for the formulation of draft article 7 and for the use of the expressions "shared", "reasonable and equitable manner" and "optimum utilization". He presumed that the words "good faith" were used in draft article 7 in the sense of *pacta sunt servanda*. The Special Rapporteur had been right to identify and emphasize the duty of system States to refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States. That duty was central to the topic because of the impact of technology on international watercourses, in whose utilization, administration and management the interests of all system States must be taken into account, so that they would not suffer appreciable harm or injury in respect of either the quantity or the quality of the water they were entitled to use.

20. Chapter III of the draft struck the right note, since international watercourses constituted a unity or continuum and it was essential for system States to co-operate in their efficient and optimum utilization, either bilaterally or multilaterally and, when necessary, with the assistance of the competent United Nations specialized agencies. The idea of such co-operation was not new and, indeed, it already existed throughout the world, but it needed to be properly institutionalized. It was in that regard that the principle of negotiation, consultation and regular exchange of data and information assumed particular importance. As the Special Rapporteur had pointed out (*ibid.*, para. 138), the collection, processing and dissemination of information and data were essential for the effective management and control of international watercourse systems.

21. Chapter IV of the draft contained articles relating to protection of the environment of a watercourse system from pollution. The definition proposed by the Special Rapporteur in draft article 22 not only covered all the essential components of modern pollution, but also referred to the dangerous consequences that such pollution could have for the physical environment.

22. Draft article 23 prohibited all system States from polluting the waters of an international watercourse and provided that a State in which pollution originated had a duty to take reasonable measures to abate or minimize such pollution. The Special Rapporteur did not, however, regard that duty as being *erga omnes*. Draft article 23 was therefore well balanced and dealt correctly with one of the main aspects of the topic, namely the duty to prevent the pollution of an international watercourse system and to take measures to abate such pollution when it occurred. The Special Rapporteur had reflected the expectations of the international community when he had stated (*ibid.*, para. 171): "To pollute an international watercourse system so as to cause appreciable harm to other system States cannot acquire 'the rank of a vested right'."

23. Draft article 26, on the control and prevention of water-related hazards, would be most helpful. The Special Rapporteur's suggestion that States should co-operate with international bodies such as UNEP and UNDRO to combat drought and flooding deserved support and further consideration.

24. On the basis of Chapter VI of the Charter of the United Nations, the Special Rapporteur had proposed a number of draft articles on the peaceful settlement of disputes arising in connection with the non-navigational uses of international watercourses. Pride of place had been given to consultation and negotiation and that was, in his own view, the correct approach, especially as the purpose of the draft articles was to promote co-operation between States in the use of a shared natural resource. Careful consideration should, however, also be given to the draft provisions on compulsory conciliation, which had been borrowed and adapted from the new United Nations Convention on the Law of the Sea⁷ and were thus

untested. Compulsory conciliation offered the possibility of a friendly but lasting settlement, in which none of the parties would lose face or feel cheated, and that psychological factor should not be underestimated in the case of disputes relating to international watercourses, which were difficult to settle because they involved questions of territory and sovereignty. He agreed with the Special Rapporteur that situations involving armed conflict should not be covered in the draft articles.

25. Referring, lastly, to the position of notes in the report, he considered it desirable to revert to the former practice of placing them at the foot of the relevant page, rather than grouping them at the end of the report.

26. Mr. PIRZADA, congratulating the Special Rapporteur on his meticulous and balanced report (A/CN.4/367), said he had noted the reference (*ibid.*, para. 27) to the Indus watercourse system. The Indus Valley was well known for its civilization, which dated back to about 5000 B.C., and remnants from that era were well preserved at Mohenjo Daro and Harappa in Pakistan. Etymologically, the name of India could be traced back to the River Indus. The many problems to which the Indus Basin had given rise over the centuries—for instance, sharing the water for irrigation purposes and changing the course of the river and its tributaries—had been satisfactorily solved long before the decision of the PCIJ in the *River Oder* case in 1929.⁸ Problems over the waters of the Indus Basin had even arisen under the British régime, and in or about 1918 a commission had been appointed. In 1938, the Indus Commission (Rau Commission) had enunciated principles of equitable sharing of waters which, *inter alia*, had provided the basis for the study by the International Law Association which had led to the Helsinki Rules.⁹

27. In 1947 India and Pakistan had become independent sovereign States and the Province of Punjab had been partitioned. That province had been given its name, which meant five rivers, because the River Indus and its five tributaries flowed through it. The partition of Punjab and the border demarcated by the Radcliffe Boundary Commission had cut across the Indus water system. Pakistan had become the downstream riparian State and the headworks of the two main irrigation canals had been awarded to India. The sharing of the use of the waters by the two States had then become a vital issue and, following a suggestion by David Lilienthal, former Chairman of the Tennessee Valley Authority, that Indian and Pakistani technicians should work out a comprehensive engineering plan with the assistance of the World Bank for the development of the waters of the system, the President of the Bank, Eugene Black, had used his good offices to further negotiations between India and Pakistan. The Indus Waters Treaty had eventually been signed in September 1960¹⁰ and, at the same time, the

⁷ See 1785th meeting, footnote 10.

⁸ *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16 of 10 September 1929, *P.C.I.J.*, Series A, No. 23.

⁹ See 1785th meeting, footnote 13.

¹⁰ See footnote 6 above.

Indus Basin Development Fund Agreement¹¹ had been signed by representatives of Australia, Canada, the Federal Republic of Germany, New Zealand, Pakistan, the United Kingdom, the United States and the World Bank. Under the Indus Waters Treaty, India and Pakistan had declared their intention of co-operating to the fullest possible extent; meteorological and hydrological observation stations had been established; provision had been made for a full exchange of information; the Permanent Indus Commission had been appointed to settle differences and disputes; and a procedure had been established for recourse to a neutral expert for final decisions on technical questions and, in certain circumstances, to a court of arbitration. The Indus Waters Treaty 1960 must be regarded as a landmark in the law of international rivers.

28. In Pakistan the Indus waters had given rise to some problems among the provinces. In 1976 a commission headed by a judge of the Supreme Court had submitted its report, the recommendations of which, though fair, had led to complications when it came to implementation. Subsequently, a high-level tribunal had been set up, headed by the Chief Justice of Pakistan and composed of the Chief Justices of the High Courts of all the provinces. The report of that tribunal had been submitted in May 1983 and was still under consideration, but it was likely to provide material that could help in formulating principles of law governing the uses of the watercourse.

29. As a member of the International Rivers Committee of the International Law Association, which had formulated the Helsinki Rules in 1966, he appreciated that those Rules were based on the concept of the drainage basin with a hydrological background, whereas the present draft had a geographical approach based on the concepts of "system States" and the "international watercourse system". He noted that draft article 1, paragraph 1, sought to discard the concept of the international drainage basin in favour of a geographical approach, although the Special Rapporteur had stated (*ibid.*, para. 73) that the definition in draft article 1 was purely descriptive and that no legal rule or principle could be deduced from it. The Special Rapporteur had also said that the definition was a first attempt. That being so, draft article 1, paragraph 1, could be taken as the starting-point and improvements could be introduced in the light of the views expressed by members. As to paragraph 2, in view of the comments made by Mr. El Rasheed Mohamed Ahmed (1785th meeting) and Mr. Reuter, he would reserve his position.

30. Draft article 6 had been received with mixed feelings. While he recognized that a watercourse system and its waters should be regarded as a shared natural resource in which each State was entitled to a reasonable and equitable share, he trusted that the Special Rapporteur would reconsider draft article 6 in the light of the constructive comments made by Mr. El Rasheed Mohamed Ahmed and elaborated upon by Mr. Reuter.

31. In draft article 9 the Special Rapporteur had used the term "appreciable harm" in reference to the prohibition of certain activities. Although traditionally such expressions as "serious damage", "serious injury", "substantial detriment" or "serious prejudice" were used, he had an open mind and would be prepared to consider the term "appreciable harm".

32. It had been pointed out that draft articles 22 and 23 made no distinction between existing pollution and new pollution, as did the Helsinki Rules, although the American branch of the International Law Association had had reservations on that matter. For his own part, he agreed with the Special Rapporteur (A/CN.4/367, para. 171) that, in view of more recent developments, such a distinction was not acceptable.

33. Conflicting opinions had been expressed regarding draft article 28, dealing with the safety of international watercourse systems. Mr. Reuter (1785th meeting) apparently took the view that provisions relating to armed conflict were outside the Commission's competence. The previous Special Rapporteur, however, had given cogent reasons in his third report (A/CN.4/348, paras. 416-420) for appropriate provisions along the lines of the two 1977 Geneva Protocols;¹² and the present Special Rapporteur had stated (A/CN.4/367, para. 186) that he was in favour of such provisions, but hesitated to include them in his first draft until he had obtained the guidance of the Commission and the Sixth Committee of the General Assembly. Given the fact that many developing countries were dependent on dams and the possibility that those dams would be destroyed in the event of war, he was in favour of the provisions proposed by the second Special Rapporteur being incorporated in the draft.

34. Lastly, he agreed with those who favoured compulsory conciliation, especially as the report provided for in draft article 35 was of a recommendatory nature. That would be in keeping with the principle of good faith. As to adjudication, provisions along the lines of those in the 1982 Convention on the Law of the Sea relating to settlement of disputes should be given objective consideration. If the aim was a purpose-oriented convention, as advocated by the Special Rapporteur, pragmatic but productive provisions were required.

The meeting rose at 12.25 p.m.

¹² See 1785th meeting, footnote 14.

1787th MEETING

Wednesday, 22 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed

¹¹ United Nations, *Treaty Series*, vol. 444, p. 259.

Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1., A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

**DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)**

1. Mr. SUCHARITKUL, congratulating the Special Rapporteur on the cautious approach displayed in his report (A/CN.4/367) on a delicate subject, said that he himself came from a country that did not have to be taught the value of watercourses. Rivers were Thailand's lifeline, a source of life not only for man but for all living things. Most of the country's inhabitants were born and lived by or on a river. They also lived off the river, from fishing, and when they died their ashes were scattered on the river.

2. In the case of international watercourses, a careful distinction first had to be drawn between navigational and non-navigational uses. In his own part of the world, for instance, such watercourses were used among other things to transport teak logs, which were pushed to the rivers by elephants and then floated down to the sawmills. Rivers also provided the means for conveying merchandise within the country or to another country. The use of a river as a natural frontier or boundary, though perhaps more political or juridical in nature, was another matter that might be taken into account or indeed considered later as an entirely separate topic.

3. The special nature of a river as compared with a lake was that it contained flowing water, and it was difficult in the present topic to speak of one State owning such water, a point he wished to mention merely in order to underscore the validity of the concept proposed by the Special Rapporteur as the core of his draft, in article 6,

namely that an international watercourse system was a shared natural resource. It had rightly been said that that concept should not be confused with or incorporated into the concept of the common heritage of mankind, which was a concept of the future, even though it might already be applicable in such areas as outer space or the sea-bed beyond the limits of national jurisdiction. The concept of shared resources, on the other hand, was nothing new. Indeed, it dated back to Buddha, who had said that a man must share his wealth with his brothers. The water of a river flowing from one country to another did not belong exclusively to any one of them; it should benefit the communities that lived alongside the river banks.

4. It was perhaps easy for European countries, with their more or less comparable levels of industrialization and legal development, to permit joint management of a watercourse system; but in that regard the countries of South-East Asia simply could not afford to think in terms of national boundaries and had long had to disregard sometimes major political differences. Since water was absolutely essential for irrigation, they had been compelled to co-operate in the Committee for Co-ordination of Investigations of the Lower Mekong Basin, established in 1957. The economic development of the member countries was closely interwoven. Over the years many projects had been implemented, some of them exclusively national, as was the case with a number of dams that had been constructed in Thailand with the help of foreign loans. In upholding the modern concept of justice and equity, the Governments concerned had agreed to many sacrifices and had proved that developing countries were prepared to go far in their negotiations. Thailand was now the only member of the Mekong Committee that was not a socialist country, a fact that made no difference when the need arose for economic co-operation, without which all the members would suffer.

5. Lastly, with regard to the definition of an international watercourse system in draft article 1, he endorsed the reference in paragraph 1 to fresh water components, since one of the main factors that distinguished an international watercourse from the sea was the absence of sea water. The Special Rapporteur had been right, however, to include a reference in the same paragraph to brackish water.

6. Mr. CALERO RODRIGUES said that it was all too easy to understand why the topic was difficult. It covered a wide variety of rivers, ranging from small international rivers that formed borders to larger rivers like the Rhine and the Danube in Europe, the Mekong and the Ganges in Asia and the Amazon and the River Plate in South America. It also encompassed all kinds of uses, from domestic consumption to the watering of livestock, irrigation, fishing, timber floating, the development of hydroelectric power, and sewage and other waste disposal. Another reason for the difficulty of the topic was the inflated expectations in certain quarters regarding what could be achieved by an international convention. Some States seemed to think that it would solve all the problems involved, whereas in his view that could be done

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

only through co-operation among the countries concerned. All a convention could do was to lay down very general rules, and he therefore urged the Commission to display caution and pragmatism. Otherwise, the draft articles would be of little practical effect—for instance, if the convention was accepted only by the downstream States or the upstream States, or by the States in one particular region.

7. He was grateful to the Special Rapporteur for his comprehensive report (A/CN.4/367), but wondered whether it would not have been better, rather than to present the Commission with a complete set of articles dealing with many different subjects, to provide it with an outline on the basis of which the articles in their entirety could be developed once the outline was approved.

8. He was also somewhat disappointed at the lack of a fresh approach. The Special Rapporteur had relied fully on arguments presented in earlier reports and had taken it for granted that the Commission and the General Assembly had accepted those arguments, something which was only partly true. Hence, it was essential for the Commission to take a new look at all of the basic concepts involved. Also, the frequent references to earlier reports necessitated perusal of them, and particularly the previous Special Rapporteur's second and third reports.

9. In respect of the structure of the draft articles, the Special Rapporteur proposed that they should be grouped under six chapter headings of his report. The sequence of the subjects covered in the draft articles was acceptable in principle, but it was somewhat disturbing that the draft made no reference to contiguous and successive rivers. Admittedly, it was not fashionable to believe that such a distinction could still play a useful role, but he wondered whether it could really be ignored in a set of articles that was intended to codify the law of the non-navigational uses of international watercourses. Were the rights and obligations of States always to be treated as the same, irrespective of the uses envisaged in the two very different situations involved?

10. The essence of chapter I of the draft (Introductory articles) lay in draft article 2, entitled "Scope of the present Convention", which set an ambitious goal. Again, it was questionable whether so much emphasis should be placed from the outset on matters pertaining to administration, management and conservation. To place them on the same level as uses in an introductory article could only justify the inclusion of non-essential provisions that might lead to further difficulties. The uses referred to were not only the uses of international watercourses but of "international watercourse systems", as defined in the opening sentence of draft article 1, paragraph 1—a definition that was qualified, however, by paragraph 2 of that article.

11. The expression "international watercourse system" had been employed by the previous Special Rapporteur in his second report,⁴ in which connection certain inter-

national instruments and multilateral treaties containing the expression had been cited. The second Special Rapporteur had also noted that the expression was widely used in scientific and technical writings and in hydrographic descriptions and analysis; and therein lay the problem. The expression could be considered, in hydrographic terms, as synonymous with "drainage basin". The concept was the same in that it expressed the unitary physical nature of watercourses. The word "basin", in general, referred to the whole geographical area encompassing the waters; "system" was simply a refinement that placed the accent on the hydrological part of the basin. The Helsinki Rules (art. II)⁵ defined an international drainage basin as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus". While both "drainage basin" and "river system" were perfectly suitable for scientific and technical studies, it was doubtful whether either concept could or should be used for the formulation of rules of international law governing the non-navigational uses of international watercourses. It should have been clear from the start that the drainage basin concept would not recommend itself as the point of departure for a draft convention, and that was indeed the opinion of the Special Rapporteur (*ibid.*, para. 13).

12. The previous Special Rapporteur, in his first report,⁶ had in fact come virtually to that conclusion by combining articles 1 and 2 and, in his second report, had introduced the expression "international watercourse system", which now appeared in draft article 1. When the Commission had considered the second report, it had apparently been aware of the difficulties of basing its work on a concept so similar to that of the drainage basin; the only difference seemed to be that the "system" focused on the waters, their uses and their interdependence. The Commission had therefore decided to admit a limitation that had now been embodied in paragraph 2 of draft article 1, a limitation that made sense because, for the purposes of the application of the rules of international law, it was not possible to cover each and every part of a basin or system. Since the rules related to uses, only the part or parts "used" that affected other uses would fall within the scope of the draft articles. The limitation was obviously necessary, and hence there was no point in retaining the concept of "system", which must necessarily be unitary in character if the concept was to have any proper meaning. If it was recognized, for legal purposes, that that unity could not be maintained, it followed that the expression "watercourse system" was inadequate. In the note which it had prepared at its thirty-second session, the Commission had attempted a very awkward accommodation by stating 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

⁴ *Yearbook* . . . 1980, vol. II (Part One), pp. 167–168, document A/CN.4/332 and Add.1, paras. 53–58.

⁵ See 1785th meeting, footnote 13.

⁶ *Yearbook* . . . 1979, vol. II (Part One), p. 143, document A/CN.4/320.

to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.⁷

That accommodation would give rise to further complications and the Commission, having already recognized that the unitary concept inherent in the idea of a “watercourse system” was not a sound basis for the rules it was drafting, should not insist on maintaining the expression “watercourse system”.

13. Much thought would be required in order to arrive at a proper definition of the term “international watercourse” and he agreed with Sir Francis Vallat, who had said that the Commission should concentrate on the uses of international watercourses and that to try to formulate a definition would only hamper its work.⁸ In his view, that opinion was still as valid as it had been in 1976. Only after the Commission had agreed on legal rules for the uses of watercourses should it seek to define the watercourses to which those rules would apply. The task might well be less difficult, and it might even prove necessary to consider the idea of an optional clause, which had been suggested in the Sixth Committee.

14. With regard to general principles, the basic rule was set forth in draft article 9, in which connection he noted two corollaries. The first, to be found in draft article 7, was that international watercourse systems and their waters should be developed, used and shared by system States in a reasonable and equitable manner with a view to attaining optimum utilization thereof. The article contained too many ideas and he would suggest that it should be amended to read: “Waters shall be used by States in a reasonable and equitable manner.” As he saw it, the article should deal with waters only, there being no need to refer to international watercourses, and with uses only, there being no need to refer to development and sharing. Again, since the purpose was to avoid causing harm to other States, the reference to optimum utilization was not necessary.

15. The second corollary, to be found in draft article 8, was that there should be a determination of whether the use was reasonable and equitable. It should be a negotiated determination requiring, in the event of failure to reach agreement, resort to peaceful settlement procedures. Such a determination should have one single purpose, namely to ascertain whether the use caused or might cause appreciable harm to another State. Only on that basis could it be admitted that a joint determination was necessary, in which case it would also be necessary to explain what was meant by joint determination. In the first of the two corollaries, the drift was away from the main element—in other words, possible or actual appreciable harm—towards development and sharing, while in the second corollary, the notion of harm, which should be a guiding principle, receded still further into the background.

16. The basic principle—not causing any appreciable harm to another State—was preceded by another principle in draft article 6, that of shared natural resources. In fact the articles, and hence the rights and obligations of States, should be developed from the real basic principle, and not from the principle of shared natural resources. The principle of not causing appreciable harm had a logical, practical foundation, whereas the shared natural resources principle was, legally speaking, theoretical and controversial. Its formulation was not clear; its consequences even less so. It therefore seemed unnecessary to include it in the draft. It added nothing and would only give rise to the difficulties that had accompanied it from the outset. In that connection, the Special Rapporteur considered that the matter had been dealt with “in an elucidating manner” (A/CN.4/367, para. 33) by the previous Special Rapporteur, who had taken the view that the concept had been “widely accepted”, but the only additional support found for the concept lay in the conclusions of the Mar del Plata Action Plan.⁹

17. The Special Rapporteur stated (*ibid.*, para. 81) that the basic principle laid down in draft article 6 was a codification of prevailing principles of international law following from customary international law as evidenced by comprehensive State practice, general principles of law, including those laid down in Articles 1 and 2 of the United Nations Charter, and also following from the very nature of things.

18. To deduce the principle that the waters of international watercourses constituted a shared natural resource from “the very nature of things” was to imply acceptance of the concept of natural law and he was not sure that that was, at present, a reasonable basis for codification. To deduce the principle from Articles 1 and 2 of the Charter seemed, at the very least, hazardous. One of the principles embodied in Article 2 of the Charter was the sovereign equality of States. Moreover, Article 2, paragraph 7, recognized that there were matters which were essentially within the domestic jurisdiction of States. Another principle that was often forcefully affirmed was that of permanent sovereignty over natural resources. In the present instance, to deduce the shared resource principle from “customary international law as evidenced by comprehensive State practice”, supporting materials would have to be furnished, but none had been provided by the Special Rapporteur, who had instead referred to the Helsinki Rules. Though he did not wish to be too critical of his approach in that respect, he thought that the Special Rapporteur had made a mistake often made by jurists, particularly by progressive jurists who wished to develop new international law but failed to distinguish between aspirations and genuinely recognized rules of

⁷ *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

⁸ *Yearbook* . . . 1976, vol. I, p. 275, 1407th meeting, para. 19.

⁹ See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), chap. I.

international law. It was a common error, as had been stressed by Philip Jessup in *A Modern Law of Nations*.¹⁰

19. Mr. Stavropoulos was to be commended for his initiative in circulating a note (A/CN.4/L.353) containing the UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States. Although, as indicated in paragraph 6 of the note, the General Assembly had decided not to adopt the draft principles and had preferred simply to take note of them,¹¹ even more important was the fact that the draft principles did not claim to contain legal definitions. The explanatory note by UNEP (*ibid.*) stated:

... An attempt has been made to avoid language which might create the impression of intending to refer, as the case may be, either to a specific legal obligation under international law or to the absence of such obligation. The language used throughout does not seek to prejudge whether or to what extent the conduct envisaged in the principles is already prescribed by existing rules of general international law.

20. In order to develop sound rules that would command general acceptance, it was neither necessary nor useful for the Commission to introduce the principle of a shared natural resource in the draft articles. From the legal point of view, it was a general principle that would add nothing to the draft and might give rise to controversy. Rather, the Commission should study the rules applicable to the uses of international watercourses on their own merits and leave aside an extraneous concept which had not been adequately defined.

21. Chapter II of the draft related to general principles, yet chapter III, entitled "Co-operation and management in regard to international watercourse systems", began with draft article 10 which was itself entitled "General principles of co-operation and management" and should have its proper place in chapter II; the developments or consequences could be dealt with in chapter III. Undeniably, international co-operation was a desirable thing. Indeed, the achievement of international co-operation was one of the purposes of the United Nations. However, although States did agree to co-operate in various fields, co-operation in general terms was not strictly speaking an obligation for States under existing international law.

22. Co-operation was being expanded in respect of the many uses of international watercourses. In Brazil, for example, the River Plate and the Amazon were covered by general co-operation agreements which went beyond questions of navigation and also applied to technical and economic uses. Nevertheless, in the draft articles co-operation should not be viewed from a legalistic angle: it should not take the form of a set of mandatory rules imposing strict norms of conduct that were precisely defined. Such an approach should be avoided, primarily because it would be impossible to foresee the different types of conduct that would be required in every instance;

moreover, when States were compelled to co-operate, they were not likely to accept strict norms.

23. The Special Rapporteur dealt with the general aspects of co-operation in draft articles 10 and 15-19. Under article 10, co-operation would be established between States "to the extent practicable . . . with regard to uses, projects and programmes" related to a watercourse system "in order to attain optimum utilization, protection and control of the watercourse system". To that end, States should engage in consultations (negotiations) and exchange of information and data and, when necessary, establish joint commissions. The reference to joint commissions in draft article 10, paragraph 3, was expanded on in draft article 15, which mentioned the establishment of "permanent institutional machinery" and "a system of regular meetings and consultations". Details on the collection and exchange of information and data were given in articles 16-18.

24. The Special Rapporteur seemed to be aware that co-operation could not be imposed and that it should emerge from agreement between the States concerned and not involve any constraints. In some places, the draft said that States "should" do something and, in others, that they "shall" do something, with the qualifying expressions "to the extent practicable" in article 10, paragraph 1, "to the extent practicable and reasonable" in article 16, paragraph 3, "to the extent possible" in article 16, paragraphs 1 and 2, "when necessary" in article 10, paragraph 3, "where it is deemed advisable" in article 15, paragraph 1, and "where practical" in article 15, paragraph 2. Fortunately, it was precisely in those terms that co-operation should be described in the draft articles, which should encourage States to co-operate, not force them to do so.

25. The question of notification dealt with in draft articles 11-14 should probably be regarded as a specific aspect of co-operation. With regard to article 11, paragraph 1, he could not agree that projects and programmes should concern "the utilization, conservation, protection or management of an international watercourse system". That wording was the result of the Special Rapporteur's monolithic approach and was not acceptable. Reference was, in fact, being made to projects and programmes concerning use of the waters of a watercourse that might cause appreciable harm to the use of the waters of the same watercourse by another State or States. If, in a State's own assessment, a project or programme would result in appreciable harm to another State, the project or programme should be abandoned. The first State had a clear obligation not to undertake the project or programme in question, unless of course the other State agreed to accept the harm, a possibility that should not be ruled out. The other State might agree to accept the harm if, although it was appreciable, it would be bearable because the project or programme would offer certain advantages. Alternatively, the other State might accept compensation for the harm caused or co-operation, including financial assistance, for measures to minimize or prevent the harm.

26. Harm that could be accepted must, however, be

¹⁰ P. C. Jessup, *A Modern Law of Nations* (New York, Macmillan, 1948).

¹¹ General Assembly resolution 34/186 of 18 December 1979, para. 2.

only potential harm, not a necessary consequence of the project or programme. In such a case, the risk had to be evaluated in a factual study, and in that connection the co-operation of the potentially harmed State might be useful in determining the likelihood of harm and ways and means of preventing or minimizing it. Information and data might be exchanged in order to help the State wishing to undertake the project or programme to make its own decision.

27. In that respect, it had been stated in the *Lake Lanoux* arbitral award in 1957 that:

In form, the upper riparian State has, by virtue of the procedure, a right of initiative; it is not obliged to associate the lower riparian State in the preparation of its projects. If during the negotiations the lower riparian State submits projects to it, the upper riparian State should examine them, but it has the right to prefer the solution adopted by its project, if it takes into consideration in a reasonable manner the interests of the lower riparian State.¹²

Although that opinion was valid in the limited context of procedures and schemes, the principle underlying it might be more broadly applicable because, as Mr. Quentin-Baxter had noted in his preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law,¹³ international law did not undermine the sovereignty of States by making their essential freedom of action within their own borders subject to a foreign veto and, except in the last resort, it did not place its faith in prohibitory rules.

28. According to draft article 11, paragraph 1, before a State undertook, permitted or authorized a project or programme that might cause appreciable harm to other States, it must submit a notification to those States. Once the notification was made, a reply was to be given within six months, although an extension could be requested for the reply; consultations and negotiations would be undertaken, and a procedure for the settlement of disputes might come into play. However, the idea of co-operation seemed to disappear, because the reply became a "protest" in draft article 13 and the concept of a "dispute" seemed to prevail.

29. The entire procedure, which would involve the reply, consultations and negotiation and the settlement of the dispute, could be a very protracted one and would therefore have a suspensive effect: the first State would not be able to proceed with its project or programme before the procedure had been completed. Yet that State could remove the obstacle by saying that it deemed the project to be "of the utmost urgency" or that further delay might cause unnecessary damage or harm. It could, in the words of draft article 13, paragraph 4, claim that it was faced with an "emergency situation". If it did so, it would be able to go ahead with its project or programme and would only have to face any "claims for damage or harm" which might be made and which would be settled "in good faith and in accordance with friendly neigh-

bourly relations by the procedures for peaceful settlement" provided for in the draft articles. Having provided for too restrictive a suspensive effect, the draft also provided for too wide an escape clause. The system thus established was not a good one, either in terms of logic or in terms of the interests of the States concerned.

30. Moreover, if he understood draft article 14, paragraph 2, correctly, the only consequence for a State which did not comply with the provisions of draft articles 11–13 was that it would be liable for the harm caused as a result of its project or programme. Hence the best approach would be for a State not to make any notification at all. The only consequence it would suffer would be liability and the notification procedure would not have any suspensive effect. The system of notification and the suspensive effects of the ensuing procedure were thus irrelevant. Why then had the Special Rapporteur drafted articles 11–13 in such a drastic way that States might hesitate to accept them because they might consider that they were being placed in a strait-jacket of limitations on their freedom of action? Would it not be better to be more straightforward and more realistic by indicating on which terms and in which conditions States were supposed to conduct themselves in that matter?

31. Lastly, the Commission should agree to the outline proposed by the Special Rapporteur as a basis for the continuation of its work; request the Special Rapporteur to give further consideration to the proposed draft articles in the light of the comments and observations made at the present session of the Commission and at the thirty-eighth session of the General Assembly; request the Special Rapporteur to present to the Commission's next session a report dealing with draft articles 1–9 and, if possible, with draft articles 10–19; request the Special Rapporteur to endeavour to submit that report as soon as possible, so that it could be distributed to the members of the Commission before the beginning of the thirty-sixth session; and decide to set aside enough time for the examination of that report on a priority basis at the thirty-sixth session.

32. Mr. STAVROPOULOS, referring to the concluding remarks by Mr. Calero Rodrigues, said that the distribution of reports took considerably longer than it had when the United Nations had first been established. For example, the report under discussion had been submitted for reproduction on 19 April 1983, but had been made available only in the first week of June. Again, in the early days of the United Nations, summary records had been distributed within one day of the meetings concerned, whereas now it was not at all certain when the summary record of the present meeting would be available. Efforts should therefore be made to ensure that the summary records were distributed as rapidly as possible so that they could be used at the present session, not at the next one.

33. He had not intended to introduce his note (A/CN.4/L.353) concerning the UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, which

¹² United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 316, para. 23; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068.

¹³ *Yearbook* . . . 1980, vol. II (Part One), p. 262, document A/CN.4/334 and Add.1 and 2, para. 50.

he had thought would be self-explanatory, but a misunderstanding had arisen in connection with that note. In introducing his report, the Special Rapporteur (1785th meeting) had said that the draft principles had encountered difficulties in the General Assembly, a statement that had been misunderstood, as revealed in one of the comments made at the previous meeting.

34. What had happened in the Second Committee was that considerable efforts had been made to find a compromise solution for the wording of the resolution on the draft principles that was to be submitted to the General Assembly. It had been impossible to reach agreement on a revised text because, as had been explained by the delegation of Pakistan, a sponsor of the draft resolution, some delegations had continued to press for the replacement of the word "adopts" by the words "takes note of", as proposed by the representative of Brazil. Ultimately, the Brazilian amendment had been adopted in the Second Committee by 59 votes to 25, with 27 abstentions. Later, the General Assembly had adopted the draft resolution recommended by the Second Committee without a vote, in its resolution 34/186 of 18 December 1979.

35. In his submission, however, there was no difference from the legal point of view between the word "adopts" and the words "takes note of". It was a well-known fact that, under Article 25 of the Charter, the Members of the United Nations had agreed to accept and carry out only the decisions of the Security Council. Under Article 10 of the Charter, the General Assembly could only make recommendations to the Members of the United Nations. Paragraph 3 of General Assembly resolution 34/186 requested all States to use the draft principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States, and surely the fact that the draft principles had been "noted" did not deprive them of any of the force they might have had if they had been "adopted". Moreover, the General Assembly continued to be interested in the question of co-operation in environmental matters connected with natural resources shared by two or more States, as could be seen from resolution 37/217, in which it had reiterated the terms of its resolution 37/186 and had requested the Governing Council of UNEP to submit a further progress report on the implementation of that resolution to the General Assembly at its fortieth session.¹⁴

36. Mr. REUTER thanked Mr. Stavropoulos for his explanations but said that they made no difference to the remarks he had made at the previous meeting.

Other business

[Agenda item 11]

37. The CHAIRMAN requested the Secretary to the Commission to provide some clarification concerning the availability of summary records.

38. Mr. ROMANOV (Secretary to the Commission) said that, as early as the 1765th meeting, Mr. Al-Qaysi had raised the question of delays in the distribution of the summary records of the Commission's meetings. In that connection, he himself had sent a note to the Chief of the Languages Service, who had replied in a memorandum which read:

While I regret the delays you mention, I should however like to point out that the problem raised is unfortunately of a perennial nature, and in fact inherent in the procedure we are required to follow in the production of summary records for the International Law Commission.

The summary records of bodies other than the Commission are prepared by two monolingual (either English or French) teams of *précis* writers, each of which is alternately responsible for producing the summary record covering one entire meeting.

The basic problem as regards the Commission's summary records is that they are prepared by a *bilingual* team (two English and two French *précis* writers) and that the record of each meeting is designated as being original English or French according as the rapporteur for the item under consideration speaks English or French.

Consequently, an "original English" record, for example, contains summaries of French statements prepared by the French *précis* writers, which must first be translated into English before the record as a whole can be sent to the English reviser. The length of the delay this entails obviously depends on the extent of the "non-original" language component that has to be translated.

The pattern of summary record production mentioned in your memo is an accurate reflection of what the current procedure involves, for of the first 10 records of the present session, eight were "original French" and two "original English", and as the lead language version appears first, it is entirely logical that more French than English records have appeared. As regards the other language versions, their production depends entirely on that of the lead languages, so that they obviously appear even later.

As the members of the Commission who have expressed concern about the unavailability of its summary records might not be aware of the above procedure, it has been explained in some detail. It might be added that, when originally introduced, this procedure was fully justified as offering an ideal solution to the problem of according equal importance to the two working languages spoken in a relatively small bilingual body. Since that time, however, not only the Commission's membership but also the number of its working languages has been considerably increased, and the greater complexity of producing its summary records reflects this development. Indeed, at the present time the delays referred to are extremely difficult to avoid unless something is done to modify the existing procedure.

39. It was thus clear that changes in the procedure for the production of summary records were beyond the Commission's control.

40. With regard to the delayed distribution of reports prepared by special rapporteurs, he said that, in inquiring into the date of submission of those reports, he usually sent special rapporteurs a letter worded along the following lines:

The linguistic and reproduction services of the Secretariat have informed us that it is necessary to receive the reports of special rapporteurs in time for their editing, translation and reproduction at Headquarters in New York well in advance of the opening of the session since, as you know, the Geneva Office has limited resources for translating and reproducing those reports, particularly during the Commission's session. In addition, attention is drawn to the fact that documents which are issued at the Geneva Office are not included in the general pattern of document distribution at Headquarters, a fact which has been regretted by a number of delegations in the Sixth Committee which have emphasized the need to have the reports of special rapporteurs available for missions in New York.

41. To some extent, that might explain why difficulties arose with regard to translation and reproduction if a

¹⁴ General Assembly resolution 37/217 of 20 December 1982, para. 6 (a).

report was submitted during or just before a session. What happened in such a case was that pre-session documentation, which was taken into account in the translation and reproduction work-load estimated by Documents Control at Headquarters in New York, became in-session documentation, which was not taken into account in the estimated work-load of the Geneva translation and reproduction services.

42. Mr. STAVROPOULOS said he thought that the question of the delayed distribution of reports and summary records should be discussed in the Planning Group.

43. Mr. DÍAZ GONZÁLEZ said that the inference to be drawn from the Secretary's explanations was that the summary records of the Commission, instead of constituting a working tool, were already archives by the time they appeared. The delay suffered by the Spanish-speaking members of the Commission before they saw the summary records of statements delivered by them in their own language was particularly long, since the summaries were drafted in English or French before being translated into Spanish in terms that were sometimes far removed from those which had actually been employed.

44. As to reports by special rapporteurs, not only did they reach the Spanish-speaking members of the Commission with some delay, but they were also drafted in terms which often necessitated preliminary decoding. Because the Spanish version of the reports was always distributed after the English and French versions, the Spanish-speaking members had less time than other members to read and absorb them. The matter should be brought before the Planning Group, since the solution to the problem apparently did not depend either on the Commission or on the Secretariat.

45. Mr. REUTER said he was under the impression that, in the letters sent to special rapporteurs by the Secretariat, the time-limit for submitting reports was 15 February or 1 March. The Secretariat might furnish some statistics on the submission of reports, which would show whether some special rapporteurs were more punctual than others.

46. Mr. ROMANOV (Secretary to the Commission) explained that the Secretariat did not set deadlines for the submission of reports. It merely informed special rapporteurs that it would be grateful if they could submit the manuscripts of their reports at their earliest convenience. It was thus left to special rapporteurs to determine when their reports would be completed and submitted.

47. The CHAIRMAN, speaking as a member of the Commission, suggested that the Planning Group should discuss ways of ensuring that all language versions of reports and summary records were made available as rapidly as possible.

The meeting rose at 12.45 p.m.

1788th MEETING

Thursday, 23 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf. Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPporteur³ (continued)

1. Mr. NJENGA said that, in justifying the unprecedented step of submitting a comprehensive set of draft articles in his first report (A/CN.4/367), the Special Rapporteur had rightly pointed out that the topic under consideration had been before the Commission since 1979, that the General Assembly had requested the Commission to treat it as urgent, and that draft articles should therefore be formulated as soon as possible. It might, however, have been preferable for the Special Rapporteur to adopt a more modest approach in his first report and to determine whether there was any consensus on general principles before submitting a full set of draft articles. Although what the Special Rapporteur had achieved must not be underestimated, he should bear in mind that whatever general principles were adopted were likely to affect the draft articles as a whole.

2. The outline for a draft convention (*ibid.*, para. 65) was entirely acceptable. It represented a logical and coherent way of dealing with the topic and would be viable whatever solutions ultimately commanded a consensus in the Commission.

3. In view of the diversity of international watercourses in terms of size and physical, hydrological and geographical characteristics, he fully agreed with the opinion expressed by the Special Rapporteur in his report (*ibid.*, para. 14) that

... a definition of international watercourses based on a doctrinal approach to the topic would be counter-productive, whether the

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

definition is based on the drainage basin concept or on other concepts of a doctrinal nature. The definition of the term "international watercourse" should not have as its purpose to create a superstructure from which to distil or extract legal principles. . . .

On the basis of that opinion, he supported draft article 1, which defined the term "international watercourse system". As long as it was clearly understood that that definition was of a purely descriptive nature and that no legal rule or principle could be deduced from it, he would have no objection to the inclusion in the definition of "deltas, river mouths or other similar formations with brackish or salt water forming a natural part of an international watercourse system". He would, however, reserve his position on other components such as canals, streams, aquifers and ground water, whose inclusion would not be justified.

4. It was still not clear to him whether the concept of an international watercourse system was a hydrological and geographical one, or whether such a system came into being as the result of a system agreement. The definition of "system States" in draft article 3 did not help him to answer that question. The Commission would obviously have to look more closely at draft articles 2-5 when it had agreed on a general approach to the topic.

5. The part of the report which caused him the greatest difficulties was chapter IV, on "General principles: rights and duties of system States". His own country, Kenya, was one of the co-riparian or basin States of the Nile, the second longest river in the world. Approximately 38 per cent of the waters of the White Nile came from the Lake Victoria basin in western Kenya. Kenya was basically an agricultural country and its population growth rate of 4 per cent per year was reputed to be the highest in the world. Only about one-third of the land had adequate rainfall and could be used for agriculture, although seasonal dry periods and droughts were not infrequent. It was therefore obvious that Kenya would have to be increasingly careful about the use of water resources for irrigation if it was to be able to feed its growing population. At present, it relied quite heavily on hydropower to meet its energy needs, since unfortunately it had not been able to locate any hydrocarbons. The available water resources were thus of vital importance for survival and would be even more important in the future.

6. It was against that background that he had considered draft article 6, on the international watercourse system as a shared natural resource. Like Mr. Reuter (1786th meeting), he had questioned whether the principle of shared natural resources existed in international law. If it did, what were its parameters and why should it be restricted to international watercourses? That principle surely could not be based on the fact that water had the physical characteristic of movement, or on the interdependence of States and good-neighbourly relations, which existed in every sphere of international life. As Mr. Reuter had pointed out, the physical characteristics of water would be equally applicable to airspace, outer space, the ozone layer or even the extra-atmospheric layer. If physical movement was to be taken as a criterion, it could also be applied to fish stocks, which moved undeterred and unknowingly from one economic zone to

another. It should be borne in mind that the United Nations Convention on the Law of the Sea referred not to shared natural resources, but to sovereign rights over resources in the exclusive economic zone.⁴ The conclusion reached by the previous Special Rapporteur and cited in the report under consideration (A/CN.4/367, para. 33, second sentence) was therefore totally unconvincing.

7. In his opinion, there was no basis for believing that there was a ground swell of support for the concept of shared natural resources. Moreover, the concept of the common heritage of mankind was entirely outside the scope of the topic under consideration, because it related to resources beyond the limits of national jurisdiction. Whatever sharing of resources in the exclusive economic zone was envisaged in the United Nations Convention on the Law of the Sea related to the surplus. There was no shared sovereignty even with respect to the surplus. That appeared to be the essence of the concept of shared natural resources and its corollary, namely entitlement to reasonable and equitable participation in the shared resource. It was therefore difficult for him to agree with the conclusion reached by the Special Rapporteur in his commentary to draft article 6 (*ibid.*, para. 81, third sentence). The most fundamental principle today was that of permanent sovereignty over natural resources—which included water, whether in rivers, springs, brooks or underground—within national jurisdiction.

8. Subject to his comments on shared natural resources, he could accept draft article 7 on equitable sharing in the uses of an international watercourse system and its waters. Nevertheless, he had some doubts about draft article 8, which contained a list of factors to be taken into account in determining whether the use made of a watercourse system or its waters by a system State was reasonable and equitable. Each State determined its own priorities in the light of its requirements, and the list given in draft article 8 would tend to create disputes rather than promote good-neighbourly relations through broad-based consultations.

9. Although the concept of "appreciable harm" might be difficult to define in practice, he supported the basic idea of draft article 9, which provided that a system State must refrain from and prevent, within its jurisdiction, uses or activities that might cause appreciable harm to the rights or interests of other system States. That draft article embodied a cardinal principle of international law which was applicable not only to international watercourses, but also in all spheres of inter-State activities.

10. Chapter V of the report, on "Co-operation and management in regard to international watercourse systems", should be the bedrock on which the future development of the law under consideration should be based. In that connection, he referred the Commission to recommendation 85 of the Mar del Plata Action Plan, quoted in the report (*ibid.*, para. 104), which reflected the

⁴ Part V of the Convention (*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).

pragmatic and function-oriented approach adopted, for example, in Africa by the member States of the Niger River Commission, the Mano River Union and the Lake Chad Basin Commission, as well as by a number of Asian and Latin-American States. Although that recommendation referred to “shared water resources”, it did so in a purely descriptive manner. The emphasis was on the need for voluntary and practical co-operation, not on the legal obligation to co-operate. Another example of such co-operation was that established by the Nile River Basin States, which had not concluded an all-embracing agreement but had set up a number of informal committees that carried out useful technical and hydrometric work in all the Nile countries. The establishment of a Nile Basin Authority was also being considered.

11. When the Commission came to consider draft articles 10–19 in detail, it would have to take care not to establish a system of co-operation that would enable lower riparian States to veto development projects undertaken by upper riparian States. Those draft articles failed to take account of the principle of reciprocity; the obligations they established seemed to be intended only for upper riparian States. Draft article 13, paragraph 3, which provided that a notifying State must not proceed with a planned project without completing the procedure for the settlement of disputes provided for in paragraph 2, came very close to a veto. The saving clause in paragraph 3, which permitted a planned project or programme to be carried out if the notifying State deemed it to be of the utmost urgency and considered that further delay might cause unnecessary damage or harm, was useful, but it might exacerbate disputes that could have been settled by means of a less rigid and more informal procedure.

12. The articles in chapter VI of the report made a very positive contribution to development of the law. Developing countries, especially those in Africa, depended heavily on the use of river water for domestic and agricultural purposes and it would be catastrophic for them to allow such water to be polluted through irresponsible use. On that subject he fully agreed with the Special Rapporteur’s view (*ibid.*, para. 171) that a distinction between old and new sources of pollution was not acceptable. With regard to draft article 28, on the safety of international watercourse systems, installations and constructions, he shared the Special Rapporteur’s doubts (*ibid.*, para. 186) about the advisability of including any provisions such as those contained in the two 1977 Protocols to the 1949 Geneva Conventions, relating to the protection of victims of international armed conflicts and non-international armed conflicts.⁵ Any attempt by the Commission to include such provisions in draft article 28 would be tantamount to amending those Protocols, which, he believed, also applied to international watercourses.

13. Lastly, he thought that the articles on the settlement of disputes contained in chapter V of the draft were premature and could be considered at a later stage.

14. Mr. USHAKOV, after thanking the Special Rapporteur for his excellent report (A/CN.4/367), said that the starting-point for the Commission’s work on the topic under study was still as unsatisfactory as it had been at the outset, some 10 years earlier. Neither the concept of a drainage basin nor the slightly broader concept of an international watercourse system, which the Commission had substituted for it, had any chance of being accepted by States. In fact, the international watercourses with which the Commission should concern itself were rivers which flowed through the territories of two or more States. The concepts of a “basin” and a “system” had completely unacceptable consequences in the present context. They implied that a State having no connection with a river which passed through the territories of other States could participate in taking decisions on the utilization of the river merely because it was fed by water from that State’s territory. A further consequence was that a river flowing in the territory of only one State acquired an international character for the sole reason that it received ground water or glacier water coming from the territory of another State. No Government would agree to a State completely unrelated to a watercourse being considered a “system State” and empowered to take decisions concerning its uses, or to a national watercourse becoming international by virtue of the draft articles.

15. Moreover, the concept of an international watercourse system was completely pointless except where navigation was concerned. For all other uses of the waters of a river passing through the territories of two or more States, it mattered little to downstream States whether the watercourse was fed by tributaries, ground water, lakes or other components of a system before reaching their territory. What mattered to them was the quantity and quality of the water they received. It was only in connection with navigation that the concept of an international watercourse system could be applied, because it was on all the components of such a system that navigation was really carried on. It was also unimportant to a State whether a watercourse, before reaching its territory, had as a tributary a watercourse which crossed the territories of several States and was thus of an international character. In his opinion, neither the concept of a “basin” nor that of a “system” was justified in theory or in practice; it would be better to regard as international watercourses rivers crossing the territories of two or more States.

16. It followed that the States concerned were the co-riparian States of a watercourse, not all the States of a basin or system. Hence, the draft articles could only take the form of a set of directives for riparian States; they could not claim to replace the numerous agreements such States had to conclude to cover each particular situation. Like the draft principles of conduct in the field of the environment prepared by UNEP and presented to the Commission in a note by Mr. Stavropoulos (A/CN.4/L.353), the draft articles should encourage co-riparian States to conclude agreements suited to the circumstances of each case. Rules of general international law could be stated in the draft, but not imposed on States.

⁵ See 1785th meeting, footnote 14.

17. Under the terms of paragraph 3 of draft article 4, which was identical to article 3 as provisionally adopted by the Commission, system States were required to negotiate in good faith for the purpose of concluding one or more system agreements "in so far as the uses of an international watercourse system may require". But very few watercourses crossing the territories of several States required regulation. He believed that only 5 per cent of international watercourses were the subject of agreements between States at present. Innumerable international rivers were used by each State through whose territory they passed in such a way that no harm could be caused to other riparian States. As it stood, draft article 4, paragraph 3, did not make it sufficiently clear that agreements should be concluded only when the uses of an international watercourse made them absolutely necessary.

18. The effect of the wording of draft article 4, paragraph 1, according to which "A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention . . .", was to make those provisions mandatory, whereas they should take the form of mere guidelines. States would never be able to accept that provision. It should, indeed, be emphasized that every international watercourse came under the sovereignty of each State through whose territory it flowed. The need for regulations and for an agreement arose only when a use of the watercourse by one of those States affected the uses that other States might make of it. But even in that case, each State retained its sovereignty, and it was only a matter of setting limits to that sovereignty by means of an agreement. It was necessary, on the one hand, to respect State sovereignty and, on the other hand, to take account of the common interests of States and the unacceptable consequences which use of a watercourse by one of them could have for the others.

19. It was completely pointless to treat an international watercourse as being a shared natural resource. If rules of international law applicable to shared natural resources existed, it would suffice to stipulate that those rules applied to international watercourses as shared natural resources; but unfortunately such rules did not exist.

20. Lastly, since the draft articles should take the form of mere guidelines, they ought not to include provisions on the settlement of disputes. It was for the States concerned to reach agreement on methods of settling any disputes that might arise.

21. Mr. DÍAZ GONZÁLEZ said he wished not only to congratulate the Special Rapporteur on his first report (A/CN.4/367), which showed great mastery of the subject and unusual skill in reconciling different points of view, but also to pay a tribute to the previous Special Rapporteur, Mr. Schwebel, for his third report (A/CN.4/348), which his election as a Judge of the ICJ had prevented him from presenting to the Commission. That monumental and fundamental report would long continue to inspire the Commission's work.

22. The subject under study was undoubtedly a difficult and delicate one, but it was of particular importance to

many States and especially to developing countries. It was a subject which lent itself both to codification and to progressive development of international law. Thanks to the enlargement of the Commission's membership, States which had been passive subjects of international law until their independence would be able to participate in the elaboration of legal rules on a subject whose study made it necessary to take account of the inalienable right to development and to the utilization of natural resources.

23. The Spanish version of the report under consideration was defective in more than one respect. For instance, the word "management", which appeared in the heading of chapter V in the English version, had been translated as *ordenación*, which was quite incorrect, whereas the terms *gestión* or *administración* would have done very well. The title of article 38, which in English was "Binding effect of adjudication", had been translated into Spanish as *Efecto vinculante de la adjudicación*. The term "adjudication" should not have been rendered in Spanish as *adjudicación*, but as *sentencia* or *fallo*; and the word *vinculante* should be replaced by *obligatorio*. Inaccuracies of that kind were a matter of substance, not of form. It should also be pointed out that the English term "landslides", which appeared in paragraph 63 of the report, had been rendered by the incorrect and unsuitable expression *corrimientos de tierra*, instead of the appropriate term *derrumbes*. It was very tiresome for those who read the report in Spanish to be continually obliged to decipher passages that were quite clear in the original version.

24. The Special Rapporteur had said that he intended to stay within the broad outlines defined by the Commission so far. What mattered was to establish a number of principles deriving from the fundamental principle that international watercourses were shared natural resources. In the light of modern demographic and social concepts, those resources should benefit the peoples which used them. It followed that the resources should be reasonably shared between States; that States should co-operate in good faith and participate in their regulation, conservation and administration; and that States should not engage in any activity likely to cause harm to other States. The latter principle was embodied in the Declaration of the United Nations Conference on the Human Environment (principle 21).⁶ Finally, the last principle to be taken into consideration was that of the settlement of disputes by peaceful means, particularly by negotiation.

25. The principles he had mentioned had already been applied in various agreements. In that connection, the instructions given by the United Kingdom Foreign Secretary to his representative in the negotiations with Egypt which had resulted in the 1929 Agreement concerning the Nile⁷ were of particular interest (see A/CN.4/348, para. 60). It should also be mentioned that the Convention relating to the Development of Hydraulic

⁶ 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), p. 5.

⁷ League of Nations, *Treaty Series*, vol. XCIII, p. 43.

Power affecting more than one State,⁸ adopted at Geneva in 1923 by the Second General Conference on Communications and Transit, while recognizing the principle that a State was free to carry out on its own territory any operations for the development of hydraulic power, stipulated that such activity should be exercised within the limits of international law and provided that the States concerned had an obligation to enter into negotiations if operations were to be carried out partly in the territory of another State or if they exposed another State to serious prejudice (*ibid.*, para. 408). The PCIJ, in the *River Oder* case,⁹ had stressed the concept of the community of interests of riparian States. True, the Permanent Court's considerations related to navigation, but they applied all the more to other uses of international watercourses when the well-being of mankind depended on them.

26. The Seventh International Conference of American States held in Montevideo in 1933 had established another precedent by adopting the "Declaration of Montevideo" on industrial and agricultural use of international rivers,¹⁰ according to which no riparian State of a contiguous river could introduce any alteration which might prove injurious to co-riparian States without their consent. Furthermore, the Inter-American Juridical Committee had prepared a draft convention on the question¹¹ and the countries of Latin America had concluded a number of multilateral and bilateral agreements, which were mentioned in the third report of the previous Special Rapporteur. Thus the Latin-American States had studied those questions, which were of vital importance for the development of their region, and had concluded agreements incorporating the principles he had mentioned earlier. For example, Venezuela had undertaken, in an agreement concluded with Colombia, to contribute to the maintenance of forests situated near the mouths of rivers which had their sources in Colombia but which flowed into Lake Maracaibo.

27. On the question of definitions, he observed that the new Special Rapporteur had been right to abide by the decision of the Commission which, before suspending work on the topic in 1980, had deemed it preferable to leave definitions aside so as not to become bogged down in sterile discussions, since absence of definitions would not prevent the continuation of the work. On that point, he associated himself with the views expressed at the Commission's thirty-first session by Sir Francis Vallat and many other members,¹² which had led to the Commission—at its next session—sending a note to the General Assembly concerning article 1 of the draft.¹³

⁸ *Ibid.*, vol. XXXVI, p. 75.

⁹ *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16 of 10 September 1929, *P.C.I.J.*, Series A, No. 23, p. 27.

¹⁰ See *Yearbook* . . . 1974, vol. II (Part Two), p. 212, document A/5409, annex I.A.

¹¹ *Ibid.*, pp. 349–351, document A/CN.4/274, para. 379.

¹² See *Yearbook* . . . 1979, vol. II (Part One), p. 154, document A/CN.4/320, para. 49.

¹³ *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

28. As to the idea of shared natural resources, there was no point in discussing it if the Commission proceeded from the principle of absolute sovereignty of States and considered the Harmon doctrine to be still valid. Fortunately, that was not the case, since the United States of America had abandoned that doctrine as far back as 1909 (*ibid.*, paras. 53–56). The previous Special Rapporteur had outlined the development of the concept not only of shared natural resources, but also of equity in the sharing of those resources. He had also explained the meaning which should be attached to the term "abuse of right" and had described the restrictions which must be provided for in order to prevent a State from vetoing the exploitation of a watercourse. The first articles approved by the Commission and by the vast majority of representatives in the Sixth Committee of the General Assembly thus formed the basis of the Commission's work on the topic. The General Assembly had found the Commission's approach correct and the Commission should continue on the same course, which was precisely what the new Special Rapporteur had done.

29. Lastly, he wished to comment on a question which had been raised during the discussion, namely that of the protection of hydraulic installations in the event of war. In his third report (*ibid.*, para. 416), the previous Special Rapporteur had referred to the two 1977 Protocols to the 1949 Geneva Conventions on humanitarian law,¹⁴ which contained provisions designed to protect installations of public utility. Like the new Special Rapporteur, he (Mr. Díaz González) doubted that the Commission should deal with that question, which was covered by the Geneva Protocols, and include provisions on the law of war among its draft articles; it should rather concern itself with the law of co-operation and peaceful coexistence.

30. On the whole, he shared the views of the new Special Rapporteur, who had submitted a useful report which could serve as a basis for the Commission's future work. He thought the report would facilitate the Commission's task because it gave an overall view of the topic. Representatives in the Sixth Committee often complained that the Commission's reports were disjointed and unsystematic and offered them no means of forming an opinion. That would not be true of the report under consideration.

31. Naturally, certain powerful interests would do their utmost to prevent any agreement on the topic; but for many countries it was a matter of fundamental importance and, since more than 100 treaties on it had been recorded, he could not agree that its study was not justified. Doctrine was developing in the direction of conservation of resources, and the United Nations Convention on the Law of the Sea showed that a balance of the interests of all countries could be achieved. The regulation of international watercourse systems was a difficult task which the Commission should tackle in accordance with the mandate it had received, on the basis not of codification of existing rules, but of progressive development of international law.

¹⁴ See 1785th meeting, footnote 14.

Visit of the Secretary-General of the United Nations

32. Mr. ROMANOV (Secretary to the Commission) said he was pleased to inform members that the Secretary-General of the United Nations, Mr. Pérez de Cuéllar, would address the Commission on Monday 4 July at noon.

33. Mr. McCAFFREY, observing that the Commission normally held its Monday meetings in the afternoon, asked whether it was intended to meet earlier on the day of the Secretary-General's visit.

34. Mr. USHAKOV suggested that the time of the Commission's meetings on 4 July should be settled in informal consultations.

It was so agreed.

The meeting rose at 12.35 p.m.

1789th MEETING

Friday, 24 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC (XXXV)/Conf. Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. BARBOZA, after warmly congratulating the Special Rapporteur on his report (A/CN.4/367), observed that, as the successor of two previous special rapporteurs on the topic, Mr. Evensen's task was not easy. The new Special Rapporteur, noting that the Sixth Committee of the General Assembly had found the work already done acceptable, had decided to follow the course already set and not put forward any revolutionary ideas.

¹ Reproduced in *Yearbook* . . . 1982, vol II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

Whatever some members of the Commission might say, he had been right to submit a full set of draft articles. It was surprising to find that some members of the Commission appeared, from their statements, to have completely written off the earlier studies on the topic. For to start out again on the same discussions as four or five years ago could only delay the Commission.

2. In regard to the specific nature of the topic under study, he associated himself with Mr. Koroma (1786th meeting), Mr. El Rasheed Mohamed Ahmed (1785th meeting) and Mr. Sucharitkul (1787th meeting), who had emphasized the important role of water in satisfying man's essential needs. It was not a matter of codifying one of the classic subjects of international law; the Commission had been criticized for limiting itself to such topics only, and so the General Assembly would closely follow the Commission's progress, as was shown by the comments of several representatives in the Sixth Committee recorded in the topical summary of the discussions (A/CN.4/L.352, sect. F.1). Those considerations, among others relating to the need for a body of legal rules to solve the many problems concerning water requirements, should make the Commission aware of the urgency of its task.

3. General Assembly resolution 2669 (XXV) of 8 December 1970 recommended that the Commission should take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification; in regard to the term "uses", it was the social and human connotations that should be stressed. As the arbitral tribunal in the *Lake Lanoux* case between France and Spain had maintained: "The unity of a basin is supported at the legal level only to the extent that it conforms to the realities of life."⁴ Hence, definitions had to be found which took account of those realities and were not mere geographical or political descriptions. Moreover, while aware of the difficulties which the Commission was bound to encounter in its work of progressive development, the General Assembly had requested it, in case of difficulty in defining rules of international law applicable to watercourses, to propose solutions and not to get lost in vain speculations. At the 1785th meeting, Mr. Stavropoulos had concluded his statement by rightly exhorting the Commission to work towards equity and justice and to rule out any possibility of a veto. In that connection, it should be recalled that it was the Commission's tradition to respect the views of the majority, not omitting, however, to transmit dissenting opinions to the General Assembly.

4. Turning to draft articles 1 and 6, which were interconnected, he observed that article 1 was based on the note which the Commission had drafted in order to explain what was meant by the term "international watercourse system"⁵ before a definition was finally adopted.

⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 304, para. 8; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 196, document A/5409, para. 1064.

⁵ See 1788th meeting, footnote 13.

The concept of an “international drainage basin” as a criterion for defining the scope of the draft articles had met with some resistance, and the majority of the Commission had been in favour of waiting until the rest of the draft articles had been completed before deciding what definition to adopt. Like Mr. Díaz González at the previous meeting, he referred members to the views expressed in that regard by Sir Francis Vallat, Mr. El-Erian and Mr. Quentin-Baxter at the Commission’s thirty-first session.⁶ The note drafted by the Commission had represented a mere working hypothesis, subject to refinement and change, depending on its reception by the General Assembly. It introduced the concept of an “international watercourse system”, which was distinct from the broader concept of an “international drainage basin”. The latter involved geographical, territorial and hydrological considerations, as shown by the definition in article II of the Helsinki Rules,⁷ whereas the former was strictly functional, in the sense that there were as many systems as there were uses: irrigation, pollution control and others. Within a system, member States naturally had rights and obligations, and as soon as the use of the waters at one place affected their use at another, States had to consider the idea of sharing. In fact, the starting-point of the topic was the truism that water flowed—a fact with inevitable consequences which had to be taken into account.

5. Article 1 dealt with the watercourses that would form the subject of the draft articles. Although there were many different kinds of watercourse, there were few criteria for defining what was meant by an international watercourse. He believed that there were two possibilities: either the waters of a watercourse could be regarded as constituting an essentially unitary system and that system as extending as far as the effects of their uses; or they could be treated on a “fragmentary” basis, limiting as much as possible the extent of the waters subject to an international régime. Any definition must, explicitly or implicitly, be based on one of those two views.

6. The question arose as to what régime would be applicable to tributaries, canals, lakes, glaciers and ground water closely connected with international watercourses. What happened, for example, in the case of a tributary situated exclusively in the territory of one State, whose waters, polluted by industrial waste, flowed into an international watercourse and polluted the waters of the lower riparian States, or in the case of ground water which fed an international watercourse after being accidentally infiltrated by buried radioactive waste from a nuclear power station? If the Commission was not to take account of the legal consequences of such incidents in its draft, there was no point in continuing the discussion. Like it or not, the concept of a system was indispensable since, without it, in the examples he had cited, States victims of pollution would only be able to invoke vague rights of good-neighbourliness or an abuse of right, whereas in an

international watercourse system the rights and duties of States were clearly established. The two positions he had mentioned earlier lay behind those two possibilities.

7. The fragmentary view of things had its source in the Final Act of the Congress of Vienna of 1815,⁸ which had regulated the only use of watercourses with which the Commission was not at present concerned, namely navigation. But the Final Act of the Congress of Vienna was an intrinsically European instrument. For instance, precipitation conditions in Europe were significantly different from those in the Horn of Africa. Besides, neither the problem of industrial pollution nor that of irrigation had arisen at the time of the Congress of Vienna. The definition adopted by the Congress of Vienna was thus of a geographical and political character, and regarded rivers exclusively as means of communication and transport. Hence it was of no use whatever for the Commission’s work.

8. On comparing the note adopted by the Commission in 1980 with the Special Rapporteur’s draft article 1, he found that he preferred the former wording, which was more systematic than the new text and laid more emphasis on the unitary nature of the system. The reference in paragraph 1 to sporadic watercourses, as well as to deltas, river mouths or other similar formations with brackish or salt water, was unnecessary. It would suffice to mention them in the commentary and delete the expression “fresh water” in the first subparagraph of paragraph 1. Like the Special Rapporteur, he believed that article 1 should not give a definition adopted from principles selected *a priori*. It should follow reality, and reality here was that the uses of water, due to their interdependence, formed systems. From that reality of interdependence, legal principles would derive.

9. Referring to article 6, he said that the concept of shared natural resources had developed during the last 15–20 years, when mankind was becoming aware of the limits and danger of exhaustion of natural resources. The demographic explosion, the increase in industrial production and problems of consumption had increased the sensitivity of world public opinion to the need for sharing previously abundant natural resources. The idea of sharing natural resources was not entirely new, however, since States had already had to reach agreement, for example, on the exploitation of oilfields lying across common frontiers. Among the legal principles applicable in such cases was the equality of States as expressed by the concept of proportionality; the parties had no right to act arbitrarily or to resort to force, and they were required to take account of the other parties’ interests.

10. In order to meet the needs of the modern world, several United Nations and other bodies had developed the concept of shared natural resources in instruments such as the Charter of Economic Rights and Duties of States;⁹ the Mar del Plata Action Plan;¹⁰ General

⁶ *Ibid.*, footnote 12.

⁷ See 1785th meeting, footnote 13.

⁸ F. Israel, ed., *Major Peace Treaties of Modern History, 1648-1967* (New York, Chelsea House and McGraw-Hill, 1967), vol. I, p. 519.

⁹ General Assembly resolution 3281 (XXIX) of 12 December 1974.

¹⁰ See 1787th meeting, footnote 9.

Assembly resolution 3129 (XXVIII) of 13 December 1973 on co-operation in the field of the environment concerning natural resources shared by two or more States; the UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (A/CN.4/L.353); the Helsinki Rules; and many others. With regard to the UNEP draft principles, it had been pointed out during the discussion that the General Assembly only "took note" of them, but it was quite natural that States should have been somewhat reluctant to accept principles that applied to all natural resources, and the draft might perhaps have been better received if it had been concerned with water resources only. However that might be, he believed that the General Assembly's taking note of the UNEP draft was equivalent to its adoption. Furthermore, as was clear from the explanatory note accompanying the draft principles, they were not intended as legal rules, but rather as guidelines with which States were encouraged by the General Assembly to comply when drawing up bilateral or multilateral agreements on shared natural resources.

11. Those considerations argued in favour of including the concept of sharing in the draft articles, and several of the principles set out in chapter II were based on it. He did not think that the theory of good-neighbourly relations or the doctrine of abuse of rights were the source of rights and obligations regarding the uses of watercourses; they derived rather from the very nature of shared resources. On the other hand, could one really speak of abuse of rights in international law? What were the rights and duties deriving from that doctrine? The view had been expressed in the Commission that a lawful act of a State which caused harm to another State could not engage the former State's responsibility. To refuse to recognize that water formed part of shared natural resources was tantamount to reviving the Harmon doctrine. On the other hand, to define the legal character of watercourses as shared natural resources would make it possible to establish general principles and derive from them a régime of clear-cut rights and obligations. As for the harm which that concept would do to the principle of the permanent sovereignty of States over their natural resources, it did not exist. It was a matter of protecting resources against third States, not against other States belonging to the same system. The exercise by a riparian State of a right which deprived a neighbouring riparian State of its rights was equivalent to spoliation, and that was not what was meant by the permanent sovereignty of States over their natural resources.

12. Since draft articles 4 and 5 had not been amended, they could be re-examined on second reading in accordance with the usual procedure. The amendments made to articles 2 and 3 did not alter the substance of the text. With regard to the examination of article 1, he believed that by considering it was time to transform the Commission's note into an article, the Special Rapporteur was about to provoke the very discussion which the Commission had wished to avoid. At the

present stage, it would be better to avoid such a general debate and revert to the previous text. Only after the Commission had reached agreement on the major principles set out in the draft should it consider the note, possibly with a view to putting it into the form of an article.

13. Mr. BALANDA said that the Special Rapporteur was to be commended for submitting a complete report (A/CN.4/367) that would enable the other members of the Commission to follow his train of thought and decide what position to adopt, provided, of course, that they clearly understood the meaning of the terms used. Although the clarity of the report, which showed the Special Rapporteur's mastery of the topic, was also commendable, some of the draft articles, such as articles 1, 10, 12 and 14, were unfortunately too long.

14. He thought it would be more convenient to speak on the report as a whole, since it differed from former reports in that the present Special Rapporteur had revised some of the articles provisionally adopted by the Commission and, as he himself had indicated (*ibid.*, para. 43), had sometimes taken different positions from those of his predecessors. For example, the French texts of the work of the earlier Special Rapporteurs had used the term "voies d'eau", whereas the present report referred to "cours d'eau", a more restrictive term that apparently did not cover canals and locks, for example. The Special Rapporteur's study should, however, relate to all the freshwater uses of international watercourses.

15. With regard to the criteria used to classify the uses of watercourses, he noted that the report (*ibid.*, para. 52) referred to three headings only—agricultural uses, economic and commercial uses, and domestic and social uses—which overlapped and were not exhaustive. As the Special Rapporteur had proposed, a pragmatic and less doctrinal approach should be adopted. The general outline seemed to cover all aspects of the use of fresh water.

16. In resolution 2669 (XXV), the General Assembly had recommended that the Commission should take up the study of the law of the topic under consideration with a view to its progressive development and codification; but development seemed to play very little part in the present draft. The provisions on the peaceful settlement of disputes offered an opportunity for developing international law; yet the proposed outline contained no innovations in that respect.

17. He shared the Special Rapporteur's opinion that, in view of the many uses to which water could be put, it would be more appropriate to propose a general framework that would be flexible enough to take account of each specific use. The draft articles would then have an inspirational and a residuary role. Hence it would not matter if they were worded conditionally, since the draft would be only a model for the guidance of States in concluding specific co-operation agreements on the use of their shared water resources.

18. The United Nations Convention on the Law of the Sea, to which some speakers had referred, was a legal instrument which had not yet entered into force; so until

the various mechanisms for which it provided—in particular the machinery for the settlement of disputes¹¹—had been tested, the value of its contribution to the progressive development of international law was only that of a precedent.

19. The relationship between the draft articles under consideration and the studies on State responsibility and on international liability for injurious consequences arising out of acts not prohibited by international law must not be overlooked, since use of the waters of a watercourse by States could engage their international responsibility. According to articles 14, 20 and 23 of the present draft, a State would be obliged to repair damage for which it was internationally liable only if the damage went beyond what might be regarded as reasonable or appreciable. That case was not quite the same as that of an internationally wrongful act entailing the responsibility of the author State. The draft articles also provided that States should contribute to the payment of costs according to the direct benefits they might derive from the use of the waters of a watercourse. In his view, the basic idea of benefits was necessarily covered by the concept of shared resources. In the case of the draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, there were no such clear grounds for the obligation to share in the cost of preventing or limiting damage.

20. One of the basic principles proposed by the Special Rapporteur for the use of international watercourses was co-operation, which was the corollary of water's characterization as a shared natural resource. It might, at first glance, seem incompatible with the sovereignty of the States of a watercourse system for them to be under an obligation to negotiate in order to give practical effect to co-operation or, rather, to the solidarity which united them; but that was not quite the case. He proposed to consider the concept of water as a shared resource and the two key concepts of co-operation and negotiation in the light of some examples taken from the current situation in Zaire. His purpose was to show the link between shared interests and the exercise of sovereignty.

21. The régime of the Congo Basin had been established by the General Act of the 1885 Berlin Conference,¹² which had proclaimed freedom of trade and navigation on what at the time had been called the Congo River and was now known as the Zaire. Most of that river was within the territory of Zaire, except for the part which formed the border with the Central African Republic and the People's Republic of the Congo. The three riparian States of the Zaire practically faced one another. Apart from navigation, the riparian States had no major problems concerning use of the waters. Minor problems had arisen, however, in regard to the joint efforts to be undertaken for the conservation of river species: manufacturing standards for fishing nets to prevent the catching of under-sized fish, and protection of crocodiles, lizards, large

water snakes and hippopotamuses. The legislation of the riparian States thus had the same objectives and those States had practically no difficulty in maintaining a balance between their respective interests. The same was true of the use of the waters of Lakes Albert, Tanganyika, Kivu and Mweru, which Zaire shared with Rwanda, Uganda and the United Republic of Tanzania.

22. Because of the many waterfalls on the Zaire, it had been possible to build dams on that river; but even before the construction of the Inga dam, which could provide enough electric power for all of central Africa, Zaire had supplied part of its water power to neighbouring States, including the People's Republic of the Congo and Rwanda. That was a typical example of sharing. Although the Inga dam had been financed without any participation by the People's Republic of the Congo and Zaire had agreed to supply that country with electric power, it would be inconceivable for the Government of Zaire to do as it pleased on the pretext of exercising its sovereignty or simply of using property that belonged to it. It would also be inconceivable for Zaire, which, because of the Inga dam, had enough energy resources to meet nearly all the needs of the central African States, to decide to reserve the use of that dam for itself, on the same pretext or on that of using its natural resources. Since Zaire had agreed to supply electric power to other States, it had to conduct negotiations with them in case the exercise of its property rights might be harmful to the enjoyment of the rights of those other States. *De facto* solidarity between all those States should attenuate the exercise of sovereignty; but it should be noted that the idea of sharing and co-operation was in no way incompatible with the idea of the exercise by States of permanent sovereignty over their wealth and natural resources.

23. In order to compensate for its inadequate access to the sea, the former colony of the Belgian Congo, under an agreement with the British Government which then administered the territory known as Tanganyika, had obtained permission to build, at its own expense, the Belbase port installations at Dar es Salaam. At present, Zaire managed those installations, which had devolved upon it through State succession to public property, jointly with the United Republic of Tanzania, Burundi and Rwanda. According to its share in the management of Belbase, each of those States was bound to co-operate and, in particular, to negotiate, so that all activities relating to the Belbase installations would be undertaken jointly. In the exercise of its sovereign rights over its territorial sea and its territory, the United Republic of Tanzania had to take account of the situation created by the existence of Belbase. Since it had accepted that situation, it also had to accept certain limitations on the exercise of its sovereignty.

24. With regard to the concept of a shared natural resource, which the Special Rapporteur had applied to water, he observed that according to the tradition of the peoples of Zaire and of many other African countries, water could not be denied to someone who was thirsty. In view of that tradition, he had no difficulty in regarding water as a shared resource and in accepting the conse-

¹¹ See 1785th meeting, footnote 10.

¹² Israel, ed., *op. cit.*, vol. II, p. 1081.

quences, namely that the water of a watercourse formed part of the common heritage of the co-riparian States and that it must be equitably used. The idea of the community of interests of peoples, from which the idea of sharing derived, should lead States to co-operate both in the use of the waters of their watercourses and in the use of the environment in general, even if their activities were carried out only within their respective national borders. Any human activity that might have a major impact on the physical environment, which was the common heritage of mankind, should be guided and monitored. What the common heritage of mankind included was more or less known, but little was yet known about the exact content of all the rights and obligations it involved. It would be unwise to refer to the application of rules whose content was still not well defined. States could formulate such rules in each particular case. In some ways, the draft articles seemed to constitute the beginnings of a substantial contribution to the formulation of rules to govern the common heritage of mankind.

25. He agreed with the Special Rapporteur that co-operation and, consequently, negotiation on the uses of a watercourse system should respect the principle of good faith. However, co-operation was not absolutely necessary for every use of a watercourse by a system State. Negotiations should be conducted between system States only in so far as a use of the waters planned by one of them might have a major or appreciable impact on their use by the others. It seemed that draft article 9 could be interpreted in that way. Hence an activity which was not likely to cause appreciable harm was not prohibited. It remained, however, to define the meaning of the expression "appreciable harm" and of the adjectives "reasonable" and "equitable".

26. Moreover, it seemed that the obligation to submit a notification provided for in draft article 11, would exist only in so far as the execution of a project by one system State might cause appreciable harm to other system States. That, at least, was what was implied by the provisions of article 13. In draft article 12, the Special Rapporteur had set a period of not less than six months for replies to a notification and had established the obligation to provide a reasoned decision. But he had not lost sight of the fact that emergency situations could arise, and had therefore included a saving clause in article 13, paragraph 3. That provision seemed acceptable, but it should be noted that the assessment of a situation as being one of "utmost urgency" was left solely to the notifying State, so that the saving clause might cancel the intended effects of article 12.

27. The reservation in article 19 concerning the confidential nature of certain information should not come into conflict with the needs of the system of exchange of information and data provided for in articles 16-18. The confidential nature of certain information might also come into conflict with the security requirements of international watercourse systems, installations and constructions, which were dealt with in draft article 28. In connection with that article, he believed that in order to enhance the safety of installations and structures

relating to the use of watercourses, it should be stated in an article of the draft that the provisions of the laws of war also applied to the present draft articles.

28. There was nothing original in what had been proposed in the report concerning the settlement of disputes. A mere reminder of the various modes of settlement, whose weaknesses were well known, added nothing to the draft.

29. According to the explanations given in his report (*ibid.*, para. 14), the Special Rapporteur seemed to consider that the draft would be a kind of framework agreement or set of guidelines for States, which they would be entirely free to follow or not. Seen in that light, the draft would not impair the sovereignty of any State. It was in order that the waters of a watercourse system should not be inequitably or selfishly used that the draft required the States concerned to co-operate by holding consultations in order to agree on the way in which they could best exercise their sovereignty. Since their interests were interdependent, States should not prevent one another from benefiting from the activities they carried out, either jointly or separately.

30. The exercise of permanent sovereignty over natural resources should not preclude the obligation of States to take due account of the effects of their activities on other States. Nor should it preclude their obligation to share their natural wealth with other States. In his view, the idea of sharing underlay the right to development. The dual concept of shared natural resources and the common heritage of mankind was bound up with the concepts of solidarity and interdependence, which were reflected in the idea of an international watercourse system. Sovereignty should not serve as a screen for egoism. In a world in which States were obliged to co-operate along new lines in order to promote their development, they should rid themselves of everything that might obstruct development. The idea of State sovereignty, for example, should be reconsidered. In his opinion, the legal nature of the draft articles would not affect enjoyment of the attributes of sovereignty by States, since in the last analysis the States of a watercourse system would assume obligations and co-operate of their own free will.

31. Mr. REUTER said that he wished to explain his position and try to identify the issues on which the Commission agreed or disagreed. Although a few members had suggested that the draft should contain only recommendations, most of them had referred to the obligations it should enunciate. Moreover, the inclusion of only one obligation, accompanied by recommendations, would suffice to make it a treaty. He was sure that Mr. Ushakov also believed some obligations could be mentioned in the draft, even though he thought it should contain indications that were not binding on States.

32. All the members of the Commission agreed that the régime of international watercourses prohibited States from disturbing the natural order. Of course, the disturbances that were prohibited still had to be specified. Some Governments would like questions relating to the pollution of international watercourses to be excluded from the draft, which he considered absolutely impossible.

Account would have to be taken not only of sources of pollution on the internationalized parts of a watercourse, but also of sources of pollution within a State which affected a watercourse. In that connection, he noted that acid rain could pollute snow, which became glacier ice; and when the polluted ice melted, serious problems could be expected. A State on whose territory there was a drainage basin receiving such polluted water might not be in any way responsible for the triple phenomenon of air, water and river pollution.

33. The problem of drainage basins and river systems was merely a quarrel over words. It was a problem that arose in regard to pollution, because in that case it was impossible not to take account of the entire land territory of the State where the river basin was situated. Hence it was necessary to begin by clearly defining the obligations of a State which disturbed the balance of nature. It was thus a problem of responsibility that lay at the root of the Commission's concern.

34. The real difference of opinion in the Commission stemmed from the fact that, according to some States, responsibility arose at the crossing of the frontier; that was the moment when the natural order was or was not respected. A State was free to do as it pleased in its own territory until its responsibility was engaged, in other words when the frontier was crossed. The Special Rapporteur had proposed an *ex ante* mechanism which came into play before the State had acted. Some members of the Commission considered that mechanism unacceptable because it entailed an obligation that infringed State sovereignty. They believed that States already co-operated to a great extent, and that there was no need to make rules for them. In view of that difference of opinion, each member of the Commission must take a position.

35. His own belief was that there could be no progressive and coherent system which did not lay obligations on States, particularly in regard to machinery for consultations and notifications. It would probably not be necessary to draft mandatory rules if only European watercourses were involved, since the States concerned had finally managed to come to terms about them. But in the case of the developing countries, mere determination of the quantity and quality of the waters which crossed a border could be important and require the consent of both sides. No State should be able to reject the need to reach agreement on such a determination. A State might also be planning a use of water in its territory which would not, for the time being, have any harmful consequences for the downstream State, but which might have such consequences in the future. The problem then might simply be the amount of water reaching the downstream State. It was therefore advisable, during negotiations, to examine the situation as a whole and with an eye to the future. Hence he considered that responsibility *ex post facto* was not enough. In that connection, he drew attention to the good faith shown by the United States of America in abandoning the Harmon doctrine.

36. He also took the view that it would not be possible to provide for the stoppage of projects, as the Special

Rapporteur had proposed, since a State could not delay the execution of a project indefinitely. In order to end a stoppage, he saw no other solution than the intervention of a third party. He could understand that for reasons of sovereignty States refused to accept mandatory decisions, but he thought some system must be established which would oblige States to explain the reasons for their positions and, if necessary, to seek assistance from a third party.

37. Lastly, he hoped that, instead of dwelling on general principles and definitions that might cause concern, the Commission would first try to settle the issues on which there was a consensus and those on which there was the least disagreement. It would then probably be able to draft articles that a larger number of States could accept.

The meeting rose at 1.15 p.m.

1790th MEETING

Monday, 27 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS
later: Mr. Alexander YANKOV

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, 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.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)

1. Mr. JAGOTA, referring to the great contribution made by the Special Rapporteur to the Third United Nations Conference on the Law of the Sea, said that his remarkable ability to find solutions acceptable to all concerned would be of great assistance to the

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

Commission in dealing with the delicate and politically sensitive topic of the non-navigational uses of international watercourses. The Special Rapporteur had drawn inspiration from the remarkable work of his predecessor, Judge Schwebel, whose third report (A/CN.4/348) was full of useful material.

2. The report under consideration (A/CN.4/367) contained a full draft of 39 articles. Article 1 was a new provision, but articles 2–5 had already been adopted by the Commission in 1980. Chapter IV of the draft contained articles 20–26, dealing with environmental protection and pollution problems, as well as articles 27–30, which in his view did not belong in that chapter. Article 27, on the regulation of international watercourse systems, and article 29, on use preferences, should be placed at the end of chapter II, on general principles, or in a special chapter immediately following it. Articles 28 and 30, the contents of which were bound to attract universal acclaim, should also be placed outside chapter IV.

3. In his oral presentation at the 1785th meeting, the Special Rapporteur had invited members of the Commission to comment on a number of questions. The first was that of determining the issues to be covered. The second was whether members agreed with the Special Rapporteur's general approach to the topic. The third was whether articles 6–9 correctly set out the general principles or whether those provisions should be modified or supplemented. The fourth question was whether the draft contained all the essentials for a framework agreement and what elements should be left to be governed by systems agreements. The fifth concerned the details of co-operation in, and management of, water resources and of procedure for the settlement of disputes, with special reference to the desirability of compulsory conciliation. Lastly, members had been invited by the Special Rapporteur to comment on the 39 individual articles submitted.

4. For his part, he had taken a continuing interest in international watercourses since the independence of India in 1947. The topic was, of course, a highly sensitive one from the political point of view, since it affected the very life of countries and had an impact on their rate of economic development. It was a topic which aroused strong emotions and had even led to wars between States. In federal States, the issue of the non-navigational uses of rivers gave rise to difficult problems between their component units. It was hardly necessary to stress that the topic was of particular interest to developing countries, but it should be emphasized that it was not a North–South issue; it was a matter for co-operation between southern States themselves. All those considerations pointed to the need to treat the topic with deftness and delicacy.

5. Traditionally, rivers had been used for navigation, fishing, timber floating and recreation, apart from domestic uses. With technological progress, newer uses had emerged and there had been a consequent realization of the role of water in development. The new uses included irrigation, the generation of hydroelectric power and industrial uses, which had grown enormously in recent years. With increasing urbanization, domestic uses

of water had also increased very greatly. Of course, all the more recent uses—or increased uses—were combined with the traditional uses of water. With the development of more uses, the problem of how to regulate the flow had arisen. A distinction had to be made between consumption and non-consumption uses. Consumption uses reduced the quantity of water flowing downstream; non-consumption uses could have a polluting effect and thus affect the quality of the water supply.

6. In the traditional legal approach an “international river” had been defined as a river which flowed through more than one State. International lawyers had traditionally concentrated on the study of the rights and duties of riparian States, with particular reference to the relationship between the upstream State and the downstream State. Later, the river system approach had developed, along with the concept of “co-riparian” States. More recently, in the 1950s and 1960s, the new concept of the drainage basin had developed. The drainage basin had been defined in terms of the total quantity of water in a system of tributaries, and covered an entire watershed having a common terminus in the sea or a lake. The fundamental idea had been that co-operation between all co-riparians was necessary for the optimum utilization of a drainage basin, and the concept of co-basin States had emerged.

7. For various reasons, when the General Assembly of the United Nations had considered the topic of international watercourses in 1970, it had avoided any mention of drainage basins and had preferred to refer only to “international watercourses”. In 1979, the Commission had adopted the concepts of “user States” and “user agreements”. In 1980 the Commission had adopted the concepts of an “international watercourse system”, “system States” and “system agreements”. With regard to international resources shared by two or more States, UNEP had evolved the concept of “shared natural resources” in 1978 (A/CN.4/L.353). In recommendation 85 of the 1977 Mar del Plata Action Plan,⁴ the text of which was quoted in the report (A/CN.4/367, para. 34), similar terminology had been adopted in referring to “shared water resources”.

8. That being the position, the question arose as to what direction the Commission should take in developing the international law of the non-navigational uses of international watercourses. As he saw it, the Commission should codify the existing law and develop it to a reasonable extent; and it should make a point of indicating the future direction of development. But it should be left to States to elaborate details in their system agreements. Like the law of the sea, the topic of the non-navigational uses of international watercourses was a very sensitive one, and if the Commission wished to retain its present role it must go beyond mere codification, but at the same time not go too far in the direction of progressive development. In his view, the 1980 concept of a framework law was acceptable, but the Commission should encourage States to develop the law further through their system agreements.

⁴ See 1787th meeting, footnote 9.

9. The framework agreement would embody the codification of existing law on the topic. It should stress, *inter alia*, the right of each system State to an equitable share of the waters of the international watercourse system. It should recognize the right of each system State to use its share of water, as well as the international watercourse system within its territory, in accordance with its own policies, programmes and principles. It should also specify that a system State “shall so exercise its rights with regard to its share of the waters and to the use of the international watercourse system” as not to cause material harm to another system State. The rule should refer to “material” or “significant” harm, but if the majority of the Commission wished to use another adjective, such as “appreciable”, he might be prepared to accept it.

10. As to the practical implications of the rules and, in particular, the question of the settlement of disputes, he believed that the provisions in the draft should be purely recommendatory. Those questions should be dealt with in the system agreements. The Commission should avoid introducing into its draft the elements of veto or moratorium; questions of that kind should likewise be left to the system agreements.

11. The development and management of water resources, and co-operation on such development, were matters that should be dealt with by individual States or by means of joint projects agreed on by system States. The Commission should confine its action to promoting the desired co-operation. It should therefore be content with a recommendation and avoid any attempt to frame mandatory rules. To put it more simply, the verb form “should” ought to be used, rather than “shall”.

12. System agreements were bound to vary, and so would the amount of co-operation between the States concerned, depending on the political climate. For instance, the Indus Waters Treaty 1960 between India and Pakistan,⁵ which had taken 10 years to negotiate, had been working well since its adoption, despite many vicissitudes in the relations between the two countries and notwithstanding periods of hostilities. In addition to the Indus River itself, the Treaty covered five other rivers in Punjab. Of the total of six rivers, three belonged to India and three mainly to Pakistan. For the three rivers used by Pakistan, limits had been set to the amount of water India was allowed to use upstream. The Treaty provided for exchanges of data and information and a joint commission had been set up to discuss matters of common interest, in particular new uses of water. That commission was responsible for distinguishing between technical differences, which had to be referred to a neutral technical expert, and legal disputes concerning the interpretation and application of the Treaty, which had to be referred to a court of arbitration. He was glad to report that since 1960 not a single matter had been referred either to a neutral technical expert or to a court of arbitration. Many difficulties and problems had, of course,

arisen, but they had all been settled by the joint commission and the two countries concerned.

13. He supported the Special Rapporteur’s proposals on environmental protection and pollution, which were based on humanitarian considerations; the subject was largely free from political implications. He also supported the provisions on the safety of international watercourse systems, installations and structures, and warmly welcomed the proposed provisions on timely notification of water-related hazards.

14. Commenting on the individual draft articles, he supported the idea of converting article 1 into a note, since its contents were purely descriptive, as pointed out by the Special Rapporteur himself (*ibid.*, para. 73). The Commission would thus be reverting to the approach it had adopted for the definition of an “international watercourse system” in 1980.⁶ But if other members wished to retain article 1, he would propose that the text be confined to the first sentence of paragraph 1, and paragraph 2. The second and third sentences of paragraph 1 should be relegated to the commentary.

15. He had few comments on articles 2–5 which the Commission had already adopted in first reading. With regard to article 2, he was not in favour of including measures of administration and management of watercourse systems and their waters within the scope of the draft articles. In article 3, he approved of the use of the concept of “components/part” of the waters of an international watercourse system. Articles 4 and 5 should be retained as they stood.

16. Articles 6–9 were the heart of the draft. Article 6 introduced the concept of a “shared natural resource”. As he saw it, that concept applied to a resource in which there was a community of interests, as in the case of joint ownership. It did not apply where the interest of the States concerned was in sharing certain uses of a resource. The law of the sea provided an analogy: in the 200-mile economic zone pertaining to the coastal State, that State shared the fishery resources to some extent with certain other States; but it would not be correct to describe those fishery resources as a “shared natural resource”. That expression might be appropriate in the case of a boundary river or an oilfield straddling a frontier, but he felt strongly that it was not correct to apply it to a river system. If it was employed solely in order to stress the duty of the upstream State to allow the water to flow downstream, the concept of a “shared natural resource” might be acceptable for the purpose of bringing out the respective rights and duties of the States concerned; but it could never be the basis of new rights and obligations.

17. It was therefore necessary to clarify the concept of a shared natural resource, and paragraph 1 of article 6 did not do so. He was particularly struck by the ambiguity of the second sentence of that paragraph, which stated that each system State was entitled to a “reasonable and equitable participation” in what was described as “this shared resource”. That language could only be a source of diffi-

⁵ See 1786th meeting, footnote 6.

⁶ *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

culty and conflict. It would be better to say that each State was "entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters" of an international watercourse system. In fact, he was proposing that the Commission should use the language of article IV of the Helsinki Rules⁷ adopted by the International Law Association in 1966 (*ibid.*, para. 83).

18. Draft article 7, on equitable sharing in the uses of an international watercourse system and its waters, was not acceptable. If the imperative verb form "shall" was to be retained, the scope of the article should be confined to the use of the watercourse system and its waters and the reference to development should be dropped. If the reference to development was to be retained, however, the verb "shall" should be replaced by "should". The provisions of article 7 would thus not constitute a mandatory rule, but merely a recommendation. It would be left to the system States concerned to formulate appropriate rules.

19. The provisions of draft article 8 were too complicated. Paragraph 1 contained an unduly long list of relevant factors, which should be compared with the list in article V of the Helsinki Rules (*ibid.*, para. 95). He found paragraph 2 (e) and (f) of article V of these Rules much clearer than the corresponding subparagraphs of draft article 8. Furthermore, subparagraphs (f) and (j) of draft article 8, paragraph 1, appeared to deal with the same subject. Lastly, the contents of paragraph 2 should be transferred to chapter V, on the settlement of disputes.

20. Draft article 27 (Regulation of international watercourse systems) and draft article 29 (Use preferences) should be placed in chapter II, on general principles, or in a separate chapter together with any other principles concerning specific uses of water the Commission might later decide to include.

21. He considered that the number of articles in Chapter II of the draft should be reduced. That chapter should indicate that each State had not only a right to a share in the watercourse, but also an obligation, and that there should be an exchange of data with a view to arriving at an accommodation of interests and resolving any differences: details should be settled in system agreements. There should be no question of a moratorium or any semblance of a vote, which article 12, paragraph 3, and article 13, paragraph 3, seemed to suggest. The draft articles should seek to promote the establishment of institutions, but the establishment of joint commissions or other such bodies should be left to the system States.

22. He supported the Special Rapporteur's approach to pollution, as reflected in draft articles 26 and 27.

23. So far as the settlement of disputes was concerned, he considered that for the time being draft article 31 would suffice. The Commission could revert to the matter after it had discussed general principles and the substantive aspects of the draft. Once it had agreed on the

content of the framework rules, it could decide whether the other articles on dispute settlement were necessary.

Mr. Yankov took the Chair.

24. Mr. RAZAFINDRALAMBO congratulated the Special Rapporteur on his report (A/CN.4/367), although he could not, unfortunately, support all its conclusions. He had hesitated to intervene in the debate, first, because of his ignorance of the subject and, secondly, because he thought that members of the Commission who came from countries with experience of it and with an obvious interest in finding solutions to their problems should have priority. He had been impressed by the force of the arguments advanced by speakers who had preceded him. They had convinced him that the importance of the issue went far beyond the framework of relations between the riparian States of an international watercourse, and that the solutions adopted were likely to affect the development of international law relating to the new international economic order.

25. Several fundamental principles were involved, including the right of permanent sovereignty over natural resources and the duty of States to co-operate with one another as prescribed by the Charter of the United Nations. It seemed that everyone recognized the need to respect and promote those two principles and that any divergences were due to the fact that different countries saw them in a different light. The Special Rapporteur had the delicate task of trying to reconcile positions that were apparently far removed from one another. In his draft, he had tried to balance the requirements of sovereignty of each riparian State with those of international co-operation, whose corollary was the obligation to maintain good-neighbourly relations and refrain from causing injury to other States.

26. The Special Rapporteur had followed the approach adopted by the previous Special Rapporteur, Judge Schwebel, and approved by the Commission at its thirty-second session. That approach consisted in advocating the conclusion of separate agreements suited to the particular characteristics and constraints of each international watercourse and preparing a draft framework convention to provide a basis for those agreements. In his oral introduction (1785th meeting), the Special Rapporteur had said that the draft convention was to contain general principles, mostly of a mandatory nature, followed by a system of river administration and management, and procedures for the peaceful settlement of disputes. That plan was quite acceptable.

27. In chapter I of his draft, the Special Rapporteur had reintroduced, in slightly modified form, the first four articles provisionally adopted by the Commission and an article based on the descriptive note adopted at the same time. Paragraph 1 of article 1 repeated, with a few minor additions, the descriptive and geographical definition of the term "international watercourse system" proposed in the note. Paragraph 2, which was clearly more important, gave a functional definition, in negative form, of waters which were to be regarded as forming part of the international watercourse system for the purposes of the article. The real interpretation of the term "system" was

⁷ See 1785th meeting, footnote 13.

to be found in paragraph 2, whose meaning and scope would have been clearer if it had been drafted in a positive form, for example:

“A part or parts of a watercourse system situated in one system State shall be treated as part of the system to the extent that they are affected by or affect uses of waters situated in another system State.”

28. It could hardly be said, however, that the definition, in whatever form it was cast, dispelled all doubt. The Commission's mandate referred to the uses of international watercourses and it would be preferable for the meaning and scope of those terms to be more clearly specified. The Special Rapporteur seemed to have been aware of that fact, since in paragraph 1 of article 1 he had stated that an “international watercourse system” was a system “ordinarily consisting of fresh water components” and had felt obliged to add two subparagraphs to explain the term. The article on the scope of the draft would have been a more appropriate place for those two new subparagraphs. However that might be, the explanations given of the term “system” were liable to be judged incomplete. They seemed to contradict the Special Rapporteur's assertion that he had avoided any reference to specific components of an international watercourse system so that the general principles stated in the draft might be flexible enough to be applicable to the specific features of each international watercourse.

29. The Special Rapporteur's wish not to create a super-structure from which legal principles might be deduced would perhaps be more adequately met if the definition in paragraph 2 of article 1 was lightened by deletion of the word “system” in the phrase “system State”. The term “international watercourse system” would keep its purely descriptive definition with a hydrographic connotation and could then be replaced by the term “hydrographic basin”. As for the delimitation of the system, it would form the subject of the provision concerning the scope of application. In any event, he was inclined to agree with the proposal made by many speakers, including Mr. Jagota, that the Commission should for the time being leave aside the controversial question of a definition and should continue to treat the phrase “international watercourse system” as a simple working hypothesis.

30. The title of chapter II, “General principles: rights and duties of system States” (arts. 6–9), could be taken to imply that the other chapters contained only residuary rules intended to be supplemented by special agreements; yet general principles were also stated in articles 10, 20 and 31. It could be argued, however, that the general principles appearing in other chapters derived from those set out in chapter II. That chapter proposed two fundamental rules which, in the Special Rapporteur's view, should govern relations between riparian States. One of those rules concerned the rights of States, and the other their duties. The rights of States were governed by a composite principle: the reasonable and equitable use of a shared natural resource. If the principle of a shared natural resource was accepted, the rules of participation and sharing could only be established on the basis of reasonableness, equity, good faith and good-neighbourly

relations, with a view to attaining optimum utilization. As the previous Special Rapporteur had pointed out in his third report (A/CN.4/348, para. 42), there was perhaps no more widely accepted principle than that each system State was entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters. Moreover, the concept of optimum utilization of shared natural resources appeared in the Charter of Economic Rights and Duties of States.⁸

31. The concept of shared natural resources was by no means universally accepted; it might be considered to derogate from the right of permanent sovereignty over natural resources, which was regarded as *jus cogens*. The qualifying adjective “shared” appeared incompatible with the words “natural resources” in so far as sharing was held to be imposed by the very nature of the resource in question. Adherents of the concept had argued that, in the case in point, the natural resources were exclusively owned but common to several States. That argument seemed attractive if, by the functional interpretation of the term “system”, waters apparently situated in the territory of only one State could be seen as increasing the common stock of natural resources which that State had to share with other States, some of which might not be contiguous to it. Failure to share could then generate State responsibility for an internationally wrongful act, that concept being extended to water uses.

32. The concept of shared natural resources was not a recent one and had already formed the subject of several United Nations resolutions; but in order to support its legal status, some speakers had compared it with the concept of the “common heritage of mankind” adopted in the United Nations Convention on the Law of the Sea.⁹ But that was to overlook the fact that the “common heritage” consisted of resources situated outside the territorial jurisdiction of any State, which were, in fact, a *res nullius*. That being said, as Judge Schwebel had put it in his third report, and as the present Special Rapporteur had agreed, the draft articles were envisaged as a set of principles and rules fulfilling the function of codification and, to a certain extent, progressive development of international law on the subject (*ibid.*, para. 500). Did the concept of shared natural resources pertain to progressive development of international law? If so, it would be advisable to consider the consequences of erecting it into a peremptory norm of international law when its precise contours had not yet been adequately defined. One such consequence might well be that other fields of international relations would soon be contaminated, especially that of the environment. No State, even if it was an Island, could remain indifferent to such a development of international law because of the impact it would inevitably have on the new international economic order. Consequently, he was in favour of leaving that concept aside for the present.

⁸ Art. 3 of the Charter (General Assembly resolution 3281 (XXIX) of 12 December 1974).

⁹ Sixth paragraph of the preamble and article 136 of the Convention (see 1785th meeting, footnote 10).

33. He had no comments or objections to make concerning chapters III and IV. In reply to a question raised by the Special Rapporteur regarding article 28, however, he could say that he shared the view expressed by many members of the Commission that, for reasons advanced by the Special Rapporteur himself, the draft should leave aside the question of international humanitarian law applicable in the event of war. A saving clause referring to the 1977 Geneva Protocols could, however, be included.

34. Chapter V dealt with a question of crucial importance for the draft, the whole structure of which was based on the likelihood of a conflict of interests between riparian States whose positions appeared *a priori* to be in conflict. The Special Rapporteur had had to proceed with great caution, which explained his use of vague, subjective and conditional wording. That caution was a source of imprecision. But the approach adopted in regard to the settlement of disputes appeared judicious in so far as it gave preference to friendly settlements as against judicial decisions or arbitral awards. He personally would prefer compulsory conciliation; but the parties might wish to gain time or have direct recourse to judicial or arbitral settlement, especially if the *de facto* situation called for the adoption of provisional or conservatory measures. In that case, there would be no room for prior conciliation procedure.

35. He would develop those preliminary reflections further during the subsequent discussion on the topic.

36. Mr. RIPHAGEN, congratulating the Special Rapporteur on his report (A/CN.4/367), said that the topic under consideration highlighted the conflict between the laws of nature and the law of nations. Nature knew no frontiers, whereas the territorial separation of States, with each State having sovereignty over events within its own territory, still formed the basis of the law of nations. The question that arose, therefore, was how to deal with water which flowed over and under the territories of States and into oceans beyond national jurisdictions.

37. The classical system of absolute separation of national territories could not be applied to a given watercourse without adjustments, as had been recognized in a number of treaties and, to a lesser extent, in State practice. To deal with that problem, the various Special Rapporteurs seemed to have favoured a framework treaty, which would leave it to the States of a given watercourse system to fill in the details. It remained to be decided where the dividing line between the framework treaty and matters of detail lay.

38. There were three interrelated elements of the problem which had to be considered: the object of the rules to be formulated, which came under the heading of the definition of an international watercourse system as laid down in draft article 1; the human conduct to be regulated by the draft articles, which was referred to as the uses of an international watercourse system and was dealt with in draft article 2; and the power to prescribe and prohibit that conduct, which involved such procedural arrangements as system agreements (art. 4), notification and consultation (arts. 11 *et seq.*), settlement

of disputes (arts. 31 *et seq.*) and certain articles on the joint management of waters.

39. The object of the rules to be formulated obviously had to cover at least the location, quantity and quality of water in its natural flow. It was immaterial whether the course or "container" of the water was natural or artificial; since it determined the flow of water, it formed part of the object. The possibility of potential natural courses was recognized in the second clause of draft article 1, paragraph 1, which referred to watercourses that were "apt to appear and disappear". On that basis, there could presumably be a watercourse even if, for the time being, it held no water.

40. The next step was to include in the object hydraulic works, since according to draft article 27, paragraph 1, such works controlled, increased, moderated or otherwise modified the flow of the waters in an international watercourse system. He noted that the Special Rapporteur did not include such artefacts in the international watercourse system itself, although he had laid down rules of conduct concerning them in draft article 27 and elsewhere. It was also necessary to determine whether there were other sites, installations and works pertaining to an international watercourse that should be included in the object of the rules. Article 28 seemed to give an affirmative answer to that question, at least in so far as their safety and security was the relevant to the location, quantity and quality of the water.

41. Having mentioned artefacts, he would pass on to the "environment of a watercourse system" (art. 20) which included its "surrounding areas" (art. 22). In that connection, he noted the reference in the report (*ibid.*, para. 156) to "the maintenance of an adequate vegetation cover, preferably forest land" as being imperative for the conservation of water resources.¹⁰ Other examples of ecosystems that formed part of, but went beyond the international watercourse system were given in other paragraphs of the report and also in subparagraphs (d) and (f) of draft article 21, in which context possible human interference with the natural hydrological cycle had to be considered. Indeed, such natural causes as precipitation and thawing, referred to in the second clause of draft article 1, paragraph 1, could to some extent be induced by human conduct. He had in mind, for example, the branch of technology known as "weather modification" and the acid rain to which Mr. Reuter had already referred (1789th meeting). Unless he was mistaken, neither the report nor the draft articles made any mention of such conduct.

42. With regard to the second element of the problem, namely conduct, the main concept was introduced in draft articles 6-8 and related to the object as a shared resource, in that each system State was entitled to a reasonable and equitable share. The notion of the distribution of benefits, and probably costs, was far-reaching and at first sight

¹⁰ Heading of section VI of the European Water Charter (1968) (text reproduced in *Yearbook* . . . 1974, vol. II (Part Two), pp. 342-343, document A/CN.4/274, para. 373).

completely at variance with the principle of territorial sovereignty. But modern international law was increasingly disinclined to allow any unreasonable exercise of territorial sovereignty that was detrimental to other States and the exercise of their national sovereignty: one example was to be found in the law governing the right of transit of land-locked countries to and from the sea.

43. The principle that a State must not cause harm to another State was in no way contrary to the classical tenets of international law, even though it was generally confined to specific conduct that caused specific harm and was treated as an internationally wrongful act. The same principle had been extended to acts not prohibited by international law and to the injurious consequences of such acts. Draft article 9 was based on that principle as it applied to the chain of causation forged, as it were, by the natural flow of water across frontiers. That article seemed to be—or could be made—-independent of the definition of the international watercourse system and of that system as a shared resource. But, as he saw it, the notion that underlay draft article 9 was half-way between the classical concepts of territorial sovereignty and State responsibility, on the one hand, and the international watercourse system as a shared resource, on the other. That was because conduct within the territory of a State which related to water must affect actual or potential conduct within another State relating to that water, if the location, quantity or quality of the water was affected by the said conduct on the part of either State. It was necessary to consider only the adverse effects or harm, since beneficial effects would give rise to no complaint and hence to no legal problem. Inevitably, however, the relative advantages and disadvantages would be compared and evaluated with a view to assessing the extent to which the conduct of the one State and the actual or potential conduct of the other State were reasonable and equitable. It was only a matter of a different approach to the basic question of the distribution of benefits and costs.

44. The duty to refrain from, or to prevent, conduct causing “appreciable harm” to another State could be applied to various kinds of human interference with water and, most easily, to interferences with its natural flow. It could, however, also be applied in cases relating to the quantity of water, where a choice had to be made between competing users. For example, uses such as irrigation and navigation could conflict, and it might be noted that the Mannheim Convention¹¹ provided for navigation on the River Rhine to take precedence over irrigation.

45. The duty not to cause “appreciable harm” could be adopted even in the case of conservation, when it was primarily a matter of the quality of the water and when the potential or future user was concerned. It had to be recognized, however, that to do so was to stretch the principle to its limit, since no direct harm was involved, although

there was a very close connection with the “shared resource” approach.

46. The “shared resource” approach also underlay draft article 8, which despite its length did not, in his view, provide much guidance for solving problems relating to the distribution of the shared resource. The factors listed in subparagraphs (f), (g), (h) and (j) of paragraph 1, for instance, seemed to refer to the relevance of the general behaviour of the State and could be regarded as subjective. Other factors were more objective, such as those in paragraph 1 (c)—although it was difficult to see what a State could contribute in terms of water—and in paragraph 1 (i), in connection with which the Commission would note the somewhat broader concept of alternatives laid down in paragraph 2 (g) and (h) of article V of the Helsinki Rules.¹² The relative weight of such subjective and objective factors was far from clear.

47. Both the principle of not causing “appreciable harm” and the “shared resource” approach were closely linked to the power elements of the problem. System States would almost inevitably disagree on questions of appreciable harm or equitable distribution, but the articles could lay down an obligation to negotiate a system agreement that would supply the necessary details. With the Commission’s permission, he would enlarge on that point at the following meeting.

The meeting rose at 6 p.m.

¹² See 1785th meeting, footnote 13.

1791st MEETING

Tuesday, 28 June 1983, at 10 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, 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.4/348,¹ A/CN.4/367,²

¹¹ Revised Convention for the Navigation of the Rhine, signed at Mannheim in 1868 (Council of Europe, *European Yearbook*, 1956 (The Hague), vol. II, p. 258).

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

**A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/
Conf. Room Doc.8)**

[Agenda item 5]

**DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (continued)**

1. Mr. RIPHAGEN, continuing the statement which he had begun at the previous meeting, said that the negotiation of system agreements, though important as a first step, was not a legal obligation the breach of which could be deemed to give rise to State responsibility. The draft articles contained in the Special Rapporteur's first report (A/CN.4/367) therefore went a step further and provided under articles 11–14 that, even in the absence of a system agreement, there was a duty to negotiate in respect of new conduct concerning the object, in other words in respect of concrete cases. Again, however, that could hardly be said to constitute a legal obligation, although complete disregard of the requirement to notify, consult and negotiate did at least give rise to the legal consequences provided for under article 14. The compulsory procedure laid down in articles 11 *et seq.*, if it were in fact adopted, would not necessarily lead to an agreed solution, since in such a case the draft articles only recommended resort to a third-party dispute-settlement procedure. That was a fatal lacuna, since it divested the draft of any practical value or real meaning. The least that could be expected of a framework treaty was that it would provide for compulsory third-party conciliation, including impartial fact-finding. Even then there was no guarantee of a final solution accepted by all the system States concerned, but the possibility of arriving at such a solution would be greatly enhanced.

2. Whereas dispute settlement was based essentially on the concept of appreciable harm, the notion of a shared resource evoked the idea of some form of joint management of the resource. Such management was obviously not confined to the control of new conduct in respect of the resource. Since a combination of the broadest description of the object and international management would constitute a large measure of extraterritoriality such joint management could hardly be made compulsory under a framework agreement, even if it was sometimes the ideal solution. In that case, however, it was pointless to create the illusion of compulsion, as did draft article 15, by using the mandatory word "shall", only to qualify that term by such phrases as "where it is deemed advisable" or "where expedient". In conclusion, he emphasized the need for a draft that had practical value in terms of specific legal obligations.

3. Mr. FLITAN warmly congratulated the Special Rapporteur, who in one year had prepared not only a

report (A/CN.4/367), but also 39 draft articles, which provided a comprehensive view of the topic and represented substantial progress in the study of a complex subject. It was clear from the report (*ibid.*, paras. 59–60) that he had followed the instructions of the Sixth Committee of the General Assembly by making the scope of the draft articles as broad as possible.

4. He disagreed with those members of the Commission who had questioned the need for chapter V of the draft, on procedures for the peaceful settlement of disputes, and who had suggested that it should be left to the discretion of system States to conclude specific agreements on that question. It might be necessary to recast chapter V, but it should be retained, especially since such procedures did not have to be adapted specifically to the nature of the dispute to be settled and since, at its thirty-seventh session, the General Assembly had adopted the Manila Declaration, providing in section I, paragraph 9, that States

... should also include in bilateral agreements and multilateral conventions to be concluded, as appropriate, effective provisions for the peaceful settlement of disputes arising from the interpretation or application thereof.⁴

States were virtually under an obligation to take account of that declaration, which had been adopted unanimously.

5. The draft articles should include a provision referring to international watercourses that formed the border between two or more States. Although it had been stated that the Special Rapporteur had implicitly dealt with that question in his draft, it would, in his own opinion, be advisable to refer expressly to the consequences of situations of that kind. The statement made by the Special Rapporteur in his commentary to draft article 10 (*ibid.*, para. 107) that "every watercourse system in many respects constitutes an 'indivisible unity'" went much too far. As an example of what might happen in the case of a watercourse forming a border, he referred to the construction on the Danube of the Iron Gate hydroelectric power station, during which it had been necessary to adjust the border between Romania and Yugoslavia according to the thalweg.

6. It might also be advisable to refer to the lawfulness of the diversion of a watercourse, if such a diversion to the territory of another State did not entail harmful consequences for the system as a whole.

7. It seemed to him that the rights of downstream States had been taken more fully into account than those of upstream States. The 39 draft articles and, in particular, article 1, paragraph 2, gave the impression that States were being treated unequally depending on their geographical location, and the Special Rapporteur should give further consideration to that point. He should also give more prominence to the principle of good-neighbourliness, an item which was on the General Assembly's agenda.

³ For the texts, see 1785th meeting, para. 5. 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.*

⁴ Manila Declaration on the Peaceful Settlement of International Disputes (General Assembly resolution 37/10 of 15 November 1982, annex).

8. Commenting on the text of the draft articles, he said he had noted that the draft began with a tautological definition of the term “international watercourse system”, which was used ambiguously. Further consideration should be given to that definition, in which the word “system” should not be used twice. In draft article 2, paragraph 1, the words “of international watercourse systems and of their waters” were unsatisfactory. In that connection, he noted that the previous Special Rapporteur had seen no point in making a distinction between the use of a watercourse and the use of its waters and that the present Special Rapporteur also considered that distinction to be unnecessary (*ibid.*, para. 19). Draft article 2, paragraph 2, might also give rise to problems because it was not clear which situations it covered. In draft article 3, it would be necessary to explain what was meant by the word “components”; glaciers, ground water and lakes could contribute, albeit minimally, to the formation of the components in question and should be taken into consideration. It was, for example, open to debate how much water a glacier had to contribute to a watercourse system for the glacier to form part of that system. In his view, the words in brackets in draft article 6, paragraph 1, should be retained.

9. Regarding chapter II of the draft, he had great difficulty in agreeing to the proposed concept of a shared natural resource. The fact that that concept had, as pointed out by some members of the Commission, been used in a number of United Nations documents issued well before the formulation of the present draft articles was not a convincing argument. “Sharing” was not the best term to use in order to reflect the idea of co-operation. As Mr. Jagota had suggested (1790th meeting), it might be better to refer to the reasonable and equitable use of the water of a watercourse by system States. In that connection, he noted that the Helsinki Rules⁵ did not refer to the concept of a shared natural resource. The Special Rapporteur should therefore reconsider the part of his commentary to article 6 (A/CN.4/367, para. 85) in which he had, in a way, compared the idea of sovereignty and that of co-operation and equality among States. In actual fact, States could not really co-operate unless they were fully sovereign.

10. The wording of draft article 8 should perhaps be reviewed by the Drafting Committee. He noted that paragraph 1 (b) did not refer to shared natural resources and did not make it clear whether preference should be given to developing or to developed countries.

11. Draft article 9 and other draft provisions referred to “appreciable harm”. The meaning of that term was not clear and it could probably be replaced by a more appropriate one. He had listened with great interest to the comments made by Mr. Riphagen, whom he had expected to refer to State responsibility in cases of failure to comply with the provisions of draft articles 11–13. The Special Rapporteur and Mr. Riphagen might try to find a

solution to the problem of the responsibility of States which did not submit the notifications provided for in draft article 14.

12. With regard to draft article 10, he drew attention to the “consultations” referred to in the commentary to that article (*ibid.*, para. 109) and invited members of the Commission to reread the Manila Declaration and, in particular, section I, paragraph 10, to which greater attention should be paid in the draft articles. Lastly, he said that the Special Rapporteur had been right to refer in draft article 12 to a period of six months, which was preferable to the vague criterion of a “reasonable period of time”.

13. Sir Ian SINCLAIR, after congratulating the Special Rapporteur on his report (A/CN.4/367) and joining in the tribute paid to Judge Schwebel on his third report (A/CN.4/348), said that reference had rightly been made to the impact of modern technology on the use of international watercourses. The world was in the throes of a veritable revolution in the many and varied uses of water in watercourses. The upsurge in the world’s population had put pressure on freshwater resources required for irrigation, hydroelectric power and sewerage. Demands for further industrialization had led to greatly increased use of freshwater resources for industrial purposes, with resultant pollution, and there were the opposing demands of the environmentalists, who were concerned at the damage being caused by excessive and conflicting uses of watercourse systems. That was doubly true of international watercourse systems situated in two or more States, since to the conflict of interests represented by potential agricultural, industrial and other uses was added the extra dimension of potential conflict between the interests of upstream and downstream States. That point served to underline the delicacy of the topic and the consequent need to bear in mind the many uses of international watercourses referred to in the Special Rapporteur’s report (A/CN.4/367, paras. 53–58). However, the problems confronting the world, though magnified by technological development, were not entirely new, as Kaackenebeeck had illustrated as far back as 1918 in his monograph *International Rivers*, from which he quoted an extract.⁶

14. The Special Rapporteur had sought guidance on a number of key issues and, in that connection, had first asked whether the proposed outline of the draft was acceptable. His own answer to that question was in the affirmative, in the sense that the various chapters of the draft covered all the main elements, although the Commission might subsequently wish to simplify certain provisions or even add new ones. In principle, the outline was satisfactory and could serve as the basis for any adjustments to be made in the light of the views expressed. He would, however, hesitate to include any provisions to cover the use of rivers or lakes as natural

⁵ See 1785th meeting, footnote 13.

⁶ G. Kaackenebeeck, *International Rivers*, Grotius Society Publications, No. 1 (London, Sweet and Maxwell, 1918), preface, p. viii.

boundaries. In his view, such a use, though non-navigational, was not one which the General Assembly had intended the Commission to deal with. It would give rise to a number of controversial technical problems as to where the dividing line should run, which would only add to the complexity of the Commission's task.

15. A second question put by the Special Rapporteur was whether the general principles were acceptable, to which his own answer would be somewhat more qualified. First, with regard to the term "international watercourse system", he did not agree that, as defined in draft article 1, paragraph 1, it was virtually synonymous with the concept of the drainage basin, his own position in the matter being more akin to that of Mr. Barboza (1789th meeting). He could understand the concern voiced at using the drainage basin as the criterion for determining what constituted an international watercourse, since the drainage basin concept, though useful for geographical and other scientific studies, was too wide and imprecise for the purposes of the draft. The proposed definition was much narrower in that it concentrated on freshwater components of the watercourse and on the watercourse itself, any land areas within the watershed falling outside its scope. To that extent there was a clear difference between the two concepts. That did not mean that what happened on land could be ignored entirely, since the industrial uses of land areas would more often than not be a source of the pollution that might affect international watercourses; but for the purposes of the draft, the notion of the international watercourse comprising the fresh water of the watercourse and the watercourse itself could be taken as the basis for further work.

16. He wished to mention another preliminary question, namely whether the Commission should base its approach on the notion of an international watercourse system—the emphasis being on the word "system", which had attracted some adverse comment from Mr. Ushakov (1788th meeting). For his part, he was convinced that the system approach was essential to signify that the waters in question must be treated as a unitary whole, at least in relation to certain uses, where what was done in one State could affect the uses of the waters in another State. There could of course be circumstances in which no such problem arose, but that eventuality was adequately covered by draft article 1, paragraph 2. He did not believe that the system approach would create any unduly rigid conceptual framework. As pointed out by Mr. Barboza, there could be, in relation to one and the same watercourse, several systems and several different groups of system States, depending upon the particular use of the waters.

17. Some members of the Commission took the position that a State was free to do what it liked on its own territory with the waters of an international watercourse system, so long as it did not significantly interfere with the quality or quantity of water flowing into a neighbouring State. The emphasis was thus placed on the negative rule of not causing appreciable harm, which was embodied in article 9. However, he himself believed that that negative rule was insufficient to solve the many problems posed by the

conflicting uses of a scarce natural resource such as the waters of an international watercourse system. Quite apart from the intrinsic difficulty of formulating a sufficiently precise rule based on the "no appreciable harm" concept, it was essential, in the case of international watercourses, to formulate a positive rule calling for co-operation among the States concerned in accordance with Article 1, paragraph 3, of the Charter of the United Nations, which listed as one of the "Purposes of the United Nations": "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character . . ." Article 55 of the Charter required the United Nations to promote "solutions of international economic, social, health, and related problems" and, under Article 56, all Member States pledged themselves to take action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. States therefore had a legal duty to co-operate in the solution of problems resulting from uses of the waters of international watercourses.

18. Those remarks brought him to draft article 6 and the comments made during the discussion with regard to the idea that the waters of an international watercourse constituted a "shared natural resource". The exact significance of a generalized concept of that nature was not clear. Such concepts, moreover, tended to acquire overtones which gave rise to hesitation among States and sometimes even degenerated into slogans. It was true that article 5, already provisionally adopted by the Commission, made use of the term "shared natural resource", but there was an important difference in that article 5 designated as such the waters of an international watercourse system and not the system itself, as had been done in draft article 6. For his part, he had a strong preference for the approach taken in article 5: it was the waters that constituted the natural resource and it was in the beneficial uses of the waters that each riparian State was entitled to a reasonable and equitable share.

19. In view of the difference of opinion as to whether the concept of water as a shared natural resource should be included in the text, he wished to stress that he had no major difficulty in acknowledging that the waters of an international watercourse should be treated, for the purposes of the present articles, as a shared natural resource. Leaving aside the semantic argument, the more important question was that there should be general acceptance of the corollaries which flowed from the concept, mainly those stated in draft articles 7, 8 and 16. If the practical consequences of the basic concept were agreed upon, the Commission would be in a better position to reach a precise formulation for the Special Rapporteur's proposal in draft article 6.

20. For reasons beyond its control, the Commission had fallen behind in its consideration of the present item and the General Assembly was impatient for results. He therefore agreed with Mr. Barboza that articles 1 to 5 and X and the note describing the tentative understanding of the term "international watercourse system" should be regarded for the time being as *acquis*, to use Mr. Reuter's

appropriate expression. Any attempt to alter those texts would involve the risk of unravelling all that had been achieved to date. They could be considered when the Commission came at a later stage to convert its working hypothesis on the definition of the term “international watercourse system” into a draft article. At its next session, the Commission could accordingly embark on a detailed discussion of draft articles 7–9 and possibly draft articles 10–19, all of which might be reviewed by the Special Rapporteur in the light of the discussion at the current session, with a view to referring them to the Drafting Committee.

21. Turning to another of the questions on which the Special Rapporteur had sought guidance from the Commission, he had considerable doubts about accepting “good-neighbourliness” (as appearing in articles 7, 13, 27, 29 and 30) as being a legal principle, to be put on a par with that of good faith. In his view, nothing concrete would be added to the notion of good faith by invoking good-neighbourly relations as a supplementary guide. If relations between neighbouring States were bad, they were not likely to be swayed by a requirement to act on the basis of good-neighbourliness.

22. The Commission should give careful consideration to the Special Rapporteur’s proposals concerning notifications, as contained in draft articles 11–14. While he did not entirely accept the criticism that the notification provisions were one-sided because in practice they would apply only to an upstream State, he felt that some of the points made by Mr. Calero Rodrigues (1787th meeting), Mr. Jagota (1790th meeting) and Mr. Riphagen on the articles in question deserved serious consideration. It was necessary to balance equitably the interests of the States concerned, for instance one State wishing to proceed with a development which might be of substantial benefit to its population and the other concerned with the harm thereby caused to its rights or interests.

23. The Special Rapporteur had also requested guidance as to whether provisions on the protection of international watercourse systems in times of armed conflict should be included in the draft articles. He agreed with the majority of members that it would be unwise to do so, because many States were considering ratification of the two 1977 Additional Protocols to the 1949 Geneva Conventions⁷ and it would be unfortunate if the Commission were to endorse proposals which might be taken to involve amendments to those Protocols. The Commission would not wish to be thought indifferent to the problem of safety of installations. Consideration should therefore be given to the possibility of extracting from article 13 as proposed in the previous Special Rapporteur’s third report (A/CN.4/348, para. 415), those elements which were applicable in peacetime, without touching upon provisions applicable only in time of war or armed conflict.

24. With regard to chapter V, on the settlement of disputes, allowance should be made for the enormous range of issues on which differences could arise between

system States, or indeed between system States and other States, regarding the application of the draft articles. Some of those issues might not amount to disputes but might be wholly technical in nature, calling for assessment by a neutral expert. However, there was still a need for some residual machinery for the peaceful settlement of disputes in the event that a system agreement made insufficient provision for the matter. In that respect, he shared the views of other speakers regarding the weaknesses of the Special Rapporteur’s proposals on the subject. At the very least, a State whose interests (for example, in navigation) were affected by a proposed development should be able to invoke unilaterally the proposed conciliation machinery.

25. Lastly, with regard to pollution, he was in general agreement with the proposals embodied in draft articles 22–24. He noted that, in the commentary to draft article 23, the Special Rapporteur took exception to the distinction between existing pollution and new pollution (A/CN.4/367, para. 171). He himself fully agreed that existing pollution could not be regarded as an acquired right, but stressed that draft article 23 was prospective in its effect. It was difficult to see how States could accept an absolute obligation to eliminate existing pollution.

26. Mr. NI recalled the important part played by the Special Rapporteur in the Third United Nations Conference on the Law of the Sea, where the Evensen group had helped to solve many thorny problems. The Special Rapporteur was now engaged in similar work on the topic of international watercourses, which was no less complicated than that of the sea-bed. A report on a topic of such magnitude and complexity, however, could not fulfil the expectations of all States concerned, whether upper riparian or lower riparian, economically developed or developing, industrial or agricultural.

27. The expansion of the world’s population and technical developments in recent decades had led to an increase in demand for drinking water, water for irrigation to meet food requirements and water for industrial purposes. At the same time, water resources were being depleted by pollution and waste. Owing to climatic changes, drought and floods were prevalent in large areas of the world.

28. The regulation of water uses in order to satisfy needs and attain an optimum utilization of water resources was calling for increasing attention on the part of lawyers as well as scientists. In the realm of law, the question was a universal one and not one merely for individual States—hence the task entrusted to the Commission.

29. The Special Rapporteur favoured the drawing up of a framework agreement comprising general principles as guidelines, to be supplemented by system agreements relating to specific watercourses. In that connection, the Commission’s report on its thirty-second session mentioned such principles as good-neighbourliness and *sic utere tuo ut alienum non laedas*, as well as the sovereign rights of riparian States.⁸ Three further basic principles had been stated by the Special Rapporteur in introducing

⁷ See 1785th meeting, footnote 14.

⁸ *Yearbook* . . . 1980, vol. II (Part Two), p. 109, para. 95.

(1785th meeting) his first report (A/CN.4/367): the obligation of States to negotiate; the application of system agreements; and the concept of the international watercourse system as a shared natural resource. In addition, he had set out the following principles, described by him as legal standards which the riparian States should observe: "reasonable and equitable participation" or "fair and reasonable distribution"; "good faith and good-neighbourly relations"; "optimum utilization"; and the requirement to refrain from causing "appreciable harm".

30. It should be stressed that those principles did not constitute mere dogmas; they were derived from accumulated experience and practice. In its report on its thirty-second session, the Commission had appropriately pointed out that, before undertaking a substantive study of the topic, "all relevant materials on State practice should be compiled and analysed".⁹ During the debates at that session, some members of the Commission had questioned the deductive approach. The previous Special Rapporteur had pointed out that, in some cases, there would be no difficulty in extracting from State practice certain general principles, but that the situation was more uncertain in other cases; however, the Special Rapporteur had entirely agreed that full account should be taken of State practice.

31. For all practical purposes, it was desirable to explore the relationship between State practice and the general principles mentioned by the present Special Rapporteur, especially the obligation to negotiate and the notion of shared natural resources.

32. With regard to the obligation to negotiate set forth in draft article 4, paragraph 3, he noted the opening words "In so far as the uses of an international watercourse system may require", which set forth a condition for entering into negotiations. The exact meaning of that passage was not clear: it might be taken to signify that wherever there were such uses there should be negotiations for the conclusion of an agreement. Article 33 of the Charter of the United Nations, however, specified that the parties to any dispute must first seek a solution by negotiation and the other means stated therein. In other words, a solution by negotiation was sought in order to settle a dispute. It was difficult to imagine that an obligation to negotiate should be laid down in the abstract. Such an obligation was incurred only when a difficulty arose and not before.

33. Both the Special Rapporteur and his immediate predecessor had affirmed the concept that the waters of an international watercourse constituted a shared natural resource. In the report under discussion, reference was made (*ibid.*, paras. 34-36) to the 1977 United Nations Water Conference, which had drawn up the Mar del Plata Action Plan¹⁰ containing recommendations on co-operation among countries concerning the use, management and development of such waters as a shared resource. However, the question arose whether the principle of permanent sovereignty over natural resources stated in

article 2 of the Charter of Economic Rights and Duties of States¹¹ applied to a natural resource shared by two or more countries, as provided in article 3 of the same Charter. It was not clear whether article 3 of that Charter constituted an exception to article 2 and consequently whether the waters of international watercourses, as a shared natural resource, were not subject to the sovereignty of the riparian States. The question was a controversial one.

34. The Mar del Plata Action Plan, in referring to the necessity for States to co-operate in the case of shared water resources, stated in its recommendation 90 that

... Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States ...

In interpreting the meaning of "shared natural resources" as applied to waters of international watercourses, the real question was not whether permanent sovereignty subsisted in a shared natural resource but the manner in which that sovereignty was to be exercised. Sovereignty did not give a State the right to do whatever it pleased. In the case of shared natural resources, the sovereign rights of all States concerned must be respected. In a spirit of good-neighbourliness, those States must accommodate the legitimate interests of co-riparian States and refrain from causing injury to other States.

35. The question of the use of the waters of international watercourses had special significance for the developing countries because of their lack of experience in concluding necessary agreements as well as the lack of available techniques for managing and developing shared natural resources. Those countries should resolve their differences, if any, in a spirit of equality and good faith.

36. Mr. USHAKOV pointed out that, unlike other sets of draft articles formulated by the Commission, the draft articles under consideration related only to bilateral relations between States. For example, the draft which had become the 1961 Vienna Convention on Diplomatic Relations governed relations between receiving States and sending States and the rules it embodied were binding on all receiving States and sending States that had become parties to it. If the present draft one day became an international convention containing binding rules and if it entered into force after being ratified by some 30 States throughout the world, it would have no legal effect. If it was to have any legal effect, it would have to be binding on all the co-riparian States of international watercourses. It would not be enough, for instance, for two co-riparian States of an international watercourse to be parties to the convention if other co-riparian States were not parties as well. The provisions relating to shared natural resources would also be meaningless if they were not binding on all the co-riparian States of an international watercourse. Accordingly, the Commission could only formulate guidelines for co-riparian States.

The meeting rose at 12.55 p.m.

⁹ *Ibid.*, p. 104, para. 60.

¹⁰ See 1787th meeting, footnote 9.

¹¹ General Assembly resolution 3281 (XXIX) of 12 December 1974.

1792nd MEETING

Wednesday, 29 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR³ (continued)

1. Mr. THIAM said that he would comment only on the general principles set out by the Special Rapporteur in his remarkable first report (A/CN.4/367), since he would have an opportunity of making other observations during the consideration of the proposed draft articles. He would not dwell at length on questions of vocabulary, because the terms used were only provisional, as the Special Rapporteur had explained.

2. With regard to terminology, he did, however, wish to say that in his view the replacement of the term "drainage basin" by the term "international watercourse system" was not entirely satisfactory; a clear distinction between the two concepts would be difficult to make. The reason why the Special Rapporteur had followed his predecessor's example in that regard was that the term "drainage basin" had given rise to controversy. In the Helsinki Rules on the Uses of the Waters of International Rivers,⁴ an international drainage basin had been defined in article II as

... a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

The drainage basin had thus been described as an inseparable unit. If emphasis was placed on the territoriality of the drainage basin, there would be a tendency to divide it up into as many parts as there were basin States, which would be contrary to economic facts as seen with regard to

the future. The drainage basin was now coming to be seen, particularly by countries which pursued a policy of economic integration, as a unit to be exploited by co-riparian States; without going as far as exercising joint sovereignty over the basin, those States regarded it as an economic unity to be exploited jointly according to jointly formulated rules. If a watercourse was held to be international, but a drainage basin was not, it might be concluded that every co-riparian State was free to do as it pleased with the drainage basin; that might have serious consequences, particularly if a State acted in such a way as to change the direction of the watercourse. For those reasons, it would be preferable not to depart from accepted concepts in the present draft.

3. The term "shared natural resource" did, of course, appear in many resolutions adopted by international organizations, but it was not necessarily preferable to the term "common natural resource", because something that was shared was usually doomed to disappear, whereas a watercourse that was common property would exist indefinitely.

4. The topic under consideration was undeniably of great importance for some third world countries, especially those of the African continent, where water was a particularly serious problem. Great projects had been undertaken for use of the waters of the major African rivers for irrigation, industry and other purposes. The drought in the countries of the Sahel had made the problem all the more urgent, and the African countries hoped that the draft articles under consideration would be completed as soon as possible. Their aim was to move on from the stage of co-operation to that of integration, to which the Special Rapporteur had referred several times. It was essential not to lose sight of that new and dynamic concept of co-operation in respect of international watercourses.

5. Up to the present, watercourses had been considered, at least in the most important international instruments, as serving primarily for navigation or constituting natural frontiers. In regard to navigation, the co-riparian States of European watercourses had combined against the non-riparian States. On African rivers, European States had until recently been granted freedom of navigation. Moreover, a number of watercourses had been recognized as forming frontiers. What was needed now was an approach that would not create divisions between riparian States, but would enable them to develop their economic potential. Such an approach would, however, inevitably lead to differences between upstream and downstream States, relating mainly to the quantity and quality of water, and attempts would have to be made to settle those differences. The Harmon doctrine, which had been abandoned, had given the upstream State a free hand in the use of water.

6. The Helsinki Rules, which the Special Rapporteur had largely followed—although, in some respects, he had gone into greater detail—proposed the equitable use of the water of watercourses by all co-riparian States. He himself was in favour of those rules, because they proposed balanced and reasonable solutions which took

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

⁴ See 1785th meeting, footnote 13.

account of all the interests involved. He noted, however, that international case-law was not so consistent. For example, the award in the *Lake Lanoux* case did not take a clear stand on the existence of a principle prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State.⁵ Hence it could not be said that there was any clear-cut rule of that kind in positive international law. Nevertheless, it was the Commission's task to formulate rules which would make it possible to settle any disputes that might arise; and although he understood Mr. Ushakov's concern (1791st meeting) about the adoption of rules that would be binding on States, he believed that anarchy could not be allowed to prevail. The Commission must at least formulate some guidelines.

7. It was necessary to determine whether, in addition to agreements and arrangements concluded by riparian States, there were any general rules from which those States could not derogate by means of special agreements. One thesis was that riparian States were bound only by agreements which they had concluded; another was that there were general rules to which all riparian States were subject. The first thesis not only led to anarchy in the absence of agreements, but it did not take account of the fact that, with the exception of the State at the source of an international watercourse and the State at its mouth, all the riparian States were both upstream and downstream States, so that any claim by those States that they could use the watercourse as they pleased, without taking account of the interests of the other riparian States, would cut both ways. The only useful approach was to propose moderate solutions, as the Special Rapporteur had done.

8. He noted that the aim of all the existing agreements was to propose reasonable compromise solutions with regard to the use of international watercourses and referred to the principle of territorial integrity, which prohibited any use of an international watercourse that might alter the quantity or quality of the water reaching downstream States. Other principles by which States must abide included that of the peaceful settlement of disputes, which prohibited a State from indefinitely failing to heed protests by another State concerning the use of a watercourse, and that of international responsibility. Those principles had been embodied in draft articles 6, 7 and 9. Although they were principles of general international law and the States parties to a dispute must observe them, they should still be stated in the draft. The Commission had to steer a middle course between saying nothing and compelling States to act against their will. On more than one occasion, the Special Rapporteur had recognized that legal rules on the subject did exist, and some of his articles were drafted in mandatory form.

9. It was important not only to ascertain positive law, but also to engage in its progressive development. Most

African States were in favour of solutions directed towards economic integration. Many of them were not large and their frontiers had been drawn contrary to common sense during the colonial era, but the OAU had decided that it was better to work across those frontiers than to change them. From that point of view, international watercourses helped to promote integrated economic development. The same was true of other resources situated in the territory of more than one State, which should not be shared but should be regarded as factors making for integration. In his commentary to draft article 10, the Special Rapporteur had rightly referred to economic integration (A/CN.4/367, para. 107), which entailed the progressive development of international law. Generally speaking, he could endorse the report under consideration.

10. Mr. McCaffrey commended the Special Rapporteur for adopting, in his excellent report (A/CN.4/367), the approach of setting out a draft outline of the entire topic, followed by draft articles with commentaries. That approach was extremely useful for understanding the scope of the topic and the direction in which it was heading. Equally helpful was the Special Rapporteur's method of cross-references, which avoided encumbering the commentaries with lengthy recitations of authorities and rationale contained in earlier reports. Moreover, the whole purpose of the Special Rapporteur's first report was to propose an outline of the topic.

11. The tentative and exploratory nature of the first report, however, did not apply to the provisions already adopted by the Commission, consisting of the note on the international watercourse system⁶ and articles 1 to 5 and X, adopted on first reading at the Commission's thirty-second session. It would considerably delay the Commission's work if a discussion on those provisions were to be reopened now, contrary to the wishes of the General Assembly, which had requested the Commission to move forward on the topic. The Commission would, of course, reconsider the provisions in question when it came to the second reading of the draft articles.

12. Thus no articles need be referred to the Drafting Committee at the present session. Articles 1 and 6, as proposed by the Special Rapporteur, could serve as signposts showing the direction he proposed, but they should not be sent to the Drafting Committee until the first reading of the entire set of articles had been completed. As for the minor changes to articles 1 and 2, they could be considered as approved if no objection was voiced; otherwise, they could be considered on second reading. With regard to the general approach to articles which had not yet been adopted, he agreed that it would be fruitful to start with the fundamental points on which there was general agreement and to work on from them to those points on which there was less agreement.

13. On the question of whether the draft articles should take the form of recommendations of obligations—the choice between “should” and “shall”—the Commission should of course identify as many legal obligations as it

⁵ United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 308, para. 13; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 197, document A/5409, para. 1066.

⁶ *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

could so long as they were of a general nature and hence capable of being adapted to specific situations. At the same time, it seemed inevitable, and also desirable, that the Commission should use more hortatory language in appropriate circumstances. The draft took the form of a framework agreement which would have to apply to a variety of systems and circumstances. The rules embodied in it would therefore have to be flexible. The draft articles would essentially provide guidelines from which States could tailor a solution to their specific problems. Thus there appeared to be room for “should” as well as “shall”, and he supported the Special Rapporteur’s general approach in that regard.

14. Turning to the substance of the topic, he observed that water was essential to life—a point that was well illustrated by the quotation from the European Water Charter of 1968⁷ given in the report (*ibid.*, para. 156). Certain legal obligations clearly resulted from that fundamental fact alone. Thus one co-riparian State could not deprive another of the quantity and quality of water necessary to life. As one moved away from that point of departure, however, the difficulties increased. For example, could the upper riparian State make it more expensive for the lower riparian State to live, or take measures that were merely economically disadvantageous to the lower riparian State? Did the fact that the waters of an international watercourse rose in or passed first through one riparian State give that State some kind of priority in them over a lower riparian State?

15. Those questions explained why the topic was of such vital and immediate interest to the international community. Unlike other topics, it did not involve the elaboration of legal principles in the abstract; the principles, norms and guidelines to be elaborated would apply to a concrete problem—that of reconciling, accommodating and adjusting competing interests in international watercourses.

16. In approaching that task, the Commission would find assistance in the analogous field of the law of riparian rights at the municipal level, which had been described as “a wet version of the law of nuisance”. One of the main predicates of the law of nuisance was the maxim *sic utere tuo ut alienum non laedas*. That fundamental rule, with its close connection to the doctrine of abuse of rights, had found expression in a wide variety of international normative statements, ranging from the *Trail Smelter* arbitration award⁸ to principle 21 of the Stockholm Declaration on the Human Environment⁹ and the Judgment of the ICJ (merits) in the *Corfu Channel* case, in which the Court had spoken of “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁰ That ruling, and the maxim on which it was based, demonstrated that the

territorial sovereign rights of States were correlative—they did not exist or operate in a vacuum, but within a framework of interdependence. Further assistance would be provided by the Commission’s work on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law; for the topic of watercourses was in large measure a concrete application of the other two topics.

17. Before considering individual draft articles, he wished to comment on the concepts of an “international watercourse system” and a “shared natural resource”, which constituted the twin pillars of the present topic. The Commission had already adopted a note describing its tentative understanding of what was meant by the term “international watercourse system”.¹¹ As stressed by the previous Special Rapporteur in his third report, that note constituted a “working hypothesis”, subject to refinement and change, which would give an indication of the scope of the draft articles (A/CN.4/348, para. 7).

18. Two features distinguished the concept of an “international watercourse system” from that of a “drainage basin”: its flexibility and its relativity. The advantage of flexibility could be illustrated by the example of the Garrison Diversion Unit. In order to irrigate some 250,000 acres of farm land, water was to be diverted from the Missouri river basin across the Continental Divide into an area whose waters eventually flowed into the Hudson Bay drainage basin in Canada. Thus there were two drainage basins, one draining essentially south and the other north. It was doubtful whether an effect in Canada of that inter-basin transfer in the United States would be covered by the drainage basin approach. For one thing, there would be no common terminus—an essential feature of the drainage basin concept. But since it had been established scientifically that uses of the waters in one basin could affect the waters in the other, the two basins would qualify as parts of a unitary “international watercourse system”, as that term was explained in the Commission’s note.

19. The feature of relativity was well explained in the concluding portion of the Commission’s note: it determined the circumstances under which a lower riparian State could have an interest in the use being made of the watercourse by an upper riparian State. If the use made by the upper riparian (such as boating) had no effect on the uses by the lower riparian, the watercourse system was, to that extent, not international. That aspect of relativity gave the concept of an international watercourse system, and hence the entire draft, a degree of flexibility that was highly desirable. However, the relative nature of that concept might make it a difficult one to implement, and the Commission might ultimately decide that the desired flexibility could best be achieved through the “appreciable harm” approach.

20. The commentary should make it absolutely clear that all the various hydrographic components of the inter-

⁷ See 1790th meeting, footnote 10.

⁸ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁹ See 1788th meeting, footnote 6.

¹⁰ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 22.

¹¹ See footnote 6 above.

national watercourse system were included, making specific mention of such essential components as glaciers and ground water. In the central valley of California, for instance, ground water was a major source of water for irrigation, and the drought in the mid-1970s had caused an over-draught which seriously threatened agricultural production for years to come, since it took time to replace ground-water supplies. As Mr. Barboza had pointed out (1789th meeting), the withdrawal or pollution of ground water in one State could have very serious consequences for a neighbouring State relying on the same "pool" of ground water.

21. The concept of a "shared natural resource" was already embodied in draft article 5, as adopted by the Commission. In his view, it followed from the *sic utere tuo* maxim that the waters of an international watercourse system constituted a shared natural resource in both the physical and the legal sense. Physically, those waters were shared either simultaneously, as in the case of a contiguous watercourse, or successively, as in the case of a watercourse that was international in the successive sense. The resource was shared in the legal sense because the rights of the system States were not absolute but correlative, at least to the extent that a use of the waters in one system State affected their use in another. For those reasons, the notion that the waters of an international watercourse system were, under certain conditions at least, a shared natural resource seemed to be a justifiable and useful principle on which to base the draft.

22. In that connection, he was in full agreement with the Special Rapporteur in rejecting the Harmon doctrine of "absolute sovereignty" (A/CN.4/367, para. 84). Indeed, as pointed out by the previous Special Rapporteur in his third report, that doctrine was contrary to customary international law and had never been followed by the United States (A/CN.4/348, para. 54 and footnote 98).

23. It seemed clear that the concept of a shared natural resource had nothing to do with the common heritage of mankind. The two concepts applied to wholly different circumstances and were designed to meet entirely different needs. Furthermore, the concept of a shared natural resource was not inconsistent with that of permanent sovereignty over natural resources. On that point, he associated himself with the remarks of Mr. Balanda (1789th meeting). The two concepts served entirely different purposes, as was clear from a reading of the preamble and operative paragraph 5 of General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources, as well as of article 3 of the Charter of Economic Rights and Duties of States.¹² Finally, the concept of a shared natural resource could be taken as an expression of the fact that nature did not respect political boundaries, as reflected in the 1929 Agreement concerning the waters of the Nile,¹³ which provided that the waters of the Nile river system "must be considered as a single unit" (see A/CN.4/348, para. 60).

24. Turning to the draft articles, he noted that article 6 stated the principle that the waters of an international watercourse system were a shared natural resource to the extent that their use in one system State affected their use in another. That article had already been provisionally adopted by the Commission as the former draft article 5.

25. Article 7 was, in a way, the corner-stone of the entire draft; for without good faith and good-neighbourly relations, all the principles, mechanisms and institutions in the world were of little help. Those principles went beyond the *sic utere tuo* rule, as explained in the award rendered by the arbitral tribunal in the *Lake Lanoux* case (see A/CN.4/367, para. 90). Obviously, it was practically impossible to impose upon a State a "real desire" to co-operate and "to reconcile the interests of the other riparian with its own", to use the language of that award.¹⁴ An obligation to act in good faith in relations with other system States was probably as much as could be achieved in that direction. The experience of the United States of America and Canada with regard to the Poplar River power plant was also relevant. That project had involved construction of a power plant in Canada some 10 miles north of the border with the United States, an open-pit coal-mine to provide coal for power generation and a dam on the Poplar River. There had been concern in the United States that the project would result in pollution of the reservoir created by the dam in Canada and thereby affect irrigation waters across the border. The matter had been referred to an intergovernmental group, which had adopted a solution that was generally considered innovative and creative, provided—as a Canadian spokesman had said—that the parties concerned acted with good will towards one another. It was that good will which was essential to the solution of international watercourse problems, but which it was impossible to impose on States. The Special Rapporteur, however, spoke of the "obligation of system States to co-operate" (*ibid.*, para. 88). In article 7, that obligation was specifically directed towards co-operation in the development, use and sharing of an international watercourse system, which States were required to carry out "in a reasonable and equitable manner". As indicated by the use of the verb form "shall", article 7 imposed a binding legal obligation, which flowed both from the *sic utere tuo* principle and from the international decisions and instruments implementing it.

26. He endorsed the approach adopted in article 8 that what constituted reasonable and equitable use in any specific situation should be determined not in accordance with rigid rules, but by reference to a range of policy factors. But he also agreed with other speakers that the list of relevant factors should be carefully reviewed, so as to make it objective and to give due weight to the rights of upper and lower riparian States. With regard to paragraph 2 of article 8, he agreed that system States had

¹² General Assembly resolution 3281 (XXIX) of 12 December 1974.

¹³ See 1788th meeting, footnote 7.

¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 315, para. 22; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068.

an obligation to negotiate. That obligation was well founded, being based on the rulings given in the *North Sea Continental Shelf* cases,¹⁵ the *Fisheries Jurisdiction* cases¹⁶ and the *Lake Lanoux* case, and on the UNEP draft principles (A/CN.4/L.353).

27. Article 9 set out the obligation to avoid causing appreciable harm. In a sense, that was already implicit in the relativity aspect of the concept of an international watercourse system. There was, of course, an element of relativity in the concept of appreciable harm itself, as illustrated by the 1927 judgment of the Constitutional Court of Germany¹⁷ quoted by the Special Rapporteur (A/CN.4/367, para. 92). In that context, the meaning of the adjective “appreciable” called for elucidation, and the previous Special Rapporteur had dwelt on it at some length in his third report (A/CN.4/348, paras. 130-141), where he had explained that “appreciable” stood for more in quantity than was denoted by “perceptible”, but meant less in quantity than such terms as “serious” or “substantial”.

28. Chapter III could be split into two or three separate chapters, since articles 11–14 concerned notification, while articles 16–19 concerned information and data collection, and article 15 stood on its own.

29. In article 10, paragraph 1, he thought the obligation to co-operate ought to be stated with less qualification. He was thinking in particular of the use of the expression “to the extent practicable” in the first sentence. Paragraph 2 appeared to be merely an illustration of the manner in which States should co-operate. Paragraph 3, on the establishment of joint commissions, should be co-ordinated with article 15.

30. Articles 11–14 dealt with notification requirements and the consequences of failure to comply with them. Those articles constituted perhaps the most important part of the draft. The duty to notify was the requirement that really set the wheels of co-operation in motion; it did more than any other single requirement to ensure that projects with potential effects on other system States would not be undertaken unilaterally, without regard for their extraterritorial impact.

31. Article 11 really covered more than the “content of notification” mentioned in the title. The words “may cause appreciable harm”, in paragraph 1, raised two questions. That criterion was important because it triggered the whole notification process. It should therefore be sufficiently broad to cover all potential harm, not only immediate and direct, but also future and indirect harm. The first question was whether a State had a duty to notify under article 11 if no immediate or direct harm would result from the proposed project or use. It should

be noted that article 13, on procedures in case of protest, applied only if a notification had been received. If there had been no notification, it might well be too late to act effectively. As he saw it, the language used in article 11, “may cause appreciable harm to the rights or interests of another system State or other system States,” could indeed be interpreted to include future and indirect harm, particularly in view of the use of the words “may” and “interests”. The position should, perhaps, be made clearer either in the article itself or in the commentary.

32. The second question related to the extent to which the language used entailed the requirement for an assessment of extraterritorial impact. Clearly, the State contemplating a project would necessarily have to assess its impact on other system States; that was the only way for it to ascertain whether it had a duty to notify. As to the legal foundation for the duty to notify under article 11, he agreed with the Special Rapporteur that that principle was “an expression of a prevailing principle of international law” (A/CN.4/367, para. 111). The proposition was amply supported by the authorities quoted by the previous Special Rapporteur (A/CN.4/348, paras. 170 *et seq.*). There was also a clear analogy between the duty to notify in the circumstances contemplated in article 11 and the duty to warn of known dangers that was recognized by the ICJ in 1949 in the *Corfu Channel* case.¹⁸

33. He was in general agreement with article 12, on time-limits for reply. In particular, he believed that the suspensive effect provided for in paragraph 3 was necessary to allow States receiving notification to evaluate adequately the potential effects of the proposed project. The criterion of a reasonable period of time should give adequate protection to the notifying State by ensuring that other States would not abuse the suspensive effect.

34. With regard to article 13, he questioned the desirability of restricting the application of the procedures to a system State that had received notification. A system State might well learn of a planned project in some other way, arrive at the conclusion that it could cause appreciable harm, and wish to invoke the procedures provided for in article 13. As to paragraph 2 of the article, he agreed with other speakers that it would be desirable to require the parties to resort to compulsory procedures for the settlement of disputes in the event of inability to reach agreement. It should perhaps also be considered whether the extent to which provisional measures were available, in the sense of Article 41 of the Statute of the ICJ, should have a bearing on the suspensive effect of paragraph 3. The notifying State should probably be allowed to proceed with the project if the tribunal allowed it to do so. The interpretation of the expressions “utmost urgency” and “unnecessary damage or harm” in paragraph 3 was apparently left to the sole discretion of the notifying State. It might be better to provide for that determination to be made through a compulsory procedure for the settlement of disputes. It was necessary to balance the interest of the notifying State in proceeding with a critical

¹⁵ See 1785th meeting, footnote 8.

¹⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland)*—(*Federal Republic of Germany v. Iceland*), Judgments of 25 July 1974, *I.C.J. Reports* 1974, p. 32, para. 75, and p. 201, para. 67.

¹⁷ *Donauversinkung* case (1927) (*Annual Digest of Public International Law Cases, 1927–1928* (London), vol. 4 (1931), case No. 86, p. 128).

¹⁸ See footnote 10 above.

project against that of the recipient State in avoiding unnecessary harm.

35. He wondered whether some provision should not be made in article 14 for harm that was unforeseen or unforeseeable by the recipient State or States. What was the exact meaning of the words "not apparent" in the second subparagraph of paragraph 1? Not apparent to whom? As worded, the article meant that the notifying State was not responsible to other States for harm caused if recipient States failed to reply within the time-limit laid down in article 12. It would be desirable to introduce some flexibility into the article so that relations between system States would not be worsened by legitimizing or perpetuating a situation that was unforeseen or unforeseeable, but none the less injurious.

36. He also wondered whether the acute emergency situations referred to by the Special Rapporteur in his commentary (A/CN.4/367, para. 130) could be covered by article 33 of part 1 of the draft articles on State responsibility, which related to a state of necessity.¹⁹ In other words, might a State undertaking a project in conditions of acute emergency claim that a state of necessity precluded wrongfulness of the act as well as responsibility for any consequences? Some consideration should perhaps be given to fashioning a *lex specialis* to govern the situation in the context of international watercourses.

37. He fully supported article 15, which dealt essentially with the institutionalized management of the international watercourse system, and considered that the approach it embodied was a logical outgrowth of the principle of co-operation. In his commentary (*ibid.*, para. 132), the Special Rapporteur rightly referred to the importance of institutionalizing co-operation and also to the work of the International Joint Commission of Canada and the United States (*ibid.*, para. 133). The treaty establishing that commission was described in some detail in the Commission's 1974 *Yearbook*.²⁰ The Commission might wish to consider adding impact assessment as one of the functions of commissions set up under article 15, although that was probably covered by paragraph 2 (a) and (b) of the article.

38. Article 18, dealing with special obligations in regard to information about emergencies, could usefully be compared with article 25, on emergency situations regarding pollution. Whereas article 25 used the mandatory form "shall", article 18 used the word "should". In his view, the verb in both cases should be "shall". Again, there was a clear analogy with the duty to warn, recognized in the *Corfu Channel* case.

39. Chapter IV of the draft was vital, because it dealt with environmental protection. In that connection, he quoted an extract from a paper by Professor Handl advocating minimum standards for the protection of the environment. Draft article 20 went some way towards achieving that desirable and practical goal, but it could perhaps be strengthened by amending the phrase "shall to

the extent possible take the necessary measures", in paragraph 1, to read "shall take necessary and reasonable measures". With regard to paragraph 2, he wondered whether the standard, namely avoidance of appreciable harm, was not too low in the context of environmental protection, and would suggest that it might be better to introduce the notions of protection, preservation and improvement. The rare or fragile ecosystems referred to in article 194, paragraph 5, of the United Nations Convention on the Law of the Sea²¹ were not really covered in the draft and he considered that provision for their protection should be included, since they could be crucial for the life of an entire watercourse system.

40. Article 23 used the phrase "cause appreciable harm", which he agreed should be interpreted to cover potential, indirect and future harm as well as direct and immediate harm. He noted, however, that the article did not prevent a non-system State from polluting the waters of the system. Since long-distance transport of air pollution was an all too frequent occurrence, the Commission might wish to include some provisions on that point. He also agreed that no distinction should be drawn between existing and new pollution.

41. In draft article 28, he agreed that the Commission should avoid the question of armed conflict, which could give rise to questions concerning possible interference with the 1977 Geneva Protocols.²²

42. There seemed to be a lacuna at the end of article 29 which could perhaps be filled by including a reference to the procedures for dispute settlement. In regard to article 30, he wished to be associated with Mr. Jagota's remarks (1790th meeting) and trusted that the article would be approved by acclamation. In his view, it should be taken as an encouragement to establish protected areas, rather than as merely permissive in its terms; possibly the article could be reworded to make that clear. In that connection, members would note that the previous Special Rapporteur had mentioned in his third report that a protected river boundary had been established between the United States and Canada (A/CN.4/348, footnote 825).

43. Referring to chapter V of the draft, on settlement of disputes, he expressed his support for compulsory conciliation, which was essential for the smooth operation of the entire framework agreement which the Commission was drawing up and without which many of the other procedures would be merely nugatory.

44. Lastly, he fully agreed that, for ease of reference, footnotes should be placed at the bottom of the page rather than at the end of the report.

45. Mr. QUENTIN-BAXTER said that he had benefited greatly from listening to those members who came from continental areas where the problem of international watercourses loomed large, and who were therefore particularly aware of the vital problems that turned

¹⁹ *Yearbook* . . . 1980, vol. II (Part Two), p. 34.

²⁰ *Yearbook* . . . 1974, vol. II (Part Two), pp. 72 *et seq.*, document A/5409, paras. 154-167.

²¹ Part XII of the Convention (Protection and preservation of the marine environment) (see 1785th meeting, footnote 10).

²² See 1785th meeting, footnote 14.

upon the use and management of rivers. He was also encouraged by the fact that the spirit in which the Commission tackled the subject and its success in that work were likely to influence the contribution that the law could make in matters relating to the new international economic order. In that respect, he shared in the sense of indebtedness to Mr. Evensen and his predecessors as Special Rapporteur.

46. In his view, the whole topic could be reduced to the question of finding a balance, first, between the principle of avoiding harm and the principle of sharing, and secondly, between matters of procedure and matters of substance. As an initial proposition he would suggest that in matters of substance the draft was very gentle, whereas in matters of procedure it was very harsh. So far as the two principles of sharing and avoiding harm were concerned, article 6 enunciated the principle of reasonable and equitable participation; article 7 used the phrase “in a reasonable and equitable manner”; and article 8, emulating article V of the Helsinki Rules,²³ contained a non-exhaustive enumeration of factors which collectively tended to establish that any legitimate interest ranked with any other, unless the parties had agreed otherwise. Basically, however, the substance of sharing, as dealt with in the draft, was contained in the phrase “reasonable and equitable participation”.

47. Article 9, which dealt with the duty not to cause harm to one's neighbour, laid down a far more clear-cut obligation, the articulation of which was governed by the term “appreciable harm”. That, as had rightly been pointed out, was a relative concept and therefore not one that could be dealt with by knife-edge rules unless the parties had first agreed on what constituted harm. He shared Mr. Flitan's concern (1791st meeting) that the term denoted a high degree of harm. Admittedly, in its ordinary meaning it simply meant a measurable and more than perceptible amount of harm. Mr. Flitan's concern, however, pertained not to the natural meaning of the words, but to the natural instinct of anyone formulating such an article to take account of all the variables; the tendency then was to make such a phrase encapsulate more than it was capable of bearing.

48. In regard to the two major principles of the need to share and the need to avoid causing harm, therefore, the draft did not offer firm guidance. What it lacked on that score, however, it made up for in the rigidity of the procedures laid down in articles 11–13. In his view, there was every reason to be somewhat anxious about the balance between substance and procedure at that stage, for if the draft did not provide States with guidance as to their substantive rights, apart from indicating that when they could not agree they would have to submit to dispute-settlement procedure, it would invite a certain reluctance on the part of States to commit themselves. The problem was particularly acute in the context of rivers, and it was therefore necessary to endeavour once again to find a balance between substance and procedure

and between the principles of sharing and of not causing harm.

49. In considering the topic with which he had been entrusted as Special Rapporteur—international liability for injurious consequences arising out of acts not prohibited by international law—he had never placed the harm principle at a lower level than the sharing principle. They were awkward but none the less inseparable companions, particularly in the case of international watercourses. Thus it might not be a bad idea to revert to Mr. Ushakov's notion (1788th meeting) that what the Commission was closely concerned with was water crossing an international frontier; if that were coupled with a reference to the abandonment of the Harmon doctrine, it would provide a point at which to begin. Once the Harmon doctrine was dismissed, the principle of sharing was instated and it was recognized that the downstream State had a right to something. Until that was recognized there was little point in talking about harm, since it was not possible to be harmed by not receiving something which there was no right to receive.

50. It had always been clear that a violation of sovereignty could be invoked to deal with transboundary harm, and it was being increasingly recognized that a substantial element of pollution in a downstream flow might, on the basis of the principle established in the *Trail Smelter* case,²⁴ amount to a violation of sovereignty, or at any rate be wrongful. But the right to receive the quantity and quality of water that normally flowed through a given channel across an international frontier was a matter not so easily related to a violation of sovereignty. It went to the very essence of the sharing principle, so that, bearing in mind the doubts expressed, he was inclined to ask whether a watercourse system was not so much a starting-point as a response to the need to modify the principle that there was a right to receive across a frontier the quantity and quality of flow that nature intended for the country in question. After all, if it was possible to set up the antithesis of the Harmon doctrine and to postulate that there was always a right to receive what nature intended, there would be little need to go much further. The downstream State would have the assurance it had always wanted, but the upstream State would be extremely limited in what it could do. It could not, for instance, build a dam, far less set up an irrigation scheme, because of the impact upon the lower riparian State. In his view, it was neither realistic nor fair to ask any riparian State to accept an absolute denial of its sovereign right to use the water within its territory while it was there. Consequently, in dealing with the basic issue of the flow of water across an international boundary, modifications had to be introduced, and that was feasible only under a framework agreement between the States directly affected. What was needed, therefore, was a convention that would promote system agreements taking due account of the community of interests of the States bordering the river.

²³ *Ibid.*, footnote 13.

²⁴ See footnote 8 above.

51. So far as the procedural provisions of the draft were concerned, it was absolutely vital to distinguish fact-finding from negotiation, and negotiation from dispute settlement. While he favoured the inclusion in the draft of provisions for dispute settlement, they should not be such as to invite States in difficulty to submit themselves to what was in effect a lottery, in which elements of fact and law were so interwoven that any sovereign State would be reluctant to submit itself to the judgment of others. He would therefore urge the Commission to reconsider the immediacy with which the provisions of chapter III, relating to machinery, led on from the articulation of the principle of avoiding harm in article 9. It was highly desirable that, in each particular situation, neighbouring States should be able to agree on what constituted appreciable harm, since a simple overall definition was quite impossible. The degree of harm depended on whether the boundaries were in urban or rural areas, on the prevailing winds, and on all kinds of other natural phenomena; its determination required careful thought, good faith and patience. Those factors could produce the kind of system agreement that would pave the way for an orderly settlement of differences, in most cases long before they developed into a dispute.

52. In regard to the comparison between the rules of State responsibility and the rules to be articulated for his own topic, article 9 had much to commend it. If there was one area in which it was becoming clear that trans-boundary harm was wrongful, it was that of pollution, particularly when water-borne, because it was within the capabilities of modern science and technology to avoid such pollution. Article 9 did not relate liability solely to the occurrence of consequences, but referred to uses or activities "that may cause appreciable harm to the rights or interests of other system States". To that extent it applied an objective test of what might cause harm and it could be contrasted with the International Law Association's Montreal Rules, adopted in 1982²⁴ which related the wrongfulness of pollution to its actual occurrence and not to a course of conduct that permitted it to occur. He doubted, however, whether it would be helpful in arriving at a settlement to provide, in effect, that any disagreement between neighbouring riparian States as to whether the action of one of them was likely to cause harm would be tantamount to an accusation of a breach of international law. In his view, it was extremely important to keep the phases of fact-finding separate, for it was by compromise that a solution to the problem would be found, not by applying Draconian rules. There was never any justification for using procedure as a means of concealing uncertainty about substance. In cases where a rule could not be formulated in clear terms, the parties should not be expected to settle their differences through litigation.

The meeting rose at 1 p.m.

²⁴ See I.L.A., *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 158 *et seq.*

1793rd MEETING

Thursday, 30 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf. Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. MAHIOU congratulated the Special Rapporteur on submitting a consistent and well-structured set of draft articles to the Commission. For the time being, he would make only preliminary observations because it would be impossible to deal with every aspect of the subject. His comments would, moreover, relate only to the Special Rapporteur's first report (A/CN.4/367), since the summary record of the 1785th meeting at which the Special Rapporteur had given his oral introduction was still not available.
2. The uses of watercourses gave rise to problems commensurate with the role rivers had always played. Not only had rivers been of great importance in the economic life of countries, they had also had a major impact on human life and had even given birth to civilizations, as in the case of the Nile in Pharaonic Egypt, which some historians did not hesitate to describe as a "water society". Literary works had also described the influence of rivers such as the Don and the Mississippi.
3. Referring to the example of the temporary watercourses in his country, which were known as "wadis" and had been mentioned by Mr. Schwebel and Mr. Evensen, he said that Algeria had an enormous ground-water horizon which covered several States and was a "shared natural resource" which had to be used with the greatest care because it took thousands of years to recharge. The scarcity of water in the Sahara had, moreover, been a decisive factor in attempts to formulate a system of customary rules for the distribution of water. The difficulties experienced by Algerian jurists in codifying

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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.*

such rules made it clear that the task ahead of the Commission, which was dealing with international water problems, would not be an easy one.

4. The overall structure of the draft articles was clear, logical and acceptable. The Special Rapporteur had been right to explain the basic concepts first and then to formulate principles and rules of co-operation, management and protection and to provide for machinery for any disputes that might arise. That outline would serve as a solid foundation for the Commission's work.

5. With regard to definitions, he noted that the Special Rapporteur had been very cautious in his analysis of the term "international watercourse system". Since it was clear from the Commission's past experience that the definition of terms often led to lengthy debates, the term "international watercourse system" should be approached with the greatest caution, as had been pointed out in paragraphs 6–7 of the Special Rapporteur's report and, in particular, in the last sentence of paragraph 12. In paragraphs 14 and 71, the Special Rapporteur had stated that he had decided not to propose a definition of international watercourses based on a doctrinal approach, while, in paragraphs 15 and 73, he had explained that it might nevertheless be useful to formulate a definition for the purpose of the draft convention. Paragraphs 14 and 16 were of considerable interest because they described an approach that should enable the Commission to make progress in its work. In trying to understand the term "international watercourse system", he would review the analysis made by the Special Rapporteur, but from a slightly different point of view.

6. It first had to be determined whether the Commission was dealing with a conceptual term or a functional one. In international law, many basic terms were of a conceptual nature and made it possible to know exactly which rights and obligations were established for States. However, the Special Rapporteur had noted in paragraph 14 of his report that such an approach would defy the purpose of drafting principles of general applicability which were sufficiently flexible. According to the Special Rapporteur, draft article 1 was purely descriptive and no legal rule or principle could be deduced from it; only at a later stage would the Commission establish the applicable legal rules. He himself would be receptive to that view if the Special Rapporteur had actually formulated a purely descriptive definition; but the definition contained in draft article 1 referred to the interdependence of the States of an "international watercourse system" and that gave that term a functional aspect. Moreover, paragraph 72, which stated that the concept of a "watercourse system" was recognized and employed in State practice, involved the risk of a reversion to a normative idea and perhaps to the doctrinal definition that the Special Rapporteur had initially tried to avoid. Clarifications would therefore be needed in order to dispel any doubts and prevent controversy.

7. A unified definition of the term "international watercourse system" had to be adopted in order to prevent its meaning from changing in the various pro-

visions of the draft convention. Once the definition had been delimited so that it would not vary, however, it would serve as a useful starting-point. The reference to "international watercourse systems" and to "system States" was likely to give rise to reservations on the part of members of the Commission and of States if it became an equation with more than one unknown. In functional terms, the main purpose of the international watercourse system was to reflect the interdependence of the States concerned and encourage them to co-operate; but it also had other related purposes which would be listed in the draft articles and which, once they were more clearly defined, should be able to be supported by members of the Commission.

8. The idea of interdependence in a watercourse system must be understood in relative, not absolute, terms because it derived from the various uses to which water could be put. As Mr. Riphagen had said (1790th meeting), a watercourse system was composed of several subsystems (fishing, irrigation, pollution, etc.), which could either be separate from one another or interdependent. In the light of those considerations, he was of the opinion that the Commission should follow the cautious approach which it had adopted in the past and that, at the present stage, a definition of the term "international watercourse system" was not needed. That term might even lose its usefulness in future.

9. Referring to the term "shared natural resource", he said that, notwithstanding the doubts expressed by some members of the Commission, that idea must not be discarded; an attempt must be made to understand everything it encompassed. Comparisons between international watercourses and the oceans or outer space could be useful if they were cautious, but it would be more dangerous to compare the concept of a "shared natural resource" with that of the common heritage of mankind. No State claimed sovereignty over any part of the common heritage of mankind, whereas States did exercise their sovereignty over rivers. The idea of the "exclusive economic zone" was perhaps a closer comparison; but riparian States did not have unlimited sovereign rights over that zone, whereas they did exercise full sovereignty over watercourses. Although a State could enter an exclusive economic zone to exploit fishery resources, it did not have similar access to a watercourse over which a neighbouring State exercised sovereignty. The term "shared" might also prompt the mistaken conclusion that sharing must be equal. Yet, as the Special Rapporteur was aware, that was not possible because a watercourse was not equally divided among the States through which it flowed. It was therefore necessary to define exactly what type of sharing was involved and to distinguish between commutative justice and distributive justice. Commutative justice implying equal sharing was out of the question. In the draft articles under consideration, only distributive justice could be involved and it meant that States equitably shared their rights and obligations according to their location. Another basic principle was that of equity or, in other words, proportionality.

10. In dealing with the protection or safety of a watercourse system, the Special Rapporteur had arrived at somewhat different conclusions from those of his predecessor. In the previous Special Rapporteur's view, it would be necessary to revise or at least amend the 1949 Geneva Conventions and the 1977 Additional Protocols thereto.⁴ The present Special Rapporteur had rightly refused to embark on such an ambitious course, which would not be the correct one. That problem could not be overlooked, but might be approached from a different angle. Instead of referring to armed conflict, why not refer to the peaceful uses of international watercourses? That idea was explicitly referred to in the draft articles and, in particular, in article 7 relating to good-neighbourliness. In that connection, he cited relevant instruments relating to areas that had been demilitarized or denuclearized; in the present case, reference might be made to the Geneva Protocols, with emphasis on the peaceful nature of the uses of international watercourses.

11. It would be necessary to devise a solution to the question of the settlement of disputes, since the aim was to encourage States to co-operate as much as possible and since principles such as equity, reasonable use and appreciable harm might give rise to differing interpretations. In many cases, the fact of establishing machinery for the settlement of disputes encouraged States to solve their problems through negotiation, since a provision establishing the obligation to submit disputes to the ICJ was comparable to a sword of Damocles for States. Like Mr. Razafindralambo (1790th meeting) and Mr. Riphagen (1791st meeting), he would be in favour of compulsory conciliation.

12. The question of the scope of the draft articles had been raised in paragraphs 59–60 of the report. He did not think that it was really necessary to choose between codification and progressive development. A number of factors argued in favour of a code of conduct for States in respect of the use of international watercourses, since some uses might, in certain circumstances, not lend themselves to rigid codification. Account must also be taken of the existence of a large number of agreements which related to most of the major rivers and appeared to work satisfactorily. However, other factors argued in favour of specific rules governing the rights and obligations of States. For example, the interdependence of interests would have to be spelled out in the rules as more than a mere guideline.

13. The Commission must therefore try to establish both a minimum basis for codification and a basis which would serve to promote progressive development and, thus, the harmonious and equitable use of international watercourses. The draft articles should contain clear and specific provisions and indicate plainly the rights and obligations of every State so that the activities of some would not have harmful consequences for others. They should also encourage States to set out their rights and obligations in detail in specific agreements. The two

options of codification and progressive development were to be found in the articles which had already been provisionally adopted and which would have to be taken into account, though perhaps reconsidered on second reading.

14. Mr. LACLETA MUÑOZ said that the Special Rapporteur was to be commended for submitting a full set of draft articles, even though an outline would initially have been enough. Although the structure of the draft articles was acceptable to him, he thought that a chapter on environmental protection might be added. The chapter on the settlement of disputes was essential and the Special Rapporteur had been right to present it merely as a set of guidelines on which members of the Commission would have to express their views. He also supported the final provisions.

15. With regard to chapter I, he noted that draft article 1 expanded on the note adopted earlier by the Commission⁵ and contained a provisional definition of watercourses. One of the basic elements of chapter I was that States were entitled to use the waters of international watercourses. In that connection, he said it was to be regretted that the proposed wording gave the impression of something static, whereas in fact a watercourse was dynamic, and that should be taken into account in the definition of terms. He shared Mr. Reuter's view (1786th meeting) that there were two different ideas embodied in the definition of an "international watercourse system". Draft article 1, paragraph 1, referred to a drainage basin in the broad sense of the term, while paragraph 2 was much closer to the notion of a watercourse system. He also wished to draw attention to some drafting problems that arose in the Spanish text. The word *sistema* was perhaps not entirely appropriate. In English, the words "system State" could simply be juxtaposed, but in Spanish a preposition had to be used in the term *Estado del sistema*, thus introducing ideas that were lacking in the English wording. Moreover, if it were not for the fact that the word *Estado* was capitalized, the term *Estado del sistema* could be taken to refer to the condition of the system.

16. Chapter II reflected the very important idea of a State's right to participate in the use of a watercourse system, while taking account of the need not to cause harm to other States. Those were rules which already existed in contemporary positive law. The idea of "appreciable harm" should be expressed in positive terms in draft articles 6 and 7. However, those two articles contained elements which complicated matters, since draft article 6 referred to the sharing of natural resources and draft article 7 dealt with the optimum utilization of water. He shared the doubts expressed by Mr. Mahiou concerning the idea of sharing. The use of systems involved more the idea of proper distribution than that of sharing. He noted that the draft articles were designed both to codify existing positive law and to encourage international co-operation for the optimum use of watercourses, but those two aspects should not be confused.

⁴ See 1785th meeting, footnote 14.

⁵ Yearbook . . . 1980, vol. II (Part Two), p. 108, para. 90.

17. Referring to chapter III of the draft, he said that he did not share Mr. Díaz González's view (1788th meeting) that the Spanish term *ordenación* gave rise to difficulties. As to the previous Special Rapporteur's third report (A/CN.4/348), he noted that, although it was quite normal to qualify the term "harm", the word "substantial" would be better than the word "appreciable". It might also be advisable to combine draft articles 6 and 9.

18. He noted that draft article 10 enunciated general principles which did not belong in chapter II because they related specifically to co-operation and management. That provision also referred to the idea of the optimum utilization of an international watercourse system. Draft articles 11–14 established a notification procedure based on the idea of "appreciable harm". As other members of the Commission had pointed out, that procedure could be effective only if it was accompanied by a system for the settlement of disputes. Since the purpose of draft articles 11–14 was to prevent appreciable harm from occurring, it might be better for them to be included in chapter II. On the other hand, draft articles 15 and 16, which both referred to the idea of optimum utilization, did in fact follow on from draft article 10. Moreover, since draft article 7 was also based on that idea, all those articles formed a separate unit. It would, however, be a mistake to draw the conclusion that draft articles 11–14 could not also apply in the case of a dispute between States wishing to establish the kind of co-operation defined in draft articles 10, 15 and 16. It was to be noted that, in chapter IV, draft articles 27 and 29 also referred to optimum utilization. The Special Rapporteur had therefore been right only to indicate the course to be followed, instead of establishing a general legal obligation to co-operate with a view to the optimum utilization of a watercourse system.

19. Although chapter IV of the draft, relating to environmental protection, was undoubtedly necessary, the draft articles of that chapter which established obligations that would apply in all circumstances should perhaps be moved to chapter II. At any rate, a distinction should be made between the provisions of chapter IV dealing expressly with environmental protection and those relating to the safety of international watercourse systems. He was also of the opinion that the Commission should at most refer to the 1949 Geneva Conventions and the Additional Protocols thereto⁶, but should not include any of the provisions of those instruments in the draft. Draft article 29 might, moreover, be included in chapter II. In his view, that provision went too far in stating that no specific use or uses should enjoy automatic preference over other uses, because there were in fact circumstances in which one use might well have priority over others. Earlier conventions on watercourses had, for example, given priority to navigation and had regarded as secondary any uses which caused too great a drop in the water level.

20. The Special Rapporteur had been right to formulate a number of draft articles constituting chapter V on the

question of the settlement of disputes. Those articles were, however, unsatisfactory and they might almost be replaced by a simple reference to Article 33 of the Charter of the United Nations. In any event, provision should be made for some kind of machinery for the settlement of disputes. He personally would be in favour of a range of procedures which would, in case of failure, culminate in a compulsory ruling by a third party in the form of an arbitral award or a judicial decision. He was, however, not unaware of the difficulties to which such a system would give rise for the many States which did not have the political will to agree to the compulsory settlement of disputes. As a minimum, conciliation should be compulsory, but that point was not made in draft article 34. Draft article 37 as it now stood was practically self-defeating. It was both permissive and restrictive in that it provided simply that States might submit a dispute for adjudication if they had not been able to arrive at an agreed solution by means of draft articles 31–36. In conclusion, he said that the establishment of boards of inquiry might go a long way towards enabling States to settle disputes relating to the uses of international watercourses directly between themselves.

21. Mr. BARBOZA said that, since the proposed draft articles would subsequently be considered individually, he would confine his statement to the general principles which formed the basis of the draft, including the obligation to negotiate, the need to apply system agreements and the characterization of the water of an international watercourse system as a shared natural resource. The Special Rapporteur had used those general principles to formulate standards that applied to the management of international watercourse systems and had referred, in that connection, to the concepts of equitable and reasonable participation, good faith, good-neighbourliness, optimum utilization and appreciable harm. He had also referred to the principle of co-operation.

22. Personally, he would have some difficulty in regarding as a principle the characterization of the water of an international watercourse system as a shared natural resource. It was rather from the legal nature of the waters of a watercourse, as defined in draft article 6, that principles could be derived. The sovereignty of a State was exercised according to the object to which it applied. For example, a State could in principle exercise full sovereignty over its territorial sea, but not in the same way as over its territory, since the sea could not be permanently occupied and population settlements could not be established there. Sovereignty over airspace was different again. The sovereignty of a State over shared natural resources was exercised within the limits set by sharing, but that was not the case of a State's own resources. It was thus in the nature of things to share sovereignty over shared natural resources and it would be inconceivable for positive law not to take account of the nature of things.

23. Three principles could therefore be deduced: sharing must be equitable and reasonable; it must be in keeping with the rule *sic utere tuo ut alienum non laedas*;

⁶ See 1785th meeting, footnote 14.

and it required co-operation. The obligation to negotiate established in article 3 as provisionally adopted was only a corollary of the obligation to use a watercourse system equitably and reasonably without causing appreciable harm. That obligation arose only if there was a danger of appreciable harm.

24. Referring to the draft articles that related to those principles, he said that, although he approved of draft article 7, which dealt with the equitable sharing of the uses of a watercourse system, he was not sure that it was essential to refer to the concept of good faith. That was a universal concept which governed the conduct of all States. He also noted that sharing counted more than good-neighbourly relations. For example, if State A was the neighbour of States B, C and D but shared a watercourse only with State B, its relations with States C and D would be governed only by the rules of good-neighbourliness, whereas its rights and obligations in respect of the watercourse would arise as a result of the sharing of that natural resource.

25. The general idea expressed in draft article 8 was undoubtedly necessary since an international watercourse system could be used for a variety of purposes. Draft article 9, which was essential, placed a restriction on reasonable and equitable use, which must not cause any appreciable harm. In his view, those two principles were mutually restrictive and, together, they constituted a legal standard which left no room for an abuse of rights. Reasonable and equitable use must not cause any appreciable harm, but if harm was actually caused, what was involved was not an abuse of rights, but rather a breach of an international obligation. As Mr. Laclea Muñoz had pointed out, the Spanish term *perjuicio apreciable* was not entirely satisfactory because it involved the idea of a judgment. It should, however, be noted that that term and other similar ones had been used in agreements and that State practice was beginning to shed some light on what they meant. It might nevertheless be better to use the Spanish term *perjuicio sensible*, which was also to be found in treaties. In any event, he was of the opinion that harm must be taken into consideration once it amounted to more than an injury that had to be tolerated. In positive law, there were, moreover, similar concepts, such as that of the conduct of the administrator of a trust and that of the conduct of a depositary, who had to take as much care of something entrusted to him as of something belonging to him.

26. Chapter III of the draft dealt with the obligation to co-operate. Draft article 10 embodied the principle of co-operation with a view to optimum utilization. The idea of optimum utilization nevertheless involved an element of subjective judgment and it might lead to a communal conception of the use of international watercourses which would require action by an authority; that would not be very realistic in the present state of international law. In his view, the purpose of the obligation to co-operate should be to give effect to the principles enunciated in the draft and to ensure the enjoyment by the States concerned of the equitable and reasonable use of a watercourse. It would be necessary to establish a general

obligation of co-operation which would be binding on all States, as well as specific obligations such as those enunciated in draft articles 16–18.

27. With regard to the notification procedure provided for in chapter III, he said he agreed with Mr. Laclea Muñoz that draft articles 11–14 did not follow from the obligation to co-operate. Those articles established a procedure that would be applicable if a project or programme caused appreciable harm. They should therefore be moved closer to draft article 9, which provided that a system State must refrain from uses that might cause appreciable harm to other system States. It was from that obligation that the articles relating to the notification procedure were derived.

28. The procedure provided for in the draft should be supplemented in three ways. A State which ran the risk of being harmed should not be able to veto the execution of a project or programme by another State; delays which might be prejudicial to the State making the notification had to be avoided; and the assessment of harm should not be left to the discretion of the State receiving the notification. The interests of the States concerned should be reconciled and there should be a compulsory and speedy procedure for the settlement of disputes. In addition, the machinery for international responsibility should be brought into play so that States would be compelled to fulfil the obligations established in the draft. If provision was not to be made only for compensation for the irreparable damage which States could do to an international watercourse system, all the other penalties authorized by international law would have to be applied. He could, moreover, agree to the establishment of joint watercourse commissions.

29. The draft articles contained in chapter IV, which dealt with environmental protection, might bring the Commission back to the concept of a drainage basin. From the point of view of international watercourses, environmental protection involved factors other than the uses of water. If the Commission dealt, for example, with the impact of deforestation on water quality, it might have to abandon the system concept and revert to the drainage basin concept.

30. Although the principles embodied in draft articles 22–25 were not really different from those enunciated in other parts of the draft, they formed a unit and might have to be applied more strictly. He agreed with the definition of pollution contained in draft article 22 and shared the Special Rapporteur's view that, once the threshold of appreciable harm had been crossed, it made no difference whether the source of pollution was old or new.

31. With regard to the question of the settlement of disputes dealt with in chapter V, he said that differences of opinion were bound to arise, particularly in trying to determine whether appreciable harm had been caused and what were preferred uses. In his view, conciliation would be an appropriate procedure that could be made compulsory in certain cases particularly in connection with the obligation to co-operate. In some cases, it might also be useful to request the assistance of technical experts or a board of inquiry. It would then be possible to

reconcile the positions of the parties to a dispute, as Argentina had done when it had been involved in a dispute with Brazil.

32. In conclusion, he said that, apart from the comments on methodology which he had made, he was of the opinion that the report under consideration (A/CN.4/367) would serve as an excellent basis for the Commission's future work on the topic.

The meeting rose at 12.55 p.m.

1794th MEETING

Friday, 1 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (concluded) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR³ (concluded)

1. Mr. MALEK endorsed the observation made by the previous Special Rapporteur in his first report⁴ to the effect that the amount of fresh water in watercourse systems was unevenly distributed throughout the world, so that there had always been large deficiencies of water in some regions and large excesses in others. Some members of the Commission had stated that, in their own countries, water was, by virtue of its abundance, a crucial commodity. Despite that abundance, or perhaps even because of it, serious problems arose in those countries

owing to the lack of appropriate rules of law. In many other countries, the absence or insufficiency of water was a source of constant concern. Sometimes the shortage of water in a State even contributed to military insecurity, not only for the State itself, but for the whole of the region in which it was situated. That was so in the case of Lebanon.

2. In the absence of official information, he referred to reports published recently in the *International Herald Tribune* and in *Monday Morning*, a Beirut weekly, which stated that many specialists in the area were convinced that the watercourses and wells in the countries of the region—namely Israel, Lebanon, the Syrian Arab Republic and Jordan—were crucial not only to the chances of success of the United States-sponsored troop-withdrawal plan for Lebanon, but also to the prospects of another Middle East war. The reports mentioned, in particular, the Oronte River, which rose in the heart of Lebanon and flowed through the Syrian Arab Republic, irrigating a large proportion of that country. The reports emphasized the Syrian Arab Republic's intention to ask Lebanon to guarantee that the Oronte would not fall under Israeli control. They also stated that the headwaters of the Oronte appeared to be one of the main factors in the Syrian Arab Republic, which was heavily dependent on agriculture, being determined to keep its troops in Lebanon. It also appeared that Israel was keenly interested in the waters of a river flowing through southern Lebanon—the Litani—over which it had no claim, but a portion of which it had controlled since its troops had entered Lebanese territory in 1982. According to the reports in question, one of the first acts of the Israelis had been to seize all the hydrographic charts and technical data concerning the dam and the river, on the grounds that those documents came under the heading of military intelligence. It had also been acknowledged that seismic soundings and surveys had been carried out with a view to boring a diversion tunnel at the point on the Litani nearest the Israeli border. Given its lack of fresh water, Lebanon made maximum use of the waters of the Litani. Any diversion of a portion of those waters would be catastrophic for Lebanon. While, admittedly, not even the most developed rules of law could change such situations, it was important for the Commission to take them into account in preparing the draft articles. The diversion of all or part of the waters of a watercourse should be considered strictly prohibited and the draft should contain a provision to that effect. In his third report (A/CN.4/348, para. 513), the previous Special Rapporteur had referred to the diversion of water outside an international watercourse system as one of the questions which should be dealt with in a separate set of articles.

3. Another question on which the Commission should take a decision was the protection of hydraulic works and water resources in periods of armed conflict, whether that conflict was international or not. In his third report (*ibid.*, para. 399), the previous Special Rapporteur had stated that any provision on that question which the Commission decided to include in its draft should be designed to avoid,

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ For the texts, see 1785th meeting, para. 5. 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* . . . 1989, vol. II (Part Two), pp. 110 *et seq.*

⁴ *Yearbook* . . . 1979, vol. II (Part One), p. 149, document A/CN.4/320, para. 24.

in so far as possible, any entanglement in the larger questions of the law of war; he had expressed the view that the extreme gravity of the damage and losses that might result from the destruction of modern hydraulic installations and the ensuing lethal contamination of drinking-water supplies warranted codification efforts. It was for that reason that he had proposed draft article 13 on that question. The current Special Rapporteur, however, doubted the advisability of such a provision. Some members of the Commission appeared to share his view, while others, including himself, favoured an article along the lines proposed by the previous Special Rapporteur. In any event, the Commission should not simply refuse to deal with the question, but should rather consider the extent to which it could do so in the light of existing relevant instruments.

4. The report before the Commission (A/CN.4/367) had been extremely well prepared and drafted. Although it might admittedly have been conceived somewhat differently, the Special Rapporteur could hardly be criticized for submitting too many draft articles, when two Special Rapporteurs concerned with other topics had recently been criticized for precisely the opposite reason. He also emphasized the high quality of the three reports presented by the previous Special Rapporteur, particularly the third report (A/CN.4/348), which would continue to guide the Commission in its work.

5. Although, at the outset, it had been decided that the debate should be confined to general questions and to draft articles 1 and 6, it had actually ranged over the whole of the draft and nothing had been done to channel it in the desired direction. In addition to his general observations, he would therefore comment mainly on draft articles 1 and 6.

6. Firstly, he noted that the longer the debate continued, the greater the ground still to be covered tended to become. The concepts, ideas and principles which had initially been clear had become obscured by the alternative concepts, ideas and principles proposed. No general agreement had been reached on any important aspect of the topic. The differences of opinion on the very concept from which it derived appeared increasingly irreconcilable. In the past, the term "international rivers" had been used and everyone had understood what was meant.

7. When work on the codification of the topic had begun in the United Nations, the term initially used had been "international watercourses", which was equally clear. However, in the course of the codification exercise, it had been felt that, in order to ensure harmony between the physical laws governing water and the legal rules governing the use of fresh water, the drainage basin must be taken as the unit for the formulation of such rules. It had been at that point that differences had arisen. The use of the international drainage basin concept had met with considerable opposition, so that it had had to be abandoned. It had then been replaced by the international watercourse system concept, which now seemed to be seriously opposed by several members of the Commission, despite the fact that the Commission had

accepted it provisionally in 1980. In introducing the term "international watercourse system", the previous Special Rapporteur had maintained in his third report (*ibid.*, para. 512) that it was a recognized concept used in State practice and by specialists in and commentators on the topic. The concept had seemed preferable to that of the basin, or drainage basin, in that it focused on the waters and their uses and interdependencies. The current Special Rapporteur had endorsed those conclusions. The meaning and scope of the international watercourse system concept had been defined by several members of the Commission, who had distinguished it from the basin or drainage basin concept. It had been argued that, once the concept had been provisionally adopted by the Commission, any attempt to modify it could jeopardize the future of the draft itself. As no final decision on article 1 was required for the time being, he would reserve his position on that article.

8. He would also reserve his position on article 6, the future of which seemed somewhat uncertain, since it contained the term "shared natural resource". Referring to paragraph 2 of that draft article, he said that he did not see why an international watercourse system and its waters, which constituted a shared natural resource, should be used only "in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5". Could it really be claimed that the convention and the agreements entered into, or to be entered into, in accordance with articles 4 and 5 encompassed all the existing rules of international law pertaining to the subject? If such were the case, the limitation would not be necessary. Perhaps the words "and other rules of international law" should be added at the end of paragraph 2 as a safeguard clause.

9. Although draft article 4 was not under discussion, its importance was such that he wished to comment briefly on it. Contrary to what was stated in the commentary to draft article 4 (A/CN.4/367, para. 78), its inclusion in the introduction to the draft articles did not emphasize its importance. The same was true of draft article 5. Draft article 4 made it an obligation of system States to negotiate, while draft article 5 established the right of system States to participate in negotiations. In his view, both of those draft articles should be placed in chapter II, which was concerned with the rights and duties of system States. Moreover, paragraph 3 of draft article 4 should be placed at the beginning of the article, since it set out the basic rule whereby system States must conclude one or more agreements on the apportionment of the use of water. Paragraph 1 could either become paragraph 2 or be placed in the special article to be devoted to the definition of terms. Moreover, the obligation to negotiate, as stated in paragraph 3, was not sufficiently clear.

10. The commentary to article 4 as provisionally adopted by the Commission⁵ provided little clarification in that regard, since it implied that there would be no

⁵ Yearbook . . . 1980, vol. II (Part Two), pp. 118-120.

obligation to negotiate where an international watercourse was little used, if the degree of use was limited in relation to the resources available and thus did not call for an agreement between the system States, or if the use made of the watercourse by one or more system States was bound to have so little effect on the uses made of it by other system States that no agreement was needed. Terms such as “little used”, “degree of use” and “so little effect” were so vague that they could make it even more difficult to determine the limits of the obligation. Instead of establishing the obligation of system States to negotiate in good faith with other system States for the purpose of concluding one or more agreements on the particulars of use, which could be easily contested or difficult to verify, it might be better quite simply to stipulate that the obligation existed not “in so far as the uses of an international watercourse system may require”, but if one of the system States called for negotiations. The rule should be conceived in such a way that it could be applied without difficulty whenever it was deemed necessary by one of the system States. Given its importance, the rule should not contain conditions which rendered it ineffectual. Even if it did not constitute a rule of customary international law, it was certainly a rule of ethics. Consequently, it should be incorporated in the draft articles if only by way of progressive development of international law.

11. In conclusion, he expressed the hope that the Commission would accept Sir Ian Sinclair's proposal (1791st meeting) concerning the articles which should be considered at the next session.

12. Mr. YANKOV congratulated the Special Rapporteur on his admirable first report (A/CN.4/367). He also expressed his appreciation for the very informative and thought-provoking memorandum submitted by Mr. Stavropoulos (A/CN.4/L.353), which contained not only much valuable information, but also the 15 very interesting UNEP draft principles, some of which called for further scrutiny in order to ensure a proper balance between the divergent interests of States.

13. Referring to draft article 1 submitted by the Special Rapporteur, he said that the term “international watercourse system” needed further clarification. While the concept might be comprehensive and flexible, as noted in the commentary to that article (A/CN.4/367, paras. 71–72), he could not agree with the view expressed by the previous Special Rapporteur that it constituted “a recognized concept employed in State practice and by specialists in and commentaries upon the topic”. His own feeling was that, even if the Commission, at its following session, went on to examine draft articles 7–20, the concept of the “international watercourse system”, like that of a “shared natural resource”, would continue to present difficulties.

14. Turning to draft article 2, he voiced doubts as to whether the concepts of “administration” and “management” should be introduced into paragraph 1, in addition to the concept of “conservation”. If the provisions of article 2 as proposed by the Special Rapporteur were taken together with those of articles 11 and 12 concerning notifications and time-limits for reply, the impression

might be created that other system States were precluded from taking any measures in their own territory until the whole notification process had taken its course. That was not to say that consultation elements should not be taken into consideration; but their proper place was in bilateral, multilateral or system agreements. They should not take the form of mandatory rules, as appeared to be the case in the draft articles.

15. The concept of a shared natural resource constituted one of the basic tenets of the draft and, for his part, he doubted whether the concept was sufficiently mature for that purpose. For the Commission's draft articles to be viable and acceptable to the international community, they had to take into account all the factors involved. The fact that the interests of States diverged in the matter could not be concealed. Every one of the various statements made during the Commission's discussion of the topic had revealed quite clearly that the speaker had been thinking of the interests of either an upper riparian or a lower riparian State.

16. He had similar reservations with regard to the contents of chapter III. Draft article 11 on notification, in particular, was much too rigid. As to the institutional arrangements dealt with in draft article 15, they should be left to regional or system agreements. Arrangements of that type did, of course, exist in State practice wherever the States concerned felt them necessary and practical. The matter was, however, one to be dealt with by specific agreements, rather than in general rules.

17. Referring to chapter IV of the draft, he said that, while he was not opposed in principle to consideration being given to the environmental aspects of the topic under consideration, it should be noted that environmental rules in different spheres constituted one of the most important issues of the day. The problems involved had received consideration in a variety of forums, both within and outside the United Nations. It was necessary, therefore, to exercise caution and to avoid establishing rules that might lead to unnecessary constraints and complications in river use.

18. In conclusion, he said that a sound basis for the Commission's work on the topic would be to adopt, as the dominant theme of the draft articles, the concept of uses based on international co-operation.

19. The CHAIRMAN recalled that, despite the fact that some members had commented on articles 2 and 3, there was general agreement that those articles should not be referred again to the Drafting Committee.

20. Mr. EVENSEN (Special Rapporteur), summing up the discussion on the topic, said that he had felt it appropriate to submit to the Commission, at the current stage, a fairly complete set of suggestions in the form of draft articles. The reasons for adopting that course were many. First, the previous Special Rapporteur's third report (A/CN.4/348) had provided a good starting-point for the Commission's work on the topic. Secondly, he had felt that an extensive exchange of views was necessary and that such an exchange should be of a very concrete rather than of a general nature, so as to enable him to do useful work. Thirdly, there had been a strong demand from the

international community—not least in the General Assembly and in its Sixth Committee—for concrete guidance because of the increasing need to find peaceful solutions in matters of watercourse management in various parts of the world. Fourthly, the task of drafting a convention on the topic was perhaps somewhat unusual in that it was of a highly political nature, while at the same time involving formidable legal challenges.

21. He had felt that the only possible approach to the task entrusted to the Commission by the General Assembly was to draft a complete framework agreement, because each watercourse system had its own distinctive characteristics and its unique set of problems arising from its geography, hydrology, climate and environment. Equally important was the fact that those various factors often gave rise to explosive political issues—both domestic and international—and frequently led to problems in the much wider context of a whole region or continent.

22. The exchange of views that had taken place over the past two weeks would prove very valuable to him in his work. He was particularly gratified to note that all members present had contributed to the discussion, and he expressed his gratitude for the assistance thus rendered to him in the form of invaluable advice and a host of ideas, recommendations and guidelines which had shed light on the various political and legal issues involved. He was also very grateful for the courteous and friendly manner in which the necessary criticisms and proposals for changes had been submitted.

23. The majority of speakers had stressed the importance of the topic, especially for the developing countries. Many had emphasized the added importance due to ever-increasing uses and to technological developments. Mr. Jagota (1790th meeting) had also emphasized the peace-keeping aspects of the topic. Mr. Mahiou (1793rd meeting) had dwelt on a particular aspect of great interest to his country, namely the importance of ground-water reserves under the Sahara desert, which amounted almost to international ground-water lakes.

24. In his second statement (1791st meeting), Mr. Ushakov had appeared to detract from the importance of the Commission's task by pointing out that the future convention might well not be ratified by all riparian States, adding that it would serve little purpose if two countries, such as the USSR and Senegal, were to ratify the convention when they had no common international watercourse. He, for one, did not share those sentiments. Observations of that kind could be made with respect to a great many multilateral treaties and reflected a risk inherent in treaty-drafting activities. That risk, however, in no way detracted from the importance of the task before the Commission. The codification part of its efforts would crystallize, in treaty form, the relevant governing principles of international law and thus influence the international relations of States in fluvial matters, regardless of ratification or non-ratification by particular States. The progressive development aspect would be equally important. One of the essential bases of discussion was the conclusion of system agreements that would take into

account all the special elements and peculiarities of a geographical problem area. The formulation of such agreements would be greatly facilitated by a framework agreement embodying relevant proposals and principles.

25. Other speakers had appeared to entertain doubts as to the usefulness of elaborating a comprehensive framework agreement, thus apparently suggesting that the task before the Commission might boil down to the elaboration of three main elements: the sovereignty concept, responsibility for substantial damage caused to others, and certain specific aspects of pollution. He felt that those comments constituted reactions to his rather unsuccessful attempts to strike a balance between the various rights and interests involved. Certain upper-riparian States, in particular, had found that his draft did not place sufficient emphasis on State sovereignty. He would bear those remarks very much in mind and was grateful to those members, especially Mr. Calero Rodrigues (1787th meeting) and Mr. Njenga (1788th meeting), who had drawn his attention to a number of sensitive issues.

26. Another question which had been discussed from various angles was that of the form which should be given to the draft. There appeared to be broad agreement that the Commission should aim at drafting a framework agreement. That being said, the question arose of the meaning of "framework agreement" in the current context. From the discussion, five elements had emerged as necessary or desirable in that regard. First, the framework agreement should be a comprehensive one, covering most of the important issues that could arise. Secondly, the principles embodied in it must be framed as general principles, partly in the form of legal standards. Thirdly, system agreements for special watercourses, special uses, specific installations or specific parts of watercourses should be encouraged. Perhaps there should be system agreements of a regional nature, taking into account the distinctive features and peculiarities of a special region. Fourthly, the framework agreement should involve both codification and progressive development of international law. Fifthly, a number of the articles in the framework agreement should be formulated as binding provisions, mainly perhaps those which represented the codification of existing State practice, of rulings taken from decisions of international or national courts, or of established norms extracted from the teachings of legal scholars. Other articles would contain non-mandatory norms which would be subject, among other things, to qualifications applicable in each concrete case.

27. In that connection, Mr. Reuter (1785th meeting) had expressed the view that any provision included in the agreement must entail some element of legal obligation. There had also been a suggestion that a distinction could be made between legally binding provisions and non-legally binding recommendations. It was difficult, however, to know where to draw the line in that respect. Possibly, members' views were divided according to whether they had had practical experience of drawing up a draft convention or had a purer concept of law and, in particular, of treaty law. In his opinion, the Commission

should be guided by practical considerations, and therefore the framework agreement should not only set forth unconditional obligations, but also contain provisions whose legally binding content was less clear. Such provisions could pertain, for example, to what was practical or necessary in a given case; they could prove indispensable in shaping practice regarding river administration and co-operation, as well as in formulating progressive rules of law, and could also provide States with the legal and political impetus to draw up modern system agreements. The bases for discussion set forth in his report (A/CN.4/367) seemed to command general support in that respect, but he would take due account of the comments made when preparing his second report.

28. In his introductory statement (1785th meeting), he had asked for the Commission's reaction to the outline for a draft convention set out in his report (A/CN.4/367, para. 65). It seemed that the outline was basically acceptable, although Mr. Jagota and Mr. Lacleta Muñoz (1793rd meeting) had suggested that the articles might be rearranged, and Mr. Flitan (1791st meeting) had underlined the importance of retaining chapter V on the settlement of disputes. In his future work on the topic, he would take account of the views that had been expressed in order to improve the outline in the manner suggested.

29. As to whether he had struck a reasonable balance between the various interests involved, he did not think that he had been entirely successful on that score, and Mr. Jagota, for example, had suggested that certain formulations might be misinterpreted. Again, in his future work, he would bear such points of concern in mind.

30. Also in connection with the outline for a draft convention, he had suggested that it might be inadvisable to include provisions on the law of war. While several members had supported this view, others had suggested that some provisions could be included on use and management for peaceful purposes or on use for peaceful purposes in time of peace and in time of war. He would reconsider the matter with a view to arriving at an accommodation in that regard.

31. The general feeling in regard to chapter V, relating to settlement of disputes, was that it was useful, and even necessary, to include it in a framework agreement. A number of members had supported his oral proposal that consideration should be given to including provisions on compulsory conciliation procedures. In that connection, he noted that Mr. Lacleta Muñoz and Mr. Quentin-Baxter (1792nd meeting) had advocated the establishment of a fact-finding technical commission, or fact-finding technical bodies, while Mr. Reuter (1786th meeting) had suggested that such negotiations could perhaps be assisted by international organizations or mediators appointed specifically to ascertain the facts. Mr. Ushakov (1788th meeting), on the other hand, had questioned the need for chapter V since, in his view, if the purpose of a framework agreement was to create the climate in which individual system agreements could be concluded, such issues should be solved by negotiation between the parties of those system agreements.

32. With regard to the interesting exchange of views

which the Commission had had on the concept of an "international watercourse system", he believed that there was a fundamental difference between that concept and the "drainage basin" concept. In addition to the two features of a watercourse system which Mr. McCaffrey (1792nd meeting) had indicated, namely flexibility and relativity, it should perhaps be borne in mind that the drainage basin concept had been defined in article II of the Helsinki Rules on the Uses of the Waters of International Rivers⁶ and, consequently, was burdened with that definition. Notwithstanding some hesitation on the part of some members of the Commission, his own view was that the concept of the watercourse system was a convenient descriptive tool, especially if it were not regarded as a superstructure from which to distil legal principles.

33. When considering draft article 6, he would take account of the statements made regarding the "shared natural resource" concept. The many valuable observations made pertaining to other concepts would likewise assist him when he came to reconsider his first report.

34. As to his future programme of work, he hoped to revise his proposals in the light of the proceedings in the Commission and in the Sixth Committee of the General Assembly, in whose deliberations he planned to take part. He trusted that he would be able to submit his second report in good time for the Commission's thirty-sixth session. In the circumstances, it did not seem appropriate at the current stage to refer any draft articles to the Drafting Committee. He had not summed up the comments on individual draft articles, since he felt that it was not the right time to do so and he also wished to be able to consult the summary records. Lastly, he thanked members again for their comments and valuable advice.

35. The CHAIRMAN, thanking Mr. Evensen for his work as Special Rapporteur, said that the Commission looked forward to receiving his second report in 1984.

The meeting rose at 12.30 p.m.

⁶ See 1785th meeting, footnote 13.

1795th MEETING

Monday, 4 July 1983, at 12.05 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Statement by the Secretary-General of the United Nations

1. The CHAIRMAN said that the Commission had gathered on the present special occasion to receive His Excellency Mr. Javier Pérez de Cuéllar, the Secretary-General of the United Nations, who had done it the honour of paying it an official visit.

2. It was his own good fortune to have been elected Chairman of the thirty-fifth session of the Commission and to have the rare opportunity to extend to the Secretary-General a very warm and cordial welcome on behalf of all members of the Commission. He hoped that the Secretary-General would accept the apologies of Chief Akinjide, Mr. Al-Qaysi, Mr. Boutros Ghali, Mr. Jacovides, Mr. Jagota, Mr. Ogiso and Mr. Reuter, who were unable to attend the present meeting.

3. It was understandable that, as a member of the Commission from the Latin-American region, he himself should claim the privilege of welcoming, on behalf of the Commission, the eminent Latin-American diplomat and jurist who, with great distinction, occupied the exceptionally important post of Secretary-General of the United Nations. As a jurist, scholar and professor who had taught and published on questions of international law, the Secretary-General should feel at home in the Commission, where he no doubt recognized not only many members of the Commission and its secretariat, but also its distinguished visitors, Judge Roberto Ago of the International Court of Justice, who had formerly been a member of the Commission for some 20 years, and Mr. Erik Suy, Director-General of the United Nations Office at Geneva.

4. Everyone present respected and admired the contributions which the Secretary-General had made to the cause of peace through the United Nations, with which he had been associated in several capacities. In the course of a brilliant career, he had provided constant proof of a deep personal commitment to the principles and purposes enshrined in the Charter of the United Nations and of his belief in the important role of international law as a means of achieving those goals. The Secretary-General had eloquently given expression to that commitment and that belief on at least two occasions in the past year, namely in the introduction of his first report on the work of the Organization, which he had submitted to the thirty-seventh session of the General Assembly,¹ and in his statement to the Montreal Conference of the International Law Association.²

5. The Secretary-General's visit to the Commission relatively early in the course of his mandate offered additional proof of his deep commitment to the promotion and maintenance of international legal order. The statement which the Secretary-General would now make to the Commission would be a further confirmation of an approach that could only serve to encourage the members

of the Commission in the performance of the tasks for which they had been elected by the General Assembly.

6. The SECRETARY-GENERAL thanked the Chairman for welcoming him on behalf of the members of the Commission. As he, too, was a lawyer, it was a particular pleasure for him to be in the Commission's company.

7. Since he was present in the Commission for the first time, he wished to mention some of his preoccupations concerning the vital importance of the codification and progressive development of international law. It was a well-known fact that one of the basic aims of the United Nations, as spelt out in the Preamble to the Charter, was the establishment of conditions under which justice and respect for the obligations arising from treaties and the other sources of international law could be maintained. The prime purpose of the Organization, as enunciated in article 1, paragraph 1, of the Charter, was the maintenance of international peace and security. To that end, that provision referred to the bringing about by peaceful means, and in conformity with the principles of justice and international law, of the adjustment or settlement of international disputes or situations which might lead to a breach of the peace. The concept of a coherent and generally accepted body of international law thus lay at the heart of the Charter. Such a body of law was essential not only for solving existing disputes without violence, but also for the day-to-day coexistence and co-operation of the many States which now constituted the international community.

8. It might be asked whether it was not perhaps ironic to stress the importance of the role of international law in the present state of international relations, when constant claims were being made about the violation of the basic principles that made up that law. In his view, however, the time had never been more critical than now, when substantial confusion reigned about international norms of conduct for restating and formulating the very foundations of international relationships and legal order. The history of mankind had demonstrated that, without a clear formulation of legal principles to serve as guidelines for the conduct of States in the common interest, the world would face even greater difficulties in searching for an ordered direction of international affairs. Regardless of their ideologies, social and economic systems, size and relative military and economic strength, States should acknowledge that there was no viable and long-term alternative to a policy of development and peaceful coexistence within a framework of international law.

9. The continuing role which the United Nations was expected to play in the growth and development of a coherent and generally accepted body of international law had found expression in Article 13, paragraph 1 (a), of the Charter, which provided that the General Assembly would initiate studies and make recommendations for the purpose of "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification". The adoption of that provision by the San Francisco Conference had marked the beginning of a new

¹ *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 1 (A/37/1).*

² Sixtieth Conference of the International Law Association, Montreal, 29 August-4 September 1982.

and unprecedented era in the process of progressive development and codification of international law. The framers of the Charter had conceived of work on the progressive development and codification of international law as a political objective of the United Nations in whose achievement the Member States had undertaken a political and legal commitment to co-operate.

10. The process of developing and codifying international law was now taking place primarily in the forums of the universal international organization, in which the participants were seeking to update, mould and even transform the criteria for the conduct of their relations so as to make those norms more responsive and effective in the context of new situations. That process relied on multilateral diplomacy, which would produce treaties and codify conventions, rather than on the development of customary international law through practice, acceptance or acquiescence. Its aim was the fulfilment of the political aspirations, interests and needs of States and of the organized international community with a view to facilitating international co-operation and contributing to the maintenance of international peace and security through the certainty of law.

11. In addition to the underlying concern with the need to maintain international peace and security, other major factors had led States to attach growing importance to the progressive development and codification of international law. It was generally recognized that, in the past 40 years, international society had undergone a substantial transformation which constantly called for the progressive development of international law and its codification in the interest of contemporary requirements.

12. As had been emphasized time and again, what had been adequate and appropriate at the turn of the century, when 60 per cent of the world's land and 70 per cent of its total population had been made up of colonies, dominions and protectorates, or even in 1945, when 51 States had signed the Charter of the United Nations, could not be expected to meet the demands of an international community of 157 States faced with a whole range of new issues and problems. Those issues and problems had also arisen out of the scientific and technological developments that had materially affected the global structure and the global economy, thereby producing a need for the legal regulation of activities that had, by the middle of the current century, still been beyond man's capabilities.

13. Contemporary civilization was largely guided by the benefits and demands of science, in which limited resources were coupled with an increasing need for their more rational and equitable distribution and in which interdependence, brought about by the ease of modern communications and the necessities of progress, had grown so much that national economic and industrial activities substantially affected not only a State's immediate neighbours, but also States on the other side of the planet. The international flow of goods and services in today's world had been so amply documented that its mention alone would suffice to confirm that interdepend-

ence. The point was that sustained global interaction had made the life and stable existence of States dependent upon numerous factors operating beyond their national boundaries: the contemporary effective pursuit by States of development and coexistence was increasingly dependent on their ability to identify those factors and to devise feasible means of dealing with them. At the same time, however, States continued to be jealous of their independence and territorial sovereignty.

14. The current emphasis was on what separated States rather than on what brought them together. There was, moreover, no doubt that, in a world with limited resources and severe economic depression, one State's larger share would be at the expense of another's smaller share. There was thus a danger of losing sight of common interests and of failing to achieve consensus on what direction should be taken. The codification of legal principles against such a background of interdependence had proved to be an enormous task, but it was all the more important precisely for that reason.

15. In November 1983, 36 years would have passed since the General Assembly, in resolution 174 (II), had established the International Law Commission as a means of exercising one of the principal functions entrusted to it by Article 13 of the United Nations Charter. With the establishment of the Commission, the General Assembly had acquired a permanent subsidiary organ of the highest scientific and technical quality to carry out the essential preparatory work for all codifications, namely the elaboration of basic drafts. The community of States had always taken care to ensure the election to the Commission of jurists of the highest qualifications and standing. The Commission had been established as a body capable of formulating legal rules simultaneously on a variety of complex topics. The Commission's membership also added a unique feature to its character: individual experts from *academia*, diplomacy and the bar provided a valuable combination of talents and experience for the theoretical and practical analysis of State practice, judicial decisions and doctrine with a view to defining the content of the legal rules to be formulated.

16. Since diplomatic codification could not be carried out in a political vacuum, the General Assembly had made the Commission part of the political system of the United Nations and had associated Member States, individually and collectively, with all the main stages of the codification process. That amalgam of legal objectivity and political subjectivity was without doubt one of the most characteristic features of the Commission and of the codifying method adopted by the United Nations. It certainly served as a basis for the flexibility and effectiveness which the Commission had displayed in elaborating drafts that had proved viable when submitted to the final scrutiny of States.

17. In the 35 years of its existence, the Commission had become the most respected international institution in the field of codification and progressive development of international law. It had responded to the appeal made by the international community as a whole as expressed through the General Assembly and had, over the years, produced

a series of conventions, some of which—such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on the Law of Treaties—constituted the principal landmarks in current international law.

18. The Commission's achievements had been the result not only of improvements in the process of co-ordination of its studies of particular topics with the opinions expressed by Governments, but also of the flexible approach it had adopted. The Commission's practice in that regard had demonstrated that there was a range of possibilities available in furtherance of its purposes and that what might suit the needs of a particular topic and of the international community in one context might not be suitable in another. As the Commission continued its work in future, it would no doubt expand the repertoire of techniques available within the framework of its Statute for the successful codification and progressive development of international law in different spheres. That would be particularly important as the Commission moved, as it certainly would, into new areas of international law in which scientific and technological advances would require the development of legal rules to regulate the immensely valuable, but sometimes potentially dangerous, instruments made available by science and technology.

19. In his first report on the work of the Organization,³ he had emphasized that an important first step towards the full realization of the role and capacity of the United Nations would be a conscious recommitment by Governments to the Charter. He believed that such a recommitment would be particularly appropriate today in respect of the objective enshrined in the Article of the Charter to which he had referred earlier. Clearly, the progressive development and codification of any legal rules that would be universally acceptable was no simple task. More than ever, there was a need for legal minds to search for ways of accommodating conflicting demands and relationships and to design coherent legal rules that would provide guidance in meeting the challenges of peaceful coexistence and development. He was convinced that the Commission would again prove to be responsive to the winds of change and continue to meet the growing expectations of mankind. He wished the Commission every success in its important task.

20. The CHAIRMAN said that he spoke on behalf of all members of the Commission in expressing appreciation for the important statement which the Secretary-General had made to mark his first visit to the Commission. The Secretary-General had stressed the significance in the contemporary world of the mandate entrusted to the General Assembly in Article 13, paragraph 1 (a), of the Charter, namely that of "encouraging the progressive development of international law and its codification", and had emphasized the central role assigned to the Commission in seeking to achieve that objective as the General Assembly's permanent subsidiary organ with general competence in the field of public international law.

21. The Secretary-General had also praised the work accomplished by the Commission during the 35 years of its existence. The Commission was proud of its achievements and the Secretary-General's words of recognition were a source of special satisfaction and inspiration to its members as well as a timely reminder of the delicate and difficult task that lay ahead.

22. During the three and a half decades that had elapsed since its establishment, the Commission had concerned itself with basic chapters of public international law in their comprehensive sense and, in particular, with diplomatic law, the law of treaties and the law of State responsibility. Pursuant to the instructions of the General Assembly, the Commission had now embarked upon the study of other complex and far-reaching topics of great practical value to the international community, including the Draft Code of Offences against the Peace and Security of Mankind; jurisdictional immunities of States and their property; State responsibility; the law of the non-navigational uses of international watercourses; the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier; relations between States and international organizations; and international liability for injurious consequences arising out of acts not prohibited by international law.

23. The Commission thus had a full agenda for the immediate future, but that did not mean that it would not be capable of undertaking additional work of an urgent nature if the General Assembly deemed it necessary. Indeed, it could be said that, in its present composition, the Commission could respond as readily as ever, if not more so, to pressing demands for international legal regulations designed to meet the needs of the contemporary international community. In 1981, the General Assembly had decided to increase by nine the membership of the Commission in accordance with an agreed set pattern for the regional distribution of seats, so that the Commission's size and composition would be more consonant with the substantial growth of the membership of the United Nations since 1961.

24. The enlargement of the Commission's membership attested to the continuing and increasing interest shown by States in the process of progressive development of international law and its codification within the framework of the United Nations system. The Commission was aware of that interest and of all the responsibilities it entailed and had at all times endeavoured to discharge those responsibilities with the utmost efficiency. In that connection, it was significant that, since the thirty-seventh session of the General Assembly, action had been taken in one instance and action was expected to be taken by States in two other instances in respect of three of the final drafts recently prepared by the Commission. Consequently, a convention had been adopted in April 1983 on succession of States in respect of State property, archives and debts;⁴ a new convention was to be elaborated on the law of treaties concluded between States and international organizations; and the General Assembly was

³ See footnote 1 above.

⁴ A/CONF.117/14.

also to take a decision on the final form of the draft articles on most-favoured-nation clauses.

25. The increase in the membership of the Commission by decision of the General Assembly in 1981 was an inevitable consequence of the increase in the membership of the General Assembly itself in the wake of the decolonization process. That transformation in the membership of the Organization had been accompanied, *inter alia*, by insistent appeals from developing countries for reforms in the international economic, financial and trading relationships between developed and developing countries. The Commission, being a microcosm of the General Assembly, would from time to time have to deal with the legal aspects of such relevant issues arising within the United Nations system with a view to readjusting the international economic and social order. In that connection, he noted that articles 23, 24 and 30 of the draft on most-favoured-nation clauses⁵ contained provisions of particular interest to developing countries. The Commission would inevitably be expected to respond to difficult issues and it was well equipped to deal with such contingencies, not only because of its expertise, but also because its members, who served in their individual capacities, formed a close-knit fraternity and because those from developed countries were aware of the problems of the developing world and were willing to help find solutions to those problems. There were thus excellent prospects for continuing good relations among the members of the Commission and for the progressive development of international law in the interests of third world countries.

26. In discharging its functions, the Commission was fortunate to have the services and assistance of a small number of highly skilled, competent and devoted staff members from the Codification Division of the Office of Legal Affairs. He took the opportunity to thank the Secretary-General for that assistance, which had over the years become an integral part of the Commission's work, and to express the hope that, in future, such assistance would not only be maintained, but would also be expanded in response to the Commission's needs at any given time.

27. The Secretary-General's visit to the Commission was of great significance, for as the chief administrator of the Secretariat and the chief executive of the United Nations system, he could be compared to a military commander-in-chief visiting his forces abroad to offer them encouragement in the battle in which they were engaged. Although the Commission was not engaged in battle, it did have a difficult task ahead of it and the Secretary-General's presence would offer it the encouragement it needed to continue to work for the codification and progressive development of international law.

28. He invited the Secretary-General to meet the members of the Commission.

The meeting rose at 12.45 p.m.

⁵ *Yearbook* . . . 1978, vol. II (Part Two), pp. 59–68 and 72–73.

1796th MEETING

Monday, 4 July 1983, at 4 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Illueca, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (A/CN.4/370¹)

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that his main purpose in submitting his preliminary report (A/CN.4/370) was to elicit the views of the members of the Commission and, in particular, of the new members on the topic under consideration.

2. Everyone was aware of the problems raised by the second part of the topic of relations between States and international organizations, namely “the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities who are not representatives of States”. The laws and regulations in force in a particular State could, for example, hamper the activities of international organizations. In order to give international organizations full freedom of action to perform the functions assigned to them by the international community, States which agreed to the establishment of such organizations in their territory had to give up part of their sovereignty. In that way, the States members of an international organization were assured of equal treatment.

3. Referring, in 1955, to the legal status of the various international organizations which had their headquarters in Switzerland, the Swiss Federal Council had informed the Federal Assembly of the Confederation that:

Under international law, an international organization which is established on the basis of a treaty between States enjoys a number of privileges within the State in which it has its headquarters; according to custom, it concludes with that State an agreement stipulating the modalities of such privileges. An organization whose members are States cannot be subject to all the provisions of the internal law of the State where its main or secondary headquarters is located. Otherwise, the State would be able to interfere, either directly or indirectly, in the organization's activities. The honour of having an international organization established in its territory naturally involves an obligation, which

¹ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

is provided for in the law of nations, to enable the organization to carry out its activities as independently as possible.²

Of course, not all States in whose territory international organizations had been established had adopted such a flexible approach. For example, the Headquarters agreement concluded by the United Nations and the United States of America³ was much more limited and did not even refer to the privileges and immunities of the Organization, which had formed the subject of a separate instrument.

4. The age-old principle *ne impediatur legatio*, which justified the privileges of diplomatic missions, had in the case of international organizations become the principle *ne impediatur officia*, a concept which could give rise to serious objections. It did not, for example, explain why international officials should, for the purpose of the exercise of their functions, be exempt from taxes. In view of their high salaries, it was not immediately clear how they might be hampered in the exercise of their functions by having to pay taxes. That was why the granting of privileges and immunities to international organizations and their officials should be based on the equality of States. If a State derived certain advantages from the establishment of an international organization in its territory, it had, out of fairness to other States, to grant privileges and immunities to the organization in question.

5. The granting of privileges and immunities was, moreover, no longer a courtesy, as it had been in the past. It was based on a sound legal instrument and constituted a right. Each State which authorized the establishment of an international organization in its territory and wanted that organization to function as effectively as possible was bound to grant it the facilities necessary for the fulfilment of its purposes, including privileges and immunities.

6. Unlike other treaties, conventions on the privileges and immunities of international organizations and headquarters agreements did not require signature, but simply accession by States and entered into force on their adoption by the General Assembly. Those agreements, which did not contain any provisions relating to denunciation, were intended for the sole benefit of international organizations, in that they established the rights of organizations while stipulating the obligations of States.

7. Referring to the question of the exact nature of the task entrusted to him and to the question of priority, he said that the Commission had to decide whether it should deal only with international organizations of a universal character or with regional organizations as well. In that connection, he recalled that the Commission had agreed to consider the status, privileges and immunities of regional organizations, without taking any final decision on whether they should be included in the draft articles.⁴

² Switzerland, *Feuille fédérale* (Berne), 107th year, vol. II, No. 35 (2 September 1955), p. 389.

³ United Nations, *Treaty Series*, vol. 11, p. 11.

⁴ Decision taken by the Commission on the basis of the recommendation made by the previous Special Rapporteur in his second report: *Yearbook* . . . 1978, vol. II (Part One), p. 284, document A/CN.4/311 and Add.1, para. 122.

Lastly, he noted that, since he had proceeded with caution, his report was far from complete; but before going any further he had wanted to consult the new members of the Commission.

8. Mr. FLITAN, thanking the Special Rapporteur for the importance he attached to the presence of new members in the Commission, said that he agreed with those members who had expressed the view at earlier sessions that the topic was now ripe for codification. A fifth convention, supplementing the rules of diplomatic law that had already been codified, would thus take its place alongside the four other multilateral conventions.⁵

9. For the reasons given by the Secretary-General at the preceding meeting, attention should be drawn to the crucial importance of the role played by international organizations in the contemporary world. As the discussion at earlier sessions, the preliminary report (A/CN.4/370) and the oral introduction showed, the Special Rapporteur's task would not be an easy one. Practice that would be useful to the Special Rapporteur had developed over the years as a result of the proliferation of international organizations. In that connection, he agreed with those members of the Commission who, at the thirtieth session, had expressed the view that the Special Rapporteur should be given full freedom of action, without undue restrictions.⁶

10. The Special Rapporteur should take as a starting-point the headquarters agreements of international organizations, which would serve as a basis for any instrument relating to the topic under consideration. The reports by the previous Special Rapporteur, Mr. El-Erian,⁷ and the abundant documentation compiled by the Secretariat⁸ should also be taken into account.

11. The Commission had been right to decide that the rules concerning the status, privileges and immunities of regional organizations should be considered.⁹ Nevertheless, the reservations with regard to the codification of those rules should be maintained. Important though regional organizations were, the Commission could not, at the current stage, embark on the codification of the rules that applied to them, but must wait until practice had developed further.

12. In conducting the proposed study, the Commission should follow the order of priority indicated in the title of the topic and the Special Rapporteur should begin by considering the willingness of host States to conclude headquarters agreements with international organizations, with all the resulting consequences which that entailed. To that end, the Special Rapporteur should

⁵ 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.

⁶ *Yearbook* . . . 1978, vol. I, 1523rd meeting, p. 266, para. 18 (Mr. Sucharitkul), and p. 267, para. 29 (Mr. Dadzie).

⁷ See 1797th meeting, footnotes 4 and 5.

⁸ *Ibid.*, footnote 3.

⁹ See footnote 4 above.

strike a balance between the status, privileges and immunities of international organizations and the sovereignty of host States.

13. Although it had been proposed at the Commission's twenty-ninth session that the draft articles should take the form of an additional protocol to the 1975 Vienna Convention on the Representation of States,¹⁰ he was of the opinion that they should take the form of an international convention. An additional protocol would not take account of all the available information on the topic. At its preceding session, the Commission had, moreover, completed the draft articles on the law of treaties between States and international organizations or between international organizations,¹¹ which were to become an international convention. It was not clear, therefore, whether there should be an additional protocol to the 1975 Vienna Convention or to that future convention. There would be a gap of more than 10 years between the conclusion of the 1975 Vienna Convention and that of the future instrument on the first part of the topic under consideration. For the time being, therefore, the Special Rapporteur should take no account of the protocol option.

14. As to methodology, the Special Rapporteur should constantly bear in mind Articles 104 and 105 of the Charter, which formed the basis for the status, privileges and immunities of the United Nations and of many other international organizations of a general nature. The Special Rapporteur should also bear in mind that the rules to be formulated, in particular those that would apply to regional organizations, should be very flexible and that host States should be able to derogate from them easily by express provisions. The draft articles to be formulated should also constitute the minimum standard for the privileges and immunities which international organizations and their officials required in order to exercise their functions. Host States should be able to derogate from those rules in order to grant international organizations broader legal status and more extensive privileges and immunities.

15. Mr. SUCHARITKUL, expressing appreciation for the Special Rapporteur's practical approach, said that the concept of an international organization was a difficult one to assess, even discounting such matters as relations between international organizations themselves and the succession of international organizations, as in the case of the Permanent Court of International Justice and the International Court of Justice. The Commission had therefore decided to deal initially with intergovernmental organizations in the strict sense of the term and to exclude non-governmental organizations such as ICRC and certain national committees, even though the activities of such committees were international in the sense that they rendered or distributed aid to developing countries.

16. Furthermore, relationships between international organizations and States varied according to whether a

State was a member of the organization in question or a non-member having observer status. There was also an infinite variety of intergovernmental organizations, which differed in terms of their nature, size and sphere of influence. The United Nations was of a very special character in that many other subsidiary bodies, such as the Economic Commissions for Africa, Asia and Latin America, had emerged from it. The United Nations also had a number of principal organs, such as the Economic and Social Council, which itself enjoyed special relations with a large number of non-governmental organizations. In addition, the United Nations family included specialized agencies. It therefore had to be decided whether all those organizations and agencies were to be treated in the same way as other, smaller intergovernmental organizations. The powers of international organizations varied according to their functions, which depended on their sphere of competence, whether medicine, telecommunications or some other field of technology, and consequently their requirements in terms of privileges and immunities might not be identical. For that reason, he fully agreed with the Special Rapporteur that the Commission should adopt a cautious approach to the topic and carefully examine all the materials available to it.

17. What were those source materials? In his view, the first one was the charter or constituent instrument setting forth the functions of the international organization concerned. It had to be recognized, however, that not all organizations were brought into being by such an instrument; in practical terms, many of them operated under powers that were renewable from year to year. That, however, was the result of the constant growth that was particularly apparent in Africa, Asia and Latin America.

18. In view of the unique position occupied by a host country, it would be of little use to draft an international convention that would be signed by most countries but not by the host country concerned. What was essential was to secure recognition of the status of organizations of a universal character, such as the United Nations, and to settle the question of the immunities and privileges to be enjoyed by such an organization in the host country. Accordingly, another kind of instrument requiring consideration was the headquarters agreement; in that respect, the Special Rapporteur would have a great deal of material at his disposal, including the headquarters agreements not only of the United Nations and its specialized agencies, but of many other smaller organizations as well. He should also find municipal legislation particularly instructive, since most of the headquarters agreements with specialized agencies had been incorporated into the internal law of the States where the headquarters in question were located. In that connection, it should be noted that there were a number of international organizations that were not so styled, since they were referred to, for instance, as associations, committees, centres or banks. Such organizations could not, however, elude their intergovernmental character if their membership or constituent instrument attested to it.

19. As to points of substance requiring consideration,

¹⁰ See *Yearbook* . . . 1978, vol. II (Part One), p. 271, document A/CN.4/311 and Add.1, paras. 59 and 61 (summaries of the views of Mr. Sette Câmara and Mr. Calle y Calle).

¹¹ *Yearbook* . . . 1982, vol. II (Part Two), pp. 17 *et seq.*, para. 63.

he said that the question of legal status was of paramount importance. Some organizations did not emerge with ready-made legal personality, although account must of course be taken of the exact meaning of the term "legal personality" in the internal law of the State concerned. For instance, treaties concluded by an economic and social commission of the United Nations were concluded in the name of the United Nations and, under the internal law of the host country, that commission had legal capacity only to conclude contracts. The Special Rapporteur would therefore have many problems to face involving the interplay between public international law and internal law, although in the final analysis it was internal law that would govern, since whether or not a specific immunity was recognized was a matter for the authorities of the country concerned to decide.

20. One further point concerned the tendency to accord more favourable treatment to smaller international organizations than to larger ones, possibly because of closer rapport among the members of the former. Uniformity, however, could not be achieved immediately. The question of privileges and immunities, though basically a matter of reciprocity, was founded in the case of international organizations on functional necessity and was thus limited in scope by the purposes of the organization concerned. To that extent, the immunities and privileges that were conferred upon international officials were enjoyed for the benefit of the organization concerned and could be waived by that organization. International organizations, for their part, wished to achieve as high a degree of standardization as possible; but host countries sought to limit the privileges and immunities of those organizations to the minimum necessary for the effective performance of their functions.

21. Mr. YANKOV said it was encouraging that the Commission was now resuming its consideration of the second part of the topic of relations between States and international organizations. Its study would be yet another contribution to the law of international organizations and to diplomatic law in general. It was obvious that the present topic had its basis in two interrelated fields, namely modern diplomatic law and multilateral institutionalized diplomacy, in which international organizations played an active role. Those two aspects of the topic should be considered in the light both of traditional law and of modern international law, which was particularly relevant to the techniques used for the exercise of the functions of international organizations.

22. In 1977 and 1978, the Commission had discussed matters such as the scope, status and legal nature of the draft articles to be prepared. At present, its main objective should be to define its future course of action. Although the Special Rapporteur's preliminary report (A/CN.4/370) was concise, it raised many delicate questions. Paragraph 9 alone referred to eight difficult questions with which the Commission would have to deal at some stage in its work. Obviously, no clear-cut answers could be given to those questions now.

23. The three questions to which particular attention should be paid were, in his view, the scope of the topic,

the methodology to be used and the structure and legal nature of the draft articles. He had doubts about some of the questions mentioned by the Special Rapporteur in paragraph 9 of the report and, in particular, about the "responsibility of States to ensure respect by their nationals of their obligations as international officials". In that connection, he drew attention to Article 100, paragraph 1, of the Charter of the United Nations, which read: "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. . . ." It was important to avoid anything which might detract from the independence of international organizations.

24. The question of scope arose both *ratione personae* and *ratione materiae*. The first aspect concerned the range of organizations to be covered in the draft articles, while the second related to the subject-matter to be covered. The Special Rapporteur had been right to stress the increasing role of multilateral institutionalized diplomacy, which involved the creation of permanent organs, thereby giving rise to the need for a relatively stable régime. Traditional diplomatic law was inter-State law that governed relations between States. It was therefore necessary to examine the rules of customary and conventional diplomatic law and to see to what extent they had to be adapted or modified to meet the needs of international organizations.

25. Neither the Special Rapporteur nor the Commission should lose sight of the fact that States were both actors in international relations and members of international organizations. Those two roles did, of course, have features in common. For example, both States and international organizations acted through their officials, for whom the host State had to provide legal protection. Exceptions from the application of internal law would have to be made and the relationship between the legal capacity of the organization and local jurisdiction would have to be defined. Consideration should also be given to the special or favourable treatment to be granted to international organizations in respect of such matters as inviolability of premises and property and immunities of various kinds.

26. An important point to be borne in mind was that, in traditional diplomatic relations, the relationship between host States and sending States involved an element of reciprocity, which functioned very effectively. In the case of relations between a State and an international organization, however, the reciprocity element was absent. Whereas the relationship between a sending State and a receiving State was a bilateral one, diplomatic relations with international organizations were tripartite, since they involved a sending State, an international organization and a host State.

27. The legal capacity of an international organization differed from that of a State. It was determined by the organization's constituent instrument, whereas the legal capacity of a State was derived from its sovereignty. For example, Article 104 of the Charter of the United Nations provided that: "The Organization shall enjoy in the

territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.” Article 105 referred to the privileges and immunities of the Organization, of the representatives of its Members and of its officials. The legal capacity of an international organization was usually limited to capacity to conclude treaties, to acquire movable and immovable property, to institute legal proceedings and to perform any functions within its competence, as defined in its constituent instrument.

28. Article 105 of the Charter of the United Nations made it clear that the privileges and immunities of the Organization and its officials were those “necessary for the fulfilment” of the purposes of the Organization and “necessary for the independent exercise of their functions in connection with the Organization”. The basis of the privileges and immunities was thus functional necessity and any new elements must be elaborated on that basis. Bilateral and multilateral agreements on the subject and customary law itself had, moreover, adopted the functional approach regarding international organizations.

29. With regard to the stages in the Commission’s work, he said that priority should be given to the question of the scope of the privileges and immunities to be accorded to international organizations. Those privileges and immunities should include inviolability of premises; inviolability of archives and documents; immunity from jurisdiction; immunity of property and assets from civil proceedings and execution; financial and fiscal privileges and immunities; and freedom of official communications.

30. The second range of issues to be examined was that of the privileges and immunities of the officials of international organizations. It should be borne in mind that international organizations needed privileges and immunities not only for themselves, but also for their staff, since they acted through their officials. It would, however, be necessary to determine the categories of officials to be covered and the range of privileges and immunities to be accorded to them. Those privileges and immunities did not constitute an *ex gratia* concession on the part of the host State; nor did they exist by virtue of *comitas gentium*. They were absolutely necessary to the functioning of the organization itself. They included personal inviolability; immunity in respect of official statements or other acts performed in the exercise of official functions; exemption from taxation on salaries and emoluments; exemption from immigration restrictions and registration of aliens; and exemption from inspection of official correspondence.

31. In a third stage, consideration should be given to the position of experts hired by international organizations for temporary assignments. In that connection, he referred to the interesting case of the privileges and immunities of the members of the Commission, about which the Legal Counsel of the United Nations had, in 1978, inquired of the Swiss Federal Council. In its reply,¹² the Federal Council had specified the privileges and

immunities enjoyed by the members of the Commission during the performance of their functions.

32. As to the question of scope *ratione personae*, it had to be decided whether the draft articles should apply only to international organizations of a universal character or to regional organizations as well. The importance of organizations such as OAS and OAU could not be overlooked, for they took an active part in United Nations meetings. Provision therefore had to be made for the privileges and immunities to be enjoyed by the official representatives of such regional organizations who attended United Nations meetings.

33. A much more delicate and difficult problem was that of international organizations of an operational character, such as regional banks and regional river commissions. It would have to be decided whether the property and assets of such organizations enjoyed immunity from legal process and taxation and whether they could claim jurisdictional immunity. Such problems were extremely difficult, but they would eventually have to be solved.

34. The wider the range of international organizations covered by the draft articles, the broader the rules would have to be. Account would have to be taken of the multiplicity of situations that would be relevant to the various organizations. It was, however, difficult to see how the legal régime of every individual international organization could be encompassed by unified general rules.

35. There was no doubt about the feasibility and desirability of the study of the present topic. The Commission’s efforts would be well worth while, particularly since the topic concerned relations between 160 States and some 300 major intergovernmental organizations, not to mention several thousand less important ones. It was necessary, however, to proceed with caution and to examine thoroughly existing international instruments, national legislation and State practice.

36. The codification of the topic should be based on State practice, but there should also be an element of progressive development with a view to filling existing gaps and formulating general rules to meet new requirements. To that end, a balance had to be struck between the status, privileges and immunities of international organizations and their officials, on the one hand, and the jurisdiction and legitimate interests of host States, on the other.

37. The Commission should adopt a functional and pragmatic approach in dealing with the topic under consideration. It was, however, too early at the present stage to decide what kind of instrument should be framed. It should, of course, contain a set of articles that would not only codify, but also develop the relevant rules of international law. If that instrument was to take the form of an international convention, the Commission would have to decide whether international organizations themselves should, like States, be allowed to become parties to it. That problem could, however, be examined at a later stage.

The meeting rose at 5.55 p.m.

¹² Reproduced in document ILC(XXX)/Conf. Room Doc.6.

1797th MEETING

Tuesday, 5 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/370¹)

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Sir IAN SINCLAIR congratulated the Special Rapporteur on his preliminary report (A/CN.4/370), which contained all the essential elements for the Commission's discussion. The great wealth of existing material on the subject of the privileges and immunities of international organizations and of officials and experts working for them made the topic under consideration a particularly delicate one. The difficulty of the task was increased by the enormous range and variety of inter-governmental international organizations, at both the universal and the regional level.

2. In that connection, he drew attention to the recent development of so-called "operational" international organizations. Some of those institutions were universal in scope, others regional; again, some of them were only partly operational in character and had other functions as well, as was the case with IBRD and IMF. It was interesting to note that the constituent instruments of both IBRD and IMF were entitled "Articles of Agreement", a term used in English to refer, among other things, to entities having commercial and financial functions.

3. Account must also be taken of international organizations of a quasi-universal character which had members from all regions of the world. A number of such organizations having their headquarters in London sprang to his mind: the International Maritime Satellite Organization (INMARSAT), the International Telecommunications Satellite Organization (INTELSAT), the International Tin Council, the International Wheat Council and the International Sugar Organization. Those bodies were undoubtedly international organizations but their needs and requirements differed from those of a universal organization with broader responsibilities. There were also important operational organizations at

the regional level, such as the African Development Bank and the Asian Development Bank.

4. One member of the Commission had mentioned at the previous meeting that the lives of international organizations varied enormously. Such organizations were born, they lived and they died. For example, the European Space Vehicle Launcher Development Organization (ELDO) had been wound up in the mid-1970s. That being said, he stressed that the basic concept underlying the need for a certain scale of privileges and immunities was that of functional necessity. An organization, and those working for it, should have those privileges and immunities that were required for the effective performance of the organization's functions. Clearly, functional necessity could dictate a higher scale of privileges and immunities for one organization, and a lower one for another.

5. Another important point was the inevitable suspicion and jealousy felt by members of the general public when they saw the servants of international organizations enjoy privileges and immunities which were not given to the ordinary man in the street. It was essential to remember that quite natural human reaction and to bear in mind that, while an international organization might be popular, privileges and immunities never were.

6. Mr. Yankov had suggested (1796th meeting) that the Commission should direct its work on the present subject towards the preparation of a convention to supplement the diplomatic conventions already in existence. Admittedly, the temptation to take that course was very great, but he personally had considerable doubts on that score in view of the very wide variety of organizations which it was proposed to cover and the resultant difficulties in achieving adequate harmonization of rules. It would in any case be premature to try to reach a definite conclusion on that matter at the present stage.

7. He drew attention to two possible alternatives to the formula of a convention. Firstly, the Commission might draw upon the experience of the European Committee on Legal Co-operation, which in the late 1960s had prepared a useful study on the privileges and immunities of international organizations. That study had not resulted in the drawing up of any convention. It had been submitted to the Council of Ministers of the European Economic Community which, in turn, had recommended to Governments that they should be guided by it. A second possibility was for the Commission to draw up model rules and recommend them to Governments as suitable for inclusion in headquarters agreements, host country agreements and the like.

8. The starting-point for the Commission's work, in his opinion, should be the status and capacity of international organizations. Every constituent instrument of an organization which had come to his knowledge contained a basic provision stating that the organization concerned had the legal capacity of a body corporate. That capacity was of course essential to enable the organization to enter into contracts and to sue and be sued in its own name within the framework of domestic law. However, certain difficult questions arose which deserved further study.

¹Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

One of them was whether an international organization functioning in a State which did not form part of its membership could enjoy in that State the capacity of a body corporate, in view of the theoretical difficulty that the organization's capacity derived from a constituent instrument to which the State concerned was not a party. Again, was there a law of recognition of international organizations, and was it necessary for a State to recognize an international organization?

9. Having dealt with the question of capacity, it was appropriate to proceed to the consideration of the immunities of an international organization as such, a question which was clearly linked with the topic of jurisdictional immunities of States and their property. In that connection, it was necessary to study the case-law which was beginning to develop with regard to the extent to which an international organization as such could invoke jurisdictional immunity.

10. Beyond that issue of jurisdictional immunity, the Commission would encounter major difficulties in seeking to determine the appropriate privileges and immunities for a great variety of international organizations. When it had discussed that question in 1978, the Commission had reached certain conclusions² with which, for his part, he fully agreed. The first was that it was necessary to proceed with great caution in seeking to rationalize and harmonize the rules in the matter, for such an attempt could easily lead to giving some international organizations more privileges and immunities than were necessary, and others less than they needed, to perform their functions. The result might well be to create friction between States and international organizations.

11. Lastly, he endorsed the Special Rapporteur's suggestion (A/CN.4/370, para. 13) that the Secretariat should be requested to revise its 1967 study³ in the light of the new material which had emerged from the replies to the 1978 questionnaire (*ibid.*, paras. 6–7). An up-to-date study of that kind would be most helpful not only to the members of the Commission but also to scholars generally.

12. Mr. STAVROPOULOS, congratulating the Special Rapporteur on his report (A/CN.4/370), noted that in 1976, immediately after the completion of the first part of the topic with the adoption in 1975 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the Commission had taken up the second part of the topic, concerning the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States. The first Special

Rapporteur appointed by the Commission to deal with the topic, Mr. El-Erian, had prepared a preliminary report in 1977⁴ and a second report in 1978.⁵ The latter had been endorsed by the Commission which, together with the Sixth Committee of the General Assembly, had been in general agreement as to the desirability of taking up the study of the second part of the topic.

13. The present Special Rapporteur, endorsing the conclusions of his predecessor, now advocated the need for great prudence and for a broad outlook initially (*ibid.*, para. 11), since the study should include not only international bodies but also regional organizations, although a final decision on the inclusion of such organizations should be taken only when the study had been completed. The Special Rapporteur also advocated a broad outlook with regard to the subject-matter of the study and suggested that a decision on the priority to be given to the various issues should be deferred until the study was completed. He (Mr. Stavropoulos) endorsed that approach.

14. The preliminary report under consideration was, of course, designed mainly to allow the new members of the Commission to express their views so that the Special Rapporteur would be apprised of the wishes of the Commission as newly constituted, which would greatly facilitate his task. His own view was that the changes introduced since the inception of the United Nations made it necessary to have general agreement within the Commission on the desirability of taking up the study.

15. He likewise considered it essential for the Commission to request the Secretariat to revise the 1967 study in the light of the replies to the 1978 questionnaire, which updated and supplemented the replies to the 1965 questionnaire. The Special Rapporteur would then be in a better position to submit his second report, which should take account of established guidelines and could perhaps contain the first draft articles, together with commentaries, on the status, privileges and immunities of international organizations.

16. Mr. KOROMA congratulated the Special Rapporteur on his helpful preliminary report (A/CN.4/370) and thanked him for giving new members like himself an opportunity to express their views before the present topic took shape.

17. Like States, international organizations had come into existence without any generally applicable body of rules to regulate them. The number of international organizations had tended to increase and their privileges and immunities, as well as those of their officials and experts, had also developed. International organizations were here to stay and they had an increasingly important role to play in world affairs. The need for such a body of rules was therefore apparent.

18. That being so, the Commission had to decide how to proceed in examining the topic. His own suggestion

² The decisions taken by the Commission at its thirtieth session (*Yearbook* . . . 1978, vol. II (Part Two), p. 147, para. 156) were based on the conclusions and recommendations of the previous Special Rapporteur in his second report (*Yearbook* . . . 1978, vol. II (Part One), pp. 282–285, document A/CN.4/311 and Add.1, paras. 117–126).

³ "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities" (*Yearbook* . . . 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1 and 2).

⁴ *Yearbook* . . . 1977, vol. II (Part One), p. 139, document A/CN.4/304.

⁵ *Yearbook* . . . 1978, vol. II (Part One), p. 263, document A/CN.4/311 and Add.1.

would be to start by spelling out the legal status of international organizations, namely by defining their legal capacity. In that context, the Commission would examine the powers and responsibilities of international organizations and their ability to conclude treaties and to enter into agreements.

19. The next point to consider would be immunities from legal jurisdiction. In that connection, it had to be noted that international organizations varied greatly in character and in functions. For example, the Constitution of ILO differed considerably from the constituent instruments of other international organizations. With the ILO tripartite system of representation, not only Government representatives but also employer and employee representatives enjoyed privileges and immunities,⁶ despite the fact that they were not accredited by a Government.

20. A comprehensive study of the United Nations, as the most universal organization currently in existence, would constitute a good starting-point for the Commission's work. In that connection, the important Articles 104 and 105 of the Charter of the United Nations tended to conform with the more traditional rule in the matter of privileges and immunities: they granted privileges in a more comprehensive fashion than was the case today, when such privileges were generally based on the concept of functional necessity.

21. The following Charter provisions were also relevant to the question of capacity: Articles 24 and 26 on the functions and powers of the Organization; Articles 42 and 43 on special agreements for the provision of armed forces and facilities necessary for the purpose of maintaining international peace and security; and Article 63 (1) on agreements with specialized agencies defining their relationship with the United Nations.

22. It was appropriate also to consider the position of agencies which had certain limited treaty-making powers. Thus the three European Communities possessed the right to enter into agreements with States not members of those communities. The European Economic Community, as a body, could become a party to a treaty. Thus the EEC as such had signed the recent United Nations Convention on the Law of the Sea,⁷ on some of whose articles it had in fact negotiated as a body on behalf of its members during the Conference.

23. Provision would also have to be made for operational organizations or "international corporations" such as IMF and IBRD. Although those organizations did not have full legal personality of their own under international law, they nevertheless played a considerable role in world financial affairs. Another category in need of study was that of regional organizations, which played such a dynamic role in United Nations affairs.

24. International organizations, and the officials and experts working for them, should be given sufficient privileges and immunities to ensure the independent discharge of their functions. At the same time, it was essential to avoid giving unduly extensive privileges which would be anathema to host States. In that connection, a guideline was provided by the Advisory Opinion of the ICJ of 11 April 1949 in the case concerning *Reparation for injuries suffered in the service of the United Nations*, in which the Court had ruled that the protection afforded to agents of the United Nations was intended to ensure the "efficient and independent performance" of their duties.⁸ On the basis of that ruling, it was clear that the privileges and immunities of international organizations and their officials and experts were based on the criterion of functional necessity.

25. Mr. CALERO RODRIGUES said that the question before the Commission was whether or not to confirm the guidelines it had given the previous Special Rapporteur in 1978, since which time the Commission's composition had changed. The debate so far had shown that those conclusions⁹ should be confirmed and he, for one, was in full agreement with them.

26. It would be recalled that the Commission had decided that the topic should be approached with caution, bearing in mind the very great diversity of international organizations involved. There was the problem of regional as opposed to universal organizations and also that of organizations dealing with political questions and those engaged in practical or operational activities. At some point, the Commission would have to decide the exact range of organizations to be covered by its draft, but for the moment it should proceed in the manner decided in 1978, when it had requested the then Special Rapporteur to envisage the possibility that the rules to be framed would apply to regional organizations as well as universal ones. An effort should also be made to define privileges and immunities on a broad basis, leaving it until a later stage to determine the exact scope of application of the rules.

27. With regard to the subject-matter of the draft, he was not at all certain that it was advisable to begin by examining the question of the status of international organizations. In his view, it might be preferable not to take a decision on that point until a much later stage in the Commission's work.

28. In his preliminary report (A/CN.4/370, para. 11), the Special Rapporteur analysed the conclusions adopted by the Commission in 1978 following its discussion of the topic. The first conclusion was that the second part of the topic of relations between States and international organizations should be codified. The second was that the Commission should proceed with great prudence in that work. The third was the adoption, for the purposes of the Commission's initial work, of a broad outlook, so as to cover regional organizations. The fourth was the adoption of the same broad outlook in connection with

⁶ Art. 40 of the Constitution of ILO (International Labour Office, *Constitution of the International Labour Organisation and Standing Orders of the International Labour Conference* (Geneva, December 1982), p. 22).

⁷ *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.

⁸ *I.C.J. Reports 1949*, p. 183

⁹ See footnote 2 above.

the subject-matter. For his part, he agreed entirely with those four conclusions. He also felt that it was not advisable to raise any further questions at the present stage.

29. He suggested that the Special Rapporteur should start work on the basis of the 1978 guidelines and should be left to determine priorities. For his part, he would accept the Special Rapporteur's decision as to whether the work should begin with the status of international organizations or with immunities.

30. Mr. MAHIOU said that, in view of the quantitative and qualitative importance of international organizations, and in order to follow up the codification work which had resulted in the various conventions relating to diplomatic law, the Commission should now codify the second part of the topic of relations between States and international organizations. On the quantitative side, there had been an increase in the number of international organizations and their permanent offices, as well as in the numbers of their staff, experts and other persons engaged in their activities. On the qualitative side, international organizations dealt with almost all areas of international relations: be it in economic, social, cultural, technical or political matters, there was always a universal, quasi-universal, continental or regional organization to deal with them.

31. That diversity of situations had repercussions on the status, privileges and immunities of international organizations and persons engaged in their activities. It could almost be said that there were as many kinds of status as there were international organizations, and as many systems of privileges and immunities as host countries. Would it then be best to envisage a convention covering all situations, or on the contrary refrain from setting out rules that were too rigid and likely to be hard to apply to all organizations? It was still too early to decide whether the distinction between universal organizations and regional organizations should be taken into account. It might be preferable to distinguish between organizations engaged in political activities and organizations of an operational nature. The question could also be raised of whether, in the case of a single international organization, the situation in fact varied according to the acts which it performed. In that connection, he drew a parallel with the considerations which prevailed in the study on the topic of the jurisdictional immunities of States and their property. He wondered whether some acts of international organizations, in the commercial field for example, should not fall within the domestic jurisdiction of the host State. The Commission should shed light on questions of that kind in order to obtain a better idea of the status, privileges and immunities which should be granted to international organizations and persons engaged in their activities. Furthermore, it must establish a sound balance between the security needs of the host State and the need to encourage the activities of international organizations, particularly those promoting international co-operation and the maintenance of world peace and security.

32. With regard to the subject-matter of the study, the Commission could either confine itself strictly to relations

between international organizations and host States, or else extend its work to relations between international organizations and non-member States or between international organizations themselves. In the case of privileges and immunities, it was necessary to begin at the beginning, in other words with those of international organizations themselves, before going on to those of their staff and deciding if a distinction should be drawn according to the status and functions of the persons working for such organizations. The privileges and immunities granted to international organizations were based on the criterion of function. That concept, implicitly contained in their statutes, had been made clearer by the jurisprudence of the ICJ. The Commission would doubtless encounter problems relating to the legal personality and capacity of international organizations, but it should avoid theoretical discussions and concentrate on the privileges and immunities which should be granted to such organizations. It would also have to specify the functional aspect of international organizations through the criterion of specialization: each organization was entrusted with a specific mandate, which was more or less precise depending on whether it was a general or a technical organization. The legal capacity of all organizations was probably not strictly the same, and it might be the case that a good part of the activities of operational organizations fell within the ordinary law of the host State.

33. With regard to form, the future codification instrument could take the form of a new convention, an additional protocol to the 1975 Vienna Convention or a set of standard rules. In his opinion, members of the Commission should keep those possibilities in mind, but it would be premature to take a final decision on the question. It should nevertheless be pointed out that the preparation of an additional protocol to the 1975 Vienna Convention would oblige the Commission to confine itself to universal international organizations, the only type covered by that Convention, to the exclusion of regional international organizations. He would therefore prefer the draft articles to lead to a convention.

34. Finally, it would be desirable for members of the Commission to be able to obtain the collection of texts which the Secretariat had prepared for the use of the Commission in 1960 and 1961, entitled *Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations*,¹⁰ which did not appear to be available at present. Furthermore, the Secretariat should update the study it had carried out in 1967.¹¹

35. Mr CASTAÑEDA endorsed the work carried out by the Commission on the topic, as well as the Special Rapporteur's analysis of it and his proposed method of work. The conclusions which the Commission had reached in 1978¹² should now be confirmed. Broadly

¹⁰ Published in the United Nations Legislative Series, in two volumes (Sales Nos. 60.V.2 and 61.V.3, respectively).

¹¹ See footnote 3 above.

¹² See footnote 2 above.

speaking, there seemed to be agreement on the need to codify and progressively develop the second part of the topic. The questions listed in the report under consideration (A/CN.4/370, para. 9) were indeed the matters with which the Commission should deal. As for the conclusions stated therein (*ibid.*, para. 11), they were perfectly correct.

36. However, the Commission should proceed not only with great prudence but also with great realism, in order to avoid falling into lengthy theoretical and sterile discussions, for example on the legal nature of international organizations. Above all, the Commission should adhere to the practice of international organizations in order to deduce useful rules from it, particularly with regard to privileges and immunities. Naturally it would have to tackle fundamental theoretical questions such as that of the legal status of international organizations, but it should refrain from analysing such questions too systematically. Only at the conclusion of its work should it perhaps put forward considerations on the status and legal capacity of international organizations or on the problems of the application of the rules it would draw up to regional organizations. The study prepared by the Secretariat in 1967¹³ should be updated, and the Special Rapporteur's mandate confirmed.

37. Mr. USHAKOV said that he had no doubts as to the need to continue the work and prepare draft articles, but in his opinion it was preferable that they should be confined to international organizations of a universal character. The rules to be drawn up would then apply to organizations of which all States were members or which were open to all States. The situation of all other organizations was in principle the same. By definition, every organization had a legal personality distinct from its individual member States, even though it could only act in conformity with their collective will. It was therefore important to envisage rules ensuring the independence of international organizations on the territory of the host State. The difficulty lay in the fact that international organizations were hard to define. It was not enough to describe them as intergovernmental organizations, as opposed to non-governmental organizations. There were borderline cases, such as that of subsidiary bodies of the United Nations, and that of a body which drafted an agreement which would be binding on an organization to be set up and its future member States. In the circumstances, it was hard to conceive of rules applicable to all international organizations. It was nevertheless the case that the situation of a particular international organization, once its existence had been recognized, was not very different from that of other such organizations, as their common feature was their independence with regard to their various members.

38. With regard to the staff of international organizations, it was undeniable that the proper fulfilment of their functions must be ensured, but that principle became more complicated at a more detailed level. The Commission should begin by studying the legal status of

organizations as such, and then the status of organizations on the territory of the host State—including the case of bodies convened elsewhere than at the headquarters of the organization—and should draft generally applicable rules. Only afterwards should it tackle questions concerning the staff and determine the privileges and immunities necessary for the proper fulfilment of their functions within a particular organization.

39. Mr. McCAFFREY, referring to the conclusions reached by the Commission in 1978, which were set out in paragraph 11 of the report under consideration (A/CN.4/370), said that he had no particular objection to the conclusion mentioned in subparagraph (a), namely that the Commission should take up the study of the second part of the topic, although he did wonder whether international organizations were in fact in need of such a study. In that connection, he fully endorsed the cautious note sounded in subparagraph (b), since international organizations were extremely diverse in both quantity and quality. He interpreted the conclusion set forth in subparagraph (c), advocating the adoption by the Commission of a broad outlook, to mean that more knowledge should be acquired about the needs of regional organizations and the extent to which the rules on privileges and immunities of international organizations could be adapted to fit the functional needs of regional organizations before any decision was taken as to whether to include the latter in the study; and, in that sense, he could agree with the conclusion.

40. The Special Rapporteur referred to a number of questions (*ibid.*, para. 9) considered by the Commission in 1978, the first of which related to the definition of the order of work on the topic. In that connection, it would be advisable to heed Mr Reuter's counsel¹⁴ and start with perhaps the most basic question, namely the status and capacity of international organizations, in which connection Sir Ian Sinclair had raised some fairly fundamental questions. A second point raised in paragraph 9 related to the critical question of the special position and regulatory functions of operational international organizations. In his view, it was highly questionable whether such organizations should have a place in the draft and, once again, he would urge the need for prudence and caution. A third point concerned the need to study the case-law of national courts in the sphere of international immunities, which would shed light on current practice. It was, of course, necessary to consider the relationship between the topic before the Commission and the jurisdictional immunities of States, since the terms of Article 105, paragraph 2, of the Charter of the United Nations made it clear that the criterion was that both organizations and the individuals concerned should have only those immunities that were necessary for the performance of their functions. Moreover, in codifying privileges and immunities, and in particular those of the staff of international organizations, it was important not to forget the impression made on the population of the host State.

41. Reference had been made to the need for a balance between the interests of the host State and the functional

¹³ See footnote 3 above.

¹⁴ *Yearbook* . . . 1977, vol. I, p. 210, 1453rd meeting, para. 13.

needs of the organization, and in that connection he endorsed the Special Rapporteur's suggestion (*ibid.*, para. 13) that the Secretariat should revise the 1967 study¹⁵ in the light of any new material. Such an updated version would be of great value to scholars and international organizations alike.

42. Finally, as to the form of the draft articles, he again considered that caution and prudence were required, since it was important to be constantly aware of the potential for conflict between such articles and existing rules and to bear in mind the risks inherent in fashioning rules that might not represent the codification of international law if they extended to regional organizations which it was not intended to cover. In his view, therefore, judgment on the question should be reserved.

43. Mr. ILLUECA said it was clear that the second part of the topic of "Relations between States and international organizations" was now ready for codification, and thus the Commission could complete the codification of diplomatic law. However, as Mr. Castañeda had said, the progressive development of law in that area should also be considered. In Latin America, major studies had been carried out on the question of the new law of international organizations, as the latter could not be governed by the traditional rules of the law of nations. The increasing number of international organizations and the variety of their activities and fields of competence called for specific rules which must be sought elsewhere than in the usual sources in order to solve the problems relating to the functioning of such organizations. The Special Rapporteur, as well as the Commission, should take account of the most recent work of Latin-American professors of international law such as Mr. César Sepúlveda. They began from the principle that the codification of diplomatic law was not enough because it was also necessary to establish new rules, specific rules which would contribute to the independence and efficiency of international organizations as well as to the harmony which should prevail in international life. It was therefore necessary to go beyond the confines of diplomatic law. Furthermore, a new independent branch of international law had grown up as a result of the dynamic change which had taken place in the traditional concepts of the law of nations.

44. Thus some authors referred to the law of international entities, which could not be governed solely either by public international law or by private international law. For the professors concerned, the concepts and rules established in systems of internal administrative law were likewise not applicable to the administrative problems of international organizations. The dealings and relations between international organizations themselves and between them and States were governed by public international law, but their relations with other entities or legal persons or with individuals should be governed by rules other than the usual and familiar ones. The law of international organizations could therefore not be viewed as a mere concretion grafted on to the traditional structure of the law of nations. That new legal system might be the means of bringing about major

structural changes in the law of nations. For the time being, however, that new branch of international law was in its infancy, and a great effort would have to be made to respond to the challenge of establishing a set of rules which would contribute to the independence and efficiency of international organizations.

45. Some authors considered that the law of international entities could be broken down into four parts: constitutional law, relating to the constituent acts of international organizations, parliamentary law, administrative law and the law of mutual relations with other entities or organizations. Those authors also considered that one of the essential chapters of the law of international entities concerned the legal personality of such entities. The question then arose however, of whether the resulting legal personality stemmed from the constituent act or from the national law of the State in which the organization had its headquarters. In that connection, he recalled the Advisory Opinion of the ICJ of 11 April 1949 in the case concerning *Reparation for injuries suffered in the service of the United Nations*, according to which the United Nations was a subject of international law capable of possessing international rights and duties, and had the capacity to maintain its rights by bringing international claims.¹⁶ No one questioned the fact that the granting of legal personality to international organizations endowed them with some powers, such as the power to conclude contracts with individuals, to engage in legal proceedings, to administer a territory or to maintain an international force. According to some authors, the capacity to conclude treaties did not depend strictly on the personality of the organization, because treaties concluded by international organizations had always been recognized without any need to introduce the concept of personality, and therefore fell within public international law. The question of personality could also be viewed from a functional standpoint, in other words in terms of the specific functions and capacities of the entity.

46. The problem also arose of determining the rule to be applied in the case of relations between international organizations and individuals or State bodies in purely administrative areas. Should concepts of public international law, or general legal principles, or the law stemming from the organization's constituent act, or the domestic law of the country concerned apply? Obviously there was no complete body of rules in that area. Consideration could also be given to the question of the relations of the United Nations, for example, with its employees. The existence of an administrative tribunal did not resolve all labour problems.

47. Finally, he wished to refer to the problem of the competent jurisdiction for settling disputes which could arise between international organizations and individuals or State bodies in connection with a particular transaction. Were such disputes public or private? The immunities granted to inter-State institutions meant that local courts could not hear such disputes. Who, then, could resolve them? While there were some principles on which practice could be based, it was nevertheless the case that

¹⁵ See footnote 3 above.

¹⁶ *I.C.J. Reports 1949*, p. 179.

genuine jurisprudence remained a long way off and that much remained to be done on that score. Finally, he suggested that the Secretariat should update the study carried out in 1967.¹⁷

The meeting rose at noon.

¹⁷ See footnote 3 above.

1798th MEETING

Wednesday, 6 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (continued) (A/CN.4/370¹)

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. BALANDA thanked the Special Rapporteur for inviting the new members of the Commission to state their views. The increase in the number of international organizations was no surprise to observers of the international political scene, for it reflected the intensification of inter-State co-operation and the increasing interdependence of States. The need to co-operate led States to seek a variety of arrangements to enable the international organizations they established to meet their diverse obligations. That was especially true of new States, which mistrusted bilateral international co-operation because it was not always free from political influence.

2. The question arose as to what an international organization was. From all the definitions suggested, including those of Mrs. Bastid and Mr. Laurent, it could be concluded that an international organization was a legal entity having a personality independent of that of the States which had established it by intergovernmental agreement. But if two international entities created a third, was that also an international organization? The question might be theoretical, but it was worth asking.

The Commission should not dwell on theoretical definitions, however, but should try to grasp the subject and study it as exhaustively as possible.

3. A whole series of questions came to mind. Was the independence of international organizations absolute or relative? Did the existence of international organizations compel recognition by the international community as a whole or did they have to be recognized as such? A wide variety of denominations was used. There were "organizations" proper, such as the United Nations, WHO and WMO; "unions", such as the Customs and Economic Union of Central Africa (UDEAC) and the African and Malagasy Postal and Telecommunications Union (AMPTU); "committees", such as ICRC; "councils", such as the Council of Europe and the International Tin Council; and "communities", such as the European Communities and the Economic Community of the Great Lakes Countries (CEPGL) which comprised Burundi, Rwanda and Zaire.

4. In establishing an international organization, States tried to represent a specific reality which differed according to the nature of the organization: it might be a mere association for co-operation in a particular field, or a more ambitious organization, such as the European Communities or CEPGL, in which case the States concerned surrendered some attributes of their sovereignty. The diversity of legal instruments used should also be noted. They ranged from charters (United Nations, OAU) and statutes (Council of Europe) to treaties (NATO) and constitutions (ILO); that diversity was due to the characteristics of each organization. Furthermore, such international entities could be universal, regional or subregional, and technical or of any other kind.

5. It was also necessary to consider the extent of the legal capacity of organizations in the performance of their functions. Some confined themselves to the activities specified in their constituent instrument; others, being more dynamic, went further. The Special Rapporteur should take account of that dynamism, which had increased in practice. Could an international organization act only in the territory of its member States or could it intervene in the territory of a third State? To what legal régime were its activities subject: to general international law, to the international law specific to the organization, or to the internal law of the host State—or to those three different régimes simultaneously?

6. The Special Rapporteur would have to devote special attention to the powers of the organs of international organizations. The question arose as to whether they had political or administrative powers. In an organization of an essentially political character such as the United Nations, did its organs exercise political powers only, or also administrative powers? Were those powers established in a legal instrument or were they implicit? At the time of Zaire's accession to independence, the question of the precise nature of the powers of the United Nations Secretary-General had arisen, and it had been asked whether he was merely the executive agent of the Security Council or whether he had administrative or political

¹ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

powers. Should the Secretary-General be restricted to his administrative prerogatives or should he enjoy some freedom of action? There again, the question of the dynamism of international organizations arose.

7. Another point to consider was the nature of the decisions, resolutions, recommendations, directives and regulations adopted by international organizations. Were those texts automatically applicable in the territories of all member States or must they be converted into internal law in the usual way? Was a resolution adopted by a small majority as binding on States as a resolution adopted by an overwhelming majority?

8. With regard to the position of international officials, it might be asked whether they were governed by a statute or were under contract, and whether the internal law of the host State was ever applicable to them. Could they acquire the nationality of the host State? What was the status of experts and consultants? Did States never intervene in the activities of international officials? All those questions must be elucidated in order to guarantee international officials the independence they needed. In that connection, it might be asked whether experts and consultants should enjoy the same privileges and immunities as international officials. Should the privileges and immunities of international officials vary according to the nature of the functions they performed? If an international organization engaged mainly in commercial activities, should all those activities enjoy immunity?

9. The Special Rapporteur would have to base his study on an examination of constituent instruments, host agreements, national legislation, the judicial decisions of host States and State practice, especially that of Ministries of Foreign Affairs. The scope of the draft articles could only be determined after completion of the study, which should therefore cover all international organizations, including those of a regional character. As to the form the draft would take, at present he favoured that of a convention.

10. Mr. BARBOZA said that the report under consideration (A/CN.4/370) was brief but satisfactory, and set out the issues clearly. After the election of the previous Special Rapporteur, Mr. El-Erian, as a Judge of the ICJ, some years had elapsed before Mr. Díaz González had been appointed to replace him, and the membership of the Commission had changed. The new Special Rapporteur had therefore been right to invite the new members to state their views, which would add to his information on the topic.

11. The Special Rapporteur appeared tacitly to endorse the conclusions formulated by his predecessor and by the members of the Commission during the discussions in 1977 and 1978. From what had been said so far, it appeared that the present members of the Commission shared the views expressed previously, as the situation had not changed much in the last few years. The new Special Rapporteur was thus about as well equipped as his predecessor had been.

12. He endorsed the conclusions of the previous Special Rapporteur as set out in the report under consideration

(*ibid.*, para. 11) and stressed the abundance of documentation on the question, the multitude of international organizations, the great number of relevant laws of host States and the wealth of judicial precedents and practice. Regional international organizations also provided a source of useful information. The Special Rapporteur should pay particular attention to the documentation of OAS, an organization he knew well. He should also study the replies to the questionnaires and be provided, as he had requested (*ibid.*, para. 13), with an updated version of the Secretariat's study.²

13. So far, the Special Rapporteur had shown the desired caution, in particular by inviting the members of the Commission to answer the various questions raised by the topic. Like other speakers, he believed that the study should include regional international organizations but that the Commission could not take a final decision on the scope of the draft articles until it had examined the whole study. Hence regional organizations should not yet be excluded. At the same time, it should not be forgotten that the first part of the topic did not relate to regional international organizations and that it might be necessary to yield to the requirements of symmetry.

14. The Special Rapporteur should first tackle the simplest questions, such as the status, privileges and immunities of international organizations, before going on to examine the status, privileges and immunities of their officials and experts and other persons participating in their activities who were not representatives of States. He would have to adopt a pragmatic approach and deal mainly with the practical aspects of the life of international organizations, so that the Commission need not engage in theoretical discussion.

15. Mr. RAZAFINDRALAMBO, thanking the Special Rapporteur for his interest in the views of new members, said he was grateful to him for not adding to the conclusions of the previous Special Rapporteur any further considerations, which might have been superfluous. The complementarity of the two parts of the topic was shown by the wording of the item under consideration. If it had been possible to draft the 1975 Vienna Convention on the Representation of States, there was no reason why the same should not be possible for the second part of the topic, which was its logical sequel.

16. There was no need to emphasize how useful it would be for the countries of the third world to harmonize the rules on the status, privileges and immunities of international organizations; for those countries had joined the community of nations fairly recently and were daily confronted with the need to conduct relations with international organizations. The rules which the Commission might adopt could provide a useful complement to the existing conventions on diplomatic law and provide States with a body of residual rules for the conclusion of their agreements with international organizations.

17. If only in order to achieve greater uniformity in the field of application of the two parts of the topic and for

² See 1797th meeting, footnote 3.

reasons of method, it might have been more expedient and simpler, at least at the initial stage, to confine the study to international organizations of a universal character; for the specific problems of regional international organizations called for the elaboration of special rules peculiar to those organizations. But the previous Special Rapporteur, who had taken that view at the start, had changed his mind in the light of certain recent facts, particularly the growth of the network of regional organizations: he had come to the conclusion that the questions which could be codified were, generally speaking, much the same for universal international organizations as for regional international organizations.³ In view of those considerations, he (Mr. Razafindralambo) endorsed the conclusion in paragraph 11 (c) of the preliminary report (A/CN.4/370).

18. As to the subject-matter of the proposed study, he reminded the Commission of the three categories of privileges and immunities suggested by the previous Special Rapporteur: those of the organization, those of its officials and those of experts on mission for the organization and persons having official business with it. He was inclined to share Sir Francis Vallat's view⁴ that the Commission should approach the subject from the standpoint of relations between States and international organizations or relations between international organizations, and not on the basis of the effect or absence of effect of the existence of international organizations in the territory of States. The latter approach might unduly restrict the subject-matter of the study. The general feeling was, however, that the study should cover both the status or legal capacity of organizations under internal law and their privileges and immunities, so as to comply with the terms of Articles 104 and 105 of the Charter.

19. The question of the privileges and immunities of officials of organizations could not be dissociated from that of the privileges and immunities of the organizations by which they were employed, since, as the ICJ had indicated in its Advisory Opinion of 11 April 1949, they were executive agents of those organizations, having been "charged by an organ of the organization with carrying out, or helping to carry out, one of its functions".⁵ Many speakers, however, had underlined the great diversity in the status of international officials, despite the existence of more or less similar rules deriving from the 1946 Convention on the Privileges and Immunities of the United Nations⁶ and the 1947 Convention on the Privileges and Immunities of the Specialized Agencies,⁷ from the protocols annexed to the treaties setting up the

European Communities, and from headquarters agreements.

20. Relations between organizations and their staff were a matter for their internal tribunals and did not come within the scope of the study. Nevertheless, the question of the privileges and immunities of international officials and other agents of international organizations was a particularly delicate one and it seemed quite natural that successive Special Rapporteurs had decided to propose that the priority to be given to any particular aspect of the study should be settled when it had been concluded.

21. It was precisely that attitude of caution that should prevail in the consideration of the whole topic, since various data and elements were still lacking. Like the Special Rapporteur, therefore, he hoped that the Secretariat would revise the 1967 study.⁸

22. Mr. NJENGA, after congratulating the Special Rapporteur on his report (A/CN.4/370), said that reference had been made to the number and diversity of international organizations, which differed not only in their objectives and membership, but also in the scope of their operations. That diversity would complicate the Special Rapporteur's task, but there was one thing which all international organizations had in common: they enjoyed privileges and immunities in the host State. Consequently, a wealth of material was available and practice was so abundant that the topic was ripe for codification. Moreover, as rightly stated in the report (*ibid.*, para. 11 (a)), there was general agreement both in the Commission and in the Sixth Committee of the General Assembly on the desirability of taking up the study of the second part of the topic.

23. He agreed on the need for the utmost caution and considered that great care should be taken to ensure a proper balance between the interests of the international organization and those of the host State. While certain basic privileges and immunities were vital for the proper functioning of international organizations, it was important not to lose sight of the fact that privileges and immunities amounted to a detraction from the sovereignty of the host State and, furthermore, were a cause of resentment among the local population. Privileges and immunities should therefore be restricted to the basic minimum to which an international organization was entitled by reason of functional necessity. In that connection, Mr. Koroma (1797th meeting) had rightly drawn attention to Article 105 of the Charter and to the Advisory Opinion of the ICJ concerning *Reparation for injuries suffered in the service of the United Nations*,⁹ which dealt with the meaning of functional necessity.

24. On closer examination, it appeared that the concept of "functional necessity" had very similar consequences whatever the nature and size of the international organization concerned. For instance, the basic immunities claimed by every intergovernmental organization included exemption from local taxation,

³ *Yearbook* . . . 1978, vol. II (Part One), pp. 283-284, document A/CN.4/311 and Add.1, paras. 120-122.

⁴ *Ibid.*, p. 269, para. 44.

⁵ *Reparation for injuries suffered in the service of the United Nations*, I.C.J. Reports 1949, p. 177.

⁶ United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

⁷ *Ibid.*, vol. 33, p. 261.

⁸ See 1797th meeting, footnote 3.

⁹ I.C.J. Reports 1949, p. 174.

inviolability of its premises and exemption from measures of attachment or execution relating to its property. Officials of intergovernmental organizations were entitled to immunity from civil and criminal jurisdiction in respect of acts carried out in the performance of their functions, and were generally recognized to be exempt from immigration and emigration restrictions.

25. With regard to the conclusions of the previous Special Rapporteur reiterated in the report, he would like to know what was meant by the statement that “the Commission adopted a broad outlook, inasmuch as the study should include regional organizations” (A/CN.4/370, para. 11 (c)). Did that mean that the Special Rapporteur would restrict his inquiries to the practice of international organizations of a universal character and then determine whether the results arrived at were equally applicable to regional organizations? If so, he (Mr. Njenga) could not endorse that procedure. As had already been pointed out, certain regional organizations, such as OAU and OAS, were of such major significance that they could not be disregarded. For instance, there was very close interaction between OAU and the United Nations, each of which was entitled to participate in the meetings of the other, and it would be anomalous if the draft articles did not cover OAU representatives. Moreover, agreements between host countries and regional organizations were modelled on the relevant United Nations conventions, and to ignore their practice would be counter-productive.

26. He therefore fully endorsed the Special Rapporteur’s recommendation (*ibid.*, para. 13) that the Secretariat revise the 1967 study,¹⁰ but would propose that the Secretariat be invited to send similar letters to the various regional organizations, requesting them to furnish information on their practice in the matters under consideration. It should be made clear at the same time that no decision had yet been reached on whether a draft convention or any other instrument would be extended to those organizations.

27. He agreed on the need for a pragmatic and step-by-step approach. It would be logical to deal first with the legal status of international organizations, in particular their capacity to conclude treaties and contracts and to acquire movable and immovable property, and then to move on to their privileges and immunities. Then it would be necessary to examine the questions mentioned by the Special Rapporteur (*ibid.*, para. 9) and to decide which of them should be given priority. While nearly all those questions were relevant, he had serious doubts about the wisdom of including the “responsibility of States to ensure respect by their nationals of their obligations as international officials”. That would amount to a negation of the terms of Article 100, paragraph 1, of the Charter of the United Nations, and of similar provisions in the constituent instruments of regional organizations and of many other organizations not of a universal character. It was essential to the very nature of an international organization for it to be independent of

the will of any State, whether it was the host State or the State from which an official of the organization came.

28. He also agreed that it would be premature to decide at the present stage on the form of the eventual product of the Commission’s work, though a decision would have to be taken soon, since it would of necessity dictate the future course of action. In view of the wide-ranging and complex nature of the issues involved, he did not think a draft protocol would be acceptable. Moreover, because of the limited scope of the 1975 Vienna Convention, a protocol thereto would be automatically restricted to international organizations of a universal character, so that regional organizations would be excluded. Model rules, or a study to be recommended to States, which had also been suggested, would tend to reduce the work done to something of minor significance, which he did not think was justifiable. He therefore favoured an integral and comprehensive draft convention.

29. The topic had been before the Commission since 1976, and he believed that it was time to come to grips with the subject-matter. He therefore welcomed the Special Rapporteur’s declared intention of including a first set of draft articles in his second report.

30. Mr. NI said that, with the increasing activities of the United Nations and its related agencies and subsidiary organs, as well as the proliferation of new international organizations, the study of the topic before the Commission had become both useful and necessary. He thanked the Special Rapporteur for his report (A/CN.4/370), for his concise and orderly introductory statement (1796th meeting) and for inviting new members of the Commission to express their views.

31. He fully agreed, first, on the need to seek additional information and to examine the agreements and practice of international organizations, both within and outside the United Nations family, as well as the legislation and practice of States, since only on that basis could a valid decision be reached. The possibility of formulating another diplomatic code could be considered, but only after the materials had been thoroughly examined. The possibility of preparing a set of model rules could likewise be considered if, after that examination, it was deemed appropriate.

32. Secondly, given the growing number of regional organizations and their expanding roles, he believed that their inclusion in the study was virtually inevitable. The previous Special Rapporteur had explained in convincing terms why he had changed his mind in favour of including regional organizations in the study;¹¹ but a final decision on the matter should be taken in the light of the examination of State and international practice. He noted that the Special Rapporteur had wisely followed the approach of his predecessor and of the Commission in advocating the need for caution in dealing with the topic.

33. Lastly, the guiding principle in the work on the topic should be the need to secure the right balance between

¹⁰ See 1797th meeting, footnote 3.

¹¹ See footnote 3 above.

the interests of host States and the functional needs of international organizations.

34. Mr. MALEK said he wished to endorse the statement made at the previous meeting by Mr. Calero Rodrigues. He fully agreed with the conclusions reached by the Commission in 1978, as set out by the Special Rapporteur in his preliminary report (A/CN.4/370, para. 11).

35. The Special Rapporteur was undoubtedly in the best position to deal with all the questions that might arise within the context of his study and he should therefore be given a free hand in the choice of solutions to be proposed. He would perform his task with the caution required in dealing with every item on the Commission's agenda.

36. The extent of the privileges and immunities of international organizations should be studied with particular care. Immunities were no longer privileges, as in the past, or granted as a courtesy, but were rights of the entities that performed public functions in the territory of a State. Of course, the presence of diplomatic missions was felt less than that of international organizations, which attained considerable size in some cases, owing to the diversity of their functions. It was doubtful whether international organizations and the officials employed by them could perform their tasks if they enjoyed only limited immunity. Nevertheless, it might perhaps be advisable to provide against the risk of abuses, since man was still an irrational being.

37. When drafting headquarters agreements, the parties should be guided by model rules which took account of all the interests at stake, not only those of the host State.

38. Mr. THIAM said he believed that the Commission should concern itself primarily with international organizations of a universal character, but should none the less take regional international organizations into account. The importance of regional organizations had already been underlined by the previous Special Rapporteur and there was no doubt that they now constituted, all over the world, a privileged means of co-operation at the regional level.

39. Several members had already stressed the difficulties of the topic, which stemmed mainly from relations between international organizations and host States or between an international organization and one of its member States. In the first case, they were generally practical difficulties relating to taxation or security, or to the privileges and immunities to be granted. It should be noted that, when several States offered to receive an international organization in their territory, they were inclined to outbid each other and declare their willingness to grant greater advantages than were normally accorded. Care should therefore be taken not to confine States within unduly strict regulations.

40. In the second case, when the relations between an international organization and one of its member States were at issue, the difficulties generally related to sovereignty. For in relations with an organization of which it was a member, a State was always at pains to protect its

sovereignty, and that attitude was all the more marked when the organization had a political purpose. When an organization was a technical one, its member States were much more inclined to facilitate its operation and even to grant it legal capacity in certain cases.

41. The considerations he had put forward were dictated by the multiplicity and diversity of international organizations, which should induce the Commission to proceed with great caution. But caution should be blended with generosity; for given the role which international organizations played in co-operation between States, they met a genuine need and could only grow more important in the future.

42. Mr. SUCHARITKUL said he wished to make three points which arose from statements by other members. The first related to the definition of an international organization as an intergovernmental organization. For the purposes of that definition, the actual number of members in the organization was immaterial; there could well be an international organization with only two or three members. It was only the international organization of a universal character which had a special status; other organizations all had the same status, regardless of whether they were regional, subregional, interregional, intraregional or even extraregional. That led to the fundamental problem of identifying those elements which helped to constitute an international organization. For example, was it necessary for the organization to have a secretariat? Did it have to possess a permanent headquarters? Clearly, there should be some element of permanence in the functioning of its mechanisms and a staff working for it. But all those elements need not necessarily be present at the same time and the absence of one or more of them did not alter the fact that the body concerned was an international organization.

43. The essential factor was the political will of States, which was expressed in the constituent instrument of the organization. It was the States parties to that instrument which decided to establish an international organization. They could just as well set up, by agreement, a mere committee, without expressing the intention to establish an international organization.

44. His second point related to the issue of recognition. The existence of an international organization was undoubtedly an objective phenomenon, but recognition was nevertheless useful. The question then arose by whom the organization must be recognized. An international organization could be recognized by another international organization or by one of its member States or by a non-member State. Three separate series of questions thus arose, and each of those questions might require a separate or different answer. Those answers would be useful in examining the relationships involved.

45. Consideration should also be given to the content of recognition. First, there was recognition of the international organization as having international personality; secondly, there was recognition of its capacity to conclude treaties; and lastly, there was recognition of its legal personality under private law, whether by way of national legislation or by declaration of the State concerned. The

State concerned could be the host State, a member State or even a non-member State wishing to enter into relations with the international organization—not necessarily diplomatic relations, but possibly co-operative, economic, social or other relations.

46. His third point concerned the legal basis for the jurisdictional immunity to be accorded to the international organization. Clearly, that legal basis rested on the consent of States. There the host State played a pre-eminent role, usually through the headquarters agreement or host agreement, but occasionally also through the constituent instrument itself. Jurisdictional immunity was significant mainly in the country where the international organization had its headquarters; hence the importance of the host State in that regard.

47. By way of example, he referred to the international organization set up by Thailand and Malaysia, called the Joint Authority for the Exploration and Exploitation of the Joint Development Areas of the Sea-Bed in the Gulf of Thailand. The intention of the parties had been to establish an international organization having two member States. The organization was independent and a certain degree of immunity had been conferred upon it. Reciprocity was not entirely irrelevant, since the organization consisted mainly of civil servants of the two countries, who had to be immune from the jurisdiction of each other's courts. The organization itself was not subject to the authority of either party and was exempt from the jurisdiction of both. It had an almost sovereign authority vested in it by both Governments in respect of certain specific matters.

48. The justification for jurisdictional immunity was functional necessity, but the true legal basis of that immunity was the consent of States and, more specifically, the sovereign will of the host Government. For an international organization, immunity from jurisdiction was not based on the concept of independence or sovereignty, because an organization, unlike a State, did not possess sovereignty. In a way, however, it could be said that certain small "pieces" of sovereignty were entrusted to the international organization by the States which established it. But the extent of the attributes thus conferred upon the organization would always depend on the political will of the States concerned.

49. Mr. LACLETA MUÑOZ said that he fully agreed with the conclusions in the preliminary report under consideration (A/CN.4/370, para. 11). The Commission should take up the study of the second part of the topic, proceeding with great caution in view of the difficulties involved. One of those difficulties lay in the fact that the Commission had agreed that the study should include regional organizations. On that point, he endorsed the reasons given by the previous Special Rapporteur in his second report.¹²

50. The topic under study constituted the third component of a trilogy, the other two being the 1975 Vienna Convention on the Representation of States and

the draft articles on the law of treaties between States and international organizations or between international organizations.¹³ The order in which those components had been taken up was based on practical considerations, but the third component was undoubtedly the most important in conceptual terms. As to the fate of the future draft articles, he would prefer them to become a separate convention, rather than an additional protocol to the 1975 Vienna Convention. The draft should be independent of that Convention, since when international organizations had first come into existence there had been no permanent missions to facilitate relations between States and international organizations, as the previous Special Rapporteur had pointed out.¹⁴

51. In view of the difficulties caused by the ever-increasing variety of international organizations, the second part of the topic should be approached very cautiously. A common denominator should first be sought for the existing instruments, whether constituent instruments of international organizations, headquarters agreements or treaties relating to privileges and immunities. The legal status and the privileges and immunities of international organizations and their officials should be examined, as well as the special position of operational organizations. In general, he approved of the list of questions presented by the Special Rapporteur (*ibid.*, para. 9), but he had some doubts about the "responsibility of States to ensure respect by their nationals of their obligations as international officials", since States claimed not to influence the conduct of their nationals as international officials.

52. A very delicate question, which should not be settled until later, was how the draft articles could be extended to organizations that were not of a universal character. Criteria had been suggested for defining international organizations and distinguishing them from other entities. In his view, the main criterion was the fact that an international organization was a grouping resulting from the agreement of a number of States, which vested it with a will separate from that of its member States.

53. Mr. QUENTIN-BAXTER said that the Special Rapporteur had acted wisely in drawing attention to the last report submitted by his predecessor, the late Judge El-Erian; that report had permanent value.¹⁵ Similarly, the directives laid down by the Commission in its 1978 discussion¹⁶ had not been made out of date by anything that had happened since.

54. The Commission had already dealt with two other items concerning international organizations. The first had been the first part of the topic of relations between

¹² See footnote 3 above.

¹³ *Yearbook* . . . 1982, vol. II (Part Two), pp. 17 *et seq.*, para. 63.

¹⁴ *Yearbook* . . . 1978, vol. II (Part One), p. 278, document A/CN.4/311 and Add.1, para. 102.

¹⁵ *Ibid.*, p. 263, document A/CN.4/311 and Add.1.

¹⁶ *Yearbook* . . . 1978, vol. II (Part Two), pp. 146–147, paras. 155–156.

States and international organizations, which had led to the adoption of the 1975 Vienna Convention on the Representation of States. There, attention had been confined to the United Nations and its specialized agencies—a very finite and special group of organizations.

55. The other topic had been the law of treaties between States and international organizations or between international organizations, concerning which the Commission had adopted a set of draft articles at its previous session.¹⁷ One of the most fascinating aspects of the Commission's work on that topic had been the careful consideration given to the introduction of very small changes to the text of the 1969 Vienna Convention on the Law of Treaties, which contained the basic law on the subject.

56. There had been certain limiting factors in that topic as well. The first was that not all international organizations had treaty-making capacity, and those which did not possess that capacity were clearly not included in the topic. But even when an international organization did have treaty-making capacity, States would deal with it according to their own will. It was the will of the member States which conferred treaty-making capacity upon the organization, and the question of whether a State chose to deal with an international organization depended on the will of that State. Those considerations showed that there was a strong process of selection associated with the topic.

57. With regard to the present topic, the question arose as to how widely the Commission should consider the unlimited problems of international organizations, which were so diverse in nature and objectives that no common definitions could be framed for them. In fact, the only thing which all such organizations had in common was that they were the product of the combined will of their member States. That being so, it would be for the Special Rapporteur to set his own limits for the topic. One way of doing so would be to concentrate on "relations" between States and international organizations, taking the key word from the general title of the topic. That would show that the Commission was not attempting to define international organizations and that its attention was focused on the problem of relations between States and those organizations, although in order to study those relations it was, of course, necessary to know something about the international organizations themselves.

58. The issue of recognition was, he agreed, relevant to the topic. With respect to relations between States, that issue governed everything the Commission did. It was a delicate matter with both legal and political aspects. States reserved their sovereign right to decide whom they would recognize. In the case of other States, there was the strongest possible reason for recognition: it was clearly embarrassing not to have relations with a State which controlled a portion of the earth's surface. In the case of international organizations, however, the position was completely different. An international organization did

not normally impinge on the affairs of a particular country, and it was hardly possible for the Commission to suggest that every State was committed to recognizing all international organizations.

59. States must be allowed freedom of choice to deal or not to deal with an international organization. They could decide to do so either as members of the organization or because they believed it to be in the interests of the international community. That particular problem had not arisen in connection with the first part of the topic, because that part had been confined to the United Nations and its specialized agencies and it had rightly been considered that a non-member State would have no objection to recognizing the United Nations and its specialized agencies.

60. He agreed that there was no basis for drawing any distinction between organizations which were not of a universal character; those organizations—regional, sub-regional or other—all fell into the same category. Organizations of a universal character were those in which there was an unlimited right of membership; all States could join them, provided they were in a position to discharge the corresponding duties. Other organizations had only a limited membership, even if they were not regional. In fact, there was an infinite variety of international organizations and it would be necessary to extract from the text of the 1975 Vienna Convention, from the draft articles on the law of treaties between States and international organizations or between international organizations, and from the various headquarters and host agreements what was common to all organizations. The rules which emerged would constitute the very essence of the relevant law and would prove to be of great value not only to international organizations, but also to States, by providing them with guidance on how to conduct their affairs.

61. Although the present work would relate only to intergovernmental organizations, it was likely to have positive results for certain other organizations as well. It would, for example, be of great advantage to ICRC. That unique body was not, of course, an intergovernmental organization; nevertheless, it had relations with all Governments, based to some extent on the 1949 Geneva Conventions.¹⁸ He had no wish to commit the Special Rapporteur to the consideration of such other organizations working at the international level, but it should be borne in mind that the world of international organizations was not always confined to intergovernmental bodies. Reference should be made to the list of non-governmental organizations in consultative status with the Economic and Social Council; those organizations played a significant part in the attempt to make international relations work.

62. Mr. EL RASHEED MOHAMED AHMED said he shared the feeling expressed by other members that the Special Rapporteur was fully aware of all the difficulties of the topic and was well prepared to meet them. He drew

¹⁷ See footnote 13 above.

¹⁸ United Nations, *Treaty Series*, vol. 75.

attention to the intention expressed by the Special Rapporteur in his preliminary report (A/CN.4/370, para. 19) to present a second report which would follow the guidelines established by the Commission. Like Mr. Calero Rodrigues (1797th meeting) and Mr. Malek, he fully endorsed those guidelines. He also agreed that the 1967 Secretariat study¹⁹ should be brought up to date, to take into account the considerable developments and changes that had taken place in international affairs during the past 16 years.

63. Regional organizations should be included in the study, but he supported the Special Rapporteur's suggestion that the question of whether to include them in the ultimate codification should be decided only after the study had been completed. It was true that caution was called for, because regional organizations would raise a host of difficulties and specific problems which could delay the Commission's work. Those problems might not prove to be permanent, however, and it should be remembered that the inclusion of regional organizations in the study would make it possible to draw an overall picture, which would be an aid to future codification.

64. It was pertinent to inquire to what extent the ultimate convention or set of rules would concern all States. A regional organization, for example, might not have any activities in the majority of States. He shared the doubts expressed by Mr. Quentin-Baxter as to whether States should be called upon to recognize all international organizations. Nevertheless, he believed that the study would prove valuable, since the ultimate convention or set of rules could constitute a framework treaty and serve as a model for host agreements, or for rules to be adopted by regional organizations or their member States.

65. Lastly, he agreed that the privileges and immunities granted to international organizations and their officials should not exceed what was stipulated in Article 105, paragraph 1, of the Charter; he favoured the functional approach of that Article.

66. Mr. USHAKOV said that the term "regional organizations" was very ambiguous. Apart from the specific meaning which the Articles of Chapter VIII of the Charter gave to the term "regional agencies", the expression "regional organizations" lent itself to many interpretations. It seemed that it should include all international organizations other than those of a universal character.

The meeting rose at 1.05 p.m.

¹⁹ See 1797th meeting, footnote 3.

1799th MEETING

Thursday, 7 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (concluded) (A/CN.4/370¹)

[Agenda item 7]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), summing up the discussion on his preliminary report (A/CN.4/370), said he was glad to note that all members who had spoken had approved the guidelines fixed by the Commission at its thirtieth session in 1978² after examining the second report of the previous Special Rapporteur.³ All were agreed that the study of the second part of the topic of relations between States and international organizations should be continued and that it was necessary to proceed very cautiously. It was only on minor points that some slight differences of opinion had come to light.

2. It did not seem possible to affirm, as Mr. McCaffrey had done (1797th meeting), that no international organization had requested the Commission to carry out the study. Indeed, it was the General Assembly of the United Nations, an international organization if ever there was one, which had entrusted that study to the Commission. Under the terms of Article 13, paragraph 1 (a), of the United Nations Charter, the General Assembly could initiate studies for the purpose of encouraging the progressive development of international law and its codification. Moreover, the specialized agencies and IAEA, to which the Secretariat had sent a questionnaire at the Commission's request, had tacitly endorsed the study by replying to that questionnaire.

3. As to the words "a broad outlook" in his report (A/CN.4/370, para. 11 (c)), on which Mr. Njenga had asked (1798th meeting) for some clarification, those were the words which the previous Special Rapporteur had used in his second report and which had been approved in 1978 by the members of the Commission, including Mr. Njenga. They should probably be interpreted as meaning

¹ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

² See 1798th meeting, footnote 16.

³ *Ibid.*, footnote 15.

that the Commission gave the topic a sufficiently wide scope to include regional organizations.

4. It was when the previous Special Rapporteur had left the Commission, following his election as a Judge of the ICJ, that he (Mr. Díaz González) had been designated as his successor. The Commission had then decided not to resume the study of the topic until its change of membership had taken place. In drafting his preliminary report, he had therefore considered it advisable to give the new members of the Commission an opportunity to express their views on how he should proceed in carrying out the study entrusted to him. Although all those who had spoken had approved of the Commission's conclusions, some of the positions taken were very far from one another. For instance, Sir Ian Sinclair (1797th meeting) and Mr. McCaffrey were for granting the minimum of privileges and immunities to international organizations and persons taking part in their work, whereas Mr. Thiam and Mr. Malek (1798th meeting) favoured greater generosity. In view of Article 105 of the United Nations Charter, a middle course could probably be found. It might perhaps be sufficient to adhere to the provisions of that Article and to well-established practice.

5. Generally speaking, all the members of the Commission who had spoken were agreed that the Special Rapporteur should be left wide freedom of action, that caution was needed and that any decisions concerning regional international organizations and the ultimate fate of the draft articles should be left until later. On the last point, however, it was understood that the Commission's object was to prepare a set of draft articles, but that only when it submitted them to the General Assembly in final form would it make any express recommendation on the subject.

6. Mr. Njenga (*ibid.*, para. 26) had proposed that regional international organizations should be sent a questionnaire similar to that sent to universal international organizations. It was for the Commission to decide on that step, which would undoubtedly be useful for the accomplishment of its work. Nevertheless, consideration should be given to the difficulties pointed out by Mr. Ushakov at the previous meeting, concerning the exact meaning of the term "regional organization". It seemed to be agreed that the study prepared by the Secretariat in 1967⁴ should be brought up to date in the light of the replies to the 1978 questionnaire.

7. All questions of substance, including the problem of the legal capacity of organizations and that of the justification for granting privileges and immunities to international organizations and their officials and experts, should be left aside until the following session. It would then be important to take account of the practice of international organizations and of States, as it appeared in multilateral and bilateral functions, and of national jurisprudence, including that of new States. It would also be important to avoid theoretical discussions.

8. The CHAIRMAN thanked the Special Rapporteur

for his excellent summing-up of the discussion. He reminded the Commission of Mr. Njenga's suggestion that a questionnaire should be sent to regional organizations to ascertain how they conducted their relations with States. Mr. Ushakov had suggested that the term "regional organization" should be construed within the meaning of Chapter VIII of the Charter. That question of interpretation could be taken up when the Commission decided whether to include regional organizations within the scope of the draft articles.

9. If there were no objections, he would take it that the Commission agreed to adopt the suggestion made by Mr. Njenga.

It was so agreed.

10. Mr. CALERO RODRIGUES drew attention to the Special Rapporteur's suggestion (A/CN.4/370, para. 13) that the 1967 Secretariat study should be revised in the light of the replies to the 1978 questionnaire, to produce an updated version.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt that suggestion.

It was so agreed.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)* (A/CN.4/359 and Add.1,⁵ A/CN.4/372 and Add.1 and 2,⁶ A/CN.4/374 and Add.1-4,⁷ A/CN.4/L.352, sect. E, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁸ (*concluded*)

ARTICLE 20 (Personal inviolability)

ARTICLE 21 (Inviolability of temporary accommodation)

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

ARTICLE 23 (Immunity from jurisdiction)⁹ (*concluded*)

12. Mr. NI said that, according to the Special Rapporteur, the question of privileges and immunities granted to the diplomatic courier related mainly to the inviolability of the courier's person and his immunity from jurisdiction. In drafting articles on the subject, consideration should be given to the special role of the diplomatic courier, in order to make the privileges and immunities accorded to him correspond as closely as possible to that role and to ensure that the courier could perform his task without hindrance.

* Resumed from the 1784th meeting.

⁵ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

⁶ Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

⁷ *Idem*.

⁸ For the texts of draft articles 1 to 14 referred to the Drafting Committee at the Commission's thirty-fourth session, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 115 *et seq.*, footnotes 314, 315, 318 and 320-330.

⁹ For the texts, see 1782nd meeting, para. 47.

⁴ See 1797th meeting, footnote 3.

13. In article 20, which laid down the principle of personal inviolability, he wondered whether the phrase “and shall prosecute and punish persons responsible for such infringements”, in paragraph 2, was necessary. Although the rationale of the provision was understandable and the role of the diplomatic courier was very important to freedom of communication, it was doubtful whether such a provision was appropriate, for it had no equivalent in any of the four codification conventions. It should be considered whether the provision was commensurate with the need for protection of the diplomatic courier. Moreover, it would oblige States to adopt laws and regulations for its implementation. Lastly, even without that provision, the personal inviolability of the diplomatic courier would be sufficiently guaranteed if paragraph 1 and the first part of paragraph 2 were fully applied.

14. In regard to article 21, which stipulated the inviolability of temporary accommodation, he agreed with the comment made by the Special Rapporteur in paragraph 69 of his report (A/CN.4/374 and Add.1-4) that “it was of paramount importance for the inviolability of the courier and the bag that the courier should be housed in a safe and secure place”. Normally, the courier was lodged in the premises of the embassy or consulate, but sometimes he was accommodated elsewhere. The rule stated in article 21 was therefore necessary and was generally acceptable. However, paragraph 2 could be combined with paragraph 1. As to paragraph 3, according to the present text, the inviolability of the diplomatic courier might be nullified, because the “serious grounds” would certainly be determined by the receiving State or the transit State. If the diplomatic courier was really suspected of carrying objects the import or export of which was prohibited by the law or controlled by the quarantine regulations of the receiving or the transit State, he should be subjected to customs inspection on entering or leaving the country rather than be subject to inspection at any time in his temporary accommodation. It should therefore be considered whether that paragraph ought to be retained. It should also be considered whether the article should not provide that, in case of fire or other emergency, officials of the receiving State or the transit State were permitted to enter the temporary accommodation of the diplomatic courier. If it was considered necessary to provide for such a contingency, a provision could be drafted on the model of the last sentence of article 31, paragraph 2, of the Vienna Convention on Consular Relations, which read:

The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

In such a case, the inviolability of the diplomatic courier and the diplomatic bag he was carrying should nevertheless be guaranteed.

15. Paragraph 2 of article 22 should be re-examined for the same reasons as paragraph 3 of article 21. The Special Rapporteur had drafted article 23 on the model of article 60 of the Vienna Convention on the Representation of States, and it was basically acceptable. Paragraph 4, however, which provided that “the diplomatic courier is not obliged to give evidence as a witness”, would raise

difficulties of application. For according to paragraph 2, the diplomatic courier did not enjoy immunity from jurisdiction in respect of acts performed outside the exercise of his official functions. If he did not appear in court to give evidence, it would be difficult to establish the facts and the proceedings might be hampered. There was also a certain contradiction between paragraphs 4 and 5, since after an accident involving the vehicle of a diplomatic courier, which might not be insured, it would be difficult to establish the facts without his appearing as a witness. Lastly, when a person who had infringed the personal inviolability of the diplomatic courier was to be prosecuted and punished as provided for in article 20, paragraph 2, it would be difficult to proceed if the diplomatic courier did not give evidence.

16. Article 23, paragraph 5, which concerned liability for damages arising from an accident caused by a vehicle used or owned by the courier, made no distinction between acts performed in the exercise of his official functions and non-official acts. But according to article 31, paragraph 2 (d), of the Convention on Special Missions, “in the case of . . . an action for damages arising out of an accident caused by a vehicle used outside the official functions of the person concerned”, that person did not enjoy immunity from the civil or administrative jurisdiction of the receiving State. As the situation was very similar in the case of the diplomatic courier, he should not enjoy immunity from jurisdiction in respect of damages arising from acts outside his official functions.

17. As to diplomatic couriers sent by international organizations, there was some well-established practice. At the 1783rd meeting, Mr. Njenga had pointed out that OAU sent confidential conference documents to its member States by diplomatic courier, for reasons of speed and security. As the number of international organizations was increasing and their activities expanding, the question of the status of their couriers should be considered. It would also be advisable to study the status of diplomatic couriers sent by national liberation movements recognized by the United Nations and by a large number of Member States.

18. Mr. YANKOV (Special Rapporteur), summing up the discussion on articles 20 to 23, said that a number of very useful drafting suggestions had been made, but he would not comment on them at the present stage. He would deal only with comments on the substance of the articles.

19. Article 20 had not attracted any criticism of substance and had, in general, been favourably received.

20. Article 21 contained certain innovations which had been criticized by several members, including Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Laclea Muñoz, Mr. Ni, Mr. Pirzada, Sir Ian Sinclair and Mr. Ushakov. Paragraph 3 would allow inspection or search of the temporary accommodation of the diplomatic courier if there were serious grounds for suspecting the presence of articles whose import or export was prohibited by law or controlled by the quarantine regulations of the receiving State or the transit State. The paragraph also laid down certain rules on the procedure to be

followed: the inspection or search had to be conducted in the presence of the diplomatic courier, without infringing his personal inviolability or the inviolability of the diplomatic bag, and without causing unreasonable delays or impediments to the delivery of the diplomatic bag. But, despite those safeguards, the paragraph had caused concern and it had also been suggested that provision should be made for the case of fire or other emergencies, along the lines of article 31, paragraph 2, of the Vienna Convention on Consular Relations. He would give careful consideration to all the criticisms made during the discussion.

21. Article 22 had been criticized by nearly all the members who had spoken on it. That applied especially to paragraph 2, regarding which the fear had been expressed by several members that its provisions might detract from, or even nullify altogether, the protection given by paragraph 1. His aim had been to strike a balance between the requirement of inviolability and the legitimate interests of the receiving State or transit State in financial, fiscal, economic or public health matters. The provisions of paragraph 2 would have to be reconsidered in the light of all the comments made, with a view to finding a generally acceptable formulation.

22. There had been some question of making provision in article 22 for preventive or coercive measures, along the lines of article 20, paragraph 2. It had been suggested that a sending State which provided the opportunity for the abuse of its bag had an obligation to take the necessary preventive and punitive measures. As he saw it, the provisions of paragraph 2 of article 22, combined with action by the sending State regarding its own courier and bag, could meet that objective.

23. In the face of the objections raised by Mr. Calero Rodrigues, Mr. Lacleta Muñoz, Mr. Ni, Mr. Quentin-Baxter, Sir Ian Sinclair and other members, he would not, of course, defend his draft article 22 to the end. But he thought an effort had to be made to respond to the clear request made in the Sixth Committee of the General Assembly that provisions be included dealing with abuse of the diplomatic bag; it had been repeatedly stressed in the proceedings of the Sixth Committee that such abuse was the problem which most required attention at present. In introducing the provisions of paragraph 2 on inspection and search, he had acted in response to a very general demand by States. It was true that a sending State was anxious to ensure the full effectiveness of the rules on inviolability, protection, facilities and privileges for the diplomatic courier and the diplomatic bag. But that attitude changed when the same State was a receiving or a transit State; it then preferred to be able to carry out inspection and search, in order to prevent abuses.

24. He was grateful for the reactions of members, which would help him to determine the best course of action to meet the legitimate needs of States. It was worth noting that States were concerned not so much with the occasional spectacular abuse which attracted publicity as with everyday minor irregularities; the incidents to which those minor irregularities led were usually settled through diplomatic channels and did not come to public notice.

25. The main rules set out in paragraph 1 of article 21 and paragraph 1 of article 22 were derived from contemporary State practice. The rule of inviolability of temporary accommodation had been framed on the understanding that it was based on the functional approach.

26. With regard to article 23, Mr. Ni and certain other speakers had stressed the clear distinction to be made between acts performed in the exercise of official functions, which were exempted from local jurisdiction, and other acts, which enjoyed no such exemption. His own view was that the rules on immunity from jurisdiction were governed by functional necessity. Like all other privileges and immunities, immunity from judicial and administrative jurisdiction had to be based on that principle. After hearing the comments made during the discussion, he realized that it would probably be necessary to revise the drafting of article 23, in order to make it clear that it was based on the functional necessity principle.

27. Paragraph 4 of article 23 exempted the diplomatic courier from giving evidence as a witness. Similar provisions relating to diplomatic agents and to administrative and technical staff were contained in article 31, paragraph 2, and article 37, paragraph 2, of the Vienna Convention on Diplomatic Relations and in other diplomatic conventions. It had, however, been suggested by some members that the provisions of paragraph 4 might impede judicial proceedings and hinder the administration of local justice. But where the giving of evidence was in the interest of the person concerned, who might be a diplomatic courier, that person would certainly appear voluntarily as a witness. As for other cases, there were several possibilities. One was to provide that the diplomatic courier was not obliged to give evidence on matters relating to his official duties. Another was to exempt him from the general duty of giving evidence as a witness, but to make an exception for traffic accidents and certain other specific cases. He agreed that the suggestions made on that point should receive very careful consideration.

28. While some members had taken the view that article 23 was generally satisfactory, others had pointed out that the provision in paragraph 4 was not included in the first two diplomatic conventions. He had been gratified to note, however, that several members had endorsed his approach, which followed article 60 of the Vienna Convention on the Representation of States, because that article seemed more in keeping with the temporary nature of the functions of the diplomatic courier. Paragraph 6 of draft article 23, which was a safeguard clause designed to provide the injured party with another option, had not given rise to any special observations and appeared to be generally acceptable.

29. Inviolability and immunity from jurisdiction were two very important elements in the rules on the status of the diplomatic courier, and perhaps the Commission should therefore be given another opportunity to express its views on articles 20 to 23 when consideration of the topic was resumed.

30. He then drew attention to the additional sections of his report (A/CN.4/374 and Add.1-4) containing, respectively, the final draft articles of part II of the draft (arts. 24-30), the draft articles of part III (arts. 31-39) and those of part IV (arts. 40-42).

ARTICLES 24 to 30 (Exemptions accorded to the diplomatic courier and the diplomatic courier *ad hoc*, and status of the captain of a commercial aircraft or the master of a merchant ship entrusted with the transportation and delivery of a diplomatic bag)

31. Article 24, on exemption from personal examination, customs duties and inspection, and article 25, on exemption from dues and taxes, were modelled on the corresponding provisions of the four main diplomatic conventions.

32. Article 26 dealt with exemption from personal and public services. Although there might not be many occasions when a diplomatic courier was called upon to perform such services, it was probably advisable to provide for that possibility, because of the nature of his duties.

33. Article 27, on exemption from social security provisions, would probably also be of rather limited application. Articles 28 and 29 dealt with the duration of privileges and immunities, and waiver of immunity, respectively.

34. Article 30 dealt with the rights and obligations of the captain of a commercial aircraft or the master of a merchant ship entrusted with the delivery of a diplomatic bag. The reference to "an authorized member of the crew" had been included because it was often difficult to place additional responsibility on the captain or master of a highly complicated machine. No reference had been made to military aircraft or vessels, because the language of the draft article had been modelled on the corresponding provisions of the four main diplomatic conventions; but the Commission might wish to consider whether such a reference was needed.

ARTICLES 31 to 39 (Status of the diplomatic bag)

35. Article 31 related to indication of status and provided that the packages constituting the diplomatic bag must bear visible external marks of their official character.

36. Article 32 dealt with the content of the diplomatic bag, which was a key issue since it related to abuses of the bag. When examining State practice in the matter, he had come across several instances in which the sending State had imposed sanctions on persons involved in misuse of the diplomatic bag.

37. Articles 33-38 dealt, respectively, with the 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 status of the diplomatic bag dispatched by postal services or other means; general facilities accorded to the diplomatic bag; inviolability of the diplomatic bag; exemption from customs and other inspections; and exemption from customs duties and all dues and taxes.

38. Article 39, which was of a more general nature, provided for protective measures in circumstances preventing the delivery of the diplomatic bag. To take account of such rather rare cases, paragraph 1 of the article stipulated that "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 . . ."; paragraph 2 dealt with the case of the unaccompanied bag.

ARTICLES 40 to 42 (Miscellaneous provisions)

39. The draft articles of part IV dealt only with issues of a general nature and therefore contained neither final clauses nor provisions on the settlement of disputes.

40. Article 40 set out the obligations of the transit State in case of *force majeure* or fortuitous event, in other words the obligations of a State which normally would not have been a transit State, but happened to become one. Article 41 dealt with situations in which a State or Government was not recognized or there were no diplomatic or consular relations, and was modelled on the corresponding provisions of the four main diplomatic conventions.

41. Article 42, which dealt with the relationship between the draft articles and other conventions, was very tentative. The Commission would note the proviso embodied in it.

42. He hoped to submit a further report which would take account of the comments made in the Sixth Committee of the General Assembly and of any considerations that might arise out of the work of the Drafting Committee. Articles 20-23 could be referred to the Drafting Committee either at once, or at the Commission's next session; that was a matter for the Commission itself to decide.

43. After a procedural discussion in which the CHAIRMAN, Mr. DÍAZ GONZÁLEZ, Mr. FLITAN, Mr. McCAFFREY, Mr. NJENGA and Sir Ian SINCLAIR took part, Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) pointed out that the Drafting Committee would not have time to consider draft articles 20-23 at the current session. In the circumstances, it would be preferable to refer those articles to the Drafting Committee at the Commission's next session.

It was so agreed.

The meeting rose at noon.

1800th MEETING

Monday, 11 July 1983, at 3.05 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Lacleta

Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/360,¹ A/CN.4/373,² A/CN.4/L.352, sect. C)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. QUENTIN-BAXTER (Special Rapporteur) observed that a special rapporteur was not an advocate for his topic: his duty was to offer his views on the best way to approach it and to marshal information and relevant arguments. The handling of the topic then became a matter between the Commission and the General Assembly. On the present occasion, the timing of the discussion governed the method of dealing with the subject. The two or three meetings available for the topic at the present session could hardly be expected to do more than confirm members in their present opinions on such a complex issue. However, the Commission had about six working weeks left before it approached the middle of the quinquennium for which members held office and the options available to it rapidly closed. In fact there was little reason to fear that the present Commission would not produce worthwhile results. The draft articles on State responsibility appeared likely to be the most important accomplishment of the Commission since the 1969 Vienna Convention on the Law of Treaties, and the work on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier also promised to yield a useful dividend.

2. At its next session the Commission must decide what further it could accomplish and form a view as to the scope and feasibility of the topic under consideration. If he considered that question from the point of view of the Commission, or as a Commission member, he would be concerned to have a sound answer to UNITAR's question³ as to whether the Commission would be able to deal with topics having a larger policy content or a greater degree of novelty than hitherto. The Commission was no nearer than UNITAR to giving an affirmative answer.

3. In his fourth report (A/CN.4/373), he had endeavoured to update the development of an elusive topic. In the same period, the Secretariat had completed an excellent analysis of relevant materials and he had requested (*ibid.*, para. 58) that it should be made more widely available. The Secretariat material was not designed to support his report: on the contrary, covering as it did the whole field of the duty to avoid, minimize and

repair harm, it would be useful also to those who would have preferred other ways of approaching the subject or that it should not be approached at all. Furthermore, as he had stated in his report (*ibid.*, para. 64), he would like help from the Secretariat in addressing a questionnaire to selected international organizations whose work might satisfy many of the requirements set out in the schematic outline. In an age of international organization, it was unrealistic to consider a topic such as that for which he was Special Rapporteur without taking account of the impact of international organizations and the actions of States within them.

4. In introducing his report, he wished to revert to the excellent discussion on the topic at the Commission's thirty-third session in 1981.⁴ In his second report,⁵ he had been concerned to develop the duty of care, which he had subsequently redefined in terms of "foreseeability", since the original term had caused some difficulty (A/CN.4/360, paras. 19-23). During the discussion, Mr. Ushakov, who had earlier played a part in the decision to treat the topic as one which fell within primary rules, had explained that he had changed his view. He had asked what sort of obligation was involved in the duty of care, arguing that international law imposed no duty to avoid transboundary harm unless it fell within some recognized category.⁶ Sir Francis Vallat, on the other hand, had emphasized that the topic should not be approached from a doctrinaire viewpoint. He had considered that the duty of care was a reasonably conservative starting-point in enunciating the obligation to avoid and minimize harm, and that it was not necessary to make a distinction between wrongfulness and liability.⁷ However, by the time the topic had been discussed in the Sixth Committee of the General Assembly at its thirty-seventh session, the representative of the United Kingdom, Mr. Berman, had displayed a change in thinking similar to that of Mr. Ushakov. He had stated that there was no basis for the topic in codification and, if it appeared at all in international law, it was merely a matter of civil liability.⁸ While there was no reason for an identity of views between Sir Francis Vallat, expressing an independent opinion, and Mr. Berman, speaking as the representative of his country, it was surprising that the former could regard the duty of care as arising out of a standardized view of international obligation and the latter could regard it as having such novelty that it had no basis in international law. A similar evolution was observable in the case of France. Mr. Reuter was a recognized authority on the responsibility of States in matters of harm to neighbouring States and, in his writings cited in the second and

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ UNITAR, *The International Law Commission. The Need for a New Direction* (United Nations publication, Sales No. E.81.XV.PE/1), pp. 34-35.

⁴ *Yearbook* . . . 1981, vol. I, pp. 217-230, 1685th-1686th meetings and 1687th meeting, paras. 1-31, and pp. 250-255, 1690th meeting, paras. 32-71.

⁵ *Yearbook* . . . 1981, vol. II (Part One), pp. 119-121, document A/CN.4/346 and Add. 1 and 2, paras. 68-72.

⁶ *Yearbook* . . . 1981, vol. I, p. 225, 1686th meeting, paras. 28-30.

⁷ *Ibid.*, pp. 229-230, 1687th meeting, paras. 25-30.

⁸ *Official Records of the General Assembly, Thirty-seventh Session, Sixth Committee*, 48th meeting, para. 20.

fourth reports, had foreseen every possibility contemplated by the Special Rapporteur. However, in the Sixth Committee, Mr. Museux, as the representative of France, had taken the view that discussion of the topic was a waste of time since it was a matter for UNEP and not the Commission.⁹

5. Four years previously, he had visited UNEP headquarters to ascertain the views of its senior officials on the topic. It appeared that, whenever the question of liability was raised in UNEP bodies, there were three reactions: that the subject should be avoided; that, if any work was to be done on it, it should be done by the Commission; or that, if the Commission was to embark on discussion of the topic, it would remain buried for 20 years. He did not himself intend to contribute to the burying process. It was his hope that the Commission would have the courage to make a firm decision either to take up the topic or to leave it to be developed in other forums. Officials at UNEP had also been most disconcerted by the fate of the draft principles on shared resources (see A/CN.4/L.353), which had been initiated by the Governments represented on UNEP's Governing Council, developed at considerable cost, endorsed by the Economic Committee of the Economic and Social Council, and had then been merely "noted" in a General Assembly resolution proposed by the Second Committee.¹⁰ The fact was that a Jekyll and Hyde element was involved. Up to a point, there was a desire and an attempt to make progress in the development of international law. But when that point was reached, delegations sought to conserve what they perceived as their country's or their region's immediate interests. It was for the Commission to decide whether it could surmount that hazard, and in so doing, it would provide the answer to the question posed by UNITAR.

6. He personally was of the opinion that there was a way for the Commission to go forward without undue risk. The real cleavage of opinion did not lie between East and West, North and South, or between practitioners of civil law and common law, but between what might be termed the old world and the new. He had been interested to see, in Tentative Draft No. 4 of the *Restatement of the Foreign Relations Law of the United States*, for the first time, a separate part dealing with the law of the environment, which was of striking relevance to the topic under consideration. A responsible group of United States lawyers appeared to think that the draft was an unadventurous statement of existing international law. They referred to the duty to take such measures as might be practical under the circumstances to ensure that activities conducted in the territory of one State did not cause harm elsewhere. As in the schematic outline presented in his report (A/CN.4/373, annex), the text referred to the importance of the activity, its economic viability, technological considerations and foreseeable harm. The obligations extended to both public and private activities in respect of loss or injury either to a particular country or to the environment in general—obligations *erga omnes*.

The text emphasized primarily prevention and dealt with reparation virtually as a facet of that aspect. States incurred special responsibility in respect of harm arising from ultra-hazardous activities. The phrase "strict liability" was not mentioned, but all liability was related to the wrongfulness of allowing unrequited harm to occur. The breadth of scope was remarkable, since it included coastal States and flag-States of ships on the high seas. There was a reference to access to local remedies and non-discrimination before local courts.

7. It was impossible to consider the present topic without starting from State responsibility for wrongfulness. The view a State would be likely to hold on strict liability depended upon its view of wrongfulness. If it took the view that it was wrongful to allow activities which caused harm to other States, it was not a great step forward to concede strict liability, which in essence was the liability to meet the cost of making good any harm incurred without the added obligation of avoiding altogether the activity causing the harm. The *Restatement of the Foreign Relations Law* made it clear that no question of attribution stood between the State and responsibility for activities which occurred in its territory or within its control. Accordingly, strict liability did not constitute a great step forward, but rather something of a relaxation. However, if a State held the view that there was no liability except for specific types of harm defined in conventional régimes, or if it drew a distinction between private and public acts, strict liability might seem an unacceptable step forward. Such was the threat of divergence on the question of liability.

8. States might, however, have more in common than would appear from the text he had just analysed. For example, the North American doctrine on the wrongfulness of harm was weak when some element of sharing entered into the equation. In respect of watercourses, the position of the United States of America with regard to responsibility for water crossing boundaries had not always been consistent. In such contexts, rules could not be stated absolutely. Mr. Evensen's approach to the question of the non-navigational uses of international watercourses (A/CN.4/367) was valuable for the topic under consideration. His draft articles 6 and 9¹¹ covered both the principle of sharing and the principle of not causing harm, and the latter principle had won a general degree of immediate acceptance by the Commission. But if it had been simply a matter of establishing a rule of prohibition, the subsequent articles would not have been necessary. Those articles set out a procedure for avoiding wrongfulness by reference to the criterion of "appreciable harm". Yet what might well prove harmful in a heavily populated boundary area might prove negligible in a desert area. There was no way of setting a minimum limit, and the parties concerned must be prepared to consult within the framework of fact-finding machinery. Usually, the matter could be amicably settled at that level. Similarly, in his own schematic outline, sections 2 and 3

⁹ *Ibid.*, 38th meeting, para. 17.

¹⁰ General Assembly resolution 34/186 of 18 December 1979.

¹¹ See 1785th meeting, para. 5.

should usually be sufficient to deal with any problem of damage or possible damage. Section 4 constituted the machinery of last resort, when the damage had either not been foreseen or, if foreseen, had not been provided for.

9. Another aspect of the draft articles on the non-navigational uses of international watercourses was the duty to co-operate. That was a substantial legal duty which was not easy to define. Sir Ian Sinclair (1791st meeting) had distinguished the duty of co-operation from *bon voisinage*. It could perhaps be related to the distinction between rights and interests recognized by the arbitral tribunal in the *Lake Lanoux* case.¹² There was, for instance, the proverb "good fences make good neighbours", which expressed the minimum content of the duty of co-operation. But it was even better if the parties could make joint arrangements, in respect of irrigation for example, so that costs were shared rather than duplicated. A bilateral convention relating to boundaries contained both aspects, and both had a large application in the topic under consideration.

10. States perhaps required reassurance that other States in a different position from themselves really had similar interests. The developing countries, for example, were reluctant to accept inflexible standards which developed countries had learned to adopt. That was paralleled by the fear of developed countries that their freedom to use technology and employ options might be impaired by rules about not causing harm to their neighbours. That was the reason for dealing with the matter within a flexible framework which did not rely on wrongfulness, but emphasized the possibility of co-operation and the need to accommodate varying interests. In that connection, he would refer to the description of the law of the sea as a progression from legal freedoms to legal powers, which he had quoted in his report (A/CN.4/373, para. 74). That was indeed the major theme of the topic under consideration.

11. There was also a real parallel with the law in respect of the treatment of aliens. If States had a duty in respect of the way they allowed foreigners to be treated in their territory, it was reasonable to assert that they also had a duty in respect of the way they allowed activities to be conducted in their territory which caused harm to people in other States. At the same time, there were no precise rules as to how aliens should be treated, since local standards varied, but the accepted rule was one of non-discrimination. The question was whether the topic under consideration could provide a useful counterpoint to obligations arising from acts of omission or commission engaging State responsibility. The notion of "different shades of prohibition" laid emphasis on co-operation, encouraging accommodation of the respective interests and the foreseeing of problems which might arise from the conduct of particular activities.

12. There were perhaps three positions to take into consideration, namely that of Mr. Ushakov that no new

principle of international law could be admitted; that of the United States of America that the scope should not be extended beyond physical transboundary harm; and, thirdly, that of some developing countries which wanted the principle of strict liability to extend to economic matters as well as to physical transboundary harm. International law envisaged two systems of obligation, namely wrongfulness involving State responsibility and strict liability. There were also two areas involving transboundary effects, namely physical activities and the conduct of economic affairs. If strict liability were applied in the first area but excluded in relation to economic matters, that would be damaging to the interests of people on their way forward to the new international economic order. That was, however, too complicated a subject to be regulated by simple prohibition.

13. A solution was offered in the schematic outline. It was not practicable to define in customary law either the principle of strict liability or the principle of wrongfulness as such. There were wide differences of views on wrongfulness and on strict liability. But there was a considerable amount of State practice dealing with transboundary issues. The aim should therefore be not to construct a rigid rule, but to develop a set of obligations which allowed as much latitude to States as the old rule governing the treatment of aliens. The object should be to postpone as long as possible the point at which wrongfulness intervened and to provide chance after chance for the source State to act, so that, if damage did occur, it had an opportunity to make it good, taking into account a variety of factors. Within that framework, the scope should be limited to physical transboundary harm, on which there was a considerable body of State practice. In contrast, there was comparatively little in respect of economic affairs, where not much progress had been made towards crystallizing the norms around which rules could evolve. Perhaps progress never would be made, if the issue was considered solely in terms of prohibitions. The present topic would set a precedent for an alternative approach. In the simpler, more developed area of physical harm, it was possible to articulate rules reflecting common interests. Accordingly, it was possible to take account of the three major interests he had mentioned.

14. It might be inquired why there was a need to draft rules with a considerable procedural content. The answer was the same as in the case of the draft articles on non-navigational uses of international watercourses. It was difficult to apply general rules to specific cases. It was therefore desirable to articulate a procedure to permit the accommodation of interests, especially in matters where third-party settlements were quite exceptional. It would be useless to codify international law on the fictitious basis that decisions would be taken by third parties. Allowing them the opportunity to articulate detailed rules increased the likelihood of achieving a judicial settlement in the case of a dispute between the parties concerned.

15. It was too early to discuss the form to be taken by any possible draft articles. Their outcome must be the ultimate obligation to make reparation for damage incurred, involving the sanction of wrongfulness if not fulfilled. That outcome should, however, be postponed as

¹² United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , pp. 315-317, paras. 23-24; see also *Yearbook* . . . 1974, vol. II (Part Two), pp. 198-199, document A/5409, para. 1068.

long as possible in order to give States the maximum opportunity of regulating their affairs on a more flexible basis. In his view, the topic could be considered as a useful supplement to that of State responsibility.

16. Mr. RIPHAGEN congratulated the Special Rapporteur on his excellent report (A/CN.4/373), which clearly showed the difficulties of the topic, especially those of a doctrinal character. The Special Rapporteur had chosen to present his report in the form of a general review and had endeavoured to place the topic in the general structure of international law, inviting members to make general comments. His own remarks, at any rate, would be of a general and somewhat theoretical character. A well-known writer had called the topic of public policy (*ordre public*) “the unfinished part of private international law” and he himself would describe the present topic as “the unfinished part of public international law”.

17. The Special Rapporteur had relied heavily on what he called the “continuum of prevention and reparation” (*ibid.*, paras. 40 *et seq.*). “Continuum” was a dangerous word for lawyers, and indeed for all scholars of the Cartesian-Newtonian school of thought; but the Special Rapporteur had said that he made “no great claim to orthodoxy” (*ibid.*, para. 54). He (Mr. Riphagen) would be the last to blame him for that, considering all that the heretics of the past had contributed to mankind. Moreover, the Special Rapporteur had disarmed him by using the expression “different shades of prohibition”, which he himself had used as Special Rapporteur on the topic of State responsibility.

18. The Special Rapporteur had nevertheless stated somewhat categorically that “it is not the policy of the law to perpetuate ambivalent situations, but rather to break them down into elements of right and wrong” (*ibid.*, para. 21). That remark appeared to rule out the “continuum” concept, and the Special Rapporteur had attempted to resolve the contradiction by having recourse to an “administrative law perspective” and quoting Professor Allot’s appeal in its favour (*ibid.*, para. 74). Although it was uncongenial to his common law colleagues, he himself found the concept of administrative law rather attractive; but he could not resist quoting an outstanding European lawyer, Professor Prosper Weil, who had begun his treatise on administrative law with the words: “L’existence même d’un droit administratif relève, en quelque sorte, du miracle” (The very existence of administrative law is something of a miracle).¹³

19. Miracles did sometimes happen, however, and it had in fact been possible in many national legal systems to control public authorities effectively without impairing the performance of their public functions. But even on the national plane, a delicate balance had to be struck between the various interests at stake. On the international plane, the transition from what Professor Allot called “legal freedom”, presumably meaning sover-

eignty, to legal power, implying “the absence of unfettered discretion”, would be even more difficult. The dominant feature of administrative law, however, was the “marginal” test applied to the conduct of public authorities, and that test could also be applied in international relations.

20. In section A of his report, the Special Rapporteur discussed “the duty to avoid, minimize and repair transboundary harm”. But in linear logic, if there was a duty to avoid, the question of minimizing harm would not arise; again, if action had been taken in conformity with the duty to minimize, the question of reparation would not arise. He would suggest that the only way to resolve those contradictions was to adopt a “systems” approach instead of a “linear” approach.

21. In dealing with the topic under consideration, it was necessary to work on the assumption that there were neither obligations nor rights, but only rules of conduct. In that connection, he referred to the phenomenon of “circumstances precluding wrongfulness” in the topic of State responsibility. In the present topic, there would be the parallel phenomenon of “circumstances precluding rightfulness”, namely the rightfulness of the exercise of territorial sovereignty.

22. He commended the Special Rapporteur for limiting the scope of the topic to physical activities which caused physical transboundary harm. The question of scope was relevant not only to the outer limits, but also to the inner limits of the topic, in other words the factors to be taken into account in the procedures described by the rules of conduct. As to the outer limits, the rules of conduct would have no meaning if compliance or non-compliance with them had no legal consequences. If those rules were completely ignored, and a physical activity within a State caused physical harm in another State, State responsibility would arise.

23. In considering the rules of conduct, a distinction could be drawn between procedural rules and substantive rules, and many factors had to be taken into account in connection with the former. The first rule of procedure related to the duty of prior information; the second concerned the duty of consultation; and the third the duty to resort to impartial, expert fact-finding in case of disagreement on the facts. All those duties were reciprocal and included the time factor, since no party could be allowed to delay a solution indefinitely.

24. In regard to the factors to be taken into consideration in striking a balance between the interests at stake, there were certain general rules. The first was a negative rule: there must be no discrimination between factors inside and factors outside the territory, on both sides. There was also the positive rule on cost-benefit sharing. Lastly, there was the encouragement of alternatives on both sides, including assistance in avoiding injurious consequences, such as depollution measures.

25. As to the inner limits of the scope of the topic, the only relevant factors were those relating to physical acts and physical harm. That excluded consideration of the anticipation of acts and also of trade-offs of advantages in other fields. In the suggested system, which took into

¹³ P. Weil, *Le droit administratif*, 10th ed. (Paris, Presses universitaires de France, 1983), *Que sais-je?* series, No. 1152, p. 3.

account both circumstances precluding wrongfulness and circumstances precluding rightfulness, there would be ample room for States to choose other "rules of the game" by treaty, possibly taking other fields of interest into account.

26. Lastly, he drew attention to a matter which was not covered in the report, namely the possibility of a third State being involved. The third State could be either a participant in the act or an injured party.

27. Mr. EL RASHEED MOHAMED AHMED commended the Special Rapporteur for his learned report (A/CN.4/373) on a difficult topic and expressed particular appreciation of the very clear introductory statement it contained. He would confine his remarks largely to section 2 of the schematic outline, in response to the Special Rapporteur's request (*ibid.*, para. 75). His observations would be of a general and preliminary character.

28. The Special Rapporteur had warned that: "The rules contained in the schematic outline are not a substitute for specific conventional or customary rules that engage the responsibility of the State." (*ibid.*, para. 19.) In an effort to delimit the uncertain boundaries of the topic, he had added that: "The topic concerns activities which are 'on the way to being . . . prohibited' or, alternatively, are being saved from prohibition because adequate guarantees have been provided as to the avoidance of adverse transboundary effects . . ." (*ibid.*, para. 20). The Special Rapporteur had drawn attention to certain areas, such as pollution, in which there was a growing body of conventional rules that would give rise to international responsibility, but he had not suggested any rule, and still less any prohibition. He had placed the emphasis on procedure in sections 2-4 of his schematic outline, which proposed: (a) a duty to provide information in respect of activities that could give rise to loss or injury and the kinds and degrees of foreseeable loss or injury; (b) the establishment of fact-finding machinery; (c) negotiations in good faith upon the report of the fact-finding body; (d) determination of the rights and obligations of the acting and affected States by agreement.

29. Clearly, the Special Rapporteur was sailing a dangerous course in not very hospitable waters. The situation warranted the question as to whether he was moving forward or perpetuating ambivalent situations. One of the objects of the present study was to encourage régimes that delimited the respective rights and obligations with some degree of certainty. Failing that, the object was to assert the duty to avoid and repair transboundary loss or injury, without a prior finding of the acting State's responsibility for a wrongful act or omission.

30. Yet there could be no duty without a correlative right; whence a dilemma for the Special Rapporteur, since the negative duty to avoid transboundary injury or loss should have a corresponding right. That right, however, arose from a wrongful activity or omission on the part of the acting State. But the responsibility for the wrongful act or omission was glossed over.

31. The extremely pragmatic and cautious approach of the Special Rapporteur showed his reluctance to enter the realm of State sovereignty. He would appear to wish to leave it to States to find for themselves the answers to the questions which arose in each specific dispute, but in accordance with a set of rules of procedure. It was very doubtful whether that approach would satisfy the affected States, which in most cases were developing or poor States, whereas in cases of pollution, for example, the sources were invariably industrialized countries. Even when those countries were not the sources of pollution, they were the only ones possessing the means of cleansing its effects. The Persian Gulf States were paying millions of dollars to developed countries to stop oil flows and clean up the waters of the Gulf. In that part of the world, water was now more expensive than petrol.

32. The Special Rapporteur was prepared to see developing countries bring about a change in the trend of international relations. That change would not be dictated by the weight of the developing countries, but by the need to balance the mutual interests of developed and developing countries. In those situations, the law should not lean against the more vulnerable party; it should maintain a delicate balance between the strong and the weak. Nevertheless, the Special Rapporteur appeared to be more concerned with the protection of source States from unreasonable demands than with ensuring reparation for affected States (*ibid.*, para. 51).

33. That situation called for one more step forward, perhaps rather further than the Special Rapporteur was prepared to go. He would venture to suggest that a general thesis should be predicated on the notion of the duty not to cause harm or injury. If harm or injury was caused and could be traced to the source State, a duty to make reparation could be inferred, provided all the relevant factors were taken into consideration. The Special Rapporteur himself had supported that idea when he had written:

There is, incidentally, no reason why the right to reparation, and the principles and factors safeguarding it, should not be stated as strongly as the Commission considers prudent and warranted by developing State practice. (*Ibid.*, para. 54.)

34. He proposed to speak at a later stage on the subject of strict liability. At first sight, however, there could be no dissent from the Special Rapporteur's assertion, in his opening statement, that the introduction of that concept would be unacceptable.

35. With regard to definitions, the Special Rapporteur had raised the question of whether the word "activity" also included absence of activity. He would not venture an answer, but suggested that the word "omission" should be added to the word "activity" in section 1, paragraph 2, of the schematic outline, to cover the question of lack of activity to remove a danger that could give rise to loss or injury.

36. Mr. USHAKOV said that, despite the explanations the Special Rapporteur had given in his introductory statement, the situation was still not very clear. As noted in the report (A/CN.4/373, para. 11), the debate in the Commission at its previous session 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.

He himself continued to hold that view and still believed that there were no rules of international law establishing the liability of States for injurious consequences arising out of acts not prohibited by international law.

37. In the case of certain specific activities, such as hazardous activities that could be expected to have harmful consequences, States concluded special agreements of universal, regional or bilateral character, such as the agreement establishing State responsibility for lawful activities conducted in outer space which were likely to have consequences on Earth.¹⁴

38. On the other hand, it was impossible to stipulate an obligation to make reparation for the injurious consequences of any lawful activity necessary for the development of industry or agriculture or to combat some natural scourge. Moreover, the acting State was usually the first to suffer the injurious consequences of its own action; but even in such a case, there was no certainty that it would be prepared to pay damage to neighbouring States which had also suffered the consequences of that action. He also had some doubts about the usefulness of the term “transboundary harm”, for if the question was being studied by the Commission, the “harm” was obviously international.

39. Either a treaty prohibited a certain activity and a State party which ignored the prohibition incurred international liability, or there was no obligation on the State, in which case, as things stood at present, the State was in no way bound to make reparation to a neighbouring State which suffered the injurious consequences of its activities.

40. Mr. KOROMA congratulated the Special Rapporteur on his very useful report (A/CN.4/373), which provided further proof of his command of the topic. In the earlier discussions he had thought that the dichotomy in the Commission and in the Sixth Committee of the General Assembly was conceptual, because the Special Rapporteur had taken as his earlier point of departure the “duty of care” towards other States. Later, however, the Special Rapporteur had been persuaded that such a general duty did not exist, or at least that the concept was not common to all legal systems. He had therefore adopted instead (A/CN.4/360, paras. 19–23) the “criterion of foreseeability”: if the harm or injury to a neighbouring State could be foreseen, a duty existed for the acting State. For the time being, that proposition should have sufficed.

41. Listening now to the Special Rapporteur and to Mr. Ushakov, however, he realized that the differences within the Commission were essentially a matter of policy and were not merely conceptual. Mr. Ushakov had maintained that no general liability arose for States under public international law in respect of transboundary harm caused by activities not prohibited by international law.

He, for one, could accept that thesis, but he drew attention to a discrepancy between the French and English versions of the title of the topic. The English title spoke of “acts not prohibited by international law”, whereas the French version used the term *activités*. As pointed out by Mr. Ushakov, “activities” that were not forbidden by international law could not give rise to liability. The position was not the same for “acts”. To take the example of activities in outer space, which were of course lawful, it was only when a particular act caused harm that the State would be held liable. He urged that the terminology used, particularly in the title of the topic, should be carefully reviewed in the light of those comments.

42. It could not be denied that there was a wealth of State practice and an impressive body of international legislation on acts which caused harm to other States, on the resulting duty of care and on the obligation to make reparation and, where appropriate, take steps to prevent the recurrence of such acts. Those ideas should constitute the point of departure for the study of the topic.

43. The Special Rapporteur had endeavoured to elaborate on the content of the duty not to cause harm to another State. That duty could be cast in preventive form, or in the form of reparation or compensation. He agreed with the Special Rapporteur that the topic should be confined to physical injury and should not extend to economic injury for the time being. In a great many cases, however, physical injury would have economic consequences; for instance, pollution of a river by an upper riparian State would lead to economic losses for farmers in a lower riparian State.

The meeting rose at 6.10 p.m.

1801st MEETING

Tuesday, 12 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Tazafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

¹⁴ Convention on International Liability for Damage Caused by Space Objects (United Nations, *Treaty Series*, vol. 961, p. 187).

cluded) (A/CN.4/360,¹ A/CN.4/373,² A/CN.4/L.352, sect. C)

[Agenda item 6]

FOURTH REPORT OF THE
SPECIAL RAPPORTEUR (concluded)

1. Mr. SUCHARITKUL, after congratulating the Special Rapporteur for clarifying the concept of international liability, said that the kind of liability in question differed from State responsibility for internationally wrongful acts in that one of its essential features was that the acts from which the injurious consequences arose were not wrongful. It was thus clear from the report (A/CN.4/373) that acts such as those dealt with in part 1, chapter V, of the draft articles on State responsibility (Circumstances precluding wrongfulness)³ could in fact engage the international responsibility of the State performing them. Another difference between the two concepts was that, in the case of State responsibility, as understood by Mr. Riphagen, it was necessary to prove the "act of the State" (part 1, chapter II, of the draft).⁴ In the case under consideration, the Special Rapporteur proposed that the State should be held internationally liable for all injurious consequences arising out of activities carried out in its territory or under its control, in order to take account of modern conditions of interdependence and the growing need for co-operation.

2. In that connection, he drew attention to the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁵ the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations⁶ and the Bandung Declaration of 1955,⁷ which emphasized, *inter alia*, the principle of good-neighbourliness. Similarly, on 8 August 1967, the member countries of ASEAN had declared themselves

conscious that in an increasingly interdependent world, the cherished ideals of peace, freedom, social justice and economic well-being are best attained by fostering good understanding, good-neighbourliness and meaningful co-operation among the countries of the region already bound together by ties of history and culture.⁸

3. The Convention on International Liability for Damage Caused by Space Objects⁹ provided an interesting example of a special régime establishing not

only the absolute liability of the launching State, but also a joint and several liability. Also of interest was a study by Mrs. Koh on straits in international navigation,¹⁰ in which it was pointed out that the *Corfu Channel* case¹¹ had laid down that a State had not only the right, but also a duty to ensure the safety of navigation in a straits régime. In that case, the ICJ had held that such obligations were based on certain general and well-recognized principles, namely elementary considerations of humanity, the principles of the freedom of maritime communication and every State's obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States. The Court had also held that a duty was placed on States to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States or of areas beyond the limits of their national jurisdiction.

4. Examples of international liability abounded in the practice of States. The *Fukuryu Maru* case (1954),¹² mentioned by the Special Rapporteur (*ibid.*, para. 34), showed the mobility of the dividing line between lawful acts and acts prohibited by international law; that mobility corresponded to the development of international law. He also had in mind the *Showa Maru* case (1975),¹³ in which a Japanese tanker of 237,698 tons had struck a rock in the Straits of Malacca and released more than 3,000 tons of oil into the waters of Indonesia, Malaysia and Singapore, which had claimed reparation to cover the cost of cleaning operations and the losses suffered by their fisheries. That case had led to the adoption of rules on navigation in the Straits of Malacca and Singapore, which limited the size of vessels to under 250,000 tons and required them to follow the route determined by the Council on Safety of Navigation and Control of Marine Pollution of the three coastal countries and approved by IMCO.¹⁴

5. It should also be noted that bilateral agreements delimiting the continental shelf always contained a safeguard clause providing that the parties could not exploit oil or mineral deposits situated near the boundary line, since such exploitation by a State could have physical and economic consequences for the neighbouring State.

6. While approving of the Special Rapporteur's report, he thought that it would be necessary to plan the next stages of the study in greater detail and concluded by emphasizing the importance of the progressive development of international law in that area, the duties of care, vigilance and prevention devolving on States, and their obligation to make reparation. The fact that there was an

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Yearbook* . . . 1980, vol. II (Part Two), pp. 33-34.

⁴ *Ibid.*, p. 31.

⁵ General Assembly resolution 1514 (XV) of 14 December 1960.

⁶ General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

⁷ See Indonesia, Ministry of Foreign Affairs, *Asian-African Conference Bulletin No. 9* (Jakarta, 1955), p. 2.

⁸ Third preambular paragraph of the "ASEAN Declaration", joint communiqué adopted at Bangkok on 8 August 1967 at the First Ministerial Meeting of ASEAN (M. Haas, ed., *Basic Documents of Asian Regional Organizations* (Dobbs Ferry (N.Y.), Oceana Publications, 1974), vol. IV, p. 1269).

⁹ See 1800th meeting, footnote 14.

¹⁰ Koh Kheng-lian, *Contemporary Issues Relating to Straits Used for International Navigation*, thesis submitted to the *Institut universitaire de hautes études internationales*, Geneva, 1980.

¹¹ Judgment of 9 April 1949, Merits, *I.C.J. Reports* 1949, p. 4.

¹² M.M. Whiteman, ed., *Digest of International Law* (Washington, D.C.), vol. 8 (1967), p. 764.

¹³ Koh, *op cit.*, pp. 87 and 89-92.

¹⁴ IMCO, resolution A.357(X) of 14 November 1977, annex V: "Rules for Vessels Navigating through the Straits of Malacca and Singapore" (*Resolutions and other Decisions of the Tenth Session of the Assembly, 7-17 November 1977* (London, 1978)).

obligation to make reparation, however, did not mean that a State could exercise its sovereign rights over its territory so as to cause harm to its neighbours.

7. Mr. NI congratulated the Special Rapporteur on his remarkable fourth report (A/CN.4/373), which was the result of painstaking research into what had aptly been called a “twilight zone” of international law. The Special Rapporteur was not pessimistic; he was trying to strike a balance between one State’s right to freedom of action and another State’s right to freedom from transboundary harm. The Special Rapporteur was not prepared either to accept the simple formula of strict liability or to allow the victim to remain without hope of remedy; he had therefore proposed the theory of apportionment of damages, whereby, with due regard for the various factors involved, the liability of the source State could be diminished, with the affected State sustaining a substantial part of the loss.

8. It was pointed out in the report (*ibid.*, para. 65) that the source State’s ultimate liability might depend upon the whole course of its conduct—an approach which suggested that justice was being administered on the basis of equity. The Special Rapporteur also stated that failure to consult, or to provide proper regulation, was only one of the elements to be taken into account in the event of transboundary harm being caused (*ibid.*, para. 19).

9. The topic was a novel and unprecedented one, in that a State could incur liability for an act or omission not prohibited by international law. Rapid scientific and technological progress had created situations in which a legitimate activity conducted in one State could result in injury to another State or its citizens. The acting State could not, of course, be held liable for the consequences of an activity that was lawful. But at the same time, a State which enjoyed exclusive authority over its territory had the correlative duty not to do harm to other members of the international community. The traditional answer to that problem was either to impute wrongfulness to the acting State or to impose the theory of strict liability. Neither of those solutions, however, could overcome the theoretical and practical difficulties involved.

10. The Special Rapporteur had put forward his theory of the “continuum of prevention and reparation”. He had thus included the concept of prevention, notwithstanding the fact that, in the 1982 debate in the Sixth Committee of the General Assembly, it had been maintained that prevention was outside the scope of the present topic, which concerned only reparation (A/CN.4/L.352, paras. 143–145). The Special Rapporteur had countered that criticism by stating in section 5, paragraph 2, of his schematic outline that “adequate protection requires measures of prevention that as far as possible avoid a risk of loss or injury and, in so far as that is not possible, measures of reparation” (A/CN.4/373, annex).

11. The Special Rapporteur had stressed that the division between sections 3 and 4 of the schematic outline was a division not between prevention and reparation, but between the steps that should be taken when States foresaw a need to construct a régime of prevention and reparation and those that must be taken “when a physical transboundary loss or injury has occurred and the

obligations of the source State have not been predetermined by any applicable or accepted régime”; and he had added: “The policy of the schematic outline is to reflect and encourage the growing practice of States to regulate these matters in advance . . .” (*ibid.*, para. 50).

12. In analysing the *Trail Smelter* case,¹⁵ the Special Rapporteur had pointed out (*ibid.*, para. 47) that the assessment of compensation had been a minor part of the tribunal’s work, its attention having been mainly devoted to discussing the means by which future loss or injury could be avoided, consistently with the continued economic viability of the smelting enterprise. A balance had thus been struck between the interest of continuing a useful activity and the protection of the neighbouring State from transboundary harm. As pointed out in the Sixth Committee debate, the elaboration of a preventive régime and of a régime of reparation were complementary, not competing objectives.¹⁶

13. Seen in that perspective, the concept of prevention was not an isolated legal norm to be imposed on any beneficial activity as a legal obligation whose breach entailed responsibility on grounds of wrongfulness. There was a duty to avoid or minimize loss or injury; only when all efforts to avoid injury had failed did the duty of reparation arise. The State’s freedom of action regarding useful activities thus remained uncurtailed, but not at the expense of the interests of other States. In the progressive development of international law, by stressing the general and common interest it would be possible to achieve stability and to give true meaning to the notion of interdependence.

14. The topic required imagination; it was not without viability or practical utility. It was important to the interests of all States, particularly developing countries, because they lacked the techniques to detect or monitor harmful transboundary effects, and because certain activities were carried out by contractors or multilateral agencies. Those countries should therefore be protected from the adverse effects of ill-planned or inconsiderate industrial development by a neighbouring State.

15. As to the scope of the topic, he believed that as it was rather new in the process of legal development, it would not be advisable to start on too ambitious a plan. He agreed with the Special Rapporteur that the central aim should be “to analyse the growing volume and variety of State practice” (*ibid.*, para. 12) and that nowhere was the tendency to accumulate experience for regulating international conduct, more evident than in “conventional régimes relating to physical uses of territory” (*ibid.*, para. 16). Accordingly, as the then Chairman of the Commission had said in the Sixth Committee in 1982, the draft articles on the present topic could be limited to

¹⁵ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

¹⁶ See “Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-sixth session of the General Assembly” (A/CN.4/L.399), para. 149.

transboundary problems pertaining to the physical environment (*ibid.*, para. 11).

16. With regard to the final form the Commission's work should take, the traditional approach was to assume that a convention was being drafted, without excluding the possibility of the subject being treated by means of guidelines, directives or rules of conduct. A decision on that question could be deferred until a later stage, when the materials on State practice, treaties and national laws had been fully analysed. Having made those preliminary and tentative observations, he would speak again on the topic at a later stage in the discussion.

17. Mr. McCAFFREY congratulated the Special Rapporteur on his scholarly report (A/CN.4/373), which showed complete command of the subject. He would not comment in detail on the report or on the many thought-provoking ideas in it but, to use the Special Rapporteur's own words, would treat it as "a very early report for the 1984 session" (*ibid.*, para. 75). He would accordingly make only a few tentative and preliminary remarks, intending to go into more detail at the next session, when he hoped that sufficient time would be allocated to the topic.

18. The Special Rapporteur was to be commended on his sensitivity to the views of the members of the Commission and of the Sixth Committee, and on his painstaking efforts to tailor the topic to suit the needs and perceptions of as many points of view as possible. As to its scope, the Special Rapporteur had noted the clear trend of majority opinion in 1982, both in the Commission and in the Sixth Committee, in favour of confining the topic to "physical activities giving rise to physical transboundary harm" and had added: "The essential reason for this change is that State practice is at present insufficiently developed in other areas." (*Ibid.*, para. 63.) He himself had always seen the subject in that light and he warmly supported that conclusion. He believed, however, that it did not involve any real change, but simply represented a refinement introduced on the basis of the Special Rapporteur's experience.

19. As he had pointed out at the previous session,¹⁷ he found the English title somewhat confusing, particularly in an era of high technology. That title spoke of "acts" not prohibited by international law, whereas the French version used the more accurate term *activités*. The focus should be on activities which entailed a risk of transboundary harm. Those activities were not prohibited and the risk in question was accepted by society because the activities were beneficial. What was prohibited was rather the act of causing, or permitting the occurrence of, some substantial harm. Although the English title was something of a misnomer, he was not suggesting that it should be changed, but simply pointing out that it could lead to some conceptual difficulties concerning the nature of the topic.

20. There were, of course, situations in which the source State's responsibility was not engaged unless its

authorities had "the means of foreseeing that loss or injury was likely to be caused, as well as the duty to prevent its occurrence" (*ibid.*, para. 28 *in fine*). There were also situations in which the causing of transboundary harm was not wrongful, but in which there was nevertheless a duty to compensate for actual loss or injury. An illustration of that situation was provided by the second phase of the *Trail Smelter* arbitration,¹⁸ which the Special Rapporteur had discussed in his report (*ibid.*, para. 47).

21. As he saw it, it was largely an academic issue whether one spoke of "wrongful" harm or of harm permitted subject to the duty to compensate. It was not entirely academic, however, because of the danger of emergence of a "smoke easement", subject to the duty to pay for it. Care should be taken to avoid that undesirable result. For the purposes of the present topic, the essential point was the correlative nature of State sovereignty. He was reminded of the comment by a professor of the law of tort, to the effect that one man's right to swing his fist ended where another man's nose began. John Donne had said that no man was an island, and that was equally true of States, which could not exist without relying on and affecting the interests of other States. The regulation of that increasing interdependence should be effected in such a way as to produce harmony among nations; that was indeed the challenge of the present topic.

22. He wholeheartedly endorsed the Special Rapporteur's "soft approach" (*ibid.*, para. 43), which was summarized as having a twofold aim: first, to induce States that foresaw a problem of transboundary harm to establish a régime consisting of a network of simple rules; second, to provide a method of settlement that was reasonably fair (*ibid.*, para. 69). In that connection, the Special Rapporteur had referred to the *Poplar River Project* case¹⁹ as one in which the affected State had had to bear the whole burden of substantial physical transboundary harm. It should be noted, however, that Canada and the United States had set up a bipartite body, the Poplar River Bilateral Monitoring Committee, to monitor pollution levels continuously and to report annually to the two Governments concerned, or more often if required by circumstances. Accordingly, although the affected State did bear the whole burden of substantial transboundary harm, that harm was limited to certain agreed parameters.

23. The Special Rapporteur had asked for comments on section 2 of the schematic outline (*ibid.*, annex). He himself had nothing to add to his preliminary observations made at the previous session.²⁰ He only wished to point out that the *Poplar River Project* case was a specific application of section 2. It would seem desirable to co-ordinate and harmonize the procedures provided for in

¹⁷ *Yearbook* . . . 1982, vol. I, p. 280, 1743rd meeting, para. 10.

¹⁸ United Nations, *Reports of International Arbitral Awards*, vol. III . . . , pp. 1938 *et seq.*

¹⁹ See *Digest of United States Practice in International Law* 1976 (Washington (D.C.), U.S. Government Printing Office, 1977), pp. 590-594; *ibid.* 1978 (1980), pp. 1116-1121 and 1496-1498.

²⁰ *Yearbook* . . . 1982, vol. I, p. 281, 1743rd meeting, paras. 19-20.

section 2 of the schematic outline with those specified in the draft articles prepared by the Special Rapporteur on the law of the non-navigational uses of international watercourses (A/CN.4/367). The rules set out in connection with that topic constituted a specific practical application to international watercourses of the general rules laid down in section 2. He hoped the Commission would co-ordinate its work on the two topics, bearing in mind that one was an application of the other to a particular problem.

24. In section 2 of the schematic outline, he noted the statement in paragraph 8 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." That statement was qualified to some extent by the terms of section 5, paragraph 4, which established a presumption in favour of the affected State in the event of the acting State not making the appropriate information available to it. In the body of his report (A/CN.4/373, para. 65), the Special Rapporteur had, moreover, stated that:

No penalty attaches to the failure or refusal to provide information, except the normal consequence that the source State's ultimate liability may depend upon the whole course of its conduct . . .

That approach seemed largely based on equity.

25. On the subject of documentation, he supported the Special Rapporteur's request that the materials assembled by the Secretariat should be made more widely available and that the third part of the Secretariat's work, presented only as a collection of documents, should be put into the form of an analytical study (*ibid.*, para. 58).

26. Lastly, he wished to record his satisfaction at the fact that the notes to the fourth report had been appropriately placed at the foot of each page to which they applied. In view of the large number of notes, it would have been most inconvenient to readers if the notes had been relegated to the end of the report, as had unfortunately been done in other cases.

27. Mr. FLITAN warmly congratulated the Special Rapporteur, who had not become the advocate of his subject but had tried to present it as objectively as possible, so that the Commission and the Sixth Committee of the General Assembly could draw their own conclusions and decide whether or not the study should be continued. His own view was that the Special Rapporteur could usefully continue his work, which supplemented that of Mr. Thiam and Mr. Riphagen.

28. For reasons of justice and equity, it was incumbent upon a State engaging in activities that caused harm to a neighbouring State to assume responsibility for the consequences by making reparation. It was inconceivable that such a State should be exempt from all liability. To appreciate the value of the Special Rapporteur's study, it was sufficient to note the growing number of conventions concluded on the topic, the mere fact that it had been placed on the Commission's agenda and the views of the great majority of the members of the Sixth Committee. Moreover, with a view to progress in science and technology, States were more and more often engaging in activities which could have injurious consequences for their neighbours.

29. The subject did not divide countries according to their attachment to the East or the West, but rather on a North-South alignment. It was the industrialized countries that were in the best position to undertake advanced activities likely to have injurious consequences whereas the developing countries suffered the consequences.

30. Moreover, as international life became more complicated, it was no longer possible to conceive that States incurred responsibility only if they committed internationally wrongful acts or failed to fulfil their international obligations. Consequently, the Commission should introduce some progressive development. The Special Rapporteur had, indeed, invited the members of the Commission to abandon their habitual view of international law as laying down only prohibitory rules.

31. The Special Rapporteur should not break off his study. Proceeding with great caution, he should take as his starting-point the activities governed by conventions, adopt a more practical viewpoint, draw upon the documentation prepared by the Secretariat, place more emphasis on the concept of good-neighbourliness and avoid entering the area of strict liability—a concept which went too far in the present state of affairs.

32. Mr. NJENGA congratulated the Special Rapporteur on his enlightening report (A/CN.4/373). He wished to place on record his view that, during its thirty-sixth session, the Commission should allocate sufficient time and priority to ensure adequate discussion of the fourth report, together with the further report which the Special Rapporteur had proposed to submit on the development of section 2 of the schematic outline and on the questions of scope and definitions referred to in section 1.

33. In his fourth report, the Special Rapporteur had clearly delineated the scope and parameters of his topic and distinguished it both from State responsibility for wrongful acts and from the ultra-hazardous situations which engaged State responsibility, mainly through international conventions, on the so-called principle of strict liability. The area of transboundary harm, as defined in the report (*ibid.*, para. 3), was one in which State practice and emerging customary rules recognized the obligations of a State to take all practicable measures to prevent harm to its neighbours from lawful activities conducted within its territory, and the need to make the necessary reparation if serious harm was done. That was an aspect of law dictated by good-neighbourly relations, where the freedom of a State to conduct within its territory any activity not prohibited by international law was predicated on the equally important freedom of its neighbour not to have unreasonable harm inflicted upon it. Those two freedoms—in some respects conflicting—called for a high degree of co-operation, which the Special Rapporteur had aptly described as "the continuum of prevention and reparation".

34. The Special Rapporteur had provided numerous examples from State practice where States had felt an obligation to make reparation for transboundary harm arising from acts clearly not prohibited by international

law and where there was no obligation arising from a specific agreement or convention. The *Trail Smelter* case²¹ (*ibid.*, para. 47) was one such early example. In the case concerning the *Cosmos 954* satellite²² (*ibid.*, para. 29), Canada could claim compensation under the Convention on International Liability for Damage Caused by Space Objects,²³ to which both the Soviet Union and Canada were parties. But no one would seriously argue that, if the object had fallen in a State not party to the Convention, that State would not have been entitled to a remedy. The *Fukuryu Maru* case²⁴ (*ibid.*, para. 34) showed the breadth of the transboundary concept, since the prompt offer of fair compensation by the United States indicated recognition of a legal obligation to compensate, although the act of the bomb test had not been wrongful. The *Poplar River Project* case²⁵ (*ibid.*, para. 36), on the other hand, showed the extent and limitation of liability that would be imposed. Canada had been allowed, without penalty, to draw upon the common reservoir of tolerable increase in air pollution levels, although it had significantly reduced the potential for increasing power generation in the neighbouring American State of Montana, which kept within predetermined quality standards.

35. Such examples showed that the topic under consideration was a legitimate one calling for both codification and progressive development. He could not subscribe to the thesis that there was no rule in general international law which prescribed liability for transboundary harm caused by activities not otherwise prohibited by international law, and that such rules existed only in specific conventions or agreements. Nor did he share the view that it was a subject on which meaningful discussions could be conducted only in regard to ultra-hazardous activities, likely damage from which could be foreseen and presumably provided for through specific agreements. The assertion that every State was free to subject its neighbours to unrestricted and unaccountable transboundary harm, so long as its acts were not prohibited by international law and there were no specific agreements to the contrary, was a return to the law of the jungle which could only benefit the major Powers at the expense of smaller States, particularly the developing countries. The argument that if there was a duty of care the question became one of State responsibility for prohibited acts was a circular one.

36. He asked the Special Rapporteur to clarify the statement in paragraph 63 of his report to the effect that the scope of the topic would be confined to physical activities giving rise to physical transboundary harm, as distinct from economic harm. If massive pollution from an accident at sea destroyed State fishery resources and brought commercial fishing to a halt, or ruined a country's

beaches and stopped tourism, surely the resultant economic damage must be taken into account.

37. He shared the frustration of the Special Rapporteur at the lack of collective commitment to the topic in the General Assembly. He hoped that, after a full debate in 1984, all members of the Commission would endeavour to give wholehearted support to the Special Rapporteur, if the Commission decided to continue its work on the topic.

38. Mr. LACLETA MUÑOZ said that he had not been able to study the Special Rapporteur's fourth report (A/CN.4/373) as it deserved because he had only received the Spanish version the previous day; he therefore preferred to regard it as a very early report for the 1984 session, as suggested in the document itself (*ibid.*, para. 75). Hence he would not comment on the many interesting ideas that the report appeared to contain until the next session. He wished, however, to reaffirm the position he had taken both in the Commission and in the Sixth Committee, namely that the study of the topic should be continued.

39. Mr. QUENTIN-BAXTER (Special Rapporteur) expressed his appreciation of the many important points made by speakers. Mr. Koroma and Mr. McCaffrey had put the case for preferring the French title, which referred to "activities", to the English title of the topic. There were difficulties with both versions. One point which might be made in favour of the English title was that international law prohibited only acts or omissions of States: it was not concerned with private activities as such. The title was admittedly long and awkward, but it had been argued that it created a useful superstructure within which all elements of the topic could be identified. However, if the Commission agreed that the proper scope of the topic was physical acts causing physical effects, it was clear that the subject as set out in the current title would not have been dealt with in its entirety. It would therefore be appropriate for the Drafting Committee to consider the question of amending the title when the scope of the topic had finally been settled.

40. In reply to the point about economic damage raised by Mr. Njenga, he would say that the economic element played a very large part in the topic, being particularly relevant to the assessment of compensation, as it had been in the *Fukuryu Maru* case in estimating the loss caused to Japanese fishermen by being deprived of their fishing grounds. Economic viability was also as relevant a factor as technical feasibility in assessing the balance of interests between the source State and the affected State in relation to the prevention of transboundary harm. What it was proposed to exclude from the scope of the topic was harm arising from acts having no physical dimension.

41. Although he disagreed with the conclusion reached by Mr. Ushakov (1800th meeting), he could agree with almost all his arguments. The need to preserve the freedom of the sovereign State to pursue its own interests was greatly in evidence throughout his report on the topic (A/CN.4/373). The same considerations applied in any national society in respect of the rights of individuals. The rights of other individuals or of the State could, if necessary, be safeguarded by rules of prohibition of every

²¹ See footnote 15 above.

²² See *International Legal Materials* (Washington, D.C.), vol. XVIII, No. 4 (1979), p. 899, at pp. 905-907.

²³ See 1800th meeting, footnote 14.

²⁴ See footnote 12 above.

²⁵ See footnote 19 above.

kind, but the more usual course was to declare that the citizen was free to do as he pleased up to the point when his freedom would diminish the freedoms of others. That line of reasoning lay behind his approach to the topic.

42. Mr. Ni had raised the question of the form which the draft articles on the topic should ultimately take. He agreed that it was too early to decide the matter. Mr. Ushakov had indicated unwillingness to agree to an obligation of reparation, as described in the fourth report. His own suggestion was that the Commission should look at State practice and construct rules or guidelines from it. A decision would ultimately have to be taken as to whether the rules or guidelines should be cast in a legally binding form. He was of the opinion that the answer should be in the affirmative, because that would reduce the area in which broad rules of prohibition would have to be relied upon. It was a matter of seeing how far it was possible to temper the need for broad prohibitory rules in international affairs. No forward commitment from States would be required. Indeed, a review of State practice was encouraging, since the degree of co-operation and the extent to which problems were avoided were large.

43. Mr. El Rasheed Mohamed Ahmed (1800th meeting) had wondered whether the approach was not too "soft", whereas Mr. McCaffrey had endorsed it. Experience suggested that better results were obtained in international affairs by a soft approach, since there was no method of obtaining agreement between parties who were in dispute about an unclear rule. Such parties might ultimately opt for a non-principled settlement, but that was in itself a soft approach. Generally speaking, reliance on the rule of co-operation and the avoidance of Government-to-Government confrontations proved more successful.

44. Mr. Flitan had asked whether there was not a strong North-South element in the topic. He had himself referred to the matter in his report (A/CN.4/373, para. 31). There was indeed a feeling that international law was made for rich and established States and that smaller States stood in need of new and undisputed rules of law, as well as procedures for implementing them. However, it was useful to see that not all the benefits were on one side. If developing countries feared the imposition of rigid rules that they were in no position to control, that attitude was paralleled by the fear of developed countries that rules might thwart the full use of their high technology. What was required was a basic honesty and fairness of approach which would persuade both sides that their common interests were safeguarded.

45. The main point was whether the conceptual struggle to banish the notion that international law must be prohibitory would succeed. Wrongfulness should be kept in its proper field, relating to State responsibility for harm caused by a wrongful act or omission of the State. In the present topic, the concept was that of harm arising from activities within the State's territory or control. There was no need to be concerned about attribution, since the State would not be held responsible for any harm that it did not have the possibility of foreseeing and providing for.

46. In conclusion, he welcomed the references by speakers to paragraph 58 of his report, which he took as indicating agreement with his suggestion that the materials in the third part of the Secretariat's study on State practice should be put in the form of an analytical study, and that the study as a whole should be made available to members of the Commission.

47. The CHAIRMAN said that the fourth report and the discussion on it had provided a preview of the debate to be held in 1984. He assumed that there was no objection to the suggestion made by the Special Rapporteur, in paragraph 58 of his report, that the materials in the third part of the Secretariat's study on State practice should be put in the form of an analytical study and that all elements of the study should be made widely available.

It was so agreed.

48. The CHAIRMAN said he further assumed that there was no objection to the suggestion made in paragraph 64 of the report that a questionnaire be sent to selected international organizations.

It was so agreed.

Co-operation with other bodies (continued)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

49. The CHAIRMAN invited Mr. Albanese, Observer for the European Committee on Legal Co-operation, to address the Commission.

50. Mr. ALBANESE (Observer for the European Committee on Legal Co-operation) said that in the Council of Europe the most important recent event connected with international law had been the establishment, in 1982, of a Committee of Experts on public international law. That committee had been instructed, first, to carry out an exchange of views and information on the attitudes of States members of the Council of Europe to the problems of public international law being studied by other international organizations, with a view to trying to reach a common approach; and secondly, to take up and study certain questions of public international law which were suitable for action at the European level.

51. So far, the Committee of Experts had considered three matters under its first mandate. It had begun with two items on the agenda of the Sixth Committee of the General Assembly, namely the review of the multilateral treaty-making process and the law of treaties between States and international organizations or between international organizations. The first of those items had been examined on the basis of the questionnaire drawn up by

* Resumed from the 1775th meeting.

the Secretary-General²⁶ and the replies of Governments.²⁷ The exchange of views had related not only to the significance of the initiative itself, but also to the contents of the replies and the suggestions to be formulated concerning future action. The second item had been examined in the light of the draft articles prepared by the Commission.²⁸ The committee had tackled questions such as the way in which the draft articles should be followed up, the participation of international organizations and their status, and the comments to be made on the various articles. The Committee of Experts had then proceeded to an exchange of views and information on the draft articles on succession of States in respect of State property, archives and debts, which had been adopted at the United Nations Conference held in Vienna from 1 March to 8 April 1983.²⁹ Generally speaking, the exchanges of views and information in the Committee of Experts seemed to have been useful, since anything which helped to unify the attitude of a group of States could only facilitate the work of the United Nations and contribute to the success of its activities.

52. Under its second mandate, the Committee of Experts had considered, among other questions of public international law suitable for action at the European level, that of a comparative study on the procedures followed by member States to express their consent to be bound by treaties and the internal procedures applicable, as well as the question of engagement in gainful occupation by members of the families of diplomatic and consular staff. The starting-point for the first question had been the finding that a number of the treaties drawn up within the Council of Europe had not been ratified by a sufficient number of States. It was true that the reasons for that situation were often political, but it was sometimes due to the fact that the internal procedures by which States expressed their consent to be bound by a treaty were long and complicated. The Committee of Experts had taken the view that the time had come to give States an opportunity of reviewing their internal procedures on the basis of a comparative study. It had prepared a questionnaire which had been sent to States and which should facilitate the drafting of such a study. Some experts had taken the view that, once the study was completed, it might be possible, in the Council of Europe, to express consent to be bound in a simplified way—opting out, provisional application, etc.—to provide for means of encouraging signature and ratification, and to exchange information continuously on the implementation of the conventions concluded in the Council of Europe.

53. The second question of public international law

suitable for European action was that of the privileges and immunities of members of the families of diplomatic and consular staff engaged in gainful occupation in the receiving State. Under article 57, paragraph 2 (c), of the 1963 Vienna Convention on Consular Relations, members of the family of a member of a consular post who carried on any private gainful occupation in the receiving State were not accorded privileges and immunities. That question was not dealt with in the 1961 Vienna Convention on Diplomatic Relations. Some people maintained that the preamble to that Convention and its article 42, which prohibited diplomatic agents from practising any professional or commercial activity for personal profit in the receiving State, also applied to members of their families. Moreover, the expression “forming part of his household” (article 37), which indicated economic dependence, would have the effect of excluding from privileges and immunities members of the family who were no longer in a position of economic dependence. That argument was not generally accepted, however, and therefore a study of the question was justified. It should be noted that the seriousness of the situation varied according to whether it involved immunity from criminal jurisdiction, immunity from civil jurisdiction or merely tax privileges. Several bilateral treaties had been concluded on the subject, but it appeared that a multilateral convention would be worth more than a large number of bilateral instruments.

54. The 1972 European Convention on State Immunity³⁰ now bound five States; it had been signed by four States, and others were considering ratifying or signing it. The Additional Protocol to that Convention, which contained provisions on a European procedure for the settlement of disputes, had been ratified by four States and signed by four others. There was also renewed interest by States in the 1967 European Convention on Consular Functions.³¹ That Convention had been ratified by only one State, but it had been signed by seven.

55. In November 1982, the European Committee on Legal Co-operation had been honoured by the visit of Mr. Reuter, the Chairman of the Commission at its thirty-fourth session. The links between the Commission and the Committee were undoubtedly useful and should be further strengthened.

56. The CHAIRMAN, thanking Mr. Albanese for his statement, said that the work of the European Committee on Legal Co-operation and its assistance in the codification process were of great value to the Commission.

The meeting rose at 1.05 p.m.

²⁶ A/35/312 and Corr.1, sect. IV.

²⁷ See United Nations, *Review of the Multilateral Treaty-Making Process* (ST/LEG/SER.B/21) (to appear as a United Nations publication), Part Three.

²⁸ *Yearbook* . . . 1982, vol. II (Part Two), pp. 17 *et seq.*

²⁹ For the text of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, adopted on 8 April 1978, see A/CONF.117/14.

³⁰ See 1762nd meeting, footnote 7.

³¹ Council of Europe, *European Convention on Consular Functions together with the Protocol concerning the Protection of Refugees, and the Protocol relating to Consular Functions in respect of Civil Aircraft*, European Treaty Series (Strasbourg), No. 61 (1967).

1802nd MEETING

Wednesday, 13 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind¹ (concluded)* (A/CN.4/364,² A/CN.4/365, A/CN.4/368 and Add.1, A/CN.4/369 and Add.1 and 2³)

[Agenda item 4]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (concluded)

1. Mr. NI said that the very lucid, concise, yet remarkably comprehensive report submitted by the Special Rapporteur (A/CN.4/364) raised sensitive political issues of concern to all the peoples of the world. The topic was of special significance to third world countries which, because of their political, economic and technological vulnerability, could more easily fall victims to such crimes as aggression and intervention—both armed and unarmed. The atrocities committed during the last two world wars were still in the memory of the older generations and the peoples of the world were therefore virtually unanimous in their resolve to strengthen international public order by providing some mechanism for preventing or deterring international crimes against the peace and security of mankind.

2. The Special Rapporteur had called (*ibid.*, para. 69) for comments on a number of questions, the first of which concerned the scope of the topic; he had sought guidance on the kind of crimes to be covered in the draft code as well as the subjects to be held criminally responsible—individuals, groups, States, or all three together. On the question of the crimes to be included, the 1954 draft code could of course serve as a basis. As was clear from its title, the present topic obviously did not relate to all crimes under international law, including those of lesser importance. The present codification had to be confined to the gravest offences which, because of their magnitude and seriousness, constituted a threat to the peace and security of mankind. That codification should take into account the development of international law since 1954 as reflected in international conventions, declarations and resolutions, including the International Convention on

the Suppression and Punishment of the Crime of *Apartheid*,⁴ the International Convention on the Elimination of All Forms of Racial Discrimination,⁵ the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁶ the Convention on the Prevention and Punishment of the Crime of Genocide⁷ and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁸

3. The question had also been raised whether there should be a list of offences or whether, on the contrary, a certain number of specific criteria should be laid down and examples of particular types of crime given under each heading, following the Special Rapporteur's recommendation (1755th meeting) to adopt the pattern of article 19 of part 1 of the draft articles on State responsibility.⁹ He himself was inclined to favour the second method, because no list of crimes could be exhaustive. It was more practical to set forth precise but fairly broad definitions of crimes, so as to avoid the risk of omissions.

4. In addition, he suggested the inclusion of a residuary provision along the following lines:

"The provisions of the present code do not prejudice, or in any way affect, any provisions of pre-existing treaties, agreements, conventions, protocols, declarations, resolutions, or similar instruments prescribing certain actions or omissions to be international crimes or, as the case may be, imposing penalties thereon."

A provision of that kind would obviate the necessity of listing all the crimes established by convention or otherwise since 1954 and, at the same time, leave intact and unaffected the provisions of any agreement, declaration, resolution or similar instrument bearing on the question.

5. As to whether legal entities such as States could be held responsible for international crimes, the Judgment of the Nürnberg International Military Tribunal had been frequently cited in support of the view that the crimes to be punished under international law were committed by men and not by abstract entities. Moreover, article 1 of the 1984 draft code specified that: "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." It had been deduced from that provision that only individuals could bear responsibility for crimes under international law. In his view, however, neither the Nürnberg Judgment nor the 1954 draft code excluded the responsibility of States. The rule remained that States were the primary subjects of public international law, although individuals could in certain circumstances be held responsible, and even

* Resumed from the 1761st meeting.

¹ For the text of the draft code adopted by the Commission in 1954, see 1755th meeting, para. 10.

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Idem*.

⁴ General Assembly resolution 3068 (XXVIII) of 30 November 1973, annex; see also United Nations, *Juridical Yearbook 1973* (Sales No. E.75.V.1), p. 70.

⁵ United Nations, *Treaty Series*, vol. 660, p. 212.

⁶ General Assembly resolution 1514 (XV) of 14 December 1960.

⁷ United Nations, *Treaty Series*, vol. 78, p. 277.

⁸ *Ibid.*, vol. 754, p. 73.

⁹ *Yearbook* . . . 1976, vol. II (Part Two), pp. 95–96.

punishable, as subjects under international law. The Nürnberg Judgment and the 1954 draft code went no further than that.

6. It was true that the physical actions constituting a crime could only be committed by individuals, who were accordingly liable to punishment, but that fact did not *a priori* relieve the State of its responsibility for any of the crimes defined in the draft code. The responsibility of the State and that of the individuals concerned did not exclude one another. Article 19 of part 1 of the draft articles on State responsibility, which attached responsibility to the State, was clearly based on the premise that a State was capable of incurring responsibility for the commission of international crimes. Of course, legal entities such as States could not be subjected to such types of punishment as imprisonment, but other punitive measures were available, including restitution, indemnification, injunction and declaration of condemnation. That particular question would fall within the purview of the topic of State responsibility. He himself agreed with the Special Rapporteur that the Commission must harmonize its positions by bringing its 1954 draft code into line with article 19 of part 1 of the draft articles on State responsibility (A/CN.4/364, para. 48).

7. With regard to implementation, it had been suggested that penalties should be prescribed for each of the crimes covered by the draft code, and that provision should be made for an international criminal court. It had also been suggested that a provision should be included authorizing the court trying the case to determine the penalty itself; the competent court might be either a national court or an *ad hoc* international court. In that connection, the Special Rapporteur had rightly raised the question concerning "cases where the issue is the criminal responsibility not of individuals, but of the State" (*ibid.*, para. 67). Since States were sovereign and not subject to compulsion, a very pertinent question had been asked at the 1757th meeting, namely: "What States would sign an international instrument which was liable to place them in the dock?" (Para. 13.) Moreover, the suggestion to confer jurisdiction in the matter upon national courts would involve many difficult problems. He therefore agreed with those members, including Mr. Boutros Ghali (1757th meeting), who had urged the Commission to concentrate at the present stage on the elaboration of the substantive part of the draft code and defer consideration of the questions of implementation and procedure until a later stage; the General Assembly might also be asked for its views on the specific steps to be taken in connection with the implementation of the code.

8. Mr. NJENGA congratulated the Special Rapporteur on his first report (A/CN.4/364), which augured well for progress on a difficult topic. The importance which the General Assembly attached to codification of the subject was beyond question, as was apparent from the analytical paper prepared in response to the request made by the Commission at its thirty-fourth session (A/CN.4/365). The Commission's mandate, as laid down in paragraph 1 of General Assembly resolution 36/106, was very clear. In

fulfilling that mandate, the Commission's task was not to reopen the question of the need for a draft Code of Offences against the Peace and Security of Mankind but to build on the draft code adopted in 1954 by taking account of developments since that date. The aim, therefore, should be to arrive at a comprehensive legal definition that would command the broadest possible support in the General Assembly and the international community as a whole and thereby to contribute to the maintenance of peace and security.

9. In his report, after giving a very useful account of the historical background to the topic, the Special Rapporteur had raised specific issues as to the scope of the draft, the method to be adopted in examining the topic, and the need for an international criminal jurisdiction to enforce the code. In that connection, he had also described (A/CN.4/364, paras. 24-25) how the victors in the Second World War, ignoring the principle *nullum crimen sine lege, nulla poena sine lege*, had decided to punish the leaders of the vanquished for war crimes under the Agreement of 8 August 1945 and the attached Charter of the International Military Tribunal.¹⁰

10. The scope of the subject raised questions both *ratione materiae* and *ratione personae*. In that connection, the first Special Rapporteur had provided a useful yardstick for determining whether an international crime was covered by the code when he had explained that the code was intended to refer to acts which, if committed or tolerated by a State, would constitute violations of international law and involve international responsibility and, further, that the main characteristic of such offences was their highly political nature and that they normally would affect international relations in a way dangerous for the maintenance of peace.¹¹ Accordingly, such a crime must not only constitute a gross violation of what the present Special Rapporteur had referred to as the sacred principles of civilization (*ibid.*, para. 34), but also threaten the peace and security of mankind; crimes such as piracy, hijacking, counterfeiting of currency and trafficking in drugs would not be covered unless a State was directly implicated.

11. In article 2, paragraphs (4)-(10), of the 1954 draft code, the Commission had listed eight crimes; but that list, though still valid, should be revised in the light of the Definition of Aggression¹² and of contemporary realities as exemplified by State practice. In that connection, the compendium of relevant international instruments (A/CN.4/368 and Add.1), prepared by the Secretariat at the Commission's request, should prove useful. Obviously, colonial domination, slavery, genocide, *apartheid* and any other form of institutionalized racial discrimination, including the possible removal of peoples to so-called bantustans or from occupied territories, must all feature in the code; and, as already recognized in

¹⁰ United Nations, *Treaty Series*, vol. 82, p. 279.

¹¹ *Yearbook* . . . 1950, vol. II, p. 259, document A/CN.4/25, para. 35.

¹² General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

article 19 of part 1 of the draft articles on State responsibility,¹³ any acts detrimental to the protection and conservation of the environment should likewise be included. Furthermore, any list of crimes that did not take account of the threat of nuclear annihilation would be unrealistic—a threat currently exacerbated by the unjustified intensification of the nuclear arms race. All uses of nuclear weapons, but in particular their use against non-nuclear powers, should be condemned as crimes along with the use of other weapons of mass destruction, such as chemical and bacteriological weapons.

12. As for the *ratione personae* aspect of the matter, in his view the 1954 draft code was defective in that it was confined to individuals. Many of the crimes envisaged, such as aggression, annexation of territory or *apartheid*, could only be committed by States and, as was clear from article 19 of part 1 of the draft articles on State responsibility, a State could incur criminal responsibility. The Special Rapporteur stated in his report: “The odds are that a State cannot be brought before an international criminal jurisdiction unless it has had the misfortune to be defeated.” (A/CN.4/364, para. 45.) But a State did not necessarily have to be subjected to the same system of adjudication as an individual. For instance, machinery was available through the Security Council, although it did of course have inherent defects. A State could obviously not be imprisoned; but a whole range of other penalties, involving various forms of sanction, could be imposed upon it. Moreover, the very possibility of being condemned as a criminal State would have a deterrent effect.

13. As for the method to be adopted in examining the topic, there was merit in the suggestion that the Special Rapporteur should use the inductive approach and base his study on State practice as reflected in existing conventions and General Assembly resolutions. It was, however, of vital importance to include in the code certain general principles that would command the widest support and describe in general terms the main constituent elements of the crimes to be covered by the code. Any list of crimes should serve merely by way of example and should not be exhaustive.

14. In regard to the implementation of the code, he agreed that the Commission should prepare a draft statute for an international jurisdiction, but only when the study of the code had been completed. Whether such jurisdiction should be exercised by a national or international tribunal was a matter on which he had an open mind, although there was no reason why the two could not exist side by side. The code could impose an obligation on each State to extradite offenders or to prosecute them, even when they were not citizens of that State and even when the crime in question was not committed in its territory.

The meeting rose at 11 a.m.

¹³ See footnote 9 above.

1803rd MEETING

Thursday, 14 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, 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-fifth session

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

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (A/CN.4/L.355)

2. Mr. THIAM (Special Rapporteur), introducing chapter II of the draft report, on the draft Code of Offences against the Peace and Security of Mankind (A/CN.4/L.355), first invited members to take note of a number of changes to be made in the text. In paragraph 19 (1) the words “What is the scope of codification” should be replaced by the words “Field of application of the draft code”; paragraph 19 (2) should be amended to read: “Method of preparing the draft”; paragraph 19 (3) should be amended to read: “Question of the statute of an international criminal court.” He proposed that paragraph 21, which seemed unnecessary, should be deleted, and that the word “codification” should be replaced by the word “draft” throughout the chapter. In paragraph 29, the words “crimes and delicts” should be amended to read “crimes or delicts”. In paragraph 31, the words “They are inclined to think” should be amended to read “They consider”, and the words “consequences involving” should be amended to read “consequences which may entail”. In the second sentence of the French text of paragraph 36, the words *constituaient un crime* should be amended to read *constituaient des crimes*. In paragraph 40, the maxim “*nullum crimen sine lege*” should be deleted, since it was already implied in the principle of non-retroactivity of criminal law.

3. Like most documents of its kind, the draft chapter contained a historical section prepared by the Secretariat. The summary of the discussion which had taken place on item 4 of the agenda began on page 11. The various questions raised during the discussion were divided into three main groups: scope, method and implementation.

4. With regard to scope, the Commission had recognized that the content of the draft code could be considered *ratione materiae* or *ratione personae*. Since article 19 of part 1 of the draft articles on State responsibility¹ defined international crimes as a whole, it

¹ *Yearbook ... 1976*, vol. II (Part Two), pp. 95–96.

was necessary in the present case to determine, within that category of crimes, those which affected the peace and security of mankind. The Commission had reached the conclusion that the offences concerned should be those that were considered the most serious. At the present stage, he had not ventured to attempt a definition of the qualifying term "serious".

5. The discussion had also turned on the question of whether a State could be treated as a subject of international criminal law. The majority of members had taken the view that a State should, indeed, be considered as a subject, although some members, including Mr. Reuter (1757th meeting), believed that the affirmation of that principle did not settle the question of whether it was possible to go further and accept the imposition of political sanctions on States by a judicial body. The Commission had also taken the view that it was not necessary to consider whether or not offences were politically motivated, since offences not so motivated could affect the security of mankind, for example if they affected the environment.

6. The question had also arisen as to whether there was a régime of responsibility for offences against the peace and security of mankind. It seemed difficult to deny the existence of such a régime. Only the previous week, in reply to Klaus Barbie's lawyer, who had challenged the lawfulness of his client's extradition from Bolivia, a French criminal court had declared that, because of their nature, the offences against humanity of which Klaus Barbie was accused did not come under French internal law, but under an international penal régime, and that consequently the absence of an extradition treaty between Bolivia and France was not relevant. He (Mr. Thiam) believed that it should be recognized that that type of offence came under an international system of law and order independent of States, the consequences of which should be studied.

7. With regard to method, members of the Commission had agreed that the inductive and deductive methods should be combined, once a general criterion had been adopted for identifying a criminal act liable to be regarded as an offence against the peace and security of mankind. It was also necessary to refer to the conventions on *apartheid*, genocide, slavery, etc., and to the relevant declarations and conventions on humanitarian law, in order to extract the maximum of substance and draw up an exhaustive list of offences against the peace and security of mankind.

8. Lastly, with regard to implementation, all members believed that it would be unrealistic not to include sanctions in the code and not to provide for an international criminal jurisdiction, though those questions could be examined later when the drafting of the code had been completed. What had to be decided in that respect was the precise mandate given to the Commission by the General Assembly on those two points.

9. The CHAIRMAN, thanking the Special Rapporteur for his introduction, said that because of the delicate and sensitive nature of the topic, it had been considered advisable to examine chapter II at some length. That

examination, however, was without prejudice to the consideration of the draft report as a whole (including chapter II) during the last week of the session.

10. He invited the Commission to begin by examining the first substantive passage of the draft chapter, namely paragraph 19, and drew attention to the fact that the General Assembly, in its resolution 36/106, had requested the Commission to report to it "*inter alia*, on the scope and the structure of the draft Code".

11. In reply to a question by Sir Ian Sinclair, he said that it would be quite in order for members to comment on any paragraph; he would invite the Commission to examine each section paragraph by paragraph.

12. Mr. THIAM (Special Rapporteur) requested members who had proposals on specific paragraphs to submit their amendments in writing.

13. Mr. EL RASHEED MOHAMED AHMED said he wished to place on record his concern to ensure that fighting as a mercenary be included in the exhaustive list of offences against the peace and security of mankind. It should be added to the list in article 2 of the draft code adopted by the Commission in 1954 (A/CN.4/L.355, para. 8). He would speak at greater length on that subject later.

14. After a brief procedural discussion in which Mr. CALERO RODRIGUES, Sir Ian SINCLAIR and Mr. DÍAZ GONZÁLEZ took part, the CHAIRMAN noted that there was general agreement to examine chapter II subsection by subsection, on the understanding that it would be open to members to single out individual paragraphs for comment or proposal of amendments.

15. Mr. USHAKOV said that it was difficult for him to approve of paragraphs 19 to 41, because of the prevailing confusion about the task assigned to the Commission, which was caused by the content of the draft *ratione personae*. For it was inconceivable that the international crimes of States and the international crimes of individuals should be treated together. As to the content *ratione materiae*, it distinctly suggested that article 19 of part 1 of the draft articles on State responsibility would have to be revised. Furthermore, the Special Rapporteur had evoked the need to determine the legal consequences of offences against the peace and security of mankind, although that matter fell within Mr. Riphagen's field of study.

16. It was important to recognize that everyone must be responsible for his own conduct. Consequently, when a State engaged in aggression, it was not the criminal responsibility of the whole population that should be engaged, but that of the few individuals who planned and executed the operation. The question of the political motivation of an international crime did not arise in the case of States, since their conduct was bound to be political. Hence he did not approve of paragraph 24 any more than of paragraph 25. Paragraph 34 raised the question of the existence of international responsibility of individuals for internationally wrongful acts. Was the Special Rapporteur seeking a revision of article 19 of part 1 of the draft articles on State responsibility, and more particularly of paragraph 2 of that article? He did not

understand how the Special Rapporteur could speak of the criminal responsibility of States (para. 30). The criminal responsibility of individuals resulted in the death penalty or deprivation of liberty, but what was to be understood by the criminal responsibility of a State?

17. What was the general criterion mentioned in paragraph 35 in the section on methodology? Why were the crimes of States mixed with the crimes of individuals? Why include an introduction recalling the general principles of criminal law (para. 40)? Had that ever been done in other instruments? Was that which was valid for individuals necessarily valid also for States? Would the Commission also propose a statute for an international criminal court having jurisdiction over States? What penalties would be imposed on States?

18. There was sometimes a link between crimes committed by individuals and those committed by States; but, in the present instance, the Commission should be concerned only with the crimes of individuals, since the crimes of States and their legal consequences were dealt with in the draft articles on State responsibility.

19. Sir Ian SINCLAIR said that he largely agreed with Mr. Ushakov's remarks, but thought they related essentially to the subsection on content *ratione personae* (paras. 26–34).

20. As to the subsection on content *ratione materiae* (paras. 22–25), he could accept the general thrust of its contents so long as it applied to the content *ratione materiae* in isolation.

21. With regard to paragraph 22, it was inaccurate to say that the international crimes in question were “defined” in article 19 of part 1 of the draft articles on State responsibility. That article did not contain any definition, but merely an illustrative list of international crimes. He therefore proposed that the word “defined” should be replaced by the word “illustrated”. Lastly, he was not satisfied with the drafting of paragraph 25, although he had no objection to its substance; he proposed that the language be adjusted so as to convey the intended meaning adequately.

22. Mr. CALERO RODRIGUES said that there should be no objection to the subsection on the content of the draft *ratione materiae*, which adequately reflected the result of the Commission's discussion. His own feeling was that all members were agreed on the paragraphs dealing with the content *ratione materiae*. It had been agreed that the draft code would not cover all international crimes, and not even all major international crimes; it would cover only the more serious international crimes, which were directly related to the peace and security of mankind.

23. With regard to the subsection on the content of the draft *ratione personae*, there was no agreement among members and, as he saw it, the Special Rapporteur had endeavoured to reflect that division of opinion. The presentation of that part of chapter II could, of course, be improved and no doubt suggestions would be forthcoming from members.

24. Mr. DÍAZ GONZÁLEZ said that on the whole he

agreed with the comments made by Sir Ian Sinclair and Mr. Calero Rodrigues. He also shared the opinion of the Special Rapporteur that the Commission considered that the draft applied only to those crimes which were “directly related to the peace and security of mankind”. Nevertheless, he still had some doubt about paragraph 22: was *apartheid* included among the crimes referred to in that paragraph?

25. In paragraph 24, the Special Rapporteur was right to speak of unanimity. But he (Mr. Díaz González) still wondered who was authorized to determine the seriousness of an international crime. What was meant by “the most serious”? Was aggression committed by a State using the atomic bomb more serious than aggression using napalm? Was aggression with napalm more serious than aggression by soldiers with machine-guns? The “category of the most serious international crimes” was not defined clearly enough.

26. Lastly, he thought that article 19 of part 1 of the draft articles of State responsibility did not define international crimes and delicts, but gave illustrations of them. Was the Commission going to amend that article when drafting the code? On the whole, he approved of paragraphs 22 to 25, but still had certain doubts.

27. Mr. McCAFFREY said that he was in substantial agreement with previous speakers regarding the subsection on the content of the draft *ratione materiae*. He wished to point out, however, that Mr. Ushakov's remarks concerning content *ratione personae* were inextricably bound up with content *ratione materiae*. He therefore suggested that the Commission should now examine the subsection on content *ratione materiae* in isolation, without prejudice to members' right to scrutinize the subsection on content *ratione personae*.

28. He fully agreed that the draft code should deal with only the most serious international crimes, namely those directly related to the peace and security of mankind; on that basis, he found paragraphs 22 and 23 acceptable, as reflecting the debate in the Commission. A reservation should, of course, be made on the question of the responsibility of States and of individuals for those international crimes.

29. The question of article 19 of part 1 of the draft articles on State responsibility undoubtedly raised certain problems, the reasons for which had been indicated by Mr. Ushakov. What was valid and applicable for States was in most cases not valid or applicable for individuals. In any case, article 19 was completely separate from the draft Code of Offences against the Peace and Security of Mankind.

30. As to the wording, he supported Sir Ian Sinclair's two proposals: first, to replace the word “defined” by the word “illustrated” in paragraph 22; and secondly, to redraft paragraph 25 so as to convey the intended meaning more accurately in the English text. The original French text of paragraph 25 was fairly clear.

31. Mr. FLITAN said that his task had been simplified by the previous speakers, who had not failed to reply to the points troubling Mr. Ushakov, and he hoped that the

latter would be able to support the majority opinion. But if Mr. Ushakov's view prevailed in the Sixth Committee of the General Assembly, the Special Rapporteur would have to limit the application of his draft to individuals alone. In any event, all were agreed in thinking that the draft code would apply only to offences directly related to the peace and security of mankind, in other words the most serious crimes. The Special Rapporteur had been right to speak of unanimity in paragraph 24, apart from the question of whether the draft should concern individuals as well as States and other artificial legal persons. Unlike Mr. McCaffrey, he did not think it necessary to consider the motivations which incited individuals to commit international crimes. Hence he found paragraphs 22 to 25 acceptable.

32. He proposed that two ideas should be added to the subsection dealing with the content of the draft *ratione materiae*. Several speakers, including himself (1759th meeting), had clearly stated that *apartheid* was an offence against the peace and security of mankind because of the extent of its consequences. *Apartheid* should therefore be covered by the draft code. He also proposed that it should be indicated in the report that one member had wondered whether the obligation of States to resort to the peaceful means of settling their disputes provided for in the Charter of the United Nations, such as good offices, mediation, etc., should not be included in the draft code as a mandatory legal rule. Any State which failed to fulfil that obligation would then be committing an offence for which it would be made responsible.

33. Mr. BARBOZA said that paragraphs 22 to 25 satisfactorily reproduced the most important points of the discussion. He did not entirely agree with Sir Ian Sinclair's comments on paragraph 22, since in his opinion article 19 of part 1 of the draft articles on State responsibility was not confined to illustrating international crimes. Although paragraph 3 of that article gave examples of international crimes, paragraph 2 contained descriptive elements. In order to take account of Sir Ian Sinclair's opinion, however, he proposed that, in paragraph 22 of draft chapter II, the words "as defined in article 19" be replaced by the words "as described and illustrated by article 19".

34. Furthermore, he considered that international crimes were committed by States, but engaged the responsibility of individuals, so that there was double criminal responsibility. The only international crime which engaged the responsibility of individuals alone was piracy. But for the time being there was no need to consider the distinction to be made between crimes committed by States and crimes committed by individuals.

35. In reply to a question by the Chairman, Sir Ian SINCLAIR said that he accepted Mr. Barboza's proposal to replace the words "as defined in" in the last sentence of paragraph 22 by the words "as described and illustrated by", and withdrew his own proposal (para. 21 above) to replace the word "defined" by the word "illustrated".

36. Mr. MAHIOU said that he endorsed the comments made by Mr. Calero Rodrigues. With regard to material,

the draft code should cover serious crimes against the peace and security of mankind, whether those crimes were perpetrated by States or by individuals. Such crimes could, indeed, be attributed both to States and to those of their agents who planned and executed the crimes. Thus the crime of genocide, which was essentially a State crime, must necessarily be carried out by civilian or military personnel. It followed that an act constituting an international crime gave rise to double responsibility. It was therefore logical to consider, *ratione materiae*, that the draft code would include both the crimes of States and the crimes of individuals. On the other hand, it appeared that, *ratione personae*, that distinction entailed different legal consequences.

37. As to the link between the draft code and the topic of State responsibility, there was no doubt that article 19 of part 1 of the draft articles on State responsibility, on international crimes and international delicts, provided a basis for the draft Code of Offences against the Peace and Security of Mankind. However, the fact that an international crime had been described in that article did not seem to be any reason why the Commission should not now deal with crimes committed by States. It would only be developing a rule taken from the draft articles on State responsibility.

38. With regard to the difficulties experienced by Mr. Díaz González concerning the criterion of seriousness, he agreed that it was rather difficult to grasp and had a subjective aspect which, moreover, the Special Rapporteur had emphasized. That criterion could, however, serve as a starting-point, since the enumeration in paragraph 3 of article 19 already gave some idea of the concept of seriousness of international crimes. The criterion of seriousness was one among others that the Commission could use. It was only later that it would have to compare the content of draft article 19, on international crimes and international delicts, with the content of article 2 of the 1954 draft code.

39. From the drafting point of view, the third sentence of paragraph 25 of chapter II was not entirely satisfactory. Rather than saying that acts which seriously jeopardized the fundamental interests of mankind "may also be committed only for advantage", it would be better to say that they "may have complex motives". Indeed, while it was true that political interest was always present, as Mr. Ushakov had pointed out, other motives might intervene.

40. Mr. BALANDA said that, as he understood it, the Commission's annual report to the General Assembly should not state the views of each member, but the unanimous or majority view formed during the discussions. Paragraphs 20 to 25 well reflected the general opinion of members of the Commission.

41. Mr. McCAFFREY said he was disturbed at the implication of Mr. Flitan's proposal concerning *apartheid*, namely that each and every offence suggested by members should be included in any list of offences drawn up by the Commission. To the best of his knowledge that was not the Commission's usual way of proceeding. What the report should seek to reflect were the broad lines of the Commission's thinking on the

matter. It if were in fact decided to include a list of offences—which was still an open question—the content of that list should be determined later. He appealed to Mr. Flitan to withdraw his proposal, since otherwise the debate would only be prolonged and the end result would be a very confusing report.

42. With regard to Mr. Mahiou's statement, he agreed that the example of damage to the environment given in paragraph 25 was not the best one in view of the heterogeneous nature and effects of the acts. Perhaps the sentence in question could be reconsidered.

43. Mr. THIAM (Special Rapporteur) said that the role of the Special Rapporteur in the draft report was to reflect the debate and record what had been said. With regard to the content of the draft code *ratione materiae*, there had really been unanimity in the Commission, for Mr. Ushakov himself had spoken in favour of including only the most serious international crimes. The Commission should now be careful not to open a general debate, thus creating a precedent which might be troublesome in its future work.

44. Mr. USHAKOV said that the most serious international crimes were those committed by individuals. The Commission might well concern itself with the international crimes of States, but it was not required to determine their legal consequences, since that question came within the study of another topic.

45. From the point of view of the draft code, when a State crime had been committed it was necessary to determine which individuals had committed it and in what circumstances they were criminally responsible. On the other hand, the legal consequences of the crime for the State responsible belonged in another draft. It should not be concluded that the Commission must not deal with the international crimes of States; but if it tried to determine, in the draft code, what consequences international crimes might have for States, it would be entering a field which had no place in contemporary international law, namely that of the international criminal responsibility of the State.

46. It should be noted that, in the case of a crime of genocide perpetrated by a State, it was normally necessary to inquire which individuals incurred responsibility. But a crime of genocide might be committed not by a State, but by individuals. In that case, the responsibility of the State was engaged not for the crime of genocide itself, but for not having prevented that crime or for having tolerated it. As the responsibility of States and that of individuals were the subject of two different studies, it was absolutely essential not to take up the same questions in each of them, at the risk of treating them differently.

47. Mr. FLITAN said that he could agree to his view not being recorded in the report if that was the wish of the Commission. He pointed out, however, that the Commission's report on the work of its thirty-fourth session had several times recorded opinions expressed by only one or a few members of the Commission. If he had suggested stating in the report that a few members considered that the crime of *apartheid* affected the

maintenance of international peace and security, it was because he thought that question should be drawn to the attention of the General Assembly, which should clarify it. Similarly, it was because of the apparent importance of the obligation of States to resort to peaceful means of settling their disputes that he had proposed mentioning that obligation in the report.

48. The CHAIRMAN, speaking as a member of the Commission, said that in his view it would not be inconsistent with article 19 of part 1 of the draft articles on State responsibility to attribute responsibility for a crime to a State in the code. He thought Mr. Flitan's point regarding *apartheid* had merit, as indeed did the opposing view. But at the present stage the Commission should confine itself to the broad issues; it could consider other possible offences against the peace and security of mankind when it came to examine the list in article 2 of the 1954 draft code.

49. Mr. McCAFFREY, expressing his appreciation of Mr. Flitan's conciliatory spirit, said that it had not been his intention to suggest that the report should not reflect the views of individual members or groups of members on matters before the Commission.

50. Mr. STAVROPOULOS observed that the difference between States and individuals was quite simple: it was not possible to execute or imprison a State, but it was possible to execute or imprison a subject who did what the State ordered. In the circumstances, he did not see where the difficulty lay.

51. The CHAIRMAN, noting that there were no further comments concerning the subsection on the content of the draft *ratione materiae*, invited comments on the subsection on the content of the draft *ratione personae*.

52. Sir Ian SINCLAIR said that, in his view, there was no doubt that the draft code should be applied to individuals, including government officials who might have been acting for and on behalf of the State; but it should be applied to such persons as individuals. Furthermore, he considered that the references in paragraphs 26 to 34 to article 19 of part 1 of the draft articles on State responsibility would only confuse the issue, since that article, though relevant, created a separate régime in regard to the legal consequences that flowed from the commission of certain internationally wrongful acts characterized as international crimes.

53. On that basis, he had the following proposals to make: (a) in paragraph 28 of chapter II, a footnote should be added to make it clear that the term *droit international pénal* had a special connotation in French, there being no corresponding term in English; (b) paragraph 29, setting out the text of article 19 of part 1 of the draft articles on State responsibility, should be deleted in its entirety; (c) the first sentence of paragraph 30 should be replaced by the following text:

"It was unanimously accepted that international penal responsibility could be attributed to individuals and that the draft code should therefore cover the most serious international crimes committed by individuals."

(d) the text of paragraph 31 should be replaced by the following:

“Some members, on the other hand, are opposed to the concept that international criminal responsibility can be attributed to States within the framework of the draft code. They point to the incongruity and impracticality of instituting criminal proceedings against States. On any view of the matter, the immunity of States would prevent the courts of another State from exercising jurisdiction in such circumstances. Nor could it be realistically anticipated that States would accept that an international criminal court could exercise jurisdiction over States alleged to have committed international crimes. In their view, article 19 of part 1 of the draft articles on State responsibility, while no doubt relevant to a study of the topic, was concerned essentially with establishing that, for certain internationally wrongful acts designated as international crimes, there was an aggravated degree of State responsibility which could involve, as a consequence, the taking of measures in the form of sanctions against the offending State as a guarantee against repetition of the offence. The question of the responsibility of States for internationally wrongful acts designated as international crimes should, in their view, be dealt with exclusively within the framework of the draft on State responsibility.”

(e) paragraph 32 should be deleted; (f) paragraph 33 should be amended to read:

“Another problem that has been raised is that of the régime applicable to offences against the peace and security of mankind. Is there a special régime for such offences?”

(g) the first two sentences of paragraph 34 should be replaced by the following text:

“There was a broad measure of agreement that such a special régime does in fact exist, at least if the scope of the draft is restricted to offences committed by individuals.”

The meeting rose at 1 p.m.

1804th MEETING

Thursday, 14 July 1983, at 3.35 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodríguez, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, 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-fifth session (continued)

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind (continued)* (A/CN.4/L.355)

1. The CHAIRMAN drew attention to the informal document containing the amendments proposed by Sir Ian Sinclair to paragraphs 29 to 34 of chapter II of the draft report (A/CN.4/L.355).

2. It was proposed that paragraph 29 should be deleted and that the first sentence of paragraph 30 should be replaced by the following text:

“It was unanimously accepted that international penal responsibility could be attributed to individuals and that the draft code should therefore cover the most serious international crimes committed by individuals.”

3. Paragraph 31 would be replaced by the following new text:

“Some members, on the other hand, are opposed to the concept that international criminal responsibility can be attributed to States within the framework of the draft code. They point to the incongruity and impracticality of instituting criminal proceedings against States. On any view of the matter, the immunity of States would prevent the courts of another State from exercising jurisdiction in such circumstances. Nor could it be realistically anticipated that States would accept that an international criminal court could exercise jurisdiction over States alleged to have committed international crimes. In their view, article 19 of part 1 of the draft articles on State responsibility, while no doubt relevant to a study of the topic, was concerned essentially with establishing that, for certain internationally wrongful acts designated as international crimes, there was an aggravated degree of State responsibility which could involve, as a consequence, the taking of measures in the form of sanctions against the offending State as a guarantee against repetition of the offence. The question of the responsibility of States for internationally wrongful acts designated as international crimes should, in their view, be dealt with exclusively within the framework of the draft on State responsibility.”

4. Paragraph 32 would be deleted and paragraph 33 should be amended to read:

“Another problem that has been raised is that of the régime applicable to offences against the peace and security of mankind. Is there a special régime for such offences?”

5. The first two sentences of paragraph 34 would be replaced by the following text:

“There was a broad measure of agreement that such a special régime does in fact exist, at least if the scope of the draft is restricted to offences committed by individuals.”

6. Mr. BARBOZA said that, without the Spanish text, he was not prepared to accept all the proposed amendments, which seemed to reopen the debate. He needed to

examine the proposals before he could give an opinion on them.

7. Mr. FLITAN said that the best course was not to change anything in a text which had been discussed at length. The proposals made by Sir Ian Sinclair were biased and expressed a minority view; the opinion of the majority must also be taken into account. It would be for the Special Rapporteur to find a proper balance between the various positions taken.

8. Sir Ian SINCLAIR said that his basic concern in submitting his proposals had been to ensure that the views of those members of the Commission whose position was similar to his own were accurately reflected in the report. While he acknowledged that adoption of his proposal for paragraph 31 might unbalance the text of the report to some extent, he had no objection to those members who held the opposite view endeavouring to restore the balance. His proposed text was designed to reflect the view that, while article 19 of part I of the draft articles on State responsibility was relevant to the draft code, the question of State responsibility in respect of international crimes should nevertheless be dealt with in the draft articles on State responsibility, rather than in the draft code of offences, which was to be a criminal code, applicable by some organ of justice.

9. His proposal regarding the first sentence of paragraph 30 of the report reflected what he believed to be unanimous agreement in the Commission that international penal responsibility could be attributed to individuals. Where members differed was on the feasibility of including offences committed by States within the scope of the draft. His proposal should not be interpreted as excluding the possibility of instituting criminal proceedings against individuals who, in their capacity as State officials, could be held criminally responsible for acts by the State. It was intended simply to reflect his own view that the institution of criminal proceedings against a State by the United Nations was beyond the bounds of possibility.

10. Mr. USHAKOV said that if the members who were in the majority considered that their point of view had been correctly summarized in the draft report, there was no problem. Sir Ian Sinclair was certainly entitled to state in the report that some members had been opposed to the idea that international criminal responsibility could be attributed to States.

11. If the question was how to express the unanimous opinion of the Commission, all members could take part in the discussion, but if it was a matter of recording the view of one or two members only, it was for those members—not others—to state their view on the proposed text.

12. If the Commission decided to retain the mention of unanimity in paragraph 30, he would propose some drafting amendments.

13. Mr. FLITAN said he agreed with Mr. Ushakov as to procedure. The Special Rapporteur had reproduced in the report the views expressed by various members, without repeating their arguments. He should draw on

the summary records to reflect the arguments on all sides, maintaining a fair balance between the opposing views.

14. Mr. McCAFFREY said that the problem was, first, not whether, but how the Commission was divided on the question of whether States should be made subjects of the draft code; and secondly, what the positions of the two sides really were. Some members, including himself, doubted whether a majority of the Commission was in favour of making States subjects of the draft code. In any event, the position of the minority should also be accurately reflected in the Commission's report. Sir Ian Sinclair's proposal, which he supported, was intended to give the Sixth Committee of the General Assembly a clear idea of what had taken place in the Commission's debate on the topic.

15. Mr. NJENGA said that the Commission should not attempt to rewrite chapter II of the draft report; that would mean reopening the debate on the topic. Any members who considered that their views were not properly represented should simply state their positions and leave it to the Special Rapporteur to amend the draft accordingly.

16. Mr. NI said it was his understanding that, at the present stage, it was not the Commission's intention to discuss the draft chapter paragraph by paragraph. In order to expedite the proceedings, it might be preferable to consider the conclusions proposed by the Special Rapporteur,¹ which covered all the important points raised. If the Commission could reach general agreement on them, it would probably have very little difficulty when the time came to consider amendments to its report.

17. Mr. BARBOZA said it was clear that Sir Ian Sinclair had made his suggestions for the Special Rapporteur, so they need not be examined, adopted or rejected at the present stage. The Commission had embarked on a discussion of a rather special kind, which concerned the conception of the report and was intended to answer the questions put by the General Assembly about the scope and structure of the draft code. He therefore proposed that the discussion should continue as though Sir Ian Sinclair had not made any proposal. The Special Rapporteur would take the discussion into account and amend his report or not amend it, as appropriate. Mr. Flitan had been right in suggesting that the Special Rapporteur should propose a new text taking into consideration all the points raised during the discussion. When the Commission had before it a more balanced text, it could examine the draft chapter in greater detail.

18. Mr. THIAM (Special Rapporteur) endorsed the remarks made by Mr. Ushakov and supported by Mr. Flitan and other members of the Commission, which he found very reasonable. There was certainly a majority in favour of the attribution of criminal responsibility to States and the view of the majority had to be expressed in

¹ An informal working paper incorporated, after amendment, as paragraph 40 of draft chapter II (revised), subsequently issued as document A/CN.4/L.366.

the report; but that did not mean that the minority view should be omitted. He would take the amendments proposed by Sir Ian Sinclair into consideration to the fullest possible extent.

19. He was surprised that the deletion of certain paragraphs had been proposed although they had not even been examined. Sir Ian Sinclair had proposed a new opening sentence for paragraph 30 in which the Commission would say that it was unanimous with regard to the penal responsibility of individuals. But had he considered paragraph 27? Perhaps it would suffice to add an endorsement by the Commission to that paragraph. Sir Ian had also proposed the deletion of paragraph 29, which referred to article 19 of part 1 of the draft articles on State responsibility. As Special Rapporteur, however, he believed that that reference should be retained, if only because the article was not sufficiently known. As to paragraph 31, which was said to be insufficiently explicit, he failed to see what could be clearer than saying that some members "are opposed to any criminal responsibility of States". The other proposals could be taken into consideration if their purpose was to stress one aspect more than another, but it was still necessary to examine the draft report more thoroughly.

20. Lastly, he pointed out that he had not officially submitted the conclusions to which Mr. Ni had referred. After consultations with several members of the Commission, he had thought it might perhaps be useful to circulate, as conclusions, a summary of the different views expressed on his draft chapter II. It was perhaps not appropriate to examine it at the present stage, since the summary of conclusions could not be adopted before the draft report itself.

21. Mr. USHAKOV said that the Commission's task was not to examine the Special Rapporteur's draft code, but to consider how the views expressed on it were reflected in the draft report. Any member who thought that his opinion was not correctly represented in the draft report could propose a clearer text. It was not for the Special Rapporteur alone to present the views of members of the Commission; that would leave the door open to a dictatorship of the Special Rapporteurs. He was perhaps not qualified to speak on how the Special Rapporteur had presented the majority view in the draft report but, as to the minority view, he supported the proposals by Sir Ian Sinclair, which were preferable to the Special Rapporteur's text.

22. Mr. BALANDA said it was obvious that the Commission's report should accurately reflect its discussions. The Special Rapporteur had to present the majority and minority views with equal objectivity, so that the General Assembly could take unbiased decisions. If every member of the Commission insisted on his views being recorded in detail, the best course would be to send the General Assembly the summary records. But since that would clearly not be acceptable, it was incumbent on the Special Rapporteur to act as spokesman, with the greatest possible objectivity and accuracy.

23. The document submitted by Sir Ian Sinclair should simply be referred to the Special Rapporteur, who would

see how far he could meet the legitimate concern of Sir Ian and other members of the Commission. The Commission should not discuss that document; it should confine itself to considering whether the contents of the draft report took account of what had actually been said, and to making any necessary drafting amendments.

24. Sir Ian SINCLAIR, referring to the comments made by the Special Rapporteur, said that he had proposed the deletion of paragraph 32 because he thought the content of that paragraph would be adequately covered by the text he had proposed for paragraph 31. With regard to the deletion of paragraph 29, he had no objection to the text of article 19 of part 1 of the draft articles on State responsibility being reproduced in full at some other point in the report. But if the Commission wished to retain paragraph 29 as it stood, he would not object.

25. While he fully agreed with what was said in paragraph 27, it was important to show, at the outset, that the Commission as a whole had agreed that the code should apply to individuals, but had subsequently been divided on whether it should also apply to the States.

26. Mr. MAHIOU observed that procedural difficulties arose with every delicate and controversial subject and that the Commission had made the mistake of combining its usual method of work, which was to examine the text paragraph by paragraph, with a general discussion on each chapter or on the draft report as a whole. The position had become clearer when Mr. Barboza had urged the Commission to examine the draft report and make its views known to the Special Rapporteur, who would take them into account in the revised text of chapter II. Sir Ian Sinclair, who regarded his proposals merely as suggestions, had accepted that procedure. The Commission's present business was therefore to exchange views on the draft report, whether paragraph by paragraph or chapter by chapter; it was only at a later stage that members would be able to submit formal amendments to the text.

27. The procedural discussion had, however, brought out the division of opinion on substance, concerning the criminal responsibility of States. The two opposing views—the majority view and the minority view—were recorded in paragraphs 30 and 31 of the draft report. It should be left to the Special Rapporteur to present those two views accurately, but Mr. Flitan's comment was justified: the paragraphs must be well balanced. Clearly, the majority view could not be recorded in two or three lines and the view of the minority in a passage two or three times as long.

28. Mr. STAVROPOULOS, referring to Sir Ian Sinclair's proposal to delete paragraph 29, said that while he thought the paragraph should be retained, it might perhaps be placed in the introduction to chapter II.

29. Mr. LACLETA MUÑOZ said he belonged to the majority of members who favoured the idea of the criminal responsibility of States, referred to in paragraph 30 of the draft report, and he stressed the need to use the term *criminal* in the Spanish text. Like many other members of the Commission, he considered it essential to develop that doctrine because of the adoption of article 19

of part 1 of the draft articles on State responsibility. It was also important to keep the text of article 19 in the report, because that article, which was little known outside the Commission, explained the position of many of its members. He saw no difficulty in adding a sentence on the question as suggested by Sir Ian Sinclair, but thought it should be in paragraph 27 rather than in paragraph 30.

30. Although he did not believe it possible for the report to record the views of every member of the Commission, he thought it should mention the need—which had been repeatedly stressed by the majority favouring the doctrine of the criminal responsibility of States—to provide for means of settlement of disputes relating to the existence of an act constituting an international crime, or to the characterization of an act as an international crime.

31. Mr. BARBOZA pointed out that several members of the Commission were confusing questions of substance with questions of procedure and suggested that the procedural problem might be settled by inviting the Special Rapporteur to take the present discussion into account in preparing a new text to be submitted at the next meeting. A decision to retain paragraph 29 would be tantamount to a decision on substance. The Commission should decide on the procedure to be followed before pronouncing on the substance.

32. On the proposal of Sir Ian Sinclair, the CHAIRMAN invited members of the Commission to state their views on the substance of paragraphs 26 to 34, before proceeding to consider the remainder of the report.

33. Mr. McCAFFREY supported the views expressed by Mr. Barboza.

34. Referring to paragraph 29, he said that, while he agreed that article 19 of part 1 of the draft articles on State responsibility should be referred to in the report to help members of the Sixth Committee of the General Assembly, he doubted whether it was appropriate to make the reference in connection with the “content of the draft *ratione personae*”. He supported the suggestion made by Mr. Stavropoulos that the reference to article 19 of part 1 of the draft articles on State responsibility be placed in the introduction to chapter II. Given the existence of article 19, he agreed with Sir Ian Sinclair that, in order to avoid confusion, States should not be made subjects of the draft code.

35. Referring to paragraph 30, he agreed that the report should record the fact that the Commission was unanimous in agreeing that individuals should be subjects of the draft code; that idea was already reflected to some extent in paragraph 27. It had not been his impression, however, that the majority of members had favoured the inclusion of States within the scope of the draft code. It might therefore be preferable to state that many members, or the majority of members who had spoken, had taken that view.

36. The second sentence of paragraph 31 was particularly unclear. The proposal by Sir Ian Sinclair appeared to be a more accurate reflection of his own views and those of other members on the question. In par-

ticular, the first and the last two sentences of that proposal were virtually essential if the report was to reflect the view of the minority.

37. With regard to the second sentence of paragraph 33, while he believed that there was a special régime of responsibility applying to individuals for offences against the peace and security of mankind, he doubted the existence of an acknowledged special régime applying to States. On that point, he would support a text along the lines proposed by Sir Ian Sinclair.

38. Mr. NJENGA, referring to the amendments proposed by Sir Ian Sinclair, said that he could not agree that paragraph 29 should be deleted or even placed in the introduction to chapter II, since article 19 of part 1 of the draft articles on State responsibility was intrinsically and crucially linked with the topic under consideration.

39. Furthermore, the text proposed for paragraph 30 gave a distorted picture of the Commission's debate. To reflect that debate more accurately, the text should make it clear that, while the Commission unanimously accepted the international penal responsibility of individuals, the majority of members held the view that there was also an international penal responsibility of States.

40. He could not agree to the proposed deletion of paragraph 32, since it must be retained if paragraph 29 was to remain unchanged.

41. Finally, he could not accept the proposed amendment to paragraph 34, which again tended to suggest that there was no international penal responsibility of States.

42. Mr. MAHIOU said that the Special Rapporteur should have rather more precise views on the crucial question of the responsibility of individuals and of States. He was not in favour of deleting paragraph 29 or the reference to article 19 of part 1 of the draft articles on State responsibility. It would be illogical to speak of international crimes by States without recognizing the principle of criminal responsibility; the Commission must infer from article 19 the necessary consequences concerning offences against the peace and security of mankind. The reference to article 19 should lead the Sixth Committee to a clear understanding of the difficulties of the subject and persuade it to give the Commission guidance on the principle of the criminal responsibility of States.

43. He was prepared to accept the replacement sentence proposed by Sir Ian Sinclair for paragraph 30, in which the Special Rapporteur in any case had also had to introduce a certain number of elements in support of the view of those advocating the principle of criminal responsibility of States, just as he would have to state the case for the opposite view in paragraph 31. He was in favour of retaining paragraph 32, which could only be deleted if paragraph 29 was also deleted. In paragraphs 33 and 34, it would of course be necessary to take account of the views expressed in paragraphs 30 and 31 and to distinguish between the criminal responsibility of individuals and that of States.

44. Mr. BARBOZA urged that paragraph 29 should be retained unchanged in its present position. To move it into the historical introduction would be to minimize its importance, whereas it was precisely from the text of article 19 of part 1 of the draft articles on State responsibility, reproduced in that paragraph, that the rest of the draft followed. Sir Ian Sinclair's proposal for paragraph 30 should rather be considered for incorporation in paragraph 27. Paragraph 32 should not be deleted. Paragraphs 27 to 32 were all interconnected and followed a logical sequence; it would be for the Special Rapporteur to see how he could reword his draft report in the light of Sir Ian Sinclair's proposals.

45. There was no need to overburden the text with a recital of arguments for particular views, since the interested reader could refer to the summary records for the positions of individual members.

46. Mr. FLITAN said that he could not support Sir Ian Sinclair's proposal for the first sentence of paragraph 30, because it might lead to misunderstanding in the Sixth Committee. All that was needed in paragraph 30 was to present the arguments advanced during the general discussion; to indicate that certain international crimes, such as aggression and *apartheid*, could only be committed by States; and to specify that the purpose of the code, which was to contribute to the achievement of international peace, would not be fulfilled if States could not be held responsible for any international crimes they might commit.

47. He could not approve of the deletion of paragraph 32 or the proposed amendment to paragraph 34. In general, the task of the Special Rapporteur was to state the various views clearly, so that the General Assembly could give the Commission precise guidance for its future work.

48. Mr. CALERO RODRIGUES said that paragraphs 26 to 34 followed a very logical sequence and covered all the essential points.

49. He did not support the proposal to delete paragraph 29 or to place it in the introduction to chapter II, where it would be less likely to be read. While he understood the difficulty of some members in accepting a text which, in their view, suggested that article 19 of part 1 of the draft articles on State responsibility clearly implied the existence of international criminal responsibility of States, it should be noted that that concept was not presented as being accepted by the Commission. At the same time, it was difficult to see how a text could refer to State responsibility in the case of crimes, without such responsibility being considered criminal. Consequently, paragraph 29 should remain unchanged and be left where it was.

50. The proposed amendments to paragraphs 30 and 31 were not unreasonable, provided the balance between the majority and minority views in the Commission was restored. As they stood, the proposed amendments devoted more space to the minority than to the majority view.

51. Paragraph 32 was quite acceptable. If it was deleted, however, as had been proposed, the reference it contained to article 19 might be inserted in the first sentence of paragraph 29.

52. He had no difficulty with paragraphs 33 and 34. The amendment to the first part of paragraph 34 proposed by Sir Ian Sinclair, on the other hand, seemed to be too restrictive and gave the impression that the Commission was inclined to limit the scope of the draft code to offences committed by individuals. He could accept the proposed amendment, however, if all reference to the scope of the draft code, which was a separate question, was deleted.

53. Mr. MALEK said he was opposed to the deletion of paragraphs 29 and 32. On the proposal relating to paragraph 30, he could give no opinion until he knew the position of the Special Rapporteur, and he would have to examine the proposed amendments to paragraphs 33 and 34 more thoroughly before pronouncing on them.

54. Mr. USHAKOV said that what raised problems for him in paragraph 29 was not the inclusion of the text of article 19 of part 1 of the draft articles on State responsibility, but the suggested interpretation of it in the phrase: "Article 19 . . . provides that crimes and delicts may be attributed to a State." He urged the Special Rapporteur to be cautious and give a balanced account of the various views expressed.

55. Sir Ian SINCLAIR said that he attached some importance to the inclusion in the report of a reference to the unanimous agreement of the Commission that international penal responsibility could be attributed to individuals. It would be inappropriate to include such a reference in paragraph 27, which was merely part of the introduction to the results of the Commission's debate on the topic.

56. While his proposed amendment to paragraph 30 of the report was intended to reflect the outcome of the Commission's debate, the same result could be achieved by a new paragraph 30 stating that the Commission's debate had been resumed and describing the Commission's unanimous acceptance of the principle of the international penal responsibility of individuals. The following paragraph could then describe the division of opinion in the Commission on the question of the criminal responsibility of States within the framework of the draft code. It should, indeed, be made quite clear that the division of opinion concerned the criminal responsibility of States within the framework of the code, as opposed to such responsibility within the framework of the draft articles on State responsibility.

57. He had proposed the deletion of paragraph 32 simply because his amendment to paragraph 31 already included a reference to the relevance of article 19 to the study of the topic under consideration.

The meeting rose at 6.20 p.m.

1805th MEETING

Friday, 15 July 1983, at 10.35 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-fifth session (continued)

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (continued) (A/CN.4/L.355)

1. The CHAIRMAN proposed that the Commission continue its consideration of chapter II of the draft report (A/CN.4/L.355), from paragraph 35 onwards.

Paragraphs 35 to 40

2. Sir Ian SINCLAIR, referring to paragraph 39, suggested that the second sentence should be redrafted to read: "The Commission will thus complete the work it began in 1954 by examining, with a view to their possible inclusion in the code, all the new offences that have emerged since then." He considered that it would be preferable to omit the reference to decolonization and the development of *jus cogens*. If that reference were retained, however, it should be amplified by a reference to fundamental human rights.

3. Mr. USHAKOV referred the Commission to the comments he had already made on that part of chapter II (1803rd meeting).

4. Mr. McCAFFREY, endorsing Sir Ian Sinclair's remarks on the second sentence of paragraph 39, said that the third sentence also raised a question, since it seemed to suggest that the Commission would endeavour to draw up a list of offences. That, however, had not been his understanding of the position, and he was not certain that he would be able to endorse such an approach.

5. Mr. NJENGA said that, in his view, Sir Ian Sinclair's suggestion would lead to considerable difficulty, since most members of both the Commission and the Sixth Committee of the General Assembly had stressed decolonization and *jus cogens*. To omit all reference to those two important developments would be a step backwards. Furthermore, he considered it necessary not only to establish a principle, but also to draw up a list of offences that would take account of new developments; hence he was unable to share Mr. McCaffrey's view. What was needed, in his opinion, was a definition followed by a non-exhaustive, but none the less comprehensive list of offences.

6. Mr. FLITAN said that he, too, favoured retaining the second sentence of paragraph 39. The Commission had

been invited to resume its work with a view to elaborating a draft code precisely because new offences against the peace and security of mankind had been recognized since 1954 in a number of international legal instruments. As Mr. Njenga had pointed out, repeated allusions had been made during the discussion to crimes connected with decolonization and with the development of *jus cogens*. The inclusion of the words "the development of *jus cogens*" should meet Sir Ian Sinclair's concern, although it would still be necessary to determine what was meant by *jus cogens*. Moreover, use of the word "particularly" clearly showed that other new offences could be taken into consideration.

7. Mr. DÍAZ GONZÁLEZ said he was not in favour of amending the second sentence of paragraph 39. During the discussion, most members of the Commission had referred to crimes which, as a result of the decolonization process, endangered the peace and security of mankind. If nothing was said on that subject, the Commission might give the impression that it did not wish to acknowledge the importance of certain crimes that had emerged since 1954. If the sentence in question was to be amended, it should be to add other crimes, such as the crime of *apartheid*.

8. Mr. RIPHAGEN said that paragraph 39 was not at all clear to him. In the first place, the reference to "all the new offences that have emerged . . . as a result of decolonization and the development of *jus cogens*" sounded strange; it would perhaps be better to say "in connection with developments such as decolonization and the emergence of the notion of *jus cogens*". Secondly, he was not clear about the meaning of the words "general and comprehensive criterion". What criterion? Lastly, paragraph 40 referred to the principle of the non-retroactivity of criminal law, which presupposed that criminal law was precise: the latter part of paragraph 39 should therefore be redrafted to take account of the fact that the reader of the report might not have attended the Commission's discussion.

9. Mr. JACOVIDES said he agreed with Mr. Riphagen that the wording "in connection with developments such as decolonization and the emergence of the notion of *jus cogens*" would be clearer.

10. As to Sir Ian Sinclair's suggestion, like other members he thought it would be better for the second sentence of paragraph 39 to stand, though he could accept the addition of a reference to the protection of fundamental human rights.

11. Mr. MALEK proposed that the phrase suggested by Sir Ian Sinclair should be reworded to read: "by examining, with a view to their possible inclusion in the code, all the offences considered appropriate that have emerged since then". The words that followed could be redrafted along the lines suggested by Mr. Riphagen.

12. Sir Ian SINCLAIR said that, in the light of the discussion, he would withdraw his suggestion and would propose that the second sentence of paragraph 39 be redrafted along the lines suggested by Mr. Riphagen and Mr. Malek, to read: "The Commission will thus complete

the work it began in 1954 by considering for inclusion in the code all the new offences that have emerged since 1954 in connection with developments such as decolonization, the development of *jus cogens* and the growing recognition of the need to protect human rights."

13. Mr. MAHIOU said that paragraph 39 should refer not only to crimes that had emerged as a result of decolonization and the development of *jus cogens*, but also to crimes affecting fundamental human rights. He welcomed the fact that agreement on that point seemed to be near.

Paragraphs 41 to 43

14. Mr. USHAKOV said that the problem of the implementation of the code could not be assimilated to that of sanctions. A distinction had to be made between sanctions and criminal procedure. It could be agreed, for example, that the sanctions provided for in the code would be the severest sanctions; but it would be premature to consider the introduction of international criminal procedure. Such a procedure could possibly be applied to individuals, but in no case to States.

15. Mr. McCAFFREY, referring to the first sentence of paragraph 43, said that in view of the confusion that had arisen regarding the applicability of the code to individuals and to States, it might be advisable to make it clearer that some members considered that the problem of implementation should be studied as it applied to individuals. That would more accurately reflect the tenor of the debate.

16. Mr. STAVROPOULOS said that, in addition to the references in footnotes 15 and 16, it would be advisable to include in paragraph 42 a reminder that consideration of the report of the Committee on International Criminal Jurisdiction had been pending for 30 years, despite the fact that the Definition of Aggression had been adopted.¹

17. Mr. CALERO RODRIGUES said that paragraph 41 should be redrafted to make it clear that there were not two, but three problems involved in implementation, namely the definition of offences, the determination of penalties and the application of penalties.

18. In paragraph 43, he could accept the Special Rapporteur's interpretation of the Commission's discussion as reflected in the first sentence. The last sentence, however, raised a particularly important point involving the Commission's mandate. In order to direct the attention of the General Assembly to the need for absolute precision, he would suggest that that sentence be replaced by the last paragraph of the conclusions proposed by the Special Rapporteur,² which read:

"With regard to the implementation of the code, although the Commission considers that a code unaccompanied by penalties and by a competent criminal jurisdiction would be of purely academic

interest, it has been deemed preferable to ask the General Assembly to indicate more precisely the scope of the Commission's mandate on this point."

19. Mr. LACLETA MUÑOZ said that the three paragraphs of the report dealing with implementation needed to be supplemented and clarified. For those who, like himself, believed that crimes committed by States should be covered by the draft code, it was important to draw a distinction, in respect of implementation, between crimes committed by individuals and crimes committed by States. The former could be tried either by an international court or by a national court; for the latter, it would be necessary to set up adequate machinery to establish the existence of an international crime, since that question could not be left to be determined by the States concerned.

20. Mr. MAHIOU also considered that the part of the report relating to implementation should be expanded. As Mr. Calero Rodrigues had pointed out, the problem of defining the crimes was quite distinct from the two problems associated with implementation, namely that of the penalties to be applied and that of the court competent to impose those penalties. The penalties would not be the same for individuals as for States; some members of the Commission, however, were only considering penalties applicable to individuals. As to jurisdiction, in the case of individuals either a national or an international court could be competent. The question on which the Commission was divided was that of jurisdiction over States. If the problem was presented in that manner, the General Assembly would be able to see more clearly where the difficulties lay.

21. Mr. USHAKOV said that he did not deny the need to prepare a draft code of offences against the peace and security of mankind committed by individuals. He recognized that those crimes had to be severely punished and that criminal procedure must be applied to them. On that last point, however, the opinion of the General Assembly should be sought. Nor was he opposed to the application of sanctions against States, in particular the sanctions provided for in the Charter of the United Nations; but that was a problem which pertained to the study of another topic. In his view, it would be premature to deal with the question of the international penal responsibility of States. Moreover, if the General Assembly decided that that question should be studied, it might entrust the work to a body better qualified than the Commission.

22. Mr. EL RASHEED MOHAMED AHMED suggested that the words "implementation and procedure" or "method of implementation", rather than simply "implementation", would cover all aspects of the matter.

23. The CHAIRMAN, noting that there were no further speakers, said that the comments and proposals made during the discussion would be taken into account by the Special Rapporteur in preparing a revised text of chapter II of the draft report.³

¹ General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

² See 1804th meeting, footnote 1.

³ Subsequently issued as document A/CN.4/L.366.

Report by the Chairman of the Drafting Committee

24. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) pointed out that in paragraph 264 of its report on the work of its thirty-fourth session, the Commission had stated that at its thirty-fifth session it intended “to establish and convene its Drafting Committee at the commencement of that session so as to allow it to complete, at an early juncture, its work on the draft articles referred to it at the present session, and of which it remains seized, on State responsibility, jurisdictional immunities of States and their property and the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier”.⁴ The Commission had accordingly decided on the composition of the Drafting Committee at the 1757th meeting, at the beginning of the second week of the current session, on 9 May 1983. The Committee had held its first meeting on 11 May and worked unceasingly until 14 July; it had held 29 meetings—the largest number for any session in the history of the Commission.

25. The Drafting Committee had concentrated its efforts on the three topics mentioned: it had examined the draft articles outstanding from the two previous sessions, as well as a number of new articles on the jurisdictional immunities of States, which had been referred to it during the current session. On that topic, as well as on State responsibility, the Committee had been able to bring its work generally up to date with respect to the articles outstanding at the beginning of the current session. The Committee had also been able to make some progress with the articles on the diplomatic courier and the diplomatic bag. At the following session, the Drafting Committee would thus have more time available to examine new articles referred to it. That result had been achieved thanks to the laudable efforts of all members of the Committee.

State responsibility (*continued*)* (A/CN.4/L.363, ILC(XXXV)/Conf.Room Doc.5)

[Agenda item 1]

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

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE⁵

ARTICLES 1, 2, 3 and 5

26. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) reminded the Commission that Mr. Riphagen, the Special Rapporteur for part 2 of the topic

of State responsibility, had submitted two sets of draft articles in 1981 and 1982, respectively (ILC(XXXV)/Conf.Room Doc.5).⁶ The first set (arts. 1–5) had been proposed by the Special Rapporteur in his second report, submitted to the Commission at its thirty-third session. The five articles were subdivided into two chapters: chapter I on “General principles” (arts. 1–3) and chapter II on the “Obligations of the State which has committed an internationally wrongful act” (arts. 4 and 5). The Commission had referred those articles to the Drafting Committee.⁷ The second set of draft articles (arts. 1–6), proposed by the Special Rapporteur in his third report, submitted to the Commission at its thirty-fourth session, took into account the comments made in the Commission on the first set. After discussion, the Commission had referred those six articles to the Drafting Committee and had confirmed its referral of articles 1–3 of the first set, on the understanding that the Committee would prepare “framework provisions” and consider whether an article along the lines of the new article 6 should be included among them.⁸

27. After examining the articles of both sets, the Drafting Committee had approved the texts of articles 1, 2, 3 and 5 of the second set. The Committee had not been able to complete its examination of draft article 4, proposed by the Special Rapporteur in his second set, but had considered that it would provide a good basis for the formulation of an article 4, the text of which could be settled at the Commission’s next session. The absence of article 4 explained why the references to it in the other articles had been placed between square brackets.

28. As to article 6, the Drafting Committee had considered that, in the form in which it was drafted, it could not be included among the framework provisions, though a similar provision might be included in the chapter dealing with international crimes. The Committee had taken note of the possibility of including among the framework provisions an article of a general character, which would refer to the subsequent articles on international crimes. The members of the Committee had not been able to reach agreement on the text of that provision and had agreed to revert to it at a later stage, when the content of the chapter on international crimes was known.

29. Whereas the first set of articles had been grouped in two chapters, the second set gave no indication in that regard. Moreover, no titles had been given to the draft articles of either set proposed by the Special Rapporteur. The Drafting Committee had decided to follow his example and defer a decision on the titles of the articles and of the chapters in which they would be grouped. The texts of the draft articles adopted by the Drafting Committee appeared in document A/CN.4/L.363.

* Resumed from the 1780th meeting.

⁴ *Yearbook* . . . 1982, vol. II (Part Two), p. 122.

⁵ For the initial consideration of the draft articles by the Commission at the current session, see 1771st–1780th meetings.

⁶ For the texts of the two sets of draft articles, see 1771st meeting, para. 2.

⁷ *Yearbook* . . . 1981, vol. II (Part Two), p. 145, para. 161.

⁸ *Yearbook* . . . 1982, vol. II (Part Two), p. 82, para. 103.

30. The Drafting Committee proposed the following text for article 1:

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.

31. Article 1 corresponded substantially to draft article 1 of the second set. In the opinion of the Drafting Committee, the text approved made it unnecessary to retain articles 1 and 3 of the first set, the contents of which were covered. In article 1 of the second set, the emphasis had been on the internationally wrongful act and the rights and obligations arising therefrom. The Drafting Committee had considered it advisable to replace the reference to rights and obligations, which raised problems of interpretation, by a reference to "legal consequences". Since article 1 was intended to be a link between parts 1 and 2 of the draft, that amendment had been considered justified, since part 2 dealt with the content, forms and degrees of international responsibility, in other words determination of the consequences attached by international law to an internationally wrongful act of the State. Besides, the Drafting Committee had considered that it would be more in keeping with the content of part 1 to refer to the international responsibility of a State which, according to the provisions of that part, arose from an internationally wrongful act committed by that State, than merely to refer to that wrongful act, as in the Special Rapporteur's text. Lastly, for stylistic reasons the phrase "in conformity with the provisions of the present part 2" had been replaced by the words "as set out in the present part".

32. One member of the Drafting Committee had thought that article 1 should give a fuller indication of the contents of part 2 and to that end had proposed a text, which the Committee had not adopted.

33. The Drafting Committee proposed the following text for article 2:

Article 2

Without prejudice to the provisions of articles [4] and 5, 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.

34. Article 2 gave expression to one of the two elements contained in article 3 of the second set of articles, namely determination of the legal consequences of an internationally wrongful act by rules of international law distinct from those contemplated in part 2. The second element related to customary international law, and the Drafting Committee had decided that it merited a separate provision, which was the present article 3.

35. Article 2 substantially reproduced the provision in article 3 of the second set of articles. As in article 1, the reference to an "obligation", or more specifically to its "breach", had been replaced by a reference to "legal consequences", an expression which had already been used in article 3 of the second set of articles. The order of the words in the introductory phrase had been reversed to give it more force and the words "except where and" had

been inserted before the words "to the extent that", in order to make the sentence more precise. Lastly, the phrase "the rule or rules of international law establishing the obligation or by other applicable rules of international law" had been replaced by the words "other rules of international law relating specifically to the internationally wrongful act in question". It had been considered that the latter wording had the same effect, but was clearer and more precise, and more consistent with the new terminology and the change of emphasis in the article.

36. In order to take into account the hierarchy of legal norms, both article 2 and article 3 began with the necessary saving clause concerning the provisions of a future article 4 on peremptory norms of general international law, and of article 5 on the provisions and procedures of the Charter of the United Nations.

37. The Drafting Committee proposed the following text for article 3:

Article 3

Without prejudice to the provisions of articles [4] and 5, 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.

38. Article 3 gave expression to the second element underlying draft article 3 of the second set of articles, namely the rules of customary international law. The wording of the article closely followed that of similar provisions in the preambles to codification conventions such as the 1969 Vienna Convention on the Law of Treaties and the 1978 Vienna Convention on Succession of States in Respect of Treaties. The adoption of article 3 would make it unnecessary to retain article 2 of the first set of articles.

39. The Drafting Committee proposed the following text for article 5:

Article 5

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.

40. Article 5 corresponded essentially to draft article 5 of the second set of articles. As in the previous cases, the former reference to rights and obligations had been replaced by a reference to the "legal consequences of an internationally wrongful act of a State". In addition, it had been considered advisable to specify that the provisions and procedures of the Charter of the United Nations which took precedence were those relating to the maintenance of international peace and security.

CONSIDERATION BY THE COMMISSION

41. The CHAIRMAN invited members of the Commission to adopt the draft articles on State responsibility proposed by the Drafting Committee (A/CN.4/L.363).

42. Mr. MALEK said that, as the texts of those articles had only just been circulated, he had not had time to study

them. He proposed that the adoption of the articles should be deferred until the next meeting.

43. Mr. QUENTIN-BAXTER said that he understood Mr. Malek's position. The Commission had been faced on a number of occasions with delays in the production of its documents. The resulting inconvenience varied, of course, with the nature of the document: in the present instance, the document under discussion contained draft articles, the formulation of which was of the very essence of the Commission's work. Moreover, those articles represented the result of years of work by the Commission, the Special Rapporteur and, finally, the Drafting Committee. The fact that they had only come before the Commission that morning created serious difficulties for those members who were not members of the Drafting Committee.

44. He had listened with interest to the introductory remarks by the Chairman of the Drafting Committee but thought that those necessarily brief explanations were insufficient to enable members like himself, who had not participated in the work of that Committee, to embark on an immediate discussion of the articles.

45. In conclusion, he believed that an important problem of a general character had been raised by Mr. Malek; perhaps it could be examined by the Commission's Planning Group.

46. Mr. DÍAZ GONZÁLEZ associated himself with the remarks of the two previous speakers and urged that the necessary time to examine the draft articles be allowed for those members who did not belong to the Drafting Committee. He much admired the work of that Committee and, having once been a member, understood its difficulties; but it was essential to remember that the articles proposed by the Drafting Committee had to be fully discussed by the Commission itself, which was the body responsible for adopting them.

47. Sir Ian SINCLAIR said that he understood the concern of the three previous speakers. The problem was one which ought to be considered by the Commission's Planning Group. In the present instance, a dilemma had been created because the Drafting Committee had worked until very late in the session, with the result that the draft articles could not have come before the Commission any earlier.

48. That being so, he agreed that the full Commission should have an adequate opportunity to consider carefully all the draft articles which were the outcome of the Drafting Committee's work. As far as the draft articles in document A/CN.4/L.363 were concerned, he suggested that the best solution might be to discuss them at once, but to defer any decision on them until the next meeting.

49. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) suggested that the whole discussion on document A/CN.4/L.363 should be deferred until the next meeting. To save time, he could now proceed to introduce the draft articles on jurisdictional immunities of States and their property.

50. Mr. NJENGA said that he shared Mr. Malek's concern and supported the suggestion that the discussion

on document A/CN.4/L.363 should be deferred until the next meeting. He did not favour the idea of deferring only the decisions and would much prefer to hear any statements by his colleagues after he had had time to study the draft articles carefully.

51. Mr. RIPHAGEN supported the suggestion to postpone the discussion on the draft articles on State responsibility, for which topic he was the Special Rapporteur. He, too, believed that comments by members on the draft articles could only be appreciated by those who had read and pondered them.

52. Mr. BALANDA said he fully agreed with those members of the Commission who had asked for time to examine the texts of the draft articles on State responsibility adopted by the Drafting Committee. He asked whether it would not be possible to distribute the text of the statement by the Chairman of the Drafting Committee, in order to give members a better understanding of the reasons for the amendments made. He hoped that in future it would be possible for the Commission to have all the necessary documentation in good time for the adoption of articles proposed by the Drafting Committee.

53. Mr. USHAKOV said that, for his part, he was quite prepared to comment on the draft articles on State responsibility proposed by the Drafting Committee.

54. The CHAIRMAN, speaking as a member of the Commission, said that from his seven years' experience of its work—a period during which he had attended all the meetings, except for one short absence—he could say that there was nothing unprecedented in the present situation. Because of the circumstances in which the Drafting Committee worked, draft articles often reached the Commission on the very morning of the meeting at which they were due to be adopted. Consequently, the procedure suggested by Mr. Lacleta Muñoz had already been followed quite frequently in the past.

55. Undoubtedly, the ideal arrangement would be for members to have ample time to study all draft articles submitted to them, so that they could give their considered response. It should be remembered, however, that the articles in document A/CN.4/L.363 would only be adopted provisionally on first reading. The Commission would be examining them again on second reading.

56. Speaking as Chairman, he noted that it was clearly the wish of the Commission to defer consideration of the draft articles on State responsibility until the next meeting. He would therefore take it that the Commission agreed to that postponement.

It was so agreed.

**Jurisdictional immunities of States and their property
(continued)* (A/CN.4/L.364, ILC(XXXV)/Conf.
Room Doc.1)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE

* Resumed from the 1770th meeting.

ARTICLES 10, 12, 2, para. 1 (g), 3, para. 2, and 15

57. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, at the beginning of the present session, draft articles 10, 11 and 12 (ILC(XXXV)/Conf.Room Doc.1) on jurisdictional immunities of States and their property had been pending in the Drafting Committee. Draft articles 7, 8, 9 and 10 in part II (General principles), which constituted a reformulation of the set of draft articles proposed by the Special Rapporteur in his third report, had been referred to the Drafting Committee at the Commission's thirty-third session. Of these, the Commission had provisionally adopted, at its thirty-fourth session, only draft articles 7, 8 and 9.⁹

58. Draft articles 11 and 12, which belonged in part III (Exceptions to State immunity), were a new version of the draft articles proposed by the Special Rapporteur in his fourth report and referred to the Drafting Committee at the Commission's thirty-fourth session.¹⁰ At the present session, the Commission had referred to the Drafting Committee articles 13, 14 and 15 proposed by the Special Rapporteur in his fifth report.

59. The Drafting Committee had approved the titles and texts of articles 10, 12 and 15. In connection with article 12, it had approved a definition of the term "commercial contract" for inclusion in article 2 (Use of terms) as paragraph 1 (g), as well as an interpretative provision for inclusion in article 3, paragraph 2. It had been considered advisable to set aside article 11 for the time being; articles 13 and 14 would be examined by the Drafting Committee at the Commission's next session. The articles adopted by the Drafting Committee were reproduced in document A/CN.4/L.364.

60. The Drafting Committee proposed the following text for article 10:

Article 10. Counter-claims¹¹

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of any counter-claim against the State arising out of the same legal relationship or facts as the claim presented by the State.

3. A State making a counter-claim in a proceeding instituted against it before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

61. Article 10 corresponded substantially to draft article 10 as proposed by the Special Rapporteur. To make the rule more easily understandable, however, the Drafting Committee had considered it advisable to set out in three separate paragraphs the three cases which appeared to be

mixed together in the two paragraphs of the original text. Accordingly, paragraph 1 dealt with the case of a counter-claim arising out of the same legal relationship or facts as the principal claim, where a State had itself instituted a proceeding before a court of another State. Paragraph 2 dealt with the case of a counter-claim against a State and arising out of the same legal relationship or facts as the claim presented by that State, where that State had intervened to present a claim in a proceeding before a court of another State. Paragraph 3 concerned a counter-claim made by a State in a proceeding instituted against it before a court of another State.

62. In order to bring the language of article 10 into line with that of the articles already provisionally adopted, the Drafting Committee had used the formula "A State . . . cannot invoke immunity from jurisdiction" in all three paragraphs. Other minor drafting changes had been introduced only to make the text clearer and more precise.

63. The Drafting Committee proposed the following text for article 12:

Article 12. Commercial contracts¹²

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a government-to-government basis;

(b) if the parties to the commercial contract have otherwise expressly agreed.

64. Although the basic principle remained the same, the drafting of article 12 was appreciably different from that of draft article 12 submitted by the Special Rapporteur. The drafting changes made had been unavoidable because of the change of focus given to the article: the original text referred to "trading or commercial activity" whereas the new text referred to "commercial contracts". In the original text, moreover, the Special Rapporteur had stressed two elements which did not need any specific mention in the new text: the fact that the activity was conducted wholly or partly in the territory of another State, as a basis for jurisdiction; and the fact that the activity was conducted by the State itself or by one of its organs or agencies, whether or not organized as a separate legal entity. In the new text, a simple reference to the State had replaced the former enumeration. As to the relationship between the activity and the territory of the other State, since the new article related to commercial contracts instead of trading or commercial

⁹ *Yearbook* . . . 1982, vol. II (Part Two), pp. 100 *et seq.*

¹⁰ *Ibid.*, p. 99, para. 198.

¹¹ For the text submitted by the Special Rapporteur, *ibid.*, p. 95, footnote 218; for the Commission's consideration thereof at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 104-119, 1716th meeting, paras. 15-47, 1717th meeting and 1718th meeting, paras. 1-39.

¹² For the revised text submitted to the Drafting Committee by the Special Rapporteur, see *Yearbook* . . . 1982, vol. II (Part Two), p. 99, footnote 237; for the Commission's consideration of the original text (*ibid.*, footnote 221) at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 183-199, 1728th meeting, paras. 7-45, and 1729th-1730th meetings.

activity, the important point was to stress, as did paragraph 1 of the new text, that the applicable rules of private international law determined whether differences relating to commercial contracts fell within the jurisdiction of a court of the other State.

65. The article specified that one of the parties to the contract had to be a foreign natural or juridical person and stressed the importance of consent to the exercise of foreign jurisdiction in a proceeding arising out of the contract, the natural consequence being that in those circumstances the contracting State could not invoke immunity of jurisdiction in that proceeding. That was the accepted formula used throughout the draft.

66. To achieve a more systematic presentation, the exceptions stated in the two paragraphs of the original text had been repeated in the two subparagraphs of the new paragraph 2. Subparagraph (a) corresponded to paragraph 2 of the draft article submitted by the Special Rapporteur and subparagraph (b) expressed the possibility of derogation by agreement provided for in the original text by the introductory phrase of paragraph 1, "Unless otherwise agreed".

67. Having introduced the concept of a "commercial contract" into article 12, the Drafting Committee had found it necessary to adopt a definition of that term for inclusion in article 2 as paragraph 1 (g), where it would replace the definition of the expression "trading or commercial activity" in the original text of article 2 submitted by the Special Rapporteur in his second report. The proposed new definition did not call for any comment and read:

Article 2. Use of terms¹³

1. For the purposes of the present articles:

...

(g) "commercial contract" means:

- (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
- (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
- (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

...

68. The following new interpretative provision had been introduced to replace, as paragraph 2 of article 3, the provision originally proposed by the Special Rapporteur in his second report, concerning the commercial character of a trading or commercial activity. According to the new text, in determining whether a contract was commercial, reference should be made primarily to its nature, but the purpose of the contract should also be taken into account if it was relevant to determining the non-commercial character of the contract.

Article 3. Interpretative provisions¹⁴

...

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

69. The Drafting Committee proposed the following text for article 15:

Article 15. Ownership, possession and use of property¹⁵

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) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or

(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or *bona vacantia*; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of, property:

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence.

3. The preceding paragraphs are without prejudice to the immunities of States in respect of their property from attachment and execution, or the inviolability of the premises of a diplomatic or special or other official mission or the protection of consular premises, or the jurisdictional immunity enjoyed by a diplomatic agent in respect of private immovable property held on behalf of the sending State for the purposes of the mission.

70. Article 15 corresponded substantially to draft article 15 submitted by the Special Rapporteur in his fifth report and referred to the Drafting Committee during the current session. In order to make the text clearer and more precise, and thus to facilitate understanding of the rule, the Drafting Committee had decided to rearrange the contents of the four subparagraphs of the original paragraph 1, dividing them between the new paragraphs 1 and 2. Paragraph 3 of the new text corresponded to the former paragraph 2.

71. In the introductory clause of paragraph 1, the Drafting Committee had deleted the proviso "Unless otherwise agreed". Furthermore, in the interests of the harmony of the draft as a whole, it had used the formula

¹³ For the original text, see *Yearbook* . . . 1982, vol. II (Part Two), pp. 95–96, footnote 224. For the Commission's decision to modify the definition of "trading or commercial activity", see *Yearbook* . . . 1982, vol. I, p. 199, 1730th meeting, paras. 28–29.

¹⁴ For the original text, see *Yearbook* . . . 1982, vol. II (Part Two), p. 96, footnote 225. For the Commission's decision to modify paragraph 2, see *Yearbook* . . . 1982, vol. I, p. 199, 1730th meeting, paras. 28–29.

¹⁵ For the text submitted by the Special Rapporteur, see 1762nd meeting, para. 1; for the Commission's consideration thereof at the current session, see 1767th meeting, paras. 9–47, and 1768th–1770th meetings.

appearing in other articles: "The immunity of a State cannot be invoked". In order to avoid problems of interpretation, the Committee had felt justified in specifying that the court referred to was "a court of another State which is otherwise competent". Lastly, it had specified that the proceeding in which that court exercised its jurisdiction had to relate to the determination of one of the rights or interests enumerated in subparagraphs (a)–(e) of paragraph 1.

72. Subject to some drafting amendments made in the interests of uniformity and precision, subparagraphs (a) and (b) of the new paragraph 1 corresponded to subparagraphs (a) and (b) of the former paragraph 1, and subparagraphs (c), (d) and (e) of the new paragraph 1 dealt with the three matters covered by subparagraph (c) of the original paragraph 1.

73. The provisions of subparagraph (d) of the former paragraph 1 were reflected, with changes in drafting and presentation, in the new paragraph 2 of the article. Lastly, a new paragraph 3 set out in greater detail the provision in the former paragraph 2.

74. One member of the Drafting Committee had been opposed to paragraph 2, which he considered unnecessary because its contents were partly covered by the provisions of other articles or related to cases outside the scope of the draft. As for paragraph 3, several members had regarded it as a provisional text subject to the approval of article 4 or other additional articles which might prove necessary.

The meeting rose at 1 p.m.

1806th MEETING

Monday, 18 July 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodriguez, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

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

* Resumed from the 1799th meeting.

(A/CN.4/L.365 and Add.1, ILC(XXXV)/Conf. Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 1 to 8¹

1. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), continuing the report on the work of the Drafting Committee which he had begun at the previous meeting, said that articles 1 to 8 on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier which had been adopted by the Drafting Committee (A/CN.4/L.365 and Add.1) corresponded to draft articles 1 to 8 submitted by the Special Rapporteur. He recalled that the original texts of draft articles 1 to 6 were contained in the second report of the Special Rapporteur. Those draft articles had been examined by the Commission at its thirty-third session and had been referred to the Drafting Committee, but it had not considered them at that time.² Draft articles 1, 3, 4 and 5, as reformulated, had been reproduced in the third report of the Special Rapporteur which had also contained, without modification, the texts of draft articles 2 and 6. Draft articles 7 to 14 had constituted a new set of articles submitted by the Special Rapporteur in his third report. The 14 draft articles submitted in the third report of the Special Rapporteur had been examined by the Commission at its thirty-fourth session and referred to the Drafting Committee which, for lack of time, had been unable to consider them.³ At the current session, the Commission had also referred to the Drafting Committee draft articles 15 to 19 submitted in the Special Rapporteur's fourth report (A/CN.4/374 and Add.1–4). Articles 9 to 19 would therefore have to be considered by the Drafting Committee at the Commission's next session. The Special Rapporteur had grouped together articles 1 to 6 in part I, entitled "General provisions", and articles 7 to 19 in part II, entitled "Status of the diplomatic courier, the diplomatic courier *ad hoc* and the captain of a commercial aircraft or the master of a ship carrying a diplomatic bag". The Drafting Committee had decided to postpone its decision on the various parts into which the draft might be divided until it had made considerably more progress in its examination of the proposed articles.

2. The Drafting Committee proposed the following text for article 1:

Article 1. Scope of the present articles⁴

The present articles apply to the diplomatic courier and the diplomatic bag employed for the official communications of a State with its missions, consular posts or delegations, wherever situated, and for the official communications of those missions, consular posts or delegations with the sending State or with each other.

¹ For the consideration of these draft articles by the Commission at its thirty-fourth session, see *Yearbook* . . . 1982, vol. I, pp. 293–312, 1745th meeting, paras. 7–37, and 1746th–1747th meetings.

² *Yearbook* . . . 1981, vol. II (Part Two), p. 162, para. 249.

³ *Yearbook* . . . 1982, vol. II (Part Two), p. 120, para. 249.

⁴ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 314.

3. The text adopted by the Drafting Committee corresponded to that of the article 1 submitted by the Special Rapporteur. However, the Drafting Committee had substantially simplified its wording by employing the generic terms used in article 3, namely “diplomatic courier”, “diplomatic bag”, “mission” and “delegation”, which would be explained in that article. Furthermore, it had changed the emphasis of article 1. Whereas the original text had stressed the communications of States for all official purposes, the Drafting Committee had highlighted the very scope of the draft—the diplomatic courier and the diplomatic bag employed for the official communications of a State.

4. The Drafting Committee proposed the following text for article 2:

Article 2. Couriers and bags not within the scope of the present articles³

The fact that the present articles do not apply to couriers and bags employed for the official communications of international organizations shall not affect:

(a) the legal status of such couriers and bags;

(b) the application to such couriers and bags of any rules set forth in the present articles which would be applicable under international law independently of the present articles.

5. The text of article 2 as adopted by the Drafting Committee reproduced, with only a few minor drafting changes, the text of paragraph 2 of the draft article submitted by the Special Rapporteur. The Committee had reached the conclusion that paragraph 1 of that draft had not been necessary and had therefore deleted it. The expression “all official purposes” had been replaced by the expression “official communications”, which was used in article 1. Furthermore, in subparagraph (b), the phrase “with regard to the facilities, privileges and immunities which would be accorded” had been replaced by the expression “which would be applicable”, which was used in the corresponding provisions of, for example, the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. The Drafting Committee’s adoption of the article in no way implied that it had taken a position on the question of extending the scope of the draft to couriers and bags of international organizations or of national liberation movements. That was a matter which could be settled at a later stage.

6. The Drafting Committee proposed the following text for article 3:

Article 3. Use of terms⁴

1. For the purposes of the present articles:

(1) “diplomatic courier” means a person duly authorized by the sending State, either on a regular basis or for a special occasion as a courier *ad hoc*, as:

(a) a diplomatic courier within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular courier within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a courier of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

³ For the text submitted by the Special Rapporteur, *ibid.*, p. 115, footnote 315.

⁴ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 116, footnote 318.

(d) a courier of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975,

who is entrusted with the custody, transportation and delivery of the diplomatic bag, and is employed for the official communications referred to in article 1;

(2) “diplomatic bag” means the packages containing official correspondence, documents or articles intended exclusively for official use, whether accompanied by diplomatic courier or not, which are used for the official communications referred to in article 1 and which bear visible external marks of their character as:

(a) a diplomatic bag within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a consular bag within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(c) a bag of a special mission within the meaning of the Convention on Special Missions of 8 December 1969; or

(d) a bag of a permanent mission, of a permanent observer mission, of a delegation or of an observer delegation, within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(3) “sending State” means a State dispatching a diplomatic bag to or from its missions, consular posts or delegations;

(4) “receiving State” means a State having on its territory missions, consular posts or delegations of the sending State which receive or dispatch a diplomatic bag;

(5) “transit State” means a State through whose territory a diplomatic courier or a diplomatic bag passes in transit;

(6) “mission” means:

(a) a permanent diplomatic mission within the meaning of the Vienna Convention on Diplomatic Relations of 18 April 1961;

(b) a special mission within the meaning of the Convention on Special Missions of 8 December 1969; and

(c) a permanent mission or a permanent observer mission within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(7) “consular post” means a consulate-general, consulate, vice-consulate or consular agency within the meaning of the Vienna Convention on Consular Relations of 24 April 1963;

(8) “delegation” means a delegation or an observer delegation within the meaning of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character of 14 March 1975;

(9) “international organization” means an intergovernmental organization.

2. The provisions of paragraph 1 of the present article regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

7. That text corresponded to the article 3 submitted by the Special Rapporteur. However, the Committee had reduced the number of paragraphs from three to two, the first of which comprised nine subparagraphs, compared with 12 subparagraphs in the original text.

8. Paragraph 1, subparagraph (1), defined the term “diplomatic courier”, which covered both the regular courier and the courier *ad hoc*, who had been the subject of a separate subparagraph in the original text. The term referred to a person duly authorized by the sending State either as a diplomatic courier in the strict sense, a consular courier, a courier of a special mission or a courier of a permanent mission, of a permanent observer mission, of a

delegation or of an observer delegation. Those various categories were distinguished by reference to the meaning given to each one by the relevant codification conventions. Moreover, the detailed reference made in the original draft to the active and passive subjects of communications effected through the diplomatic courier had been simplified by a reference to "the official communications referred to in article 1".

9. Paragraph 1, subparagraph (2), corresponded to paragraph 1, subparagraph (3), of the original draft. However, its wording was modelled on that of subparagraph (1). For example, the description of the dispatchers or recipients of the diplomatic bag had been replaced by a reference to "the official communications referred to in article 1". Similarly, the subdivisions of the subparagraph referred to the various types of bags covered by the term "diplomatic bag", which were defined by reference to the meaning given to them in the relevant codification conventions. The Drafting Committee had further simplified the text by using the expression "packages . . . whether accompanied by diplomatic courier or not" in place of the original phrase "packages . . . dispatched through diplomatic courier or the captain of a commercial ship or aircraft or sent by postal or other means, whether by land, air or sea".

10. Paragraph 1, subparagraph (3), which corresponded to subparagraph (4) of the original draft, defined the term "sending State". The wording had been simplified through the use of the generic terms "missions" and "delegations". The Drafting Committee had deleted the expressions "with or without a courier" and "wherever situated" as being superfluous.

11. Paragraph 1, subparagraph (4), which defined the term "receiving State", corresponded to subparagraph (5) of the original draft, which had defined in two subdivisions the two concepts of "receiving State" found in the codification conventions. The distinction made in those conventions between diplomatic or special missions and missions or delegations to international organizations or conferences had been rendered unnecessary by the use of the generic terms "missions" and "delegations". For reasons of consistency, the Drafting Committee had added a clarification by employing the words "which receive or dispatch a diplomatic bag".

12. Paragraph 1, subparagraph (5), which defined the term "transit State", reproduced the wording of subparagraph (6) of the original text, with the exception of the expression "*en route* to the receiving State", which had been replaced by the words "in transit" in order to cover both communications through a courier or a diplomatic bag originating in the territory of the receiving State and those effected between the territories of two States other than the sending State.

13. Paragraph 1, subparagraph (6), defined "mission" as a generic term covering a permanent diplomatic mission, a special mission, a permanent mission and a permanent observer mission, within the meaning given to them in the relevant codification conventions. Through that drafting technique, used in the 1975 Vienna Convention on the Representation of States in their Relations

with International Organizations of a Universal Character, the Drafting Committee had been able to recast the definitions given in subparagraphs (7), (9) and (10) of the original draft.

14. The definition of the term "consular post" given in paragraph 1, subparagraph (7), was identical to that appearing in subparagraph (8) of the original draft, except that the word "any" had been replaced by the word "a".

15. In order to harmonize the provisions, the term "delegation" had been defined in paragraph 1, subparagraph (8), not as in the corresponding subparagraph (11) of the original text, but by a reference to the meaning given to that term in the Vienna Convention on the Representation of States. The term meant both a delegation in the strict sense and an observer delegation.

16. Lastly, paragraph 1, subparagraph (9), which defined the term "international organization", was identical to subparagraph (12) of the original draft.

17. In view of the definitions adopted, in particular those concerning the terms "diplomatic courier" and "diplomatic bag", the Drafting Committee had not deemed it necessary to retain paragraph 2 of the original draft.

18. The rule set forth in article 3, paragraph 2, was the same as that contained in paragraph 3 of the original draft. That saving clause and the introductory phrase of paragraph 1, "For the purposes of the present articles", reflected the self-contained character of the draft and prevented any confusion as a result of the use of identical terms in other conventions.

19. The Drafting Committee proposed the following text for article 4:

Article 4. Freedom of official communications⁷

1. The receiving State shall permit and protect the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, as referred to in article 1.

2. The transit State shall accord to the official communications of the sending State, effected through the diplomatic courier or the diplomatic bag, the same freedom and protection as is accorded by the receiving State.

20. The text of article 4 adopted by the Drafting Committee was a simplified version of the article 4 submitted by the Special Rapporteur. The reference in paragraph 1 to "official communications . . . as referred to in article 1" made it unnecessary to retain the detailed enumeration appearing in the original text. Furthermore, the present text of paragraph 1 specified that the communications concerned were effected "through the diplomatic courier or the diplomatic bag". The wording of paragraph 2 reflected more precisely than the original text the rule laid down in the Vienna Conventions on Diplomatic Relations (art. 40, para. 3) and on Consular Relations (art. 54, para. 3), in the Convention on Special Missions (art. 42, para. 3) and in the Vienna Convention on the Representation of States (art. 81, para. 4). Lastly,

⁷ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 320.

the Drafting Committee had shortened the title of the article.

21. The Drafting Committee proposed the following text for article 5:

Article 5. Duties of the sending State and its diplomatic courier⁸

1. The sending State shall ensure that the privileges and immunities accorded to its diplomatic courier and diplomatic bag are not used in a manner incompatible with the object and purpose of the present articles.

2. Without prejudice to the privileges and immunities accorded to him, it is the duty of the diplomatic courier to respect the laws and regulations of the receiving State or the transit State, as the case may be. He also has the duty not to interfere in the internal affairs of the receiving State or the transit State, as the case may be.

22. Article 5 of the original draft had comprised three paragraphs. The first two had been to some extent incorporated in paragraph 2 of the current text. Paragraph 3 of the original text, which had concerned temporary accommodation, had been deleted as being unnecessary and inappropriate. In view of the discussion which had taken place in the Commission, the Drafting Committee had considered it useful to insert a provision (para. 1) concerning the duties of the sending State, the wording of which was based on that of article 6, paragraph 2 (b). In the Committee's opinion, that text laid down the duties in question in a more appropriate manner than did paragraph 1 of the original text. Paragraph 2 was concerned solely with the duties of the diplomatic courier. Consequently, the Drafting Committee had deleted the reference in the original text to the duty to respect the rules of international law.

23. The Drafting Committee proposed the following text for article 6:

Article 6. Non-discrimination and reciprocity⁹

1. In the application of the provisions of the present articles, the receiving State or the transit State shall not discriminate as between States.

2. However, discrimination shall not be regarded as taking place:

(a) where the receiving State or the transit State applies any of the provisions of the present articles restrictively because of a restrictive application of that provision to its diplomatic courier or diplomatic bag by the sending State;

(b) where States modify among themselves, by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags, provided that such a modification is not incompatible with the object and purpose of the present articles and does not affect the enjoyment of the rights or the performance of the obligations of third States.

24. The text of article 6 adopted by the Drafting Committee reproduced that submitted by the Special Rapporteur with a few drafting changes intended to make it more precise. The Committee had added in paragraph 1 a reference to the receiving State or the transit State and had deleted the phrase "with regard to the treatment of diplomatic couriers and diplomatic bags", which it had considered superfluous. In paragraph 2 (a), it had also inserted a reference to the transit State.

25. The Drafting Committee proposed the following text for article 7:

Article 7. Documentation of the diplomatic courier¹⁰

The diplomatic courier shall be provided with an official document indicating his status and the number of packages constituting the diplomatic bag which is accompanied by him.

26. The text of the new article 7 followed closely that submitted by the Special Rapporteur. However, the reference to the passport of the diplomatic courier had been deleted, since a passport was not required in all cases. In addition, the title had been changed in order to reflect more accurately the content of the article. The Drafting Committee had decided to postpone a decision on where to place the article in the draft and on its numbering until further progress had been made in considering the other articles.

27. The Drafting Committee proposed the following text for article 8:

Article 8. Appointment of a diplomatic courier¹¹

Subject to the provisions of articles [9], 10 and 14, the diplomatic courier is freely appointed by the sending State or by its missions, consular posts or delegations.

28. Article 8 as adopted by the Drafting Committee was a simplified version of the corresponding article submitted by the Special Rapporteur, as a result of the use of the generic terms defined in article 3. The reference to "the competent authorities" had been considered unnecessary and had been deleted. Similarly, the Committee had deleted the phrase "and are admitted to perform their functions on the territory of the receiving State or the transit State", considering that article 8 should be confined to the appointment of a diplomatic courier and that those words seemed unnecessary in the light of the provisions of draft article 16, paragraph 1. Lastly, the reference to article 9 had been placed between square brackets, since the Committee had been unable to agree on its relevance, and the reference to article 11, which the Committee had considered irrelevant, had been replaced by a reference—which was appropriate—to article 14.

**State responsibility (concluded) (A/CN.4/L.363,
ILC(XXXV)/Conf.Room Doc.5)**

[Agenda item 1]

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

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (concluded)

CONSIDERATION BY THE COMMISSION

29. The CHAIRMAN invited the Commission to consider the adoption of articles 1, 2, 3 and 5 of part 2 of the draft articles on State responsibility, as proposed by the Drafting Committee, which had been introduced by

⁸ For the revised text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 321.

⁹ For the text submitted by the Special Rapporteur, *ibid.*, p. 117, footnote 322.

¹⁰ For the text submitted by the Special Rapporteur, *ibid.*, p. 118, footnote 323.

¹¹ For the text submitted by the Special Rapporteur, *ibid.*, p. 118, footnote 324.

the Chairman of that Committee at the previous meeting. He pointed out that those articles, which were reproduced in document A/CN.4/L.363, would be adopted at present only in first reading; the Commission would have an opportunity to discuss them again in second reading at a future session, when they would be referred once again to the Drafting Committee.

30. Mr. USHAKOV informed members of the Commission that at the time of the adoption of article 1 by the Drafting Committee he had abstained, being of the opinion that the question dealt with in that article had not been studied in sufficient detail. On that occasion, he had submitted the following text which he would like to see reproduced in the commentary, to be prefaced by the words "One member of the Commission proposed the following text":

Article 1

1. The international responsibility of a State arising pursuant to the provisions of part 1 of the present articles consists for that State in the negative legal consequences of its internationally wrongful act.

2. Under paragraph 1 and depending on each particular case and the attendant circumstances, the international responsibility of a State consists, *inter alia*, in that the State:

(a) shall be subjected to measures and action provided for in the Charter of the United Nations, including Chapter VII thereof, and taken in accordance with the Charter, or to measures authorized by virtue of the provisions thereof;

(b) shall be subjected to the limitations and restraints in accordance with international law, including restraints on the use of its territory and/or the exercise of its rights;

(c) shall make reparation for the damage caused and, if necessary, restore the rights and interests that have been infringed;

(d) shall take measures and action prescribed by international law, including the applicable international arrangements;

(e) shall provide the requisite satisfaction to the injured State or States;

(f) shall institute criminal proceedings against persons accused of having committed offences which have given rise to the international responsibility of the State.

31. Furthermore, he wished to point out with regard to article 3 that he saw no connection between article 5, to which it referred, and the rules of customary international law. In his opinion, the reference was not justified and should be deleted. Article 4 had not yet been drafted and it was therefore not possible to speak about it.

32. Mr. MALEK said that the proposed articles 1, 2, 3 and 5 were acceptable and that he was prepared to vote for them or to join in any consensus on them. He expressed his appreciation of the remarkable work done by the Drafting Committee.

33. He was somewhat surprised to note that none of the opening articles of part 2 spelled out the area of law which it was intended to cover. It was to be feared that the articles in part 2 would swell in number by continuing to refer to "legal consequences" while neglecting to give a precise idea of the legal concepts in question. In his third report, the Special Rapporteur had submitted an article 1¹² concerning the new obligations and new rights arising as legal consequences from an internationally wrongful

act. A reading of that article as drafted by the Special Rapporteur had made it possible to understand immediately the specific object of part 2. However, that article had been drafted in such a way as to give the impression that it reserved obligations exclusively for the State committing the wrongful act and rights exclusively for other States. Yet it was known that the perpetrator of a wrongful act did not lose all its rights under international law. It was also known that an internationally wrongful act did not necessarily merely give rise to rights for other States. That was why, at the Commission's previous session, he had proposed a text for article 1 which would provide that any internationally wrongful act of a State entailed, for that State and any other State concerned, obligations and rights in conformity with the provisions of part 2 and other rules of international law.

34. The article 1 proposed by the Drafting Committee was, on the whole, well drafted and it brought out clearly the connection between parts 1 and 2 of the draft. However, as the introductory article of part 2, it would be greatly enhanced by a more precise indication of its objective. For example, the phrase "entails legal consequences as set out in the present part" should be replaced by a text which might be worded in the following manner: "entails obligations and rights in conformity with the provisions of the present part".

35. With regard to article 2, he had doubts about the usefulness of the word "specifically". He also wondered whether the phrase "the provisions of this part govern the legal consequences of any internationally wrongful act of a State" was not in contradiction with the main statement of article 3, namely "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". In other words, if according to article 2 the draft was designed to govern in all cases—except those in which the legal consequences of an internationally wrongful act had been determined by other rules of international law—the legal consequences of any wrongful act of a State, he had difficulty in understanding the *raison d'être* of article 3, which would be concerned with the legal consequences not set out in the draft. That article 3, which was new in relation to the articles submitted by the Special Rapporteur, could be deleted without disrupting the balance of the draft. However, the point it was intended to cover might be met by adding at the end of article 1 a saving clause referring not only to the provisions of part 2, but also to general international law or simply to international law and not necessarily to customary international law as stated specifically in article 3.

36. That said, he stressed that he was not making any formal proposal regarding the various articles proposed by the Drafting Committee. His comments were intended only for the summary record of the meeting.

37. Mr. QUENTIN-BAXTER said that he had two general comments with regard to the four articles under discussion. In the first place, he entertained serious doubts regarding the expression "as appropriate" used in article 5. The position, as he saw it, was that either the

¹² See 1771st meeting, para. 2.

Charter of the United Nations was applicable in a particular case or it was not. Neither the Commission nor anyone else could say when it was appropriate for the provisions and procedures of the Charter to apply. Consequently, he preferred the text originally submitted by the Special Rapporteur¹³ to the text of article 5 proposed by the Drafting Committee.

38. His second point concerned the fact that the Drafting Committee had not found it possible to draft articles 4 and 6. He was concerned at the implications of that situation, since the work of the Drafting Committee had, owing to various circumstances beyond the Committee's control, fallen out of step with that of the Commission. In that connection he recalled that, when the Commission had adopted in first reading part 1 of the draft articles on State responsibility,¹⁴ consisting of as many as 35 draft articles, it had discussed each individual article thoroughly. No such discussion would be possible on the four articles on State responsibility which the Drafting Committee had now completed.

39. Furthermore, he noted that the Drafting Committee had not been able to formulate an article on the principle of proportionality, which was basic to the Special Rapporteur's whole reasoning. As a result, the Commission would be unable to give any guidance to the Special Rapporteur on that vital question.

40. The elaboration of the draft articles on State responsibility was the Commission's primary task, and the General Assembly was impatient to see the topic advance to the stage of second reading. In order to meet that expectation, the Commission should see to it that the Drafting Committee moved back into step with it in its work.

41. Mr. RIPHAGEN (Special Rapporteur) said that, while he had no objection to Mr. Ushakov's proposal concerning article 1 appearing somewhere in the Commission's report, he felt that it would be incongruous to insert it in the commentary to that article. Readers of that commentary would be puzzled to find in it a proposal for a completely different text.

42. Mr. FLITAN said that in the Drafting Committee he had opposed the idea of replacing article 1 by a text of much broader scope such as that proposed by Mr. Ushakov. In the Committee's opinion, article 1 was a transitional article which should be brief and merely introduce the following articles. It would be hazardous and contrary to general legislative practice to refer in article 1 to the content of all the provisions of part 2. Furthermore, the expression "legal consequences" should continue to be used, since it was somewhat difficult to say that rights as well as obligations arose from an internationally wrongful act. The Drafting Committee had therefore preferred to use a more neutral expression.

43. Mr. SUCHARITKUL said that he found the Drafting Committee's texts for articles 1, 2 and 5 quite acceptable.

44. As far as article 3 was concerned, however, he had an observation to make. That article contained a residual rule concerning the application of "the rules of customary international law". That expression had been used in the preamble to a number of codification conventions but he drew attention to the fact that, in the more recent instruments of that nature, it had been replaced by the formula "the rules of general international law". Two important examples in that respect were the 1982 United Nations Convention on the Law of the Sea and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 8 April 1983. The reason for that change was political, because the reference to customary international law was not acceptable to the developing countries. He stressed that he was not proposing any formal amendment, but merely drawing attention to the problem.

45. Mr. JACOVIDES noted that the Drafting Committee had not made any proposals with respect to articles 4 and 6, although those articles had been thoroughly discussed by the Commission earlier in the session. In the Sixth Committee and elsewhere, the conclusion might be drawn that the debates in the Commission had not been properly reflected.

46. He recalled that, in the course of that discussion (1776th meeting), he had stressed the need to include in article 4 a reference to the concept of *jus cogens* and to deal in draft article 6 with legal consequences for third States.

47. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) observed that the Drafting Committee had examined article 6, but strictly within the framework of its mandate, under which it had been invited to determine whether it was necessary to include a provision along the lines of article 6 among the basic provisions. He wished to stress that the Drafting Committee had reached the conclusion that such a provision should not appear among the basic provisions but among those devoted to international crimes. On the other hand, the Drafting Committee had taken note of the possibility of including in those provisions a general article referring to international crimes but had not considered drafting it for lack of time. Furthermore, replying to Mr. Quentin-Baxter, he said that while the Commission had indeed confirmed the referral to the Committee of articles 1, 2 and 3 of the first set of draft articles, it had not confirmed the referral of articles 4 and 5.

48. Mr. MAHIOU said he found the presentation of the articles in part 2 of the draft logical. Article 1 rightly indicated that the legal consequences of an internationally wrongful act were set out in part 2. Those articles also took account of other facts, notably that the provisions were residual in character. When the Commission formulated a draft convention, it endeavoured to regulate all aspects of the problem, but it was never very certain of having done so, hence the need to make it clear that there were other rules of international law, generally based on custom. However, the rules embodied in the Charter of the United Nations should not be ignored.

¹³ *Ibid.*

¹⁴ *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

49. The Drafting Committee had replaced the reference to rights and obligations in the article 1¹⁵ submitted in the Special Rapporteur's third report by a vaguer formula in order to avoid referring to rights arising from wrongful acts. To avoid any risk of contradiction, it would have been necessary to have a more complex text drawing a distinction between the obligations of the State committing such an act and the rights of the victim State. It should be noted that article 1 became meaningful only in the light of part 1 and the later provisions.

50. With regard to article 3, he was not convinced by Mr. Ushakov's contention that the reference to article 5 was redundant. For his part, he saw a link between articles 3 and 5: the Charter of the United Nations was applicable at the same time as part 2 and where there were gaps in its provisions, in which case the Charter would apply at the same time as customary international law. It was true that the inclusion of a reference to customary international law was debatable, since problems could also be settled by international treaty law or the general principles of law. He therefore feared that article 3 might restrict the applicable rules of international law if the expression "customary international law" were to be interpreted too strictly.

51. Sir Ian SINCLAIR said that, in general and in principle, he could accept the draft articles under discussion, but had two comments to make. The first related to his preference for a draft more along the lines of the original text submitted by the Special Rapporteur, inasmuch as it referred to the obligations of the author State and to the rights and obligations of other States. He himself would be inclined to use the terms "consequential obligations" and "consequential rights and obligations".

52. The use in the Drafting Committee's texts of articles 1, 2, 3 and 5 of the expression "legal consequences" was much too elliptical and general, although no doubt it would be spelled out later in part 2 that the legal consequences had to consist of obligations for the author State and rights and obligations for other States. It should also be borne in mind that an internationally wrongful act could have legal consequences not only for other States but also for other subjects of international law, such as international organizations.

53. His second comment related to the use of the expression "rules of customary international law". He did not believe that it was the time or place to enter into a discussion on the respective merits of that expression and of the term "rules of general international law". He himself believed that the latter formula would introduce an element of confusion and favoured the expression used by the Drafting Committee, which was backed by a long tradition in the Commission.

54. Mr. USHAKOV said he would not insist that the text which he had proposed for article 1 should appear in the commentary to that article. However, he would like it to be reproduced in the section of the report concerning State responsibility.

ARTICLE 1

55. The CHAIRMAN said that, if there were no further comments on article 1, he would take it that the Commission agreed to adopt it in the form proposed by the Drafting Committee.¹⁶

Article 1 was adopted.

ARTICLE 2

56. The CHAIRMAN said that, if there were no further comments on article 2, he would take it that the Commission agreed to adopt it in the form proposed by the Drafting Committee.¹⁷

Article 2 was adopted.

ARTICLE 3

57. Mr. DÍAZ GONZÁLEZ said he had doubts about the usefulness of article 3, since its connection with article 5 was difficult to see. It seemed to him that article 2 already met the objective sought by article 3. If the Commission were nevertheless to accept article 3, it should draft the provision in the following terms:

"Without prejudice to the provisions of articles [4] and 5, the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part shall be governed by the rules of customary international law."

58. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) explained that the object of article 3 was different from that of article 2, which was to note the residual character of the provisions of the draft articles. Article 3, on the other hand, was intended to cover cases in which the draft articles were incomplete. The two articles therefore concerned two different situations. The absence of an article on the principle of proportionality was explained by the fact that the Drafting Committee had replaced the reference to rights and obligations by a reference to the legal consequences of an internationally wrongful act. There had therefore been no immediate need for a provision on the principle of proportionality, which would be examined in due course.

59. Mr. FLITAN observed that the question of the relationship between *jus cogens* and the provisions of part 2 was the subject of article 4, the wording of which was still to be formulated by the Drafting Committee.

60. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt article 3 in the form proposed by the Drafting Committee.¹⁸

Article 3 was adopted.

ARTICLE 5

61. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed

¹⁵ See 1771st meeting, para. 2.

¹⁶ For the text, see 1805th meeting, para. 30.

¹⁷ *Idem*, para. 33.

¹⁸ *Idem*, para. 37.

to adopt article 5 in the form proposed by the Drafting Committee.¹⁹

Article 5 was adopted.

**Jurisdictional immunities of States and their property
(concluded) (A/CN.4/L.364, ILC(XXXV)/Conf.
Room Doc.1)**

[Agenda item 2]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (*concluded*)

CONSIDERATION BY THE COMMISSION

62. The CHAIRMAN invited the Commission to consider the adoption of the articles proposed by the Drafting Committee (A/CN.4/L.364).

ARTICLE 10 (Counter-claims)

63. Mr. USHAKOV said that he was not opposed to article 10 but wished to reiterate his doubts regarding the validity of some of its provisions. According to certain authors, in particular some specialists of private international law in the Soviet Union, it was doubtful whether a State which presented a claim before a court thereby consented to any counter-claims against it. It would be interesting to have more information on the practice in the matter.

64. The CHAIRMAN said that, if there was no objection, he would take it that article 10 as proposed by the Drafting Committee²⁰ was adopted.

Article 10 was adopted.

ARTICLE 12 (Commercial contracts)

65. Mr. USHAKOV stressed that any natural or juridical person that entered into a commercial contract with a State generally made sure that the applicable law and the competent jurisdiction were specified either in the contract or in an annex. Article 12 was actually concerned only with the case in which such a stipulation was omitted, either inadvertently or through carelessness on the part of that person. Although he was not entirely opposed to article 12, he considered it superfluous.

66. Mr. NI said that he had great difficulty with article 12, first of all because of the reference in paragraph 1 to the applicable rules of private international law. It was well known that there were no uniform rules of private international law applicable to all countries, although there were some regional conventions in the matter. When a court was seized of a case, it naturally held that it was competent to exercise jurisdiction if there were the slightest grounds for so doing. Moreover, the rules pertaining to conflict of laws were sometimes even incorporated into domestic legislation. Under article 12 as drafted, only the court of the forum State had the power to decide whether or not it could exercise juris-

diction, and that decision was final: the foreign defendant State, should it object to the exercise of jurisdiction, could either enter a conditional appearance to argue a virtually hopeless case, or suffer the consequences of a default judgment.

67. Secondly, under the terms of paragraph 1, if the foreign State entered into a commercial contract with a foreign natural or juridical person, it would be deemed to have consented to the exercise of jurisdiction by the court of the forum State. That, in his view, was an arbitrary provision since it would force the foreign, and sovereign, State to accept something which it could not have anticipated. Furthermore, it went further than the original article 12,²¹ which provided for the exercise of jurisdiction in cases where the activity in question was conducted wholly or partly by the foreign State in the territory of the forum State; and it went much further than the 1972 European Convention on State Immunity, which provided for jurisdiction in cases where the foreign State had an office, agency or other establishment on the territory of the forum State through which the activity in question was conducted, and the proceedings related to such activity.²² In both those instances, there was a requirement of a physical nature.

68. If it were not possible to modify the article, he would submit a comment for inclusion in the commentary to article 12 in order to reflect his position in the matter. He believed that Mr. Ushakov and he were trying to reach the same goal but in different ways. The point was that, if all contracts included a choice-of-law clause, there would be no difficulties: it was precisely because that was not the case that the problem arose.

69. Sir Ian SINCLAIR observed that the Commission's mandate was to prepare a draft on jurisdictional immunities of States and their property, not to try to harmonize the jurisdictional rules already in operation in national courts. Had it had such a mandate, its task would have been even more difficult. For his part, he was prepared to go along with article 12 subject to the reservation that he would want to examine its terms more carefully, given that it now related to commercial contracts rather than to trading or commercial activities as in the original text.

70. As to Mr. Ushakov's point, he regarded the article as absolutely essential and as a key to the acceptability of the draft as a whole for many States. He wished it were clear that such an article was not necessary but there was a large measure of jurisprudence on precisely those cases where the parties to a commercial contract, including a State, had failed to stipulate what the applicable law was to be, and it was to cover those cases that the rule in paragraph 1 of article 12 was required.

71. Mr. KOROMA said that, despite the Special Rapporteur's efforts in regard to article 12, two very serious difficulties remained. In the first place, he continued to believe that the expression "the applicable

¹⁹ *Idem*, para. 39.

²⁰ *Idem*, para. 60.

²¹ See 1805th meeting, footnote 12.

²² Art. 7 of the Convention; see 1762nd meeting, footnote 7.

rules of private international law", in paragraph 1, was indeterminate. Moreover, as Mr. Ni had stated, those rules were not uniform. Secondly, he had the strongest reservations about the notion of implied consent inherent in the phrase "the State is considered to have consented to the exercise of that jurisdiction . . .", which meant, in effect, that the court would decide the matter.

72. Mr. SUCHARITKUL (Special Rapporteur) pointed out that, so far as implied consent was concerned, under the terms of paragraph 2 (b) of article 12, paragraph 1 would not apply "if the parties to the commercial contract have otherwise expressly agreed". Such agreement did not have to be in writing or even incorporated into the contract, provided that it was express.

73. To meet Mr. Ni's point, the Commission might wish to consider the addition in paragraph 1 of a proviso reading: "provided that the commercial contract has a significant territorial connection with the State of the forum".

74. The CHAIRMAN said that, in view of the limited time available, the Commission should perhaps consider the Special Rapporteur's proposed form of wording at a later date. He suggested that the Commission should, subject to the reservations made, adopt article 12 as proposed by the Drafting Committee.²³

It was so agreed.

Article 12 was adopted.

ARTICLE 2 (Use of terms), para. 1 (g)

75. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission wished to adopt paragraph 1 (g) of article 2 as proposed by the Drafting Committee.²⁴

Paragraph 1 (g) of article 2 was adopted.

ARTICLE 3 (Interpretative provisions), para. 2

76. Mr. THIAM said he would prefer the words "the non-commercial character of the contract", at the end of article 3, paragraph 2, to be replaced by "the commercial or non-commercial character of the contract". Doubtless the intention had been to indicate that the non-commercial character of the contract made it possible to determine whether or not the State which had concluded the contract enjoyed immunity from jurisdiction, but it was preferable to make a distinction between two cases. If the commercial character of a contract could be inferred from its object, the State concluding the contract could not invoke immunity from jurisdiction. In the contrary case, it could invoke it.

77. The CHAIRMAN said that, if there was no objection, he would take it that article 3, paragraph 2, as proposed by the Drafting Committee²⁵ was adopted.

Paragraph 2 of article 3 was adopted.

²³ For the text, see 1805th meeting, para. 63.

²⁴ *Idem*, para. 67.

²⁵ *Idem*, para. 68.

ARTICLE 15 (Ownership, possession and use of property)

78. Mr. USHAKOV said that he was entirely opposed to article 15, paragraph 2. On the basis of that provision it would be sufficient, in the case of a proceeding designed to deprive a State of property in its possession or under its control, to institute before a court of that State a proceeding directed not against the State itself, but against a person other than the State; that was in conflict with article 7, paragraph 3.

79. He could accept paragraph 3 of article 15 on the understanding that it was merely indicative in nature and would have to be elaborated upon.

80. Mr. MAHIOU said that he had serious reservations regarding article 15, paragraph 2, but for reasons other than those given by Mr. Ushakov. The provision concerned the case in which a State, although not a party to the proceeding, might be involved. The argument developed in that provision was interesting, but in the final analysis it could affect the principle of immunity of States from jurisdiction. According to that provision, it was for the court in which the judicial proceeding was instituted to decide whether or not the State could have invoked immunity from jurisdiction, if the proceeding had been instituted against it, or whether the right or interest claimed by the State was admitted or supported by *prima facie* evidence. He was therefore concerned about the possible scope of article 15, paragraph 2. In that connection, he stressed the tendency of some courts to want to expand their jurisdiction.

81. Mr. YANKOV noted that, whereas paragraph 3 referred to the "inviolability" of the premises of a diplomatic or special or other official mission, it spoke of the "protection" of consular premises. He further noted that all the corresponding articles of the main diplomatic conventions used the terms "inviolable" or "inviolability" in reference to premises, including article 31 of the Vienna Convention on Consular Relations, article 25 of the Convention on Special Missions and article 23 of the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character. He therefore considered that, unless there was a very good reason for making such a distinction, it would be preferable to use the same term in both instances.

82. Mr. SUCHARITKUL (Special Rapporteur), agreeing with Mr. Yankov, suggested that the words "the protection" in paragraph 3 should be deleted.

It was so agreed.

83. Sir Ian SINCLAIR, referring to paragraph 2, said that he regarded it as a necessary gloss on paragraph 3 of article 7. There were very few cases in which proceedings could be instituted by a natural or legal person against, for example, a bank acting as a bailee in respect of certain property regarding which a foreign State or a series of foreign States might have a claim or interest or which might be in the constructive possession or control of the State or States concerned since they had in fact deposited the property with the bank. A case in point was that of

Dollfus Mieg et Cie S.A. v. Bank of England (1950).²⁶ Paragraph 2 of article 15 therefore provided that in such a situation the State was at liberty to intervene in the proceedings to assert its immunity: if the State could not have invoked immunity, then the proceedings could continue; conversely, if it could have invoked immunity, then that immunity had to be upheld. The latter part of the paragraph merely indicated that a State could not automatically assert that it had a claim to or interest in property and that there must be at least some indication that the claim or interest was justified. That explained the reference to *prima facie* evidence.

84. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee), referring to the comments of Sir Ian Sinclair, confirmed that the condition set forth in the last part of paragraph 2 applied equally to subparagraph (a) and subparagraph (b).

85. Mr. USHAKOV, referring to article 15, paragraph 2, drew attention to two possible cases. In the first, the State was not able to invoke immunity from jurisdiction. It would then be of little importance whether the proceeding was instituted against the State itself or against a person other than the State. In those circumstances, it was strange to provide that a proceeding could be brought against a person other than a State when the State concerned could not have invoked immunity from jurisdiction if the proceeding had been brought against it. In the second case, the right or interest claimed by the State was neither admitted nor supported by *prima facie* evidence. The latter case therefore came under paragraph 1: the court first had to proceed to the determination of the right or interest in question. If the existence of that right or interest was established, a proceeding could not be brought against a person other than the State. In the contrary case, the question did not arise, since no right or interest existed.

86. Mr. SUCHARITKUL (Special Rapporteur) said that there were certain peculiarities in the common law system of dealing with the property of a foreign Government, and a closer examination of decided cases might help to shed light on the matter. He continued to think that article 15 was both useful and necessary and that, if it were omitted, paragraph 3 of article 7 would be unnecessary too.

87. The CHAIRMAN said that, in the absence of further comments, he would take it that the Commission agreed, subject to the reservations entered by Mr. Mahiou and Mr. Ushakov, to adopt article 15 as proposed by the Drafting Committee.²⁷

It was so agreed.

Article 15 was adopted.

The meeting rose at 6.15 p.m.

²⁶ United Kingdom, *The Law Reports, Chancery Division, 1950*, p. 333.

²⁷ For the text, see 1805th meeting, para. 69.

1807th MEETING

Tuesday, 19 July 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, 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.365 and Add.1, ILC(XXXV)/Conf.Room Doc.7)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (*concluded*)

CONSIDERATION BY THE COMMISSION

ARTICLE 1 (Scope of the present articles)

1. Mr. McCAFFREY said that he wished to reserve his position on article 1 since, in his view, the uniform approach which it embodied did not reflect customary international law. That was apparent from the fact that the 1969 Convention on Special Missions had not yet entered into force and that treatment of the diplomatic bag under the 1961 Vienna Convention on Diplomatic Relations and under the 1963 Vienna Convention on Consular Relations differed. He had agreed to the text of the article as formulated on the express understanding that, at a later stage, an article would be incorporated in the draft whereby States could declare that they accepted the draft articles only in so far as they applied to certain kinds of couriers and bags. He trusted that that would be made clear in the commentary to articles 1 and 3.

2. The CHAIRMAN suggested that, subject to Mr. McCaffrey's reservation, the Commission should adopt article 1 as proposed by the Drafting Committee.¹

It was so agreed.

Article 1 was adopted.

ARTICLE 2 (Couriers and bags not within the scope of the present articles)

3. Mr. MAHIOU said that article 2 raised the question as to whether the draft articles should be extended to couriers and bags used by international organizations and national liberation movements. The Drafting Committee had finally decided to adopt the article, rather than place it between brackets as it had at one time envisaged, and to include in the commentary an explanation of the

¹ For the text, see 1806th meeting, para. 2.

problems involved. Perhaps it would be advisable to add an asterisk after the title of article 2 in reference to a note indicating that the problem would have to be re-examined.

4. Mr. FLITAN said that he agreed entirely with Mr. Mahiou regarding both international organizations and national liberation movements.

5. Mr. BALANDA said he, too, considered that the problem had still to be settled and that guidelines from the General Assembly would be needed before the draft articles could be extended to international organizations and national liberation movements.

6. Mr. NJENGA said he agreed that an asterisk should be added to the title of the article so as to direct attention to the problem. Alternatively, members' views should be reflected in detail in the commentary as an indication of the widespread support for extending the articles to international organizations and liberation movements. The Chairman could also be asked to stress the point when he introduced the report of the Commission to the Sixth Committee of the General Assembly.

7. Mr. THIAM said that, from the time when the Special Rapporteur's first report had been considered, some members had underlined the need to deal with the couriers and bags of international organizations and national liberation movements; he had himself raised the question in 1981 in the Sixth Committee. He therefore supported Mr. Mahiou's suggestion.

8. Mr. MALEK said that he agreed with those who considered that the draft should apply to the couriers and bags of international organizations and national liberation movements.

9. Mr. RAZAFINDRALAMBO said he trusted that the Commission would agree to draw the General Assembly's attention to the problem in a footnote to the article. Alternatively, the Chairman could at least raise the matter in his report to the General Assembly.

10. Mr. KOROMA said that, as he had already made clear (1781st meeting), he considered that the draft should cover entities other than States. It was a matter not merely of reciprocity but of confidentiality: if the draft were extended to both international organizations and national liberation movements, so that their communications then enjoyed the privilege of confidentiality, it would enhance the product of the Commission's work. It would also make the draft articles more comprehensive and thus obviate the need to take up the matter again at a later date.

11. Mr. McCAFFREY said that any decision reached by the Commission at the current stage should be without prejudice to its reconsideration of the scope of the draft upon completion of the first reading. In the light of the discussion that had taken place in the Drafting Committee, he would suggest that the article should be retained in its existing form and that the conditions on which the Commission adopted it should be noted in its report to the General Assembly.

12. The CHAIRMAN said that, on the understanding that the various statements made would be reflected in the

report, he would take it that the Commission agreed to adopt article 2 as proposed by the Drafting Committee.²

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Use of terms)

13. Mr. RIPHAGEN noted that, in subparagraph (2) of paragraph 1, the term "diplomatic bag" was defined as meaning "the packages containing official correspondence, documents or articles intended exclusively for official use". However, there were cases in which a diplomatic bag contained material other than official correspondence and he wondered whether, in that event, a package would lose its status as a diplomatic bag within the meaning of the articles. That was certainly not the intent, but the point should be clarified.

14. Mr. McCAFFREY said that he wished to reserve his position on article 3 for the reasons he had given in connection with article 1.

15. Mr. BALANDA, referring to paragraph 1 (1), proposed that the expression *de façon régulière* ("on a regular basis") should be replaced by *de façon habituelle* ("habitually"). The term *de façon régulière* might suggest that a diplomatic courier could be authorized in an irregular manner to carry out certain functions.

16. Mr. DÍAZ GONZÁLEZ, also referring to paragraph 1 (1), said that he wondered why the word "authorized" rather than "accredited" had been used. The latter term would be in keeping with article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations and article 35, paragraph 5, of the Vienna Convention on Consular Relations, as well as with draft articles 7 and 8: a person could be authorized without being accredited.

17. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) pointed out that, under article 27, paragraph 5, of the Vienna Convention on Diplomatic Relations, the concept of accreditation applied not to the diplomatic courier but to the mission. Rather than the courier being accredited, the receiving State accredited a mission. The nature of the diplomatic courier's functions meant that it was not possible to regard him as being accredited.

18. Mr. DÍAZ GONZÁLEZ said that the texts of the provisions of the two Vienna Conventions in question formed the grounds for asserting that the diplomatic courier was in fact accredited and not authorized.

19. Mr. RAZAFINDRALAMBO said that, for the reasons stated by Mr. Balanda, he supported the proposal that the expression *de façon régulière* should be replaced by *de façon habituelle* ("habitually"), although the term *de façon normale* ("normally") might be even better.

20. Mr. MAHIOU said that the expression *de façon régulière* gave an idea either of normality or of conformity with the law. Since, in the case in question, the intent was to convey the first of those meanings, the expression should be modified in the manner suggested.

² *Idem*, para. 4.

21. Although Mr. Díaz González was justifiably concerned to depart as little as possible from existing instruments, the situation for which the Vienna Conventions on Diplomatic Relations and on Consular Relations provided had to be distinguished from that for which the draft articles provided. In the first case, the persons involved were appointed to represent a State on a permanent basis, which explained why, in French, the terms *Etat accréditant* and *Etat accréditaire* were used. In the second case, the person was not appointed to represent a State on a permanent basis, which was why the terms *Etat d'envoi* and *Etat de réception* were used. For that reason, the diplomatic courier was to be regarded as an "authorized" (*habilitée*) rather than an "accredited" person. Furthermore, as proof of status, the diplomatic courier had to produce, in addition to his passport, an official document that differed somewhat from that which diplomatic and consular officials had to produce.

22. Mr. YANKOV (Special Rapporteur) said that, in his view, the word "authorized" would be more appropriate than "accredited", since "authorized" did not imply any kind of permanent status *vis-à-vis* the receiving State.

23. As to Mr. Balanda's proposal, he pointed out that it was a question of a regular courier as opposed to an *ad hoc* courier. While he had no objection to the term *de façon habituelle* in French, he would point out that, for most countries, what was habitual was the *ad hoc* courier. Fewer than 10 per cent of 160 States used permanent couriers on a professional basis. He would be only too pleased if another, more appropriate term could be found but, failing that, it could be made clear in the commentary that the terms "regular" or "on a regular basis" were meant to refer to an institutionalized service of a foreign office.

24. Mr. DÍAZ GONZÁLEZ said that he agreed in general with the views expressed by Mr. Mahiou but would stress the need to harmonize the English, Spanish and French versions of the expressions "person duly authorized" and "on a regular basis". In the case of the latter, the Spanish version seemed to be the best.

25. Mr. BARBOZA observed that only the French version of the latter expression seemed to be unsatisfactory.

26. Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) said that, in his view, the content of the three versions was, in effect, the same. The Spanish wording did not give rise to any difficulty, corresponding exactly to the English, which implied an idea of either permanence or conformity with the rules. The corresponding expression in French surely embraced the same two ideas as the English expression.

27. Mr. THIAM, supported by Mr. FLITAN, said that he favoured the use of the expression *de façon permanente* in the French text.

28. Mr. MAHIOU said it would be possible either to use that term or to retain the expression *de façon régulière* and to give an explanation in the commentary.

29. Sir Ian SINCLAIR said that the English text was

quite satisfactory since, read in context, the words "on a regular basis" meant "on a continuing basis". He would object to the expression "on a permanent basis", which would convey the idea that all professional couriers were full-time employees, whereas some were in fact employed on short-term contracts. In his view, therefore, the article should be retained as drafted and an explanation of the meaning of the phrase should be included in the commentary.

30. Mr. KOROMA said it seemed to him that, in paragraph 1, the particular was being used to define the general, since "diplomatic courier" was meant to cover both a diplomatic courier and a consular courier. There were, moreover, differences in terms of the privileges and immunities accorded to the diplomatic courier and the consular courier, respectively. In his view, those differences had not been sufficiently brought out.

31. The CHAIRMAN said that, on the understanding that the various statements made would be reflected in the report, he would take it that the Commission agreed to adopt article 3 as proposed by the Drafting Committee.³

It was so agreed.

Article 3 was adopted.

ARTICLE 4 (Freedom of official communications) and

ARTICLE 5 (Duties of the sending State and its diplomatic courier)

32. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt articles 4 and 5 as proposed by the Drafting Committee.⁴

Articles 4 and 5 were adopted.

ARTICLE 6 (Non-discrimination and reciprocity)

33. In reply to a point raised by Mr. MAHIOU, Mr. LACLETA MUÑOZ (Chairman of the Drafting Committee) explained that, in the French text of paragraph 2 (a), the words *ou l'Etat de transit* should be added after *l'Etat de réception*.

34. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt article 6 as proposed by the Drafting Committee.⁵

Article 6 was adopted.

ARTICLE 7 (Documentation of the diplomatic courier)

35. Mr. MAHIOU, referring to the French text, pointed out that the word *documents* appeared in the title to the article whereas, in the body of the article, the term *un document officiel* was used.

36. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed,

³ *Idem*, para. 6.

⁴ *Idem*, paras. 19 and 21, respectively.

⁵ *Idem*, para. 23.

subject to the comment made by Mr. Mahiou, to adopt article 7 as proposed by the Drafting Committee.⁶

It was so agreed.

Article 7 was adopted.

ARTICLE 8 (Appointment of a diplomatic courier)

37. Sir Ian SINCLAIR said that, as pointed out by Mr. Calero Rodrigues in the Drafting Committee, article 7 marked the start of a new part of the draft; logically, since it dealt with documentation, it should not come before article 8, which dealt with the appointment of a diplomatic courier. He therefore suggested that an asterisk should be added after "article 8" to indicate that the numbering of the article was provisional.

It was so agreed.

38. Mr. McCAFFREY proposed that the title of article 8 should be amended to read "Appointment of the diplomatic courier", use of the definite article rather than the indefinite being in line with the practice followed throughout the draft.

It was so agreed.

39. Mr. KOROMA said that he found the phrase "is freely appointed", in the English text, somewhat unusual.

40. Mr. MAHIOU, referring to the French text, said that the expression *à son choix* was unsuitable since it appeared to refer to the diplomatic courier. It should be replaced either by the expression *à leur choix*, in which case the second part of the article would be reworded to read *l'Etat d'envoi, ses missions, ses postes consulaires ou ses délégations nomment à leur choix le courrier diplomatique*, or simply by the word *librement*.

41. Following an exchange of views in which Mr. BARBOZA, Mr. FLITAN, Mr. CALERO RODRIGUES, Mr. THIAM and Mr. MAHIOU took part, the CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to adopt article 8 as proposed by the Drafting Committee⁷ on the understanding that, in the French text, the second part of the article would be amended to read: *le courrier diplomatique est nommé à leur choix par l'Etat d'envoi, ses missions, ses postes consulaires ou ses délégations*.

It was so agreed.

Article 8 was adopted.

The meeting rose at 11.25 a.m.

⁶ *Idem.* para. 25.

⁷ *Idem.* para. 27.

1808th MEETING

Wednesday, 20 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-fifth session (continued)*

CHAPTER III. Jurisdictional immunities of States and their property (A/CN.4/L.356 and Corr.1, A/CN.4/L.356/Add.1-3 and Add.3/Corr. 1)

A. Introduction (A/CN.4/L.356)

Paragraphs 1 to 13

Paragraphs 1 to 13 were adopted.

Paragraph 14

1. Mr. McCAFFREY said that he wished to reserve his position regarding the statement in the first sentence of paragraph 14 to the effect that draft article 13 "dealt with a completely new area".

Paragraph 14 was adopted.

Paragraph 15

2. Sir Ian SINCLAIR proposed that the phrase "before the local courts" should be inserted in the first sentence, after the words "proceedings being instituted", and that the phrase "in the local courts" should be inserted in the second sentence, after the words "where no jurisdiction existed".

It was so agreed.

Paragraph 15, as amended, was adopted.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

Paragraph 17 was adopted, subject to some drafting changes.

Paragraph 18

3. Sir Ian SINCLAIR proposed that the words "in such cases" in the third sentence should be replaced by the words "at least in some jurisdictions", since in some jurisdictions an action had to be brought against the State, which in turn was indemnified by the insurer.

It was so agreed.

Paragraph 18, as amended, was adopted.

* Resumed from the 1805th meeting.

Paragraphs 19 to 22.

Paragraphs 19 to 22 were adopted.

Paragraph 23

4. Sir Ian SINCLAIR proposed that, in the interests of clarity, the second and third sentences of paragraph 23 should be reworded as follows:

“The exception was based on the exclusive authority of the courts of the State of the forum to determine legal issues concerning immovable property situated in the forum State. It was also based on the need for the courts of the State of the forum to be able to adjudicate upon conflicting claims to property being administered by those courts. Where the foreign State appeared as one among several claimants endeavouring to assert title to property or a claim to an inheritance, it was natural that the State concerned . . .”

5. Mr. LACLETA MUÑOZ welcomed that amendment inasmuch as it introduced the concept of “immovable property” to replace the unsuitable term “land”, which was particularly unsatisfactory in Spanish (*tierra*).

6. The CHAIRMAN said that, if there was no objection, he would take it that the Commission wished to adopt paragraph 23 with the amendment proposed by Sir Ian Sinclair.

It was so agreed.

Paragraph 23, as amended, was adopted.

Paragraphs 24 and 25

Paragraphs 24 and 25 were adopted.

Paragraph 26

7. Mr. SUCHARITKUL (Special Rapporteur) said that the words “together with the relevant provisions of article 2 (1) (g) and article 3 (2)” should be added at the end of paragraph 26.

Paragraph 26 was adopted, subject to that correction.

Paragraph 27

Paragraph 27 was adopted.

Section A, as amended, was adopted.

B. Draft articles on jurisdictional immunities of States and their property.

PART II (GENERAL PRINCIPLES) (A/CN.4/L.356)

Commentary to article 10 (Counter-claims)

Paragraph (1)

Paragraph (1) was approved, subject to some drafting changes.

Paragraph (2)

8. Mr. LACLETA MUÑOZ said that the words *respecto de* should be replaced by the word *en* in the first sentence of paragraph (2) of the Spanish text and anywhere else in the report where they were used.

Paragraph (2) was approved, subject to some drafting changes.

Paragraphs (3) to (5)

Paragraphs (3) to (5) were approved, subject to some drafting changes.

Paragraph (6)

9. Mr. BALANDA, supported by Mr. LACLETA MUÑOZ, said he found it surprising that the term “disinterested party” should be used in connection with a judicial proceeding and asked for a fuller explanation of that term.

10. Mr. MAHIU suggested that the term *autorisables* used in the fourth sentence of the French text should be replaced by the word *autorisées* or *permises*.

11. Mr. SUCHARITKUL (Special Rapporteur) suggested that the expression “nor as a disinterested party”, which might cover an intervention by the State, should be deleted in all the language versions, since the concern which it reflected was met by the term *amicus curiae*.

12. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve paragraph (6), subject to those changes.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

Paragraph (7) was approved.

Paragraph (8)

Paragraph (8) was approved, subject to some drafting changes.

Paragraph (9)

13. Mr. LACLETA MUÑOZ proposed the deletion of the words *al efecto* from the second sentence of the Spanish text.

14. Mr. McCAFFREY proposed the insertion in the second sentence, after the words “thereby subjecting itself”, of the words “to the court’s jurisdiction”.

15. Sir Ian SINCLAIR proposed the deletion of the last sentence of paragraph (9).

16. The CHAIRMAN said that, if there was no objection, he would take it that the Commission agreed to approve paragraph (9), subject to those changes.

It was so agreed.

Paragraph (9), as amended, was approved.

The commentary to article 10, as amended, was approved.

PART III (EXCEPTIONS TO STATE IMMUNITY) (A/CN.4/L.356/Add.1)

Commentary to article 12 (Commercial contracts)

17. Mr. NI said that the question of commercial contracts as an exception to jurisdictional immunity was a controversial one, which had been extensively discussed both in the Commission itself and in the Sixth Committee of the General Assembly. The formulation now presented for article 12 relied for the solution of the problem on the “applicable rules of private international law”. Those rules, however, because of the lack of uniformity

with which they were applied in different countries, were bound to introduce an element of uncertainty into the future application of the article.

18. Another argument adduced in support of the new formulation was that the State concerned was considered to have consented to the exercise of the jurisdiction of a court of another State in a proceeding arising out of a commercial contract entered into with a foreign person. That presumption of consent was much too far-fetched. The passage quoted in paragraph (20) of the commentary from *The "Charkieh"* case,¹ which went back to 1873, described the character of a trader very much like that of a villain in a play. That description was clearly out of date: vital changes had occurred in the past century, one of the main ones being that commerce was now being undertaken by Governments (or their agencies) not only of the socialist States but also of many developing countries as well. There was no reason to downgrade a State or its agencies which undertook commercial activities by depriving them of the treatment to which they were normally entitled. A State which entered into a commercial contract with a foreign natural or juridical person should not by intent or by conduct be presumed to have waived immunity from territorial jurisdiction.

19. The commentary to article 12 appeared to assume that the new formulation had become generally acceptable and that a consensus had been reached thereon. He for one could not subscribe to that hasty conclusion. He also wished to point out the optimistic nature of the statement in paragraph (7) of the commentary that the rule thus formulated "seeks to reconcile views and theories prevalent in various legal systems" and that it took into account "not only the differing views of States but also the varying interests of States with different legal, political and economic systems and ideologies".

20. His uneasiness was particularly heightened by the remarks in paragraphs (3) and (5) of the commentary to the effect that the new formulation "will allow each school of thought to apply its own legal reasoning to justify or to permit the exercise of existing jurisdiction" and that "each State is eminently sovereign in matters of jurisdiction". It was for that reason that he had warned against the seeds of uncertainty which were thus being sown;² every State would be free to interpret matters concerning the exercise or non-exercise of jurisdiction according to its own reasoning, thus reducing the principle of State immunity to an empty shell.

21. In view of the foregoing, and since the commentary to article 12 contained six paragraphs in support of the new formulation without a single word on the contrary opinion, he proposed the insertion of a further paragraph in the commentary, to be numbered (7 *bis*), which would reflect not only his own views but also those of seven or eight other members of the Commission who had read the proposed paragraph and supported its contents. The new paragraph would read:

"(7 *bis*) A view was expressed by some members concerning the formula contained in paragraph 1 of article 12, that the expression 'the applicable rules of private international law' is elusive and susceptible of differing interpretations leading to different results, and that the concept of 'implied consent' is artificial and questionable since in fact a State concluding a commercial contract with a foreigner has not waived its immunity, or agreed to submit to the territorial jurisdiction, nor should it be presumed to have done so. The hope was accordingly expressed that this formula could in due course be revised and improved so as to take more fully into account the interests and views of all countries with different systems and practices."

22. Mr. BALANDA observed that the French version of document A/CN.4/L.356/Add.1 had only just been circulated. Since that was a very important document, he wondered whether it would not be possible to defer its consideration until a later stage.

23. Mr. BARBOZA said that he was in broad agreement with the statement made by Mr. Ni and with the amendment which he had proposed.

24. Mr. NJENGA expressed support for the statement made by Mr. Ni and also for the text of his proposed new paragraph (7 *bis*).

25. Sir Ian SINCLAIR suggested that, in accordance with what he understood to be the usual practice, Mr. Ni's statement should be recorded in a footnote to paragraph (7) of the commentary.

26. Mr. NI objected to that suggestion. The commentary to an article usually reflected all the opinions expressed during the discussion. Since there were six or seven paragraphs in the commentary in support of the new formulation, the opposing view also had to be reflected.

27. Mr. McCAFFREY said that it would be difficult for the Commission to take a decision on Mr. Ni's proposal until the text of the proposed paragraph (7 *bis*) was circulated in writing.

28. Mr. QUENTIN-BAXTER also urged that the proposed paragraph (7 *bis*) should be circulated as a document.

29. Mr. FLITAN said he would prefer the Commission not to become involved in a lengthy procedural discussion and was in favour of including the paragraph proposed by Mr. Ni in the commentary itself.

30. Mr. DÍAZ GONZÁLEZ said that he, too, supported Mr. Ni's proposal and considered that it should be included in the commentary. At the 1804th meeting, Sir Ian Sinclair himself had submitted an amendment, which had been accepted, to a paragraph of the report on the draft Code of Offences against the Peace and Security of Mankind. He failed to see why the Commission should not, in the present instance, agree to a proposal which would not involve replacing a paragraph but adding a new one reflecting a particular viewpoint.

31. Mr. SUCHARITKUL (Special Rapporteur) said that it would be difficult to introduce the proposed new

¹ United Kingdom, *The Law Reports, High Court of Admiralty and Ecclesiastical Courts*, vol. IV (1875), p. 59.

² See *Yearbook* . . . 1982, vol. I, p. 193, 1729th meeting, para. 33.

paragraph (7 *bis*) because many changes would have to be made to the existing paragraphs (1) to (7) of the commentary. He suggested that he should discuss the matter with Mr. Ni and agree with him on alterations to the existing commentary which would take into account the points included in the proposed paragraph (7 *bis*). It would be more satisfactory to tone down and adjust the present text of the commentary than to introduce a new paragraph conflicting with the others, a method which would give the impression that the division of opinion in the Commission was much greater than it really was.

32. Mr. BARBOZA said there could be no question of inserting Mr. Ni's proposal in a footnote, since it belonged in the commentary proper.

33. The CHAIRMAN said that the Secretariat would arrange for the text of the proposed paragraph (7 *bis*) to be circulated. If there was no objection, he would take it that the Commission agreed to suspend its consideration of the commentary to article 12 until a later meeting.

It was so agreed.

PART I (INTRODUCTION) (A/CN.4/L.356/Add.2)

Commentary to paragraph 1 (g) of article 2 (Use of terms)

The commentary to paragraph 1 (g) of article 2 was approved.

Commentary to paragraph 2 of article 3 (Interpretative provisions)

34. Mr. McCAFFREY, referring to the last sentence of paragraph (4), said that, while a contract of guarantee for a loan to purchase military aircraft would usually be non-commercial, there might be some instances in which it should be open to the court to determine whether or not such a contract was non-commercial. He therefore proposed that the word "would", in the last line of the paragraph, should be replaced by the word "could".

35. Mr. NJENGA said that he could not agree to that proposal since, in his view, there were no conceivable circumstances in which the purchase of a military aircraft would be other than non-commercial.

36. Following an exchange of views in which Mr. BARBOZA, Mr. McCAFFREY, Mr. NJENGA and Sir Ian SINCLAIR took part, and informal consultations among those concerned, Mr. SUCHARITKUL (Special Rapporteur) suggested that the last sentence of paragraph (4) should be amended to read: "For example, a contract of guarantee for a loan to purchase military aircraft would usually be non-commercial because of its presumably public purpose."

It was so agreed.

The commentary to paragraph 2 of article 3, as amended, was approved.

CHAPTER IV. State responsibility (A/CN.4/L.357 and Add.1 and Add.1/Corr.1)

A. Introduction (A/CN.4/L.357)

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.357)

37. Following a remark by Mr. MAHIOU regarding the word *inadmissible*, in the French text of paragraph 24, the

CHAIRMAN suggested that the French text should be brought into line with the English original.

It was so agreed.

38. Mr. RIPHAGEN (Special Rapporteur) said that Mr. Ushakov had indicated (1806th meeting) that he would like his proposal for draft article 1 to be recorded in the report. He suggested that the Commission might reflect that proposal in a new paragraph 36 to be added at the end of section B.

It was so agreed.

39. Mr. FLITAN proposed the addition of a paragraph 37 along the following lines:

"The other members objected to the introduction of this article because it was drafted in too general a manner. The general view was that article 1 of part 2 of the draft articles on State responsibility should merely be a transitional text linking part 1 and part 2."

It was so agreed.

Section B, as amended, was adopted.

CHAPTER V. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.358 and Add.1 and Add.1/Corr.1)

A. Introduction (A/CN.4/L.358)

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.358)

Paragraphs 9 to 11

Paragraphs 9 to 11 were adopted.

Paragraph 12

40. In response to a request for clarification from Mr. BALANDA, the CHAIRMAN suggested that the French text of the opening phrase should be brought into line with the English text.

It was so agreed.

Paragraph 12 was adopted.

Paragraph 13

Paragraph 13 was adopted.

Paragraph 14

41. Mr. BALANDA, referring to the third sentence, proposed that the words "One member referred" should be replaced by "Some members referred".

It was so agreed.

Paragraph 14, as amended, was adopted.

Paragraphs 15 to 18

Paragraphs 15 to 18 were adopted.

Paragraph 19

42. After an exchange of views between Mr. BALANDA, Mr. McCAFFREY and Mr. YANKOV (Special Rapporteur), the CHAIRMAN suggested that the French text of the opening phrase should be brought into line with the English text.

It was so agreed.

Paragraph 19 was adopted.

Paragraphs 20 to 24

Paragraphs 20 to 24 were adopted.

Paragraph 25

43. Following a proposal by Mr. BALANDA to delete the last phrase of paragraph 25, Mr. YANKOV (Special Rapporteur) suggested that the words "in accordance with" should be replaced by "taking into consideration".

It was so agreed.

Paragraph 25, as amended, was adopted.

The meeting rose at 1.05 p.m.

1809th MEETING

Wednesday, 20 July 1983, at 3.30 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-fifth session (continued)

CHAPTER V. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (continued) (A/CN.4/L.358 and Add.1 and Add.1/Corr.1)

B. Consideration of the topic at the present session (concluded) (A/CN.4/L.358)

Paragraphs 26 to 29

Paragraphs 26 to 29 were adopted.

Paragraph 30

1. Mr. BALANDA said that paragraph 30 appeared to duplicate the third sentence of paragraph 29.

2. Mr. FLITAN suggested that the second part of the paragraph, reading "there were a number of drafting and other comments specific to each draft article", should be retained, since it did not duplicate the third sentence of paragraph 29.

3. Mr. McCAFFREY said that he would be reluctant to see paragraph 30 deleted since, in his view, it did not duplicate the statement made in the third sentence of paragraph 29 but drew a separate conclusion.

4. Mr. MAHIOU said that, if paragraph 30 were deleted, it would be necessary to renumber all the subsequent paragraphs. Perhaps the Special Rapporteur could include the third sentence of paragraph 29 in paragraph 30, making the appropriate adjustments.

5. Mr. YANKOV (Special Rapporteur) said that the difficulty stemmed from the difference between the English and French texts of paragraph 30. In the French text there was no equivalent of the word "Besides", which linked paragraphs 29 and 30 and meant that paragraph 30 served as an introduction to paragraph 31. He therefore suggested that the French text should be brought into line with the English.

6. The CHAIRMAN suggested that the Secretariat should be asked to make the necessary changes in the French text.

It was so agreed.

Paragraph 30 was adopted on that understanding.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

7. Mr. BALANDA suggested that the words *ne suscitait pas* in the first sentence of the French text should be replaced by *n'a pas suscité*, in order to bring the French text into line with the Spanish.

It was so agreed.

Paragraph 32, as amended, was adopted.

Paragraph 33

8. Mr. BALANDA suggested that the expression *n'éprouvait, de même, pas de difficulté* in the first sentence of the French text should be replaced by *n'a pas éprouvé non plus de difficulté*, in order to bring it into line with the Spanish text.

It was so agreed.

Paragraph 33, as amended, was adopted.

Paragraphs 34 to 44

Paragraphs 34 to 44 were adopted.

Paragraph 45

9. Mr. McCAFFREY pointed out that the word "damages" meant monetary compensation, whereas "damage" in the singular meant injury. Since the intent in paragraph 45 was to refer to injury arising from an accident, he proposed that the word "damages" should be amended to read "damage".

It was so agreed.

Paragraph 45, as amended, was adopted.

Paragraph 46

10. Mr. McCAFFREY, noting that the second and third sentences dealt with two separate matters, proposed that the words "In that connection", at the beginning of the third sentence, should be deleted and that, in the same sentence, the word "also" should be added after the words "some members". He further proposed that, in the fourth sentence, the expression "the regulations governing due process" should be replaced by "the requirements of due process", since something of a higher status than a regulation was involved.

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraphs 47 to 51

Paragraphs 47 to 51 were adopted.

Paragraph 52

11. In response to an observation by Mr. McCaffrey concerning the first sentence, Mr. KOROMA proposed that the expression "enough distinction" should be replaced by "a clear distinction".

It was so agreed.

Paragraph 52, as amended, was adopted.

Paragraph 53

12. Mr. YANKOV (Special Rapporteur) said that the last phrase in the fourth sentence was inaccurate, since draft articles 40, 41 and 42 dealt with miscellaneous provisions and not with final clauses. He therefore suggested that the words "the final clauses" should be replaced by "some miscellaneous provisions relating to the obligations of the transit State in the case of *force majeure*; non-recognition of States or Governments or absence of diplomatic or consular relations; and the relation of these draft articles to other conventions and international agreements".

It was so agreed.

Paragraph 53, as amended, was adopted.

Paragraphs 54 to 56

Paragraphs 54 to 56 were adopted.

Section B, as amended, was adopted.

CHAPTER IX. Other decisions and conclusions of the Commission (A/CN.4/L.362 and Add. 1 and 2)

B. Co-operation with other bodies (A/CN.4/L.362)

13. The CHAIRMAN said that the report on the statement that was to be made by the Observer for the Arab Commission for International Law would be incorporated later.

Section B was adopted.

14. In reply to a question put by Sir Ian SINCLAIR, the CHAIRMAN said that an account of the Secretary-General's visit to the Commission and the statement he had made would be included in the Commission's report.

C. Date and place of the thirty-sixth session (A/CN.4/L.362)

15. The CHAIRMAN said that the dates of the Commission's thirty-sixth session would be filled in later.

D. Representation at the thirty-eighth session of the General Assembly (A/CN.4/L.362)

Section D was adopted.

E. Gilberto Amado Memorial Lecture (A/CN.4/L.362/Add.1)

Section E was adopted.

F. International Law Seminar (A/CN.4/L.362/Add.1)

Section F was adopted.

The meeting rose at 4.30 p.m.

1810th MEETING

Thursday, 21 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies (concluded)*

[Agenda item 9]

STATEMENT BY THE OBSERVER FOR THE ARAB COMMISSION FOR INTERNATIONAL LAW

1. The CHAIRMAN invited Mr. El Baccouche, Observer for the Arab Commission for International Law, to address the Commission.

2. Mr. EL BACCOUCHE (Observer for the Arab Commission for International Law), expressed appreciation for the work of the International Law Commission at its current session, which would be welcomed by the international community with the utmost gratitude.

3. The Arab Commission for International Law was one of the technical advisory committees of the Council of the League of Arab States. Its function was identical to that of the International Law Commission but the States of which it was comprised belonged to a geographical region which, of course, had special features. In that region the codification and progressive development of international law were marked by a series of conflicts which had an effect both on international relations and on the rules of international law. The International Law Commission, for its part, should lay the foundations for a new rule of law that guaranteed justice and progress, and should reject those rules that legitimized war, aggression, the bondage of nations and the taking of territories by force. There were a number of conditions favouring effective co-operation between the two commissions. In general, the role of regional bodies such as the Arab Commission for International Law should be strengthened in the interests of peace and development.

4. The Arab Commission for International Law had been entrusted by the Council of the League of Arab States with the task of following the work of the International Law Commission and had appointed a Special Rapporteur for the purpose; several of the topics on the Commission's agenda were under consideration by the Arab Commission.

* Resumed from the 1801st meeting.

5. Lastly, he expressed the hope that the participation of the Arab Commission for International Law in the work of the International Law Commission would in future not be confined to sending an observer but would involve a fruitful exchange of knowledge and information.

6. Mr. EL RASHEED MOHAMED AHMED, speaking on behalf of the African members of the Commission, said that the visit of Mr. El Baccouche could not but affect the relations between two bodies which had the common objective of promoting the codification and progressive development of international law at a time when the various regions of the world were beset by numerous conflicts. At the end of the twentieth century, mankind aspired to a community which was not founded on discrimination but which respected the law and the lofty humanitarian principles that had more than once been proclaimed. It was essential to establish human solidarity throughout the world. The League of Arab States represented an ancient civilization founded on humanitarian values. It was the objective not only of the Arab Commission for International Law but also of the International Law Commission to draw up rules that would make it possible to cement international solidarity and ensure the well-being of mankind.

7. Mr. YANKOV, speaking also on behalf of Mr. Flitan and Mr. Ushakov, thanked the Observer for the Arab Commission for International Law for his account of his organization's endeavours to expand its co-operation with the Commission. Its valuable contribution had done much to enhance the rule of law in international relations. The International Law Commission, for its part, had the pleasure to count among its past and present membership the esteemed sons of Arab nations whose contribution to its work was one of its major assets. He endorsed the principles for which the Arab Commission stood and, in particular, its belief that there was never any justification for aggression in the modern world and that no acquisitions arising out of acts of aggression could be recognized. He also noted its dedication to the principles of self-determination and promotion of human rights and its opposition to racial discrimination and *apartheid*. Lastly, he expressed the hope that the ties of friendship and co-operation between the two commissions would be further strengthened.

8. Mr. DÍAZ GONZÁLEZ, speaking also on behalf of Mr. Barboza and Mr. Calero Rodrigues, thanked Mr. El Baccouche for his statement and said that the Arab traditions which had been introduced via Spain and Portugal had enriched Latin-American law. In the course of five centuries, through the intermediary of the Caliph of Córdoba, Arab law, culture and knowledge had spread throughout the Western world.

9. He was pleased to note that the Arab Commission for International Law hoped to strengthen its relations with the Commission and he expressed the hope that the two bodies would help to build a more humane and more just international society.

10. Mr. SUCHARITKUL, speaking on behalf of the Asian members of the Commission and other, absent

members, said that Asia had close connections with the Arab world, no less than half of which was situated in Asia. Arab civilization was highly valued throughout the whole of his region, both for its culture and for its religion, and the presence of the Observer for the Arab Commission for International Law enabled him to express his appreciation for the contribution which the Arab world had made to international law. In that connection, he would remind members of the early developments in international law that had taken place in the Mediterranean region. The peoples of Asia, like those of the Arab world, continued to uphold the principles of non-discrimination and territorial integrity and, indeed, all the principles of coexistence enunciated in the Bandung Declaration of 1955.¹

11. Mr. LACLETA MUÑOZ, speaking on behalf of the Western European and other members of the Commission, thanked the Observer for the Arab Commission for International Law and underlined the close ties which united his country, Spain, to the Arab world, for the historical reasons recalled by Mr. Díaz González. He expressed the hope that the efforts of both commissions would be directed towards a new international law which respected the values of the past while taking account of the new requirements of a more just world. That was the form which co-operation between international jurists should take in the future.

12. The CHAIRMAN thanked the Observer for the Arab Commission for International Law for attending the meeting and requested him to convey the International Law Commission's appreciation to the Secretary-General of the Arab League.

Draft report of the Commission on the work of its thirty-fifth session (continued)

CHAPTER VII. Relations between States and international organizations (second part of the topic) (A/CN.4/L.360)

A. Introduction

Section A was adopted.

B. Resumption of the consideration of the topic at the present session

13. Mr. CALERO RODRIGUES proposed that the expression "some latitude" in paragraph 16 should be amended to read "considerable latitude" and that the word "inasmuch" in subparagraph (c) of paragraph 17 should be deleted.

It was so agreed.

Section B, as amended, was adopted.

Chapter VII of the draft report, as amended, was adopted.

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (continued)* (A/CN.4/L.366)

14. The CHAIRMAN invited the Commission to resume its consideration of chapter II of the draft report as revised by the Special Rapporteur (A/CN.4/L.366).

¹ See 1801st meeting, footnote 7.

* Resumed from the 1805th meeting.

A. Introduction

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 17 to 23

Paragraphs 17 to 23 were adopted.

Paragraph 24

15. Mr. USHAKOV said that, in his view, the paragraph should be interpreted as referring to crimes committed by individuals to the exclusion of crimes committed by States.

Paragraph 24 was adopted.

Paragraph 25

16. In response to a comment made by Mr. USHAKOV, Mr. MAHIOU proposed that the word *imputée* in the French text should be replaced by *attribuée*, which was wider in scope.

It was so agreed.

Paragraph 25, as amended, was adopted.

Paragraphs 26 and 27

Paragraphs 26 and 27 were adopted.

Paragraph 28

17. Mr. USHAKOV said he considered that the second part of the first sentence, after the word "responsibility", gave an erroneous interpretation of article 19 of part 1 of the draft articles on State responsibility.

18. After an exchange of views in which Mr. THIAM (Special Rapporteur), Mr. USHAKOV, Mr. MALEK, Mr. FLITAN, Mr. McCAFFREY, Mr. RIPHAGEN and Mr. EL RASHEED MOHAMED AHMED took part, Mr. MAHIOU proposed that the phrase referred to by Mr. Ushakov should be redrafted to read: "indicates which internationally wrongful acts of a State constitute international crimes and delicts".

It was so agreed.

Paragraph 28, as amended, was adopted.

Paragraph 29

19. Mr. McCAFFREY, referring to the third sentence, said that, as a matter of principle, it would be preferable to confine the reference to offences that could be committed by States to those specified in the 1954 draft Code of Offences against the Peace and Security of Mankind. He had in mind the reference to *apartheid*, which was not included in that code. His remark was not, however, to be construed as an expression of sympathy for *apartheid*, which he regarded as both legally indefensible and morally reprehensible.

20. In the sixth sentence, the expression "the only redress" should be reworded to read "the only means of redress".

21. Referring to the antepenultimate and penultimate sentences of the paragraph, he noted that the former implied that the "super-Powers"—a term that was not defined—could legally resort to force to defend their interests. In his view, it was not appropriate for the Commission to make such a political statement in its

report. As for the following sentence, it was not only the medium-sized and small States that wanted "a certain morality to be established". He therefore proposed that those two sentences be deleted and that the last sentence be amended to read: "It was viewed as being in the particular interest of the latter two categories of States that the scope of the draft code cover States and other legal persons."

22. Mr. USHAKOV, referring to the last part of the paragraph, said that he strongly objected to the use of the term "super-Powers", which was never used in United Nations reports, and to the conclusions expounded, which took a simplistic view of matters, the wicked being opposed to the good, in other words the super-Powers to the medium-sized and small States—the former resorting to force to defend their interests and the latter alone wanting a certain morality to be established in international life and a certain justice to be applied therein.

23. Mr. CALERO RODRIGUES pointed out that the passage in question referred to an individual view which had been expressed, rather than to the opinion of the Commission itself, and as such could be reflected in the report.

24. Mr. DÍAZ GONZÁLEZ said he, too, considered that paragraph 29 reflected what had been said during the discussion. Members who had expressed other views could have them reflected in the report.

25. Mr. THIAM (Special Rapporteur) pointed out that he had merely reproduced what had been said during the discussion.

26. Mr. NJENGA, agreeing with the Special Rapporteur, said he trusted that Mr. McCaffrey would not insist on his point concerning *apartheid*, in view of the terms of General Assembly resolution 36/106 and the fact that the elimination of *apartheid* was now an aspect of the progressive development of international law.

27. Mr. FLITAN said that the reaction of Mr. Ushakov and Mr. McCaffrey could perhaps be attributed to a cursory reading of paragraph 29. It would, of course, be inaccurate and simplistic to say that only the super-Powers could commit offences, but there was nothing defamatory about saying that some countries were stronger than others. He therefore favoured the deletion of the passage from "The world contained" to "to be applied therein" and proposed that the words "In the interests of those States", in the last sentence of the paragraph, be replaced by "In the interests of small and medium-sized States". He could not, however, agree to the proposal to delete the reference to aggression and *apartheid*. That reference served as an argument in support of the proposition put forward at the beginning of the paragraph and did not form part of a list of international crimes and delicts. That proposition would be divested of any basis if all reference to the arguments advanced in its support were deleted.

28. Mr. THIAM (Special Rapporteur) said that the changes proposed by Mr. Flitan seemed reasonable to him. It would be difficult to delete the reference to *apartheid*, since nobody would dream of denying that it constituted a crime.

29. Mr. USHAKOV said that he was unable to accept the words "In the interests of small and medium-sized States" proposed by Mr. Flitan. The Commission worked for the whole community of States, from which no group of States should be excluded. He reiterated that it should be stated in the report that one member of the Commission had considered such language to be disgraceful.

30. Mr. KOROMA proposed that the three sentences beginning with the words "The world contained super-Powers" should be deleted and replaced by the following text: "The view was expressed that, whereas some States had the capability to use force to defend their interests, the same was not true of the great majority of other States. Most States would wish to have a certain code of conduct established in international life and a certain justice applied therein." The last sentence of the paragraph would remain unchanged.

31. Mr. FLITAN accepted Mr. Koroma's proposal, which reflected very well the substance of his own statement during the discussion. He withdrew his own proposal.

32. Mr. USHAKOV said that he had no objection to Mr. Koroma's proposal, on the understanding that his own reservation would be included in a footnote.

33. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 29, with the amendment proposed by Mr. Koroma and with the addition of the words "means of" before the word "redress" in the sixth sentence, as proposed by Mr. McCaffrey.

It was so agreed.

Paragraph 29, as amended, was adopted.

Paragraph 30

34. Mr. LACLETA MUÑOZ said that he regretted the lack of harmonization between the Spanish and English texts. In the Spanish text, reference should be made, in both paragraph 29 and paragraph 30, not to *responsabilidad penal* but to *responsabilidad criminal*. The same terminology should be used in the three working languages.

35. Mr. USHAKOV said that the first sentence should be redrafted either on the basis of the proposal made by Sir Ian Sinclair at the 1804th meeting or by replacing the words "under the present draft code" by the words "because it does not exist under contemporary international law". Such a change would reflect the opinion which he had expressed.

36. Mr. YANKOV pointed out that he himself had expressed the same view.

37. Mr. THIAM (Special Rapporteur) noted that, of those members who were opposed to the idea that international criminal responsibility could be attributed to a State, some, like Sir Ian Sinclair, were in favour of the expression "under the present draft code" while others, like Mr. Ushakov and Mr. Yankov, wished to make the point that that notion did not exist in international law. The latter point could be met by adding to the first sentence as worded a phrase which would reflect the view of Mr. Ushakov and Mr. Yankov.

38. Mr. RIPHAGEN said that, logically, it would be preferable to divide paragraph 30 into two separate paragraphs, the first concluding with the words "of the draft on State responsibility". The second should then start with the words "However, it was pointed out that it is easy to imagine".

39. Mr. THIAM (Special Rapporteur) said that he had no objection to Mr. Riphagen's proposal.

40. Mr. McCAFFREY criticized as misleading the concluding portion of the penultimate sentence, reading "excluding, of course, offences against the peace and security of mankind, as referred to in paragraphs 22 to 24 of this report". He did not recall any decision excluding those offences from the international crimes defined in article 19 of part 1 of the draft articles on State responsibility. The position, in fact, was that article 19 covered all international offences, including those against the peace and security of mankind.

41. Mr. LACLETA MUÑOZ, endorsing Mr. McCaffrey's views, said that the main difference between the draft code and the draft articles on State responsibility stemmed not so much from the distinction drawn between crimes against peace and international crimes as a whole, as from the fact that the former involved primary rules and the latter, secondary rules.

42. Mr. CALERO RODRIGUES agreed with Mr. McCaffrey and proposed the deletion of the phrase beginning with the words "excluding, of course".

43. Mr. THIAM (Special Rapporteur) and Mr. RIPHAGEN said they found that amendment acceptable.

44. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 39 subject to that deletion, to the division of the text into two paragraphs, the second one beginning with the fifth sentence and with the words "However, it was pointed out that it is easy to imagine", as proposed by Mr. Riphagen, and to the addition of wording reflecting the views of Mr. Ushakov and Mr. Yankov.

It was so agreed.

Paragraph 30, as amended, was adopted.

Paragraph 31

Paragraph 31 was adopted.

Paragraph 32

45. Mr. McCAFFREY said that he had the same objection to paragraph 32 as to paragraph 29, namely that he did not believe it appropriate for the report to give as examples of international crimes certain acts not listed as such in the 1954 draft code.

46. Mr. USHAKOV pointed out, first, that the words "by a State" should be added after the words "international crime", at the end of the first sentence. Secondly, the reference to statutory limitations in the fifth sentence could lead to confusion, since the principle in question applied to natural persons but not States. Thirdly, the sixth sentence, beginning with the words "It is also significant", suggested that countries with territorial

competence to try crimes against peace might have to try crimes committed by States, which was impossible. Furthermore, he wondered why the Special Rapporteur had cited a ruling handed down by the Court of Appeal of Lyon, which applied to an individual, when the paragraph gave the impression that the examples related to States. Obviously, the internal law of States could apply only to individuals and not to States; article 19, on the other hand, to which reference was made at the beginning of paragraph 32, was in no way concerned with offences committed by individuals but with those of States. The paragraph was therefore somewhat confused.

47. Mr. MAHIOU agreed that paragraph 32 moved imperceptibly from a crime by a State to a crime by an individual, whereas a clear distinction should be drawn between the two categories of crime.

48. Mr. THIAM (Special Rapporteur) said that he would draft a paragraph to take account of the reservations of those members who considered that the criminal responsibility of States did not exist and of those members who considered that a special régime existed only for individuals.

49. Mr. USHAKOV said that, in the case in question, it was a matter of reflecting facts, not views. The internal law of States made no provision for one State to be judged by another. As for the principle of non-subjection to statutory limitations, it applied only to crimes committed by individuals.

50. Mr. MAHIOU pointed out that the Special Rapporteur had endeavoured to contrast an international crime of a State with one committed by an individual by considering the possibility of extending to the State the special procedure and absence of statutory limitations that applied in the case of crimes committed by individuals.

51. Mr. McCAFFREY associated himself with Mr. Mahiou's remarks. As he saw it, the purpose of paragraph 32 was to illustrate the idea set out in the antepenultimate sentence, which read: "The régime of criminal responsibility for offences against the peace and security of mankind thus stands apart from the general régime of responsibility for internationally wrongful acts."

52. Mr. THIAM (Special Rapporteur) said that the language of paragraph 32 would be reviewed in order to take into account the remarks made by members. However, the reference to the crime of *apartheid* would be retained, notwithstanding the objection raised by one member.

53. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt paragraph 32, subject to the insertion at the end of the first sentence of the words "by a State" and to the rewording of certain passages by the Special Rapporteur in order to reflect the remarks made by members.

It was so agreed.

Paragraph 32, as amended, was adopted.

The meeting rose at 1.05 p.m.

1811th MEETING

Thursday, 21 July 1983, at 3.15 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-fifth session (continued)

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (continued) (A/CN.4/L.366)

B. Consideration of the topic at the present session (continued)

1. The CHAIRMAN invited the Commission to continue its consideration of chapter II of the draft report as revised by the Special Rapporteur (A/CN.4/L.366).

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

2. Mr. USHAKOV said he did not think it was entirely correct to state that in 1954 the Commission had not tried to establish a link between acts constituting offences against the peace and security of mankind, since it had recognized that the acts in question were crimes under international law. He would not, however, insist on paragraph 34 being amended.

Paragraph 34 was adopted.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 36

3. Mr. McCAFFREY, referring to the last sentence, proposed the addition of the words "as a whole" after the words "the international community", in line with article 19 of part 1 of the draft articles on State responsibility.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraph 37

4. Mr. McCAFFREY proposed that the last part of the second sentence, after the words "*inter alia*", should be amended to read "as a result of the decolonization process, the need to foster fundamental human rights, and the development of *jus cogens*".

It was so agreed.

Paragraph 37, as amended, was adopted.

Paragraph 38

Paragraph 38 was adopted.

Paragraph 39

5. Mr. USHAKOV said that not every penal system necessarily had a "three-tiered structure constituted by three successive stages". Also, how could it be said that "the 1954 draft was limited to the first of these operations, namely incrimination"? "Incrimination" came under the heading of procedure, something with which a code was not concerned. What was meant by the phrase "or go further"? Why, moreover, was it said that "some members . . . are opposed to any system of penalties encompassing States", when no member held that view and the Charter of the United Nations provided for certain penalties to which no State was opposed? On the other hand, a State could not be made subject to criminal penalties.

6. Mr. THIAM (Special Rapporteur), referring to Mr. Ushakov's first point, proposed that the phrase "Every penal system has" should be replaced by the more flexible expression "A penal system generally consists of", and that the word "criminal" should be inserted before "penalties" in the expression "system of penalties encompassing States".

It was so agreed.

7. Following an exchange of views in which Mr. THIAM (Special Rapporteur), Mr. USHAKOV, Mr. LACLETA MUÑOZ and Mr. MAHIOU took part, Mr. McCAFFREY proposed that the word "incrimination" should be replaced by the expression "determination of offences".

It was so agreed.

8. Mr. CALERO RODRIGUES suggested that, if the sentence starting with the words "However, the opinion has been expressed that", in the second part of the paragraph, referred to a view expressed during the Commission's debate, the words "has been" should be replaced by "was". He further suggested that, in the sentence starting with the words "With respect to item (c)", the words "is necessary" should be replaced by "would be necessary" to make it clear that an international criminal jurisdiction would be necessary if the Commission decided to adopt the three-tiered structure referred to in the introductory part of the paragraph.

It was so agreed.

9. Mr. USHAKOV said he took exception to the statement: "With respect to item (c), the general opinion in the Commission is that an international criminal jurisdiction is necessary." To his mind, the expression "general opinion" suggested unanimity, whereas he, for one, did not hold that view. It was unrealistic to believe that States would ever agree to being subjected to an international criminal jurisdiction. As for an international criminal jurisdiction to which individuals would be subject, it was not really necessary for the time being and, in any event, it was for States to decide whether they wished the Commission to deal with the question.

10. Following an exchange of views in which Mr. THIAM (Special Rapporteur), Mr. YANKOV, Mr. USHAKOV, Mr. CALERO RODRIGUES and Mr. MAHIOU took part, Mr. McCAFFREY proposed that

the words "the general opinion" should be replaced by "the prevailing opinion", an expression which had already been used in paragraph 29 of chapter II.

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraph 40

11. Mr. USHAKOV said that the second sentence of subparagraph (a) was unacceptable in his view, since it was not possible to include an exhaustive list of all the instruments to be taken into account. As for subparagraph (b), he maintained the view that there was no such thing as criminal responsibility of States and was therefore unable to agree with the statement in the first sentence. The Commission had not yet taken a decision on the matter. With respect to subparagraph (c), he considered that, even if unaccompanied by penalties and by a criminal jurisdiction, a code would not be of purely academic interest but would help to prevent individuals from committing international crimes.

12. Mr. MAHIOU said that the opening phrase of paragraph 40 could perhaps be brought into line with the revised text of paragraph 39 so as to read "To sum up, the prevailing opinion in the International Law Commission is", which would indicate that some members held a different point of view. Alternatively, a few words would have to be added in each subparagraph to reflect the minority view. With reference to subparagraph (a), he recognized the difficulties to which the formulation of a list of instruments might give rise. It would therefore be better to refer only to those crimes that were covered by article 19 of part 1 of the draft articles on State responsibility and to indicate that that was not an exhaustive enumeration.

13. Mr. FLITAN said that it was impossible to reflect in paragraph 40 all the points of view referred to in the preceding paragraphs. He therefore proposed that paragraph 40 should simply be deleted.

14. Mr. LACLETA MUÑOZ suggested that only the first part of subparagraph (a) should be retained, as far as the words "pertaining to the subject". It was important to indicate in the report that there had been agreement in the Commission that the draft code should cover only the most serious international offences and not others, such as delicts.

15. Mr. McCAFFREY agreed with Mr. Flitan that it would perhaps be simplest to delete paragraph 40. If that paragraph were to be retained, however, he would support the suggestion made by Mr. Lacleta Muñoz.

16. Mr. MALEK said that he questioned the value of the controversial conclusion set out in paragraph 40.

17. Mr. BALANDA said that, in his view, paragraph 40 was useful in that it summarized the points on which agreement had already been reached. Unlike Mr. Mahiou, he believed that if a list were to be drawn up it would be inadvisable to refer to crimes covered by article 19 of part 1 of the draft articles on State responsibility. The crimes referred to in subparagraph (a) were those which members had cited by way of example during the

discussion. If the Commission was unable to accept the subparagraph as worded, it could perhaps agree to the solution proposed by Mr. Lacleta Muñoz.

18. Mr. MAHIOU withdrew his proposal and supported that of Mr. Lacleta Muñoz.

19. Mr. CALERO RODRIGUES said that he supported the suggestion made by Mr. Lacleta Muñoz but disagreed entirely with Mr. Flitan. A conclusion was absolutely essential, in his view, since its purpose was to seek the General Assembly's guidance on the two important points referred to in subparagraphs (b) and (c). The question of State versus individual responsibility, dealt with in subparagraph (b), was not only of a legal but also of a political nature and therefore had to be put to the General Assembly; however, the subparagraph could perhaps be reworded so as to indicate that there were doubts on the matter. While he agreed fully with subparagraph (c), he recognized that it was perhaps too strongly worded; he therefore suggested that the expression "of purely academic interest" should be replaced by "of limited value".

20. Mr. USHAKOV expressed his support for the proposal of Mr. Lacleta Muñoz.

21. The CHAIRMAN said that, in the light of the comments made, he would take it that the Commission agreed to adopt subparagraph (a), as amended by Mr. Lacleta Muñoz.

It was so agreed.

Subparagraph (a), as amended, was adopted.

22. Mr. USHAKOV, referring to subparagraph (b), asked why the Commission should seek the General Assembly's views on the international responsibility of States when, at the request of the General Assembly, it had already been working on that question for years.

23. Mr. MAHIOU said that he shared Mr. Ushakov's conclusion, albeit on the basis of a different standpoint. He would suggest that subparagraph (b) should be reworded to read: "With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem." There did not seem any useful purpose in going on to repeat views which had already been described.

24. Mr. LACLETA MUÑOZ said he was prepared to accept Mr. Mahiou's proposal on condition that, in the Spanish text, the term *responsabilidad criminal* was used, which he preferred to *responsabilidad penal*. In subparagraph (c), the word *penal* should either be replaced by *criminal* or be deleted from the expression *jurisdicción penal competente*.

25. Mr. BALANDA said that he was prepared to accept Mr. Mahiou's proposal with regard to subparagraph (b). So far as the problem of terminology raised by Mr. Lacleta Muñoz was concerned, he noted that, at least in French, the words *criminel* and *pénal* were interchangeable.

26. Mr. USHAKOV said that, in his view, discussions about terminology obscured the main points, namely

that, at the current stage, no other international responsibility existed than that which gave rise to the imposition of sanctions by the Security Council, and that States could not be penalized in the same way as individuals.

27. Mr. EL RASHEED MOHAMED AHMED said that, in order to avoid repetition and make it quite clear that the Commission was seeking the General Assembly's guidance on two important points, subparagraphs (b) and (c) might be replaced by a single sentence reading: "As to the parameters of the study and the appropriate method of implementation, it has been deemed preferable to ask the General Assembly to indicate more precisely the scope of the Commission's mandate on this point."

28. Mr. McCAFFREY said he could agree to that suggestion, and also to Mr. Mahiou's proposal regarding subparagraph (b), which was very similar.

29. Mr. YANKOV said that he could also agree to those two proposals but would suggest that subparagraphs (b) and (c) should be combined and formulated as a question so as to avoid giving the impression that any general view of the Commission was being stated.

30. Mr. MAHIOU proposed that subparagraph (c) should be reworded to read: "Lastly, with regard to the implementation of the code, the prevailing opinion in the Commission is that a code unaccompanied by penalties and by a criminal jurisdiction would be of only academic interest. It has therefore also been deemed preferable to ask the General Assembly to indicate more precisely the scope of the Commission's mandate on this point." That wording, while taking account of all views, made it clear that it was for the General Assembly to decide whether or not the Commission should embark on a study of the statute of an international jurisdiction.

31. Mr. THIAM (Special Rapporteur) said that Mr. Calero Rodrigues had clearly understood his intention in his draft report, which was to put to the General Assembly two questions of a political nature, one concerning the criminal responsibility of the State and the other an international criminal jurisdiction, so that the Commission would know on which course to embark. Neither the Special Rapporteur nor the Commission itself could take a decision on those questions, since their solution called for a political stand. However, it mattered little if the wording of those questions was modified.

32. While he could accept Mr. Mahiou's proposed wording for subparagraph (b), it could perhaps be redrafted in even more precise terms to read: "With regard to subjects of law, is there a criminal responsibility of the State? The Commission would like to have the views of the General Assembly on this point." Lastly, he supported Mr. Mahiou's proposal with regard to subparagraph (c).

33. Mr. YANKOV said that he agreed with Mr. Mahiou's proposal concerning subparagraph (b). With regard to subparagraph (c), he wondered what exactly was the meaning of "purely academic interest". Even if the draft code were unaccompanied by a criminal jurisdiction, it could have a political or moral impact. He therefore proposed that subparagraph (c) should be

redrafted in more precise terms, along the following lines: "The Commission took the view that a code unaccompanied by penalties and by a competent criminal jurisdiction was not sufficient. However, since the matter also has political implications, a question is addressed to the General Assembly asking for guidance on the point."

34. Mr. USHAKOV said that the question referred to in subparagraph (c) was couched in terms that were too broad. Furthermore, it was premature to envisage an international criminal jurisdiction for individuals, while an international criminal jurisdiction for States was inconceivable. In that connection, he drew attention to article 5 of part 2 of the draft articles on state responsibility, which read: "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."¹ In his view, there were no grounds for substituting an international criminal jurisdiction for those provisions and procedures.

35. Mr. EL RASHEED MOHAMED AHMED said he could agree to Mr. Mahiou's suggestion concerning subparagraph (b). With regard to subparagraph (c), he proposed the deletion of the phrase reading "although the Commission considers that a code unaccompanied by penalties and by a competent criminal jurisdiction would be of purely academic interest".

36. Mr. BALANDA said he could accept Mr. Mahiou's proposal or Mr. Yankov's suggestion regarding subparagraph (c). He noted that most members who had spoken on the draft code had raised the question of the criminal responsibility of States. The Special Rapporteur was therefore fully justified in asking the General Assembly, in subparagraph (c), to indicate more precisely the Commission's mandate on that point.

37. Mr. USHAKOV said that subparagraph (c) should comprise two questions: "Is it necessary to provide for an international criminal jurisdiction for States?"; "Is it necessary to provide for an international criminal jurisdiction for individuals?"

38. Mr. THIAM (Special Rapporteur) said he could agree to a proposal along those lines.

39. Mr. CALERO RODRIGUES proposed that the Special Rapporteur should consult Mr. Ushakov and the other members concerned with a view to arriving at a text for final approval by the Commission.

It was so agreed.

The meeting rose at 4.45 p.m.

¹ See 1805th meeting, para. 39.

1812th MEETING

Friday, 22 July 1983, at 10.05 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Stavropoulos, Mr. Sucharitul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-fifth session (continued)

CHAPTER II. Draft Code of Offences against the Peace and Security of Mankind (concluded) A/CN.4/L.366)

B. Consideration of the topic at the present session (concluded)

Paragraph 40 (concluded)

1. In reply to a request by Mr. CALERO RODRIGUES, Mr. THIAM (Special Rapporteur) read out subparagraph (b) of the conclusion in the amended form approved at the 1811th meeting:

"(b) With regard to the subjects of law to which international criminal responsibility can be attributed, the Commission would like to have the views of the General Assembly on this point, because of the political nature of the problem."

Subparagraph (b), as amended, was adopted.

2. It only remained for the Commission to adopt subparagraph (c), which he had reworded with the assistance of Mr. Ushakov and Mr. Mahiou and which read:

"(c) With regard to the implementation of the code:

(i) Since some members consider that a code unaccompanied by penalties and by a competent criminal jurisdiction would be ineffective, the Commission requests the General Assembly to indicate whether the Commission's mandate extends to the preparation of the statute of a competent international criminal jurisdiction for individuals;

(ii) Moreover, in view of the prevailing opinion within the Commission, which endorses the principle of criminal responsibility in the case of States, the General Assembly should indicate whether such jurisdiction should also be competent with respect to States."

Subparagraph (c), as amended, was adopted.

Paragraph 40, as amended, was adopted.

Section B, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

CHAPTER III. Jurisdictional immunities of States and their property (continued)* (A/CN.4/L.356 and Corr.1, A/CN.4/L.356/Add.1-3 and Add.3/Corr.1)

B. Draft articles on jurisdictional immunities of States and their property (continued)

* Resumed from the 1808th meeting.

PART III (EXCEPTIONS TO STATE IMMUNITY) (*continued*) (A/CN.4/L.356/Add.1)

Commentary to article 12 (Commercial contracts) (continued)

3. Mr. SUCHARITKUL (Special Rapporteur) said that, further to consultations with Mr. Ni and other members, agreement had been reached regarding the amendments to be made in order to take account of Mr. Ni's proposal at the 1808th meeting. Accordingly, he would in due course introduce a new version of paragraph (7) of the commentary to article 12. Consequential amendments were thus required in paragraphs (2) and (3) of the commentary.

4. Mr. NI thanked the Special Rapporteur for his co-operation, which had made it possible to iron out the differences regarding paragraph (7) of the commentary. He had not requested any change in the text of paragraph (2), but would not object to the amendments by the Special Rapporteur.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

5. Mr. SUCHARITKUL (Special Rapporteur) explained that two changes were to be made in paragraph (2). The first consisted in replacing the opening words of the second sentence "It is designed to accommodate" by "It is the result of continuing efforts to accommodate". The second change was to insert the words "or on other grounds" after the words "the theory of implied consent", in the same sentence.

Paragraph (2), as amended, was approved.

Paragraph (3)

6. Mr. SUCHARITKUL (Special Rapporteur) explained that a consequential amendment required the concluding portion of paragraph (3), from the words "and is now able to reach", to be replaced by the following: "and is now able provisionally to adopt a formula, which could in due course be revised and improved so as to take more fully into account the interests and views of all countries with different systems and practices."

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

Paragraph (5)

Paragraph (5) was approved, subject to some drafting changes.

Paragraph (6)

7. Mr. BALANDA said that the words "disposed to", in the first sentence, should be replaced by "in a position to". Again, the second sentence gave the impression that foreign law would apply in all cases and that the State concluding the contract would waive its immunity from jurisdiction. The word "abroad" should therefore be inserted after the phrase "The conduct of the State in concluding a commercial contract".

8. Mr. SUCHARITKUL (Special Rapporteur) said that he had no objection to Mr. Balanda's amendment to the first sentence. The position was different with regard

to the second sentence, which was the outcome of a lengthy discussion in the Commission.

9. Mr. MAHIU said that Mr. Balanda's second point was well taken, but in his opinion the concluding sentence of paragraph (6) met Mr. Balanda's concern.

10. The CHAIRMAN said that, if there were no objections, he would take it that the Commission approved Mr. Balanda's amendment to the first sentence.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

11. Mr. SUCHARITKUL (Special Rapporteur) said that paragraph (7) should be replaced by the following text:

"(7) However, the view was expressed by some members concerning the formula contained in paragraph 1 of article 12 that the expression 'the applicable rules of private international law' is elusive, susceptible of differing interpretations leading to different results, and that the concept of 'implied consent' is artificial and questionable, since in fact a State concluding a commercial contract with a foreigner has not waived its immunity, or agreed to submit to the territorial jurisdiction, nor should it be presumed to have done so."

Paragraph (7), as amended, was approved.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

Paragraph (11)

12. Mr. SUCHARITKUL (Special Rapporteur) said that the wording of paragraph (11) stood in need of improvement. It would be redrafted without affecting the substance in any way.

Paragraph (11) was approved on that understanding.

Paragraph (12)

Paragraph (12) was approved.

Paragraph (13)

13. Mr. BALANDA proposed that the words "non-existence of sovereign power of the State", in the last sentence, should be replaced by "activity not pertaining to the sovereignty of the State".

It was so agreed.

Paragraph (13), as amended, was approved.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were approved.

Paragraph (17)

14. Mr. McCAFFREY said that he could not agree with the statement in the penultimate sentence that the term "commercial contracts" was preferable to the expression "trading or commercial activity". The words "preferable to" should be replaced by "more widely acceptable than".

It was so agreed.

Paragraph (17), as amended, was approved.

Paragraph (18)

15. Mr. McCAFFREY said that the first sentence was confusing, particularly because of the concluding words "in the context of time dimension". They should be deleted and the sentence should be reworded to state that "an attempt has been made to ascertain the development, over time, of State practice with respect to this exception".

It was so agreed.

Paragraph (18), as amended, was approved.

Paragraph (19)

16. Mr. McCAFFREY said that it was inappropriate to speak, in the last sentence, of "the determination of the non-commercial nature" of a particular contract or transaction. It would be better to use the formulation "determination of the nature".

It was so agreed.

Paragraph (19), as amended, was approved.

Paragraph (20)

17. Mr. McCAFFREY proposed that the word "activities" should be inserted after the word "trading" in the first sentence.

It was so agreed.

Paragraph (20), as amended, was approved.

Paragraphs (21) to (23)

Paragraphs (21) to (23) were approved.

Paragraph (24)

18. Mr. LACLETA MUÑOZ said that, in the Spanish text, the words *ilimitada es como* should be replaced by the words *amplia como*.

It was so agreed.

Paragraph (24), as amended, was approved.

Paragraph (25)

Paragraph (25) was approved.

Paragraph (26)

19. Mr. McCAFFREY said that the concluding words of the paragraph, "as the question of exception of commercial contracts from State immunity", should be replaced by "on the question of the exception of commercial contracts from State immunity".

It was so agreed.

Paragraph (26), as amended, was approved.

Paragraph (27)

20. Mr. MAHIOU said that, in the French text, the opening words were misleading, because they gave the impression that the majority of countries had enacted legislation on the question of State immunity, which was far from being the case. It would be better to speak of "a number of Governments".

21. Mr. SUCHARITKUL (Special Rapporteur) explained that, while a certain number of Governments had adopted such legislation, many more were contemplating the enactment of laws on the subject. Moreover, in some countries the question of State

immunity was regulated in laws also dealing with other matters.

22. Mr. McCAFFREY said that, in the heading of the subsection, the word "on" should be replaced by "of". In the second sentence of paragraph (27), the opening words "While these legislations" should be replaced by "While these laws". In the third sentence, the word "of", before "commercial contracts", should be replaced by the words "relating to the", and the words "as provided" should be replaced by "as contained". Lastly, a full stop should be inserted after "United Kingdom", to be followed by the opening words of a new sentence beginning: "The latter has, on this point . . .".

23. Mr. LACLETA MUÑOZ said that, in the Spanish text, the words *según se estipula*, in the third sentence, should be replaced by the word *contenidos*.

It was so agreed.

Paragraph (27), as amended, was approved.

Paragraphs (28) to (34)

Paragraphs (28) to (34) were approved.

Paragraph (35)

24. Mr. SUCHARITKUL (Special Rapporteur) said that the last sentence had to be redrafted in order to take account of more recent developments. He therefore suggested that it should be amended to read: "More recently, the problem was re-examined by the International Law Association during its meeting at Montreal in 1982."

It was so agreed.

Paragraph (35), as amended, was approved.

Paragraphs (36) and (37)

Paragraphs (36) and (37) were approved.

Paragraph (38)

25. Mr. USHAKOV said that he had refrained from commenting on certain passages of chapter II of the draft report because he had already fully explained his position in his memorandum (A/CN.4/371). He did not accept the distinction between State acts which were manifestations of State or public power (*jure imperii*) and State acts which were of a private or commercial nature (*jure gestionis*). In fact, the element that had to be taken into account was the express or tacit consent of a State to submit to the jurisdiction of another State. He could not endorse the theory of restricted immunity on which the commentary relied, particularly since article 12 simply alluded to tacit consent. It was therefore difficult for him to accept article 12 accompanied by a commentary of that kind.

26. Mr. KOROMA proposed the insertion of an additional paragraph along the following lines: "This survey should not lead to the conclusion that the majority of States now subscribe to the restricted immunity school of thought." The fact of the matter was that the overwhelming majority of States adhered firmly to the doctrine of the absolute immunity of States from jurisdiction.

27. Mr. NI supported that statement. The commentary to article 12, from paragraph (11) onwards, seemed one-sided in that it entirely endorsed the theory of restricted immunity. It was essential to introduce an element of balance and to indicate the other point of view.

28. Mr. MAHIOU said that he strongly supported Mr. Koroma's proposal, which reflected the views of a number of members of the Commission.

29. Mr. SUCHARITKUL (Special Rapporteur) said that he was prepared to insert a new paragraph to meet Mr. Koroma's concern, but the paragraph should not appear to express a conclusion that was contrary to the entire substance of the commentary.

30. Mr. KOROMA said that he had examined the most recent legal literature on the subject and had ascertained that the doctrine of absolute immunity still prevailed in the vast majority of countries.

31. Mr. McCAFFREY suggested that the proposed new paragraph should be worded along the following lines: "Some members of the Commission wished to point out that the survey should not necessarily lead to the conclusion . . .", with the remainder of Mr. Koroma's text unchanged.

32. Mr. NI said that the abundant State practice referred to in the commentary was predominantly that of countries in Western Europe and North America. The absence of recorded practice in many countries from other parts of the world was simply proof that those countries adhered to the doctrine of absolute immunity; as a result, there were no cases to report. Arguments based on the number of decisions reported were thus quite misleading.

33. Mr. USHAKOV drew attention to paragraph 17 of his memorandum (A/CN.4/371) and pointed out that 18 of the 29 States which had replied to the questionnaire and supplied information on the question did not share the views of the Special Rapporteur. It was therefore wrong to say that the majority of States favoured the theory of restricted immunity. In the Sixth Committee of the General Assembly, representatives from a large number of countries had taken a stand against that notion. As Mr. Ni had pointed out, the commentary did not reflect the world situation but rather the trends in, and the practice of, certain Western States. If article 12 rested exclusively on the principle of tacit consent by States it would be acceptable, but it was unacceptable when it was based on a commentary that took the principle of restricted immunity as its point of departure.

34. The CHAIRMAN suggested that the drafting of the proposed additional paragraph should be left to Mr. Koroma and the Special Rapporteur, in consultation with other interested members.

It was so agreed.

Paragraph (38) was approved.

The commentary to article 12, as amended, was approved, subject to the addition of paragraph (39).¹

Commentary to article 15 (Ownership, possession and use of property) (A/CN.4/L.356/Add.3 and Corr.1)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

35. Mr. USHAKOV said that paragraph (4) failed to explain the situation properly. In principle, a court was always competent, so there was no reason to refer to the existence of competence "in regard to the proceeding". For a court to be competent in a particular proceeding, there had to be some territorial link: a succession arising in the forum State or the fact that the deceased person was a national of the State concerned.

36. Mr. SUCHARITKUL (Special Rapporteur) said that the insertion of a sentence would suffice to meet Mr. Ushakov's concern.

It was so agreed.

37. In reply to a question by Mr. LACLETA MUÑOZ, Mr. VALENCIA OSPINA (Deputy Secretary to the Commission) said that the final text would of course take into account the changes made by the Drafting Committee.

38. Mr. BALANDA pointed out that, in the French text of the document under consideration, the phrases in English still had to be translated into French.

Paragraph (4), as amended, was approved.

Paragraph (5)

39. Mr. NJENGA proposed that the word "which", in the fifth sentence, should be replaced by "what".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

Paragraph (7)

Paragraph (7) was approved, with a drafting change.

Paragraph (8)

40. Mr. CALERO RODRIGUES pointed out that paragraph (8) of the commentary explained only one of the two cases envisaged in paragraph 2 of article 15, namely the case in which the State itself could not have invoked immunity had the proceeding been instituted against it.

41. Nothing was said in the commentary about the other kind of case, in other words "if the right or interest claimed by the State is neither admitted nor supported by *prima facie* evidence".

42. Mr. SUCHARITKUL (Special Rapporteur) thanked Mr. Calero Rodrigues for drawing his attention to that omission. He would prepare a paragraph (8 *bis*) which would state that paragraph 2 of article 15 was also designed to cover situations in which there was no *prima facie* evidence in support of the claim by the State concerned, and in which that claim was not admitted.

It was so agreed.

Paragraph (8) was approved, on the understanding that it would be followed by an appropriate paragraph (8 bis).

¹ See 1813th meeting, para. 112.

Paragraph (9)

43. Mr. MAHIU suggested the insertion at the end of the paragraph of a sentence along the following lines: "Another member reserved his position on this paragraph which, by its content and formulation, was likely to give rise to serious difficulties, particularly where it sought to deprive a State of property as a result of a proceeding from which it was absent; he considered that paragraph 2 must be re-examined before deciding whether it should be included in draft article 15."

It was so agreed.

44. Mr. LACLETA MUÑOZ pointed out that, in the Spanish text of article 15, paragraph 2 (b) as reproduced in chapter III of the draft report should end with the words *derecho o interés*; the remainder of the sentence should constitute the concluding part of paragraph 2 itself.

45. Mr. USHAKOV suggested that the concluding words of the last sentence, "do not concern another State but are instituted against persons, natural or juridical, other than a State", should be replaced by "do not concern persons, natural or juridical, other than a State, but are in fact instituted against the State itself".

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

Paragraph (10) was approved.

The commentary to article 15, as amended, was approved.

CHAPTER VIII. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.361)

A. Introduction

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 6

46. Mr. CALERO RODRIGUES, referring to the third sentence, said he did not think it was correct to say that the Drafting Committee had not considered any draft articles on account of the programme of work. Perhaps the sentence should be deleted.

47. Mr. QUENTIN-BAXTER (Special Rapporteur) said his intent had been to indicate that the programme of work had not permitted any in-depth discussion of the topic in 1983. It was not an implied criticism but simply an explanation of the course of events.

48. Mr. NJENGA, agreeing that the sentence in question contained a purely factual statement, suggested that Mr. Calero Rodrigues' point might be met by inserting the word "any" before "draft articles".

49. Mr. CALERO RODRIGUES said that, while he could agree to that suggestion, he would none the less propose that the phrase "or for draft articles to be considered by the Drafting Committee" should be replaced by "or for any draft articles which might be presented to be considered by the Drafting Committee".

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraph 7

50. Mr. BALANDA said that, in the third sentence of the French text, the words *un rapport prématurément soumis pour la session de 1984* should be replaced by *un rapport soumis en avance pour la session de 1984*.

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

51. Mr. USHAKOV said that he was unaware of the existence of the study of State practice mentioned in paragraph 9. He could therefore neither support nor oppose the suggestion that it should be made more widely available. Perhaps the study had been intended for the Special Rapporteur.

52. Mr. QUENTIN-BAXTER (Special Rapporteur) said that the sentence was merely intended to reflect a decision taken by the Commission. The study in question was the kind of document members required in order to form their own views, and interest in it had been displayed both in the Sixth Committee and in the Commission.

53. Mr. CALERO RODRIGUES proposed that the word "more" should be deleted from the expression "more widely available", at the end of the third sentence.

It was so agreed.

54. Mr. BALANDA said that, as he saw it, there was a contradiction in the second sentence, which spoke of the participation of a "substantial number of Commission members" in what was none the less a "short" debate.

55. Mr. YANKOV said that it was not the normal practice to give any indication in the report of the Commission of the number of members who had participated in a debate; those interested in such information had only to consult the summary records. Moreover, such subjective assessments served no useful purpose.

56. Mr. McCAFFREY proposed that the expression "A substantial number", at the beginning of the sentence, should be amended to read "A number".

It was so agreed.

Paragraph 9, as amended, was adopted.

1. The majority policy conflicts and the solutions offered

Paragraphs 10 to 17

57. Mr. USHAKOV said he wondered whether paragraphs 10 to 17 were intended to reflect the views of the Special Rapporteur or of the members of the Commission. For instance, he did not recall the Commission taking any decision on the question of the scope of application. In the circumstances, paragraphs 10 to 17 should be deleted.

58. Mr. McCAFFREY pointed out that the paragraphs in question set forth the Special Rapporteur's conclusions, as based on the discussions that had taken place in the Commission and in the Sixth Committee.

59. Mr. NJENGA said that the paragraphs contained a fair and balanced account of the debates in the Sixth

Committee and in the Commission. Accordingly, he was unable to agree to any deletion.

60. Mr. QUENTIN-BAXTER (Special Rapporteur) explained that his aim had been to present, in condensed form, aspects of his fourth report (A/CN.4/373) and of his oral introduction, and to draw attention to certain broad issues that had been the subject of extensive debate in the Commission and the Sixth Committee over a period of years. The first of those issues concerned the scope of the topic and there could be no doubt that the predominant view was in favour of a limitation of scope.

61. Mr. THIAM said that, in 1982, the Commission had not taken a decision on the advisability of pursuing the study of the topic and still less had it decided to delineate the scope. It had preferred to await the report which the Special Rapporteur was to submit later—a report which in fact had been only superficially examined at the present session. Since the purpose now was to reflect the discussions which had taken place in 1983, it was better to focus attention on those discussions.

62. Mr. CALERO RODRIGUES said that, in his view, the paragraphs were useful as an introduction to subsection 2, which dealt with the discussion in the Commission, for they described the Special Rapporteur's approach to the problem and how matters had progressed since his latest report. Hence he would not be in favour of any deletion. The heading of the subsection under discussion might none the less give rise to difficulties and could perhaps be amended to something like "The Special Rapporteur's approach".

63. Mr. YANKOV said that, while he could agree to that suggestion, it would perhaps be simpler just to add "as contemplated by the Special Rapporteur" to the existing heading.

64. Mr. McCaffrey proposed that the heading should be amended by adding the words "by the Special Rapporteur" and that the first sentence of paragraph 10 should be amended to read: "In his report the Special Rapporteur had resolved the question of scope on the basis of positions taken in the Sixth Committee."

65. Mr. THIAM stressed that it was necessary in the paragraphs under consideration to attribute to the Special Rapporteur all the opinions that were presented as being those of the Commission.

66. Mr. USHAKOV said that his criticism of the paragraphs in question was precisely that they reflected only the subjective and biased interpretation of the discussion by the Special Rapporteur. The impression was being conveyed that the Commission had taken a decision on the issues of principle and that the only thing left to be done was to submit the draft articles to the General Assembly.

67. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, while there had been no formal decisions in the Commission or the Sixth Committee, debates had taken place in which a large number of representatives had adopted clear-cut positions. Moreover, the statement made in the first sentence of paragraph 17, for instance, was supported by documentation, and the votes taken on the matter had been listed in his fourth and earlier

reports. It was the duty of a special rapporteur to listen to what was said in the Commission and in the Sixth Committee and, when dealing with new and broad subjects, to assess the various trends.

68. In 1982 the Commission had taken the view that the time had come to decide whether to pursue consideration of the topic. It was therefore his task to place the matter within a context in which such a decision could be taken and he had endeavoured to prepare the way in the two meetings that had been available. In principle, decisions should be taken on the basis of the evidence marshalled by the Special Rapporteur. No one had to agree with such evidence; but no one was entitled to suppress it.

69. Mr. BARBOZA suggested that, in addition to making it clear that paragraphs 10 to 17 reflected the views of the Special Rapporteur, it was necessary to delete certain adjectives such as "majority" or "predominant", which portrayed an unduly clear-cut position on the part of the Commission.

70. Mr. EVENSEN said that paragraphs 10 to 17 should be toned down, since they seemed to rely too much on what had been said in the Sixth Committee, where views varied from year to year.

71. Mr. QUENTIN-BAXTER (Special Rapporteur) said that any toning down could be effected only at the expense of the continued treatment of the topic. The second sentence of paragraph 10, for example, was by no stretch of the imagination a subjective view. It was clearly founded on the position taken in the Commission and in the Sixth Committee. Indeed, there was nothing in paragraphs 10 to 17 that could not be supported by an appraisal of the facts.

72. Mr. USHAKOV said that the paragraphs under consideration had the defect of presenting only the majority view in the Commission and in the Sixth Committee, while ignoring the minority view.

73. Mr. QUENTIN-BAXTER (Special Rapporteur) said it was incorrect to say that he had given only the majority point of view; that was apparent, for example, from paragraph 12. Naturally, every special rapporteur tended to introduce a topic in terms of his own views, but those members who did not agree with them were entitled to say so and subsection 2 endeavoured to do just that. It was important for the Commission's future method of work to accept that special rapporteurs had to listen to what was said in the Commission and the Sixth Committee and to rely on that when nothing else was available. It would always be possible, of course, to add another paragraph at the end of subsection 1 to the effect that some members did not agree with the Special Rapporteur. However, such a course would be superfluous, since there was no assumption that they did agree.

74. The CHAIRMAN suggested that, in the light of the comments made, the heading of subsection 1 should be amended to read "The Special Rapporteur's appraisal of the situation".

It was so agreed.

Paragraphs 10 to 17 were adopted.

Subsection 1, as amended, was adopted.

2. *The Commission's discussion*

Paragraph 18

Paragraph 18 was adopted.

Paragraph 19

75. Mr. USHAKOV suggested that, in the last sentence, which reflected his own views, the words "a State had no obligation to repair transboundary harm unless the breach of a treaty obligation . . ." should be replaced by the following text: "a State had no obligation to repair harm arising from activities that were not prohibited by international law unless provision was made therefor by a relevant convention to which it was a party."

*It was so agreed.**Paragraph 19, as amended, was adopted.*

Paragraph 20

76. Mr. BALANDA suggested that, in the first sentence, the word "one" should be replaced by the words "some of them".

*It was so agreed.**Paragraph 20, as amended, was adopted.*

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Paragraph 24

77. In response to a proposal by Mr. McCAFFREY, Mr. QUENTIN-BAXTER (Special Rapporteur) proposed that the word "susceptible", in the third sentence, should be replaced by "attracted".

*It was so agreed.**Paragraph 24, as amended, was adopted.*

Paragraph 25

*Paragraph 25 was adopted.**Subsection 2, as amended, was adopted.**Section B, as amended, was adopted.*

Chapter VIII of the draft report, as amended, was adopted.

CHAPTER IV. State responsibility (concluded)* A/CN.4/L.357 and Add.1 and Add.1/Corr.1)

C. Draft articles on State responsibility (part 2 of the draft articles)
(A/CN.4/L.357/Add.1 and Corr.1)

Commentaries to articles 1, 2, 3 and 5

The commentaries to articles 1, 2, 3 and 5 were approved.

Section C was adopted.

Chapter IV of the draft report, as amended, was adopted.

The meeting rose at 1 p.m.

* Resumed from the 1808th meeting.

1813th MEETING*Friday, 22 July 1983, at 3.30 p.m.**Chairman: Mr. Laurel B. FRANCIS**later: Mr. Alexander YANKOV*

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Ushakov.

**Draft report of the Commission on the work
of its thirty-fifth session (concluded)**

CHAPTER V. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (concluded)* (A/CN.4/L.358 and Add.1 and Add.1/Corr.1)

C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.358/Add.1 and Corr.1)

Paragraph 57

*Paragraph 57 was adopted.**Commentary to article 1 (Scope of the present articles)*

Paragraph (1)

1. Mr. McCAFFREY proposed that a comma should be inserted after the words "of the draft articles", in the first sentence, and that the words "circumscribing it to all kinds" should be replaced by "comprising all kinds".

*It was so agreed.**Paragraph (1), as amended, was approved.*

Paragraphs (2) and (3)

Paragraphs (2) and (3) were approved, with some drafting changes.

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 1, as amended, was approved.

Commentary to article 2 (Couriers and bags not within the scope of the present articles)

*The commentary to article 2 was approved.**Commentary to article 3 (Use of terms)**Introduction to the commentary**The introduction to the commentary was approved.**Commentary to paragraph 1.**Commentary to subparagraph (1)*

Paragraph (1)

Paragraph (1) was approved, with some drafting changes.

Paragraph (2)

2. Mr. McCAFFREY said that the reference in the second sentence to reasons based on custom was

* Resumed from the 1809th meeting.

ambiguous. The word “custom” should be replaced by “practice”.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

3. Mr. LACLETA MUÑOZ said that the word “generally”, in the sentence to be inserted between the first and second sentences of the paragraph (see A/CN.4/L.358/Add.1/Corr.1), unfortunately gave the impression that the Commission had not been in complete agreement. Hence the word should be deleted.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were approved.

The commentary to subparagraph (1), as amended, was approved.

Commentary to subparagraph (2)

Paragraph (1)

4. Mr. YANKOV (Special Rapporteur) pointed out that, in the French text, the opening words *Les deux objectifs et caractéristiques fondamentales* should be corrected to read *Les deux caractéristiques objectives et fondamentales*.

Paragraph (1), as amended, was approved.

Paragraph (2)

5. Mr. McCAFFREY proposed that the opening words “The way of delivery” should be amended to read “The means of delivery”. In the fourth sentence, the words “Its way of delivery” should be altered to “Its method of delivery”.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

6. Mr. McCAFFREY proposed that, in the English text, the phrase “this subparagraph is similarly structured as”, in the first sentence, should be reworded to read “this subparagraph is structured similarly to”.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

The commentary to subparagraph (2), as amended, was approved.

Commentary to subparagraph (3)

7. Mr. McCAFFREY proposed that, in the second sentence, the opening words “They have been” should be amended to read “It has been”, bearing in mind that the antecedent was the word “terminology”. In the third sentence, the words “dispatching a diplomatic courier whose function is precisely to accompany a bag” should be replaced by the shorter and more accurate formula: “dispatching a bag accompanied by a diplomatic courier”.

8. Mr. YANKOV (Special Rapporteur) said he could accept the first amendment; but, with regard to the second, the language in the third sentence constituted an explanation of the terms used.

9. Mr. McCAFFREY said that he would not insist on his second proposal.

10. Mr. BALANDA suggested that the difficulty which had led Mr. McCaffrey to make his proposal to amend the third sentence could be resolved by replacing the phrase “a State dispatching a diplomatic courier” by “a State sending a diplomatic courier”.

11. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve the commentary to subparagraph (3), with Mr. McCaffrey’s amendment to the second sentence and Mr. Balanda’s amendment to the third sentence.

It was so agreed.

The commentary to subparagraph (3), as amended, was approved.

Commentary to subparagraph (4)

Paragraph (1)

12. Mr. YANKOV (Special Rapporteur) said that, in the Spanish text of the second sentence, the word *ecuación* should be amended to *asimilación*.

13. Mr. McCAFFREY proposed that, in the second sentence, the opening words “To use another terminology”, should be replaced by “To use other terminology”.

14. Mr. BALANDA said that, in the French text of the first sentence, the words *celui même* should be replaced by *celui-là même*.

15. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (1), subject to those three amendments.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved

The commentary to subparagraph (4), as amended, was approved.

Commentary to subparagraph (5)

The commentary to subparagraph (5) was approved.

Commentary to subparagraphs (6), (7) and (8)

The commentary to subparagraphs (6), (7) and (8) was approved.

Commentary to subparagraph (9)

The commentary to subparagraph (9) was approved.

The commentary to paragraph 1 of article 3, as amended, was approved.

Commentary to paragraph 2

The commentary to paragraph 2 of article 3 was approved.

The commentary to article 3, as amended, was approved.

Commentary to article 4 (Freedom of official communications)

Commentary to paragraph 1

The commentary to paragraph 1 of article 4 was approved.

Commentary to paragraph 2

The commentary to paragraph 2 of article 4 was approved, with a drafting change.

The commentary to article 4, as amended, was approved.

Commentary to article 5 (Duty to respect the laws and regulations of the receiving State and the transit State)

Commentary to paragraph 1

16. Mr. McCAFFREY said that, at the end of the third sentence, the words "and its safe arrival at its destination" should be followed by a comma and the phrase "while guarding against its abuse", so as to take into consideration the sentiments expressed in the Sixth Committee that part of the purpose of the draft articles was to help to ensure that a sending State did not abuse the use of the diplomatic bag. As the text now stood, the third and fourth sentences gave the impression that all the privileges, immunities and facilities accorded to the courier and the bag were aimed solely at ensuring protection of the bag and its safe arrival at its destination. Lastly, the words "shall do all possible efforts", in the final sentence, should be replaced by "shall make all possible efforts".

It was so agreed.

The commentary to paragraph 1 of article 5, as amended, was approved.

Commentary to paragraph 2

The commentary to paragraph 2 of article 5 was approved.

The commentary to article 5, as amended, was approved.

Commentary to article 6 (Non-discrimination and reciprocity)

Introduction to the commentary

The introduction to the commentary was approved.

Commentary to paragraph 1

The commentary to paragraph 1 of article 6 was approved.

Commentary to paragraph 2, subparagraph (a)

The commentary of subparagraph (a) of paragraph 2 of article 6 was approved, with a drafting change.

Commentary to paragraph 2, subparagraph (b)

The commentary to subparagraph (b) of paragraph 2 of article 6 was approved.

The commentary to paragraph 2 of article 6, as amended, was approved.

The commentary to article 6, as amended, was approved.

Commentary to article 7 (Documentation of the diplomatic courier)

17. Mr. BALANDA said it had already been proposed that, in the French text of article 7 before the commentary, the words *d'un document officiel* should be

replaced by the plural *des documents officiels*, in order to bring the text of the article into line with the title. The purpose of such a change would be to cover cases in which the diplomatic courier was the bearer of several official documents establishing his status and specifying the number of items constituting the diplomatic bag.

18. Mr. YANKOV (Special Rapporteur) said that the best solution might be to bring the French text into line with the other texts.

It was so agreed.

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

19. Mr. LACLETA MUÑOZ said that, in the first sentence of the Spanish text, the words *su número de matrícula* should be replaced by *los números de serie de éstos*.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

20. Mr. BALANDA said that, in the second sentence of the French text, the word *reflétaient* should be replaced by *reflètent*.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

Paragraph (4) was approved.

The commentary to article 7, as amended, was approved.

Commentary to article 8 (Appointment of the diplomatic courier)

Paragraph (1)

Paragraph (1) was approved.

Paragraph (2)

21. Mr. McCAFFREY proposed the insertion at the end of the second sentence, which stated that the appointment of the diplomatic courier was an act within the domestic jurisdiction of the sending State, of the phrase "and the word 'freely' is used to indicate this". Some explanation should be given to show how the term "freely" was used in article 8, notwithstanding the fact that it was also found in the corresponding provisions of the existing diplomatic conventions.

22. Mr. YANKOV (Special Rapporteur) said that comments had been made in the Sixth Committee about the use of the word "freely". Some representatives have considered it redundant to state in the article that the courier was "freely appointed", something that was self-evident. As he saw it, it was desirable to indicate that freedom of appointment in the matter was the consequence of the sovereignty and discretionary powers of the sending State. He would prefer Mr. McCaffrey's proposal to take the form of a separate sentence along the following lines: "Accordingly, the word 'freely' has been used in the text of article 8."

23. Mr. FLITAN pointed out that the first sentence of paragraph (1) explained that the use of the expression “freely appointed” was “consistent with the terminology used in the corresponding provisions of all four diplomatic conventions”.

24. Mr. YANKOV (Special Rapporteur) said that it was none the less desirable to provide an explanation in paragraph (2), one that would not in any way affect what was stated in paragraph (1).

25. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (2), with the insertion proposed by Mr. McCaffrey, as reworded by the Special Rapporteur.

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved.

Paragraph (4)

26. Mr. YANKOV (Special Rapporteur) proposed that the words “or a member of the staff of the Ministry of Foreign Affairs” should be inserted at the end of the second sentence, thereby making the text more complete.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

27. Mr. FLITAN proposed that the phrase “or the matter could be dealt with in a separate article to follow draft article 11” should be inserted at the end of the paragraph, so as to take account of a possibility which had also been contemplated by the Drafting Committee.

It was so agreed.

Paragraph (5), as amended, was approved.

The commentary to article 8, as amended, was approved.

Section C, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

Mr. Yankov took the Chair.

CHAPTER VI. The law of the non-navigational uses of international watercourses (A/CN.4/L.359 and Add.1)

A. Introduction (A/CN.4/L.359)

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Paragraph 12

28. Mr. BARBOZA proposed that footnotes 20 and 21, containing draft articles 1 to 5 and X and a “provisional working hypothesis” that had been adopted by the Commission at its thirty-second session,¹ should be incorporated into the body of paragraph 12, for they were no less important than the questionnaire addressed to Governments, which was reproduced in the body of paragraph 5.

29. Mr. EVENSEN (Special Rapporteur) explained that the texts in question had been placed in footnotes

because they had been adopted not at the present session, but in 1980. They were reproduced in the draft report only for information.

30. Mr. McCAFFREY said that in chapter III, dealing with jurisdictional immunities of States and their property, the draft articles adopted at previous sessions appeared in the body of the chapter and not in a footnote. For the purposes of the discussion in the Sixth Committee, it was preferable for the material in footnotes 20 and 21 to be set out in paragraph 12 itself.

31. The CHAIRMAN said that, as a rule, texts of articles placed in footnotes were draft articles which had not been adopted. In the present instance, the articles concerned had been adopted on first reading and should be included in the body of paragraph 12.

32. Mr. LACLETA MUÑOZ pointed out that, in the Spanish text of footnote 20, the passage in square brackets following article X was obviously an error and should be deleted.

33. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 12, with the correction to the Spanish text and with the amendment proposed by Mr. Barboza.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 15

Paragraphs 13 to 15 were adopted.

Paragraph 16

34. Mr. McCAFFREY said that paragraph 16 seemed somewhat out of place, since it did not follow on naturally from the previous paragraphs; but in view of the lateness of the hour, he would not make any proposal in that regard.

35. Mr. BALANDA said that the proper place for paragraph 16 was the beginning of the chapter. Nevertheless, he would not press the point.

Paragraph 16 was adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.359/Add.1)

Paragraphs 1 to 14

Paragraphs 1 to 14 were adopted.

Paragraph 15

Paragraph 15 was adopted, with some drafting changes.

Paragraph 16

Paragraph 16 was adopted.

Paragraph 17

36. Mr. McCAFFREY, referring to the words “contiguous or successive rivers”, in the first sentence, said that it would be more appropriate to speak of contiguous or successive riparian States.

37. The CHAIRMAN said that he did not experience the same difficulty as Mr. McCaffrey, for it was possible to have contiguous or successive riparian States and also contiguous or successive rivers.

¹ Yearbook . . . 1980, vol. II (Part Two), pp. 110 *et seq.* (arts. 1 to 5 and X and commentaries thereto), and p. 108, para. 90 (note concerning the term “international watercourse system”).

38. Mr. NJENGA said he agreed with that remark.

39. Mr. BARBOZA pointed out that the correct expression was employed in Spanish. *Río de curso sucesivo* was used for a river that crossed the territory of one State and then another State. *Río contiguo* was used for rivers that formed frontiers. In any event, reference was always made to rivers, not to States.

40. Mr. CALERO RODRIGUES said that, during the discussion, he himself had referred to "contiguous or successive rivers", an expression which he believed to be correct not only in his own language but also in English.

41. Mr. McCAFFREY said that he would not press the point, although the expression did seem strange.

42. Mr. BALANDA said that, in French, he had similar difficulties with the expression *rivières contiguës ou successives*, and he tended to agree with Mr. McCaffrey.

43. The CHAIRMAN said he would take it that the Commission agreed to adopt paragraph 17 as it stood, on the understanding that the views expressed by members on the expression "contiguous or successive rivers" would appear in the summary record.

It was so agreed.

Paragraph 17 was adopted.

Paragraphs 18 to 27

Paragraphs 18 to 27 were adopted.

New paragraph 27 bis

44. Mr. BARBOZA proposed the insertion of a paragraph 27 bis worded along the following lines: "Many members expressed the opinion that articles 1 to 5 and X and the note, provisionally adopted by the Commission at its thirty-second session (1980), should no longer be considered in the first reading of the draft, and that the Special Rapporteur should begin his next report with the new article 6."

45. Mr. CALERO RODRIGUES said that he had no objection to the proposed additional paragraph, but the opening words "Many members" should be amended to read "Several members".

46. Mr. EVENSEN (Special Rapporteur) said that there were good reasons to prefer the expression "Several members", which would introduce a desirable element of flexibility, especially in view of the discussions in the Sixth Committee.

47. Mr. McCAFFREY said he agreed with Mr. Barboza. He would have been inclined to say "Many members", but if that wording was not acceptable, perhaps it would be possible to say "A number of members".

48. In reply to a question by the CHAIRMAN, Mr. BARBOZA said that he would prefer the wording "A number of members", but he was prepared to accept the term "Several members".

49. Mr. NJENGA said he was strongly opposed to Mr. Barboza's proposal for a new paragraph 27 bis, one which suggested that certain draft articles already provisionally adopted could not be reviewed. In fact, the article on shared natural resources had attracted considerable

criticism. It was therefore essential not to tie the Special Rapporteur's hands, as would be the case if the proposed paragraph 27 bis were adopted. The text was not balanced and did not take into account the fact that many members of the Commission were totally opposed to the course of action indicated therein.

50. The Commission had to elaborate a set of draft articles that would command the broadest support, not only among members but also among States. It would be doing no service to the cause of progress on the topic if the draft included articles that a number of members found unacceptable.

51. Mr. EVENSEN (Special Rapporteur) said that a very delicate political matter appeared to be involved. He therefore proposed to listen to the discussions in the Sixth Committee very carefully and also planned to visit the Governments of some major riparian States before proceeding with his work. He had no strong feelings with regard to the choice of the opening words, but since the view expressed in paragraph 27 bis was opposed by some members, it would be appropriate for their opinion to be reflected in another paragraph to follow paragraph 27 bis. He assured all members that the proposed paragraph would not be unduly restrictive in regard to his future work.

52. Mr. BARBOZA said that he was compelled to insist on his proposed paragraph 27 bis, which was necessary in the interests of balance. It was not intended to reflect the debate in the Sixth Committee, but rather the discussion in the Commission, six or seven members of which had clearly expressed views identical to his own.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Barboza's proposal, amending the opening word to "Several", and on the understanding that the Special Rapporteur considered that the paragraph would not restrict him in any way in his work.

It was so agreed.

54. Mr. NJENGA pointed out that the Special Rapporteur had also suggested that, for the sake of balance, a further paragraph should be included to reflect the views of members who did not agree with the opinion expressed in paragraph 27 bis. He therefore proposed the insertion of the following text, to follow paragraph 27 bis: "Some other members, however, questioned some of the concepts in the articles provisionally adopted, such as 'shared natural resources', as offering a suitable basis for evolving generally acceptable principles in this field."

55. Mr. BARBOZA pointed out that paragraphs 31 *et seq.* reflected the different opinions expressed in the Commission with regard to the advisability of adopting the principle of shared natural resources; those paragraphs covered the contents of Mr. Njenga's proposed text, which, if adopted, would be repetitive and complicate the task of the Special Rapporteur.

56. The CHAIRMAN suggested that the proposed additional passage might perhaps read: "Other members of the Commission, however, considered that the Special Rapporteur should not be limited in his further work,

considering the examination of this problem in the Sixth Committee.” A formulation along those lines would put the emphasis on the desirability of allowing the Special Rapporteur the necessary latitude in his work.

57. Mr. EVENSEN (Special Rapporteur) proposed the following compromise formula: “Other members expressed their concern with regard to certain aspects of the provisionally adopted articles.” It did not take up any of the specific issues and also allowed for the fact that concern had been expressed about some other matters, not only the concept of shared natural resources.

58. Mr. BARBOZA pointed out that paragraph 27 *bis* related to a question of procedure; it meant that the discussion could be re-opened only on the second reading of the texts which the Commission had already adopted on first reading. Opinions regarding the concepts of international watercourse systems and shared natural resources had been fully expressed elsewhere. His own views on procedure had in fact been supported by many members of the Commission.

59. Mr. CALERO RODRIGUES said that he had not opposed the inclusion of paragraph 27 *bis* because the paragraph was a statement of fact. He did not like the idea, held by some members of the Commission, that articles, once they were adopted, should be considered sacrosanct, even at the expense of condemning the Commission to a fruitless exercise. Insistence on leaving the draft articles in question as they were would simply mean that the Commission would be unable to produce effective draft articles.

60. The concern expressed by Mr. Njenga for some balance in the reporting of views, and for ensuring that the Special Rapporteur’s hands were not tied, seemed to be justified. Paragraph 27 *bis* did not, in his view, tie the Special Rapporteur’s hands, for it simply expressed the opinion of six or seven members of the Commission. That opinion, however, was rejected by other members, who felt that the draft articles in question must be reviewed in order to provide the Commission with a better basis for its future work.

61. The compromise text suggested by the Special Rapporteur reflected to some extent the opinions expressed by himself and a number of other members, including Mr. Njenga, in the course of the debate. His own idea, however, would be to introduce an additional sentence at the end of paragraph 27 *bis* reading simply: “Other members did not share that view.” If that suggestion was not acceptable, he would be prepared to accept the formulation proposed by the Special Rapporteur, but on the understanding that it would constitute an additional sentence to paragraph 27 *bis*. Insertion of that sentence would not in any way prejudice the main part of that paragraph.

62. Mr. McCaffrey said that Mr. Barboza’s position was procedurally correct. If the Commission were to go back on draft articles which it had provisionally adopted simply because some member did not like them, it would never get anything done. For example, he did not like article 19 of part 1 of the draft articles on State responsibility, but he would not think of proposing that

the debate on that article should be re-opened. The Commission had to follow certain methods in its procedure. The compromise text proposed by the Special Rapporteur was acceptable and he was prepared to support it.

63. Mr. BARBOZA said that he accepted the Special Rapporteur’s proposal, but with great reluctance, for it upset the balance of paragraph 27 *bis* and repeated unnecessarily what was already stated elsewhere in the report.

64. Mr. NJENGA said that he could accept, for the additional sentence, the compromise formulation suggested by the Special Rapporteur, provided it was expanded to read: “Other members expressed their concern with regard to certain aspects of the provisionally adopted articles and felt that the Special Rapporteur should not be unduly restricted in his future task.”

65. Mr. EVENSEN (Special Rapporteur) appealed to Mr. Njenga to withdraw his proposal and to accept the compromise formulation. He wished to stress that he did not feel in any way restricted by the terms of paragraph 27 *bis*. He therefore urged the Commission to adopt his compromise proposal, without any addition that would upset its balance.

66. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the compromise text proposed by the Special Rapporteur, on the understanding that it would become the second sentence of paragraph 27 *bis*.

It was so agreed.

Paragraph 27 bis, as amended, was adopted.

Mr. Francis resumed the Chair.

Paragraphs 28 to 33

Paragraphs 28 to 33 were adopted.

Paragraph 34

67. Mr. CALERO RODRIGUES proposed that the word “since”, in the second sentence, should be deleted.

It was so agreed.

Paragraph 34, as amended, was adopted.

Paragraphs 35 to 37

Paragraphs 35 to 37 were adopted.

Paragraph 38

Paragraph 38 was adopted, with a drafting change.

Paragraphs 39 to 45

Paragraphs 39 to 45 were adopted.

New paragraph 45 *bis*.

68. Mr. BARBOZA proposed the insertion of a paragraph 45 *bis* reading: “Some members proposed that articles 11 to 14 should be placed in chapter II, in the light of the clear obligation not to cause appreciable harm (art. 9), instead of in chapter III (Co-operation and management), in which the obligations set forth had less clear outlines.”

It was so agreed.

Paragraph 45 bis was adopted.

Paragraphs 46 to 52

Paragraphs 46 to 52 were adopted.

Section B, as amended, was adopted.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER IX. Other decisions and conclusions of the Commission (concluded)* (A/CN.4/L.362 and Add. 1 and 2)

A. Programme and methods of work of the Commission (A/CN.4/L.362/Add.2)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

69. Mr. McCaffrey proposed that the opening words "Satisfaction was expressed" should be amended to read "The Commission expressed satisfaction": the words "to the Commission", in the same sentence, would then be deleted as redundant.

It was so agreed.

70. On a more important point of substance, he could not accept the last sentence, which reflected the view that the increase in the number of professional officials servicing the Commission "should become permanent". The sentence went on to add that the numbers of Secretariat staff should match the increase in the membership of the Commission "as well as the ever-increasing assistance in the form of research and studies to be provided to Special Rapporteurs". As he had had occasion to point out in the Planning Group, no member of the Commission had expressed such a view, although some members had of course expressed gratitude for assistance received from the Secretariat. A number of members who had been unable to attend the meeting because of other commitments had asked him to propose that the last sentence should be replaced by a formulation along the following lines: "The current level of staffing should be maintained in order to satisfy the increasing demand for professional services."

71. At least two Special Rapporteurs had taken exception to the statement that there was "ever-increasing assistance in the form of research and studies to be provided to Special Rapporteurs". He was not qualified to speak on that point, but it should be borne in mind, since those Special Rapporteurs were not in attendance at the present meeting. The statement in question was somewhat demeaning and it was understandable that any Special Rapporteur should object to it.

72. Lastly, he had serious doubts about the statement in the last sentence that the number of Secretariat staff members assisting the Commission "should match the increase of its membership". He failed to see the relationship between the two.

73. Mr. Yankov, speaking as Chairman of the Planning Group, said that the question raised by Mr. McCaffrey had been considered at two consecutive meetings of the Group and at a meeting of the Enlarged Bureau. The view in question had in fact been expressed by several members of the Commission.

74. Some members of the Planning Group had suggested that consideration be given in future to having the Secretariat extend its research assistance to members of the Commission other than Special Rapporteurs, when so required, in which case the increased membership of the Commission would in fact play an important role with regard to professional staff requirements.

75. Speaking as a member of the Commission, he could accept Mr. McCaffrey's proposal in part, but he considered that it had to be supplemented by a reference to maintaining the level of staffing — an idea which was reflected in the existing text by the words "should become permanent". It was also necessary to retain the idea of the number of Secretariat members matching the increase in the membership of the Commission and its work-load.

76. Mr. EL RASHEED MOHAMED AHMED said that there appeared to be no conflict between Mr. McCaffrey's proposal and Mr. Yankov's suggestion. Both were giving expression to the same idea, namely satisfaction at the increase in the professional staff servicing the Commission.

77. Mr. YANKOV proposed that the last sentence of paragraph 7 should be reworded to read: "The view was expressed that the level of staffing pattern should be maintained, as the number of members of the Secretariat assisting the Commission in the course of its session should match the increase in its membership and its work-load, as well as the ever-increasing assistance in the form of research and studies to be provided to Special Rapporteurs."

78. Mr. McCaffrey said that, in order to save time, he could accept the proposal, provided the opening words were amended to "A view was expressed that the current staffing pattern should be maintained". He wished, however, to place on record his reservations regarding Mr. Yankov's text.

79. Mr. USHAKOV said that the sentence actually expressed the point of view of several members, including himself. He therefore suggested that the opening words should be "The view".

80. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to replace the last sentence of paragraph 7 by the text proposed by Mr. Yankov, but with the opening words amended to read: "The view was expressed that the current staffing pattern should be maintained".

It was so agreed.

Paragraph 7, as amended, was adopted.

Paragraphs 8 and 9

Paragraphs 8 and 9 were adopted.

Paragraph 10

81. The CHAIRMAN said that the Enlarged Bureau had not accepted the Planning Group's recommendation for the Commission's annual session to be held partly in New York and partly in Geneva. Normally, the last two sentences of paragraph 10 would not have been included in the draft report.

* Resumed from the 1809th meeting.

82. Mr. JACOVIDES said that, in the Planning Group, he and at least one other member had felt that it would be helpful to mention the suggestion in question. To do so did not commit the Commission to any particular course. The idea was a novel one and might, or might not, be tried out, depending on the outcome of the inquiry into the financial and other implications.

83. The CHAIRMAN said that the suggestion was mentioned in paragraph 10 simply as a matter of courtesy to the members of the Planning Group. It had not been accepted by the Enlarged Bureau. For one thing, such a course might prove to be financially prohibitive, among other reasons because of the higher per diem in New York than in Geneva.

84. Mr. JACOVIDES said that the whole point of requesting the Secretariat to make a survey of the financial and other implications was to find out whether the idea was feasible from the financial point of view. Quite apart from financial considerations, however, the Commission owed it to the Sixth Committee to see how it could improve its methods of work. A session held partly in New York and partly in Geneva would improve the prospects of better attendance, at least for some members. He felt certain that several members shared his opinion.

85. If the suggestion was kept in the form in which it appeared in paragraph 10, the Commission could consider it again in 1984 in the light of the findings of the proposed survey.

86. Mr. YANKOV said that, since the suggestion in question had in fact been made, it would have been his duty as Chairman of the Planning Group to inform the Commission thereof, regardless of whether it was mentioned in paragraph 10.

87. He wished to state for the record that it would be almost impossible for him, as a member of the Commission, to attend sessions at two different periods of the year. Apart from financial and other implications—and even the proposed Secretariat study would have some financial implications—he could not see the point of asking the Secretariat to undertake that work when the suggestion was known in advance not to be viable.

88. The CHAIRMAN suggested that the two sentences in question should be deleted, on the understanding that the suggestion for meetings elsewhere than in Geneva should be discussed in plenary by the Commission at its next session.

It was so agreed.

Paragraph 10, as amended, was adopted.

Paragraph 11

Paragraph 11 was adopted.

Paragraph 12

89. Mr. BARBOZA, referring to the English and Spanish texts, pointed out that the Planning Group had decided that the Commission should prepare “draft articles” and not “drafts”. He therefore proposed that the word “drafts”, in the first sentence, should be amended to “draft articles”.

90. The CHAIRMAN said it was his understanding that the Enlarged Bureau had adopted the term “drafts” in the interests of flexibility.

91. Mr. YANKOV, speaking as Chairman of the Planning Group, said that was indeed the case. The Planning Group, however, had submitted a text which referred specifically to the draft articles on State responsibility, on jurisdictional immunities of States and their property, on the law of the non-navigational uses of international watercourses and on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. It had added that the necessary priority should be accorded to the topic of the draft Code of Offences against the Peace and Security of Mankind in accordance with the relevant General Assembly resolutions. Lastly, reference had been made to the possibility of attention being devoted to the elaboration of draft articles on the remaining topics on the current programme.

92. The purpose of the Enlarged Bureau, as expressed in paragraph 12, was to set forth those same ideas in an abbreviated form. Nevertheless, the reference to “draft articles” should not be lost and he therefore supported Mr. Barboza’s proposal.

93. Mr. BARBOZA observed that, in paragraph 10, the Enlarged Bureau had included a reference to a suggestion which had been rejected; in the case of paragraph 12, on the other hand, it had failed to include a suggestion which had not been rejected. He saw no reason for such difference in treatment. He noted, however, that the Chairman of the Planning Group had accepted his proposal to replace the reference to “drafts” by “draft articles”.

94. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt paragraph 12, with the amendment proposed by Mr. Barboza.

It was so agreed.

Paragraph 12, as amended, was adopted.

Section A, as amended, was adopted.

C. Date and place of the thirty-sixth session (concluded) (A/CN.4/L.362)

95. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the Enlarged Bureau’s recommendation that the Commission should hold its next session at Geneva from 7 May to 27 July 1984.

It was so agreed.

Section C was adopted.

Chapter IX of the draft report, as amended, was adopted.

CHAPTER I. Organization of the session (A/CN.4/L.354 and Add.1)

Paragraphs 1 to 10 (A/CN.4/L.354)

Paragraphs 1 to 10 were adopted.

Paragraphs 11 to 38 (A/CN.4/L.354/Add.1)

96. The CHAIRMAN explained that paragraphs 11 to 38 reproduced the passages of the summary record of the

Commission's 1795th meeting which recorded the statement made by the Secretary-General, as well as his own statements as Chairman.

97. Mr. USHAKOV suggested that the Commission should conform to the procedure established in connection with visits by the previous Secretary-General, namely to reproduce the Secretary-General's statement in full, as an annex to the report, but to omit the statements by the Chairman.

98. Mr. JACOVIDES said he tended to agree with Mr. Ushakov.

99. Mr. McCAFFREY said that perhaps the Secretariat could inform the Commission of the precedents in the matter. His own view was that it was important to include the statements made by the Chairman in connection with the Secretary-General's visit. He was in favour of reproducing the Secretary-General's statement in full, but there might be some rule regarding the length of documentation.

100. Mr. YANKOV said he supported the proposal by Mr. Ushakov to include an annex reproducing the whole of the statement by the Secretary-General, who was the highest official of the United Nations and did not visit the Commission very often. However, he saw no useful purpose in including an extensive summary of the same statement in the main body of the report.

101. Mr. VALENCIA-OSPINA (Deputy Secretary to the Commission) said that the previous Secretary-General, Mr. Waldheim, had visited the Commission in 1972 and in 1974. On both occasions, the statements by the Secretary-General and the Chairman had been summarized at some length in chapter I of the Commission's report. The suggestion that the full text of the Secretary-General's statement should be reproduced as an annex was an innovation. Moreover, it would mean repeating an existing text, a procedure that would be contrary to current regulations, which precluded the reproduction of texts already distributed as documents.

102. The CHAIRMAN said that Mr. Jagota, in his capacity as Rapporteur of the Commission, had asked him to take over his responsibilities with respect to the report. He had therefore addressed a note to the Secretary to the Commission requesting that documents normally sent to the Rapporteur should be passed to him.

103. Upon receiving the draft of chapter I, he had noted that it contained extensive summaries of statements made by observers from various regional bodies. Accordingly, he had been concerned to ensure that the statement by the Secretary-General should be suitably summarized, for it was unthinkable that such an important text should not be given proper treatment. He had requested that an appropriate summary of the statements by the Secretary-General and himself at the 1795th meeting should be included in chapter I, and had received the following reply, dated 20 July 1983, from the Secretary to the Commission:

1. Reference is made to your memorandum of 19 July 1983 dealing with the matter.
2. The attached is a draft for "an appropriate summary" referred to in your memorandum.

3. I have to emphasize that summarizing such an important statement as the one made by the Secretary-General in the Commission is an extremely delicate task, both substantively and politically. It is even more so, as the original text of the statement is a several-page document and the summary is to be a very short one. Summarizing it unavoidably involves deletions from, alterations to, and other changes in the original text.

Should I not be so specifically requested by you, I would never have ventured to associate the Commission Secretariat or myself with the submission of any summary of this kind unless it had been prepared or cleared by the author of the original statement.

My firm view is to the effect that either the statement in question should be reproduced (in the Commission's report) as it appears in the official record (A/CN.4/SR.1795) or it should be covered in the Commission's report by way of a cross-reference to that summary record.

But the idea of a summary is yours, and no responsibility for its contents or the inclusion in the draft report can rest with the Secretariat.

4. As the time for releasing chapter I of the draft report, which was submitted for translation quite a time ago, is about to run out, I would suggest that it should be released right now, it being understood that at the end of the chapter we may tentatively say in brackets "to be continued". Then a summary, once finalized by you, can be submitted and issued as a separate text actually continuing the text of document A/CN.4/L.354 (the opening paragraph of the summary will bear number 11). This would save time and facilitate the work of the documents services.

He had replied on 21 July 1983 as follows:

Your memorandum of 20 July refers.

I fear we are losing too much time on what, in my view, is a simple (yet important) matter. It is simple in the sense that it goes without saying that at least an appropriate summary of the Secretary-General's and other statements made at the meeting should be included in the Commission's report. If this is so, as indeed it must be, then the Secretariat cannot escape its responsibility by omitting to do that in the first instance with reference to the draft report.

If in my previous memorandum I asked for an appropriate summary, it was because it then appeared to me (and still does) that the Commission's reports for 1972 (1194th meeting) and 1974 (1288th meeting) respectively reflected a concise summary of the statements concerned. But, in any case, I was not particularly concerned about the textual form in which the statements are reflected in the Commission's report but rather about their total omission.

I am the happier now that you have a firm view as to how the matter is to be resolved, and there would have been quick progress and no misunderstanding had the first draft submitted to me reflected the results of that view. I prefer your first alternative (in paragraph 3), namely that the Secretary-General's statement be reproduced in the Commission's report as it appears in the relevant official record, and I suggest that you proceed on that basis.

In the circumstances, I assume that the other statements will also be reproduced. That, in any case, would solve the translation problem.

104. Mr. USHAKOV said he still considered that it was not normal to attach the same weight to the Chairman's expressions of welcome and thanks as to the Secretary-General's statement.

105. Mr. NJENGA urged that the Commission should follow the precedent established on the occasion of the visits by the Secretary-General in 1972 and 1974.

106. Mr. McCAFFREY said he fully endorsed those remarks and suggested that the Secretariat should be entrusted with the harmonization of the present session's report with previous reports. The statements made by the Secretary-General and the Chairman had to be reflected in the report, but some balance had to be maintained between the length of the summaries, as Mr. Ushakov had rightly indicated.

107. Mr. NI said he shared the views of Mr. Njenga and Mr. McCaffrey and felt that the problem should be dealt with in accordance with precedent.

108. The CHAIRMAN said that he had originally asked for summaries in keeping with what had been done in previous reports, but the Secretary to the Commission had expressed a preference for reproducing the Secretary-General's statement in full. It was for the Commission to decide whether the report should include a summary, in accordance with past practice, or reproduce the text of the Secretary-General's statement in full.

109. Mr. FLITAN proposed that the Secretary-General's statement should be reproduced in full in the form of a working document of the Commission.

110. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Flitan's proposal, in addition to the inclusion of a summary in chapter I of the report.

*It was so agreed.*²

Paragraphs 11 to 38 were adopted, subject to the appropriate amendments.

Chapter I of the draft report, as amended, was adopted.

CHAPTER III. Jurisdictional immunities of States and their property (concluded) (A/CN.4/L.356 and Corr.1, A/CN.4/L.356/Add.1-3 and Add.3/Corr.1)

B. Draft articles on jurisdictional immunities of States and their property (concluded)

PART III (EXCEPTIONS TO STATE IMMUNITY) (concluded) (A/CN.4/L.356/Add.1)

Commentary to article 12 (Commercial contracts) (concluded)

New paragraph (39)

111. Mr. NI recalled that, at the 1812th meeting, a proposal had been made by Mr. Koroma, supported by Mr. Mahiou and himself, to insert an additional paragraph after paragraph (38) of the commentary to article 12. He wished to know whether that paragraph had been submitted for inclusion in chapter III of the report.

112. Mr. ROMANOV (Secretary to the Commission) said that Mr. Koroma, before leaving, had supplied him with the following text for the additional paragraph in question:

"Some members of the Commission pointed out that this survey should not necessarily lead to the conclusion that the majority of States now subscribed to the restrictive practice of immunity."

113. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to insert that paragraph (39) in the commentary to article 12, as approved at the 1812th meeting.

It was so agreed.

Paragraph (39) was approved.

PART III, as amended, was adopted.

Section B, as amended, was adopted.

Chapter III of the draft report, as amended was adopted.

The draft report of the Commission on the work of its thirty-fifth session as a whole, as amended, was adopted.

Closure of the session

114. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-fifth session of the International Law Commission closed.

The meeting rose at 7.05 p.m.

² The statement made by the Secretary-General at the Commission's 1795th meeting appeared as document A/CN.4/L.368.

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