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Summary record of the 1968th meeting

Topic:
Jurisdictional immunities of States and their property

Extract from the Yearbook of the International Law Commission:-
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necessity than of *force majeure*. He also wondered what role coercion proper played alongside of state of necessity, which involved mental coercion, and of *force majeure*, which involved physical coercion.

74. He approved of subparagraphs (*c*) and (*d*), subject to his remark regarding the imminent nature of the peril. Lastly, he pointed out that the Spanish text of subparagraph (*e*) (i) stated the opposite of what the Special Rapporteur had sought to express in a provision which still raised some doubts in his mind. While the solution adopted for chapter V of part 1 of the draft articles on State responsibility was understandable, in the case of human beings the question was whether they should be required to show heroism and even sacrifice their lives for the sake of compliance with a *jus cogens* obligation. How could the extent of the interests at stake be measured? He had no definite view on the matter, but would invite members to reflect upon it further.

75. The solution proposed in draft article 9 was, in his view, satisfactory.

The meeting rose at 1.10 p.m.

1968th MEETING

Tuesday, 17 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov.

Jurisdictional immunities of States and their property (*continued*)* (A/CN.4/396,[1] A/CN.4/L.399, ILC (XXXVIII)/Conf.Room Doc.1)

[Agenda item 3]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

ARTICLES 2 TO 6 AND 20 TO 28

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the Committee's report (A/CN.4/L.399) and the texts of articles 2 to 6 and 20 to 28 adopted by the Committee.

2. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the report set out the complete texts of the draft articles for adoption on first reading. It included articles already adopted—to which some drafting adjustments had been made—as well as articles adopted by the Drafting Committee at the present session. It had been necessary to renumber certain articles, whose previous numbers appeared in square brackets.

3. Before turning to the articles adopted by the Committee at the present session, he drew attention to certain drafting changes made to previously adopted articles to secure greater consistency in terminology. For example, the introductory phrase appearing in many articles of part III, "Unless otherwise agreed between the States concerned", had been added to article 14 [15]. In articles 13 [14] and 17 [18], the words following that introductory phrase had been aligned with those in other articles in part III, so that they now read: "the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to ...". Article 16 [17] had been adjusted to include the usual phrase "which is otherwise competent". Changes to previously adopted articles that were consequent upon the adoption of new articles would be noted in the discussion of those new articles.

4. In view of the limited time available, he would not refer specifically to the titles of the articles recommended by the Drafting Committee, although certain changes had been made to the titles originally proposed.

ARTICLE 2 (Use of terms)

5. He introduced the text proposed by the Drafting Committee for article 2, which read:

Article 2. Use of terms

1. For the purposes of the present articles:

(*a*) "court" means any organ of a State, however named, entitled to exercise judicial functions;

(*b*) "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.

2. The provisions of paragraph 1 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 in the internal law of any State.

6. The Special Rapporteur had proposed a definition of the term "State property" for inclusion in paragraph 1;[2] but in the light of the discussion and of the articles in parts III and IV relating to property of the State, the Drafting Committee had considered it unnecessary to include such a definition in article 2. The relevant articles themselves were believed to provide sufficient guidance as to what was meant by "State property" in the context of each article.

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* Resumed from the 1947th meeting.

[1] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[2] See 1942nd meeting, para. 5.

7. Paragraph 2 was based on the text submitted by the Special Rapporteur.[3] It had been amended by the deletion of the words "by the rules of any international organization" and the addition of the words "in other international instruments". That addition had been thought useful in the light of existing and proposed regional conventions on the topic, although some members considered that paragraph 2 stated the obvious.

8. The CHAIRMAN said that, in the absence of any comment, he would take it that the Commission agreed provisionally to adopt paragraph 2 of article 2.

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Interpretative provisions)

9. Mr. RIPHAGEN (Chairman of the Drafting Committee), recalling that paragraph 2 of article 3 had been provisionally adopted by the Commission at its thirty-fifth session, introduced the text proposed by the Drafting Committee for paragraph 1. The whole of article 3 read:

Article 3. Interpretative provisions

1. The expression "State" as used in the present articles is to be understood as comprehending:

(*a*) the State and its various organs of government;

(*b*) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;

(*c*) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;

(*d*) representatives of the State acting in that capacity.

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.

10. The two interpretative provisions proposed for paragraph 1[4] had been referred to the Drafting Committee: one dealt with the expression "State" and the other with the expression "judicial functions". It had become apparent that a description of "judicial functions" would entail complex drafting, because that expression could have a variety of meanings under different legal or constitutional systems. Besides, it was not essential to include such a provision, since the expression appeared only once in the draft, namely in article 2, paragraph 1 (*a*). The commentary to article 2 could give examples of the kind of "judicial functions" intended to be covered by that article.

11. The Drafting Committee had, however, adopted the interpretative provision for the expression "State", which was to be found in paragraph 1 of article 3. The introductory phrase had been modified to bring out more clearly that the purpose was to aid in the interpretation of an expression, not to define a term.

12. The various subparagraphs of paragraph 1 had been reworded for greater clarity and precision. The new subparagraph (*a*) was intended to cover the content of the former subparagraph (*a*) (i), referring to the sovereign or head of State, who would, in most systems, be considered as one of the organs of government. Subparagraph (*a*) now referred simply to "the State and its various organs of government", which meant the various ministries, departments and sub-entities of the central Government, however designated.

13. The new subparagraph (*b*) covered political subdivisions, such as the constituent territories of a federal State and autonomous regions that were entitled to perform acts in the exercise of the sovereign authority of the State. It was thus made clearer that it was not a matter merely of exercising "governmental" authority in the broad sense, but of exercising the higher level of authority associated with the State itself; "local" or municipal governments were excluded.

14. Subparagraph (*c*) was based on the former subparagraph (*a*) (iv), the text of which had been simplified to show that it covered agencies and instrumentalities of the State to the extent that they were entitled to perform acts in the exercise of the sovereign authority of the State.

15. Subparagraph (*d*) was new and covered representatives of all the entities referred to in the preceding subparagraphs, when acting as representatives of those entities. That subparagraph had to be read, of course, in conjunction with article 4.

16. In consequence of the adoption of the interpretative provision in article 3, the Drafting Committee had adjusted article 7, paragraph 3, by introducing the notion of "political subdivisions" and replacing the reference to "governmental authority" by a reference to "sovereign authority".

17. Mr. USHAKOV said that, since he had been unable to take part in the Drafting Committee's work, he would comment on the articles it had proposed.

18. It was not the State as such that should be defined in article 3, but the organs which represented it in international relations and which should enjoy immunities in the exercise of their functions and in respect of the property they needed for those functions. He also had some doubts about the words "organs of government" used in paragraph 1 (*a*), which did not mean anything specific. In article 5 of part 1 of the draft articles on State responsibility,[5] the Commission had defined what was meant by a "State organ" by providing that

> ... conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Where an organ was a natural person, that person could act either as an organ or in a private capacity. For example, the ministers and ambassadors who were members of the Commission were acting not as State organs, but in their personal capacity, and thus did not engage the responsibility of the State of which they were nationals. Article 6 of part 1 of the above-mentioned draft articles

[3] *Ibid.*

[4] *Ibid.*, para. 6.

[5] *Yearbook ... 1980*, vol. II (Part Two), p. 31.

also explained the meaning of "State organ". Hence he did not see why the draft articles on jurisdictional immunities should refer to "organs of government" rather than "State organs".

19. He also had reservations about the expression "political subdivisions of the State", in paragraph 1 (*b*). Article 7 of part 1 of the draft articles on State responsibility referred to "territorial governmental entities", which might, for example, be the republics of a federated State. Although he understood the idea conveyed by the expression "political subdivisions of the State", he did not think that it expressed that idea properly.

20. He noted that, in the English text of paragraph 1 (*c*), the Drafting Committee had replaced the term "governmental authority" by "sovereign authority". That amendment was rather awkward because the State organs in question, for example regional or departmental authorities, did not exercise sovereign power on behalf of the State, but only the governmental authority of the State. In that connection, he referred to article 7, paragraph 2, of part 1 of the draft articles on State responsibility, which also referred to "governmental authority". The term used by the Drafting Committee might raise problems, especially as it was also used in article 28 of the present draft.

21. He agreed with the idea expressed in article 3, but did not think that the terms used were entirely satisfactory.

22. Mr. MAHIOU said that, in the last clause of paragraph 2, commas should be placed after the word "if" and the word "State".

23. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt paragraph 1 of article 3.

It was so agreed.

Article 3 was adopted.

ARTICLE 4 (Privileges and immunities not affected by the present articles)

24. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 4, which read:

Article 4. Privileges and immunities not affected by the present articles

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:

(*a*) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and

(*b*) persons connected with them.

2. The present articles are likewise without prejudice to the privileges and immunities accorded under international law to heads of State *ratione personae*.

25. Paragraph 1 was a simplified version of the text submitted by the Special Rapporteur;[6] it emphasized the exercise of the functions of various official missions and persons connected with them. The provisions submitted by the Special Rapporteur as subparagraphs (*b*) and (*c*) had been deleted as being unnecessary.

26. Paragraph 2 had been added as a result of the discussion on draft article 25 (Immunities of personal sovereigns and other heads of State) submitted by the Special Rapporteur.[7] Since some elements of draft article 25 were already covered in article 3, paragraph 1 (*a*) and (*d*), it had been thought best to place the remaining element in article 4 and word it in general terms as a safeguard clause, without going into needless detail.

27. As a consequence of the adoption of article 4 and of the articles of part IV on immunity from measures of constraint, the Drafting Committee had re-examined the text of article 15, paragraph 3, and had deleted it as being unnecessary.

28. Mr. USHAKOV said that he was not sure of the meaning of the words "persons connected with them" in paragraph 1 (*b*). It might be better to refer to the diplomatic, administrative and technical staff of missions, since the words "connected with" might be interpreted, for example, as referring to persons taking part in a training course with a mission.

29. Although it was true that heads of State enjoyed certain privileges under international law, he did not think those privileges were accorded *ratione personae*. Heads of State enjoyed immunities as State organs, not as natural persons. Article 21 of the 1969 Convention on Special Missions, dealing with the privileges and immunities of heads of State and persons of high rank, did not refer to immunities *ratione personae*.

30. Mr. SUCHARITKUL (Special Rapporteur) explained that the expression *ratione personae* had always been used to designate the privileges and immunities which were enjoyed by a diplomatic agent personally, as distinct from immunities *ratione materiae*, which were connected with his functions. The 1961 Vienna Convention on Diplomatic Relations clearly specified the privileges and immunities *ratione personae* that protected the diplomatic agent from being sued in purely personal matters. Immunities *ratione personae*, unlike immunities *ratione materiae*, did not survive the termination of the functions or appointment of the diplomatic agent. Should he subsequently return to the country of his former appointment, it would be possible to prosecute him. The position of heads of State was, in most countries, similar to that of diplomatic agents. They were inviolable and immune from prosecution for as long as they held office.

31. Mr. KOROMA said that he agreed with Mr. Ushakov that paragraph 1 (*b*) needed to be re-examined, since it was open to various interpretations. It could be taken to mean, for example, that the technical staff of an embassy or the officials of an international organization or an international conference enjoyed immunity.

32. He also had doubts about paragraph 2. He would like to know, for example, whether a head of State, once divested of his official capacity, could be pro-

[6] See 1942nd meeting, para. 7.

[7] *Ibid.*, para. 10.

secuted on his return to a country where a charge had been brought against him.

33. Mr. EL RASHEED MOHAMED AHMED said that he agreed with Mr. Ushakov on paragraph 1 (*b*). If that provision was intended to cover only diplomatic staff, it could be added to paragraph 1 (*a*). As it stood, it was capable of being interpreted much too widely.

34. Mr. ARANGIO-RUIZ said that, although he shared Mr. Ushakov's opinion on the wording of paragraph 1 (*b*), he endorsed the Special Rapporteur's explanations concerning immunities *ratione personae*. Rather serious diplomatic incidents had taken place in Rome in the 1920s and the Court of Cassation, making no distinction between diplomatic immunities and parliamentary immunities, had refused to recognize any immunity of diplomatic agents accredited to the King of Italy in respect of matters in which they had been involved in their private capacity. Following strong protests by the diplomatic corps, Italian jurisprudence had evolved and had recognized the existence of such diplomatic immunities. Even in the case of debts incurred as a result of personal purchases, a diplomatic agent enjoyed immunity from jurisdiction.

35. Mr. USHAKOV said that the age of ambassadors accompanied by their suites was past and there remained only diplomatic missions. If a head of State travelling privately abroad received special treatment, he owed it to courtesy, to *comitas gentium*, not to international law.

36. Mr. LACLETA MUÑOZ said that he did not agree with Mr. Ushakov about the personal immunities of heads of State. However, the enumeration in paragraph 1 (*a*) implied that consular posts, special missions and other missions or delegations were not diplomatic missions. Perhaps it should be explained in the commentary to article 4 that "diplomatic missions" meant "permanent diplomatic missions".

37. The Spanish text of paragraph 1 (*b*) did not raise any problems. In French, the word *attachées* was a technical term used in diplomacy to refer specifically to certain persons who performed functions in a diplomatic mission. The main purpose of the provision was to protect the privileges and immunities enjoyed by States and by the persons mentioned by reason of their functions, which were performed for the State. It did not extend those provileges and immunities to categories of persons other than those who already enjoyed them in accordance with other rules of international law.

38. Mr. ARANGIO-RUIZ said that *comitas gentium* played no part in the example he had given of jurisdictional immunities accorded to diplomatic agents and that the only applicable rules were those of positive international law, whether conventional or customary. The raison d'être of such immunities was to be found in the Latin maxim *ne impediatur legatio*, which conveyed the idea that diplomatic agents must be protected from all disturbance, even in their private lives.

39. Mr. SUCHARITKUL (Special Rapporteur) reminded members that the Commission was not reopening the discussion on substance, or more particularly on the question whether any particular person enjoyed immunity and, if so, to what extent. Article 4 was simply a safeguard clause. It provided that the present articles were without prejudice to any privileges and immunities which might otherwise be enjoyed by the persons concerned.

40. With regard to the position of heads of State, a great many countries, such as the United States of America, the United Kingdom, France and Thailand, extended full privileges to a head of State. The provisions of article 4, paragraph 2, were thus based on abundant State practice.

41. Paragraph 1 (*b*) of the article also covered private servants in so far as they otherwise enjoyed immunities. The provision was merely a safeguard clause: if the persons concerned enjoyed immunity, their position was safeguarded; article 4 did not confer any immunities. Once again, he urged members not to engage in a debate on the substance of immunities.

42. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 4, on the understanding that the various views expressed would be placed on record.

Article 4 was adopted.

ARTICLE 5 (Non-retroactivity of the present articles)

43. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 5, which read:

Article 5. Non-retroactivity of the present articles

Without prejudice to the application of any rules set forth in the present articles to which jurisdictional immunities of States and their property are subject under international law independently of the present articles, the articles shall not apply to any question of jurisdictional immunities of States or their property arising in a proceeding instituted against a State before a court of another State prior to the entry into force of the said articles for the States concerned.

44. The Drafting Committee had discussed the utility of including an article on non-retroactivity in the draft. It had eventually been agreed that, since article 28 of the 1969 Vienna Convention on the Law of Treaties would apply if no article on non-retroactivity were included, it would be preferable to include a rule that was clearer and more flexible. The text now referred to "any question ... arising in a proceeding ... prior to the entry into force" of the articles "for the States concerned".

45. Although not all the complex issues of non-retroactivity were covered by article 5, it had been thought advisable to propose such a rule for submission to States. The article also included the useful proviso that the present articles were without prejudice to the application of any rules set forth therein to which jurisdictional immunities of States and their property were subject under international law independently of the present articles.

46. Mr. KOROMA remarked on the use of the word "question" rather than "case". He wished to know whether the intention was to refer not to a case being litigated, but to a matter referred to a Ministry of Foreign Affairs.

47. Mr. SUCHARITKUL (Special Rapporteur) explained that the word "question" had been used not only to widen the principle of non-retroactivity, but also to conform to the Commission's practice regarding non-retroactivity provisions in its earlier drafts. It should be noted that article 5 referred to a question arising "in a proceeding instituted ... before a court". The reference was thus clearly to proceedings in court and not to steps taken with the executive branch.

48. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 5.

Article 5 was adopted.

ARTICLE 6 (State immunity)

49. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 6, which read:

Article 6. State immunity

A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present articles and the relevant rules of general international law applicable in the matter.

50. At its thirty-second session, in 1980, the Commission had provisionally adopted a text for article 6.[8] That article had subsequently been the subject of much discussion and divergence of views in the Commission, and the Drafting Committee had been requested to re-examine it. The text now proposed attempted to show more clearly the intention not to take a position on the existing doctrinal theories of the basis for "State immunity". It was drafted in a neutral fashion and included the clause: "subject to the provisions of the present articles and the relevant rules of general international law applicable in the matter". It stated a unitary rule.

51. After long discussion in the Commission over a number of years, the Drafting Committee now recommended the proposed text for provisional adoption. In anticipation of its adoption, the square brackets which had appeared in paragraph 1 of article 7 had been removed.

52. Mr. USHAKOV said that he was firmly opposed to article 6 as proposed by the Drafting Committee, which made the whole draft pointless. The "provisions of the present articles" should reflect the rules of international law, since the Commission's task was to codify that law and develop it where appropriate. By referring to "the relevant rules of general international law applicable in the matter", the Commission gave the impression that there were rules which it had not taken into account in its draft. What State would accede to an instrument that invited it to look elsewhere for possible exceptions? By adopting such wording, the Commission would make itself look ridiculous.

53. Mr. FRANCIS suggested that the title of part II of the draft, "General principles", should be amended to read "General provisions". The present title was open to criticism since, apart from article 6, the articles in part II did not contain any general principles, but simply basic provisions. Even the general principle stated in article 6 was itself based on another general principle, namely that of the sovereign equality of States.

54. He agreed with Mr. Ushakov on the need to make the last part of article 6 clearer and more precise. As it stood, it could lead to misunderstanding and might even be dangerous.

55. Mr. REUTER suggested that, before continuing consideration of article 6, the Commission should examine the other articles proposed. Since article 6 was the result of a compromise, it was quite normal that it should not be entirely satisfactory, and it might therefore be wiser to revert to it when the other articles had been examined.

56. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Reuter's suggestion.

It was so agreed.

TITLE OF PART III (Limitations on State immunity)

57. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that the Drafting Committee had examined the title of part III and had decided to adopt a title that was more descriptive and less susceptible of being interpreted from a doctrinal point of view. Instead of "Exceptions to State immunity" the new title read: "Limitations on State immunity".

58. Mr. KOROMA said that he saw no valid reason for that change. He preferred the former title: "Exceptions to State immunity".

59. Mr. DÍAZ GONZÁLEZ said that, in Spanish, it would be preferable to say *Limitaciones a la inmunidad del Estado.*

60. Mr. BARBOZA said that he agreed with Mr. Koroma that the word "exceptions" should be restored in place of "limitations".

61. Mr. USHAKOV said that, although he would not press the point, he found the word "exceptions" preferable to "limitations", since part III dealt with cases in which there was no immunity.

62. Mr. REUTER suggested that the title of part III might be considered at the same time as article 6.

63. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to discuss the title of part III at a later stage, at the same time as article 6.

It was so agreed.

ARTICLE 20 [11] (Cases of nationalization)

64. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 20 [11], which read:

[8] *Yearbook ... 1980*, vol. II (Part Two), p. 142.

Article 20 [11]. Cases of nationalization

The provisions of the present part shall not prejudge any question that may arise in regard to extraterritorial effects of measures of nationalization taken by a State with regard to property, movable or immovable, industrial or intellectual, which is situated within its territory.

65. Article 20 was based on paragraph 2 of the former article 11. That paragraph had been referred to the Drafting Committee as a result of the Commission's adoption of article 16[9] (now article 15).

66. The former article 11 had dealt with the scope of part III; the Special Rapporteur had also submitted article 21 on the scope of part IV. In both cases, the Drafting Committee had decided that a general provision was unnecessary. The substantive provisions of the respective parts had been considered sufficient, without any descriptive introductory provisions on scope. Furthermore, the Special Rapporteur's revised version of article 11, paragraph 1, concerning reciprocity,[10] had been considered unnecessary in the light of article 28. Thus paragraph 1 of article 11 as well as article 21 had been deleted.

67. Paragraph 2 of the former article 11, concerning measures of nationalization, formed the basis of the new article 20. The original proposal had been slightly modified in order to bring out more clearly its "non-prejudicial" character, and the phrase "in the exercise of governmental authority" had been deleted as stating the obvious. The Drafting Committee had decided that the appropriate place for the new article was at the end of part III.

68. Mr. USHAKOV said that the words "situated within its territory" might cause difficulties in the event of nationalization of a shipping company which owned vessels located abroad or a commercial enterprise having some of its goods abroad. In that connection, the question arose whether a vessel was to be regarded as movable or immovable property; but the answer was probably to be found in the internal law of each State. Apart from those considerations, he had no objection to article 20.

69. Mr. REUTER pointed out that there was a considerable difference between the English and French texts. In the French, the words *situé sur son territoire* referred only to *un objet de propriété industrielle ou intellectuelle*, not to *un bien meuble ou immeuble*, because the word *situé* was in the masculine singular, whereas the English text gave the impression that the words "is situated" referred to all the property mentioned. What had been the intention of the Special Rapporteur and the Drafting Committee? He was inclined to think that the word *situé* referred only to industrial or intellectual property. He even wondered whether the territorial relationship was not limited to the legal concept of property itself; for industrial or intellectual property was a legal concept that could be defined only in relation to a legal system. It would therefore have been more correct in French to make the word *situé* agree with the word *propriété*, which was defined in relation to the local law of a territory.

70. Mr. RIPHAGEN (Chairman of the Drafting Committee) said that, in the French text, the word *situé* should be in the plural, since it applied both to movable or immovable property and to industrial or intellectual property.

71. Mr. ARANGIO-RUIZ said that, as Mr. Reuter had rightly pointed out, industrial property was linked not so much to a territory as to a legal system. When it came to consider article 20 on second reading, the Commission should therefore find a formula that was more correct from the legal standpoint and took account of the link between industrial property and the legal system concerned.

72. Mr. MAHIOU said that the provisions of part III, referred to in the words "The provisions of the present part", were not the only ones involved. The provisions that could have implications for the extraterritorial effects of measures of nationalization were chiefly those of part IV. Hence either the wording should be amended to apply also to the provisions of part IV, or the provisions of article 20 should be reproduced in part IV.

73. The phrase "situated within its territory" could perhaps be replaced by "under its jurisdiction", for movable or immovable property came under the jurisdiction of the State in whose territory it was situated. Industrial or intellectual property was linked to that State's legal system, and the words "under its jurisdiction", which covered both the territorial aspect and the link with the system of law, might well solve the problems mentioned by Mr. Ushakov and Mr. Reuter.

74. Mr. SUCHARITKUL (Special Rapporteur) suggested that the phrase "The provisions of the present part" should be replaced by "The provisions of the present articles", so that the provisions of part IV would also be covered. He had no objection to using the words "under its jurisdiction", rather than "situated within its territory".

75. Mr. RIPHAGEN, speaking as a member of the Commission, said that he supported the proposal to replace the words "The provisions of the present part" by "The provisions of the present articles", but thought it better to retain the phrase "situated within its territory". The legal term "extraterritorial effects" was not easy to define, but if it was to be used, then the phrase "situated within its territory" should also be retained. Determining the location of intellectual and industrial property was a question of private international law and the Commission could not settle it. Some writers took the view that such property was situated in all countries in which it was protected.

76. Mr. REUTER said that he shared the view expressed by Mr. Riphagen. If the words "under its jurisdiction" were used, the article might well become much more obscure. Moreover, the purpose of article 20 was to reserve the possibility of "extraterritorial effects". It did not call into question the nationalization of movable, immovable, industrial or intellectual property situated within the territory of the State. The for-

[9] See *Yearbook ... 1984*, vol. II (Part Two) p. 59, para. 207 and footnote 200.

[10] *Yearbook ... 1982*, vol. II (Part Two), p. 99, footnote 237.

mula "under its jurisdiction" would introduce some ambiguity.

77. Mr. USHAKOV agreed that it would be better to use the formula "The provisions of the present articles". Article 20 could be kept provisionally in part III, but it would ultimately have to appear in part IV.

78. The last phrase of article 20, "which is situated within its territory", was somewhat strange. The measures of nationalization taken by a State produced extraterritorial effects only when the property affected by the measures was in the territory of another State at the time of the nationalization or was transferred to another State as a result of the nationalization. If the property was in the territory of the State which nationalized it, the question of extraterritorial effects did not arise. It would be much better to delete the phrase and place a full stop after the word "intellectual".

79. Mr. REUTER supported Mr. Ushakov's proposal.

80. Mr. MAHIOU said that he withdrew his proposal, since he found Mr. Ushakov's proposal entirely satisfactory.

81. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 20 [11] with the amendment proposed by Mr. Ushakov, namely the deletion of the phrase "which is situated within its territory".

It was so agreed.

Article 20 [11] was adopted.

ARTICLE 21 [22] (State immunity from measures of constraint)

82. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21 [22], which read:

Article 21 [22]. State immunity from measures of constraint

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of constraint, including any measure of attachment, arrest and execution, on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] unless the property:

(*a*) is specifically in use or intended for use by the State for commercial [non-governmental] purposes and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed; or

(*b*) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.

83. Article 21 began part IV of the draft, which was entitled "State immunity in respect of property from measures of constraint". It was based on the former article 22,[11] which had been restructured and modified. The new introductory clause spoke of a State enjoying immunity "in connection with a proceeding before a court of another State". The reference to "a proceeding" covered both the proceeding on the merits and the measures of constraint. It had been recognized, however, that a request for application of measures of constraint might be made in a third State, that was to say a State other than the defendant State or the State of the forum of the merits proceeding. Such a third State would be the State in which the property against which measures of constraint were sought was physically located and under whose laws or treaties such a proceeding was possible.

84. The phrase "or property in which it has a legally protected interest" had been placed in square brackets. That was due to a difference of opinion in the Drafting Committee on whether it was proper to provide protection in the case of a State having a legally protected interest in property, but not owning, possessing or controlling that property. Some members had thought it unnecessary to provide protection for such a low level of State interest in property, which would only inure to the benefit of the actual owner of the property. Others had thought that, since the State's "interest" in property was covered in part III by article 14 [15], it was only logical to include corresponding protection in part IV, which would cover a number of cases in which a State could have a concrete interest in property even though it was not, or not yet, in possession or control of that property. The comments of Governments were requested on that particular point.

85. As suggested by the Special Rapporteur in his original proposal, two exceptions to the general provision on immunity from measures of constraint were provided for in subparagraphs (*a*) and (*b*).

86. In subparagraph (*a*), the expression "non-governmental" had been placed in square brackets, as it had in article 18 [19]; for the reasons, he referred members to the commentary to that article.[12] The Drafting Committee had discussed at length what kind of connecting factors should be included in subparagraph (*a*). Although not all members had been fully satisfied with the text, the Committee had eventually agreed to include the two connecting factors mentioned.

87. Subparagraph (*b*) was based on the original proposal, but incorporated drafting improvements, such as requiring that the property should be allocated for the satisfaction of the claim which was the object of the proceeding on the merits. Temporal issues raised by both subparagraphs would have to be addressed by the court concerned.

88. Mr. USHAKOV said that he could agree to article 21 only if the square brackets around the expression "non-governmental" in subparagraph (*a*) were deleted. The same applied to all the other articles in which that expression was between square brackets.

89. Mr. BARBOZA said that he would like to know why the Spanish text of subparagraph (*a*) differed from the English and French texts in that the expression "non-governmental" in square brackets had been translated as *no estatales*.

90. Mr. LACLETA MUÑOZ explained that some members of the Drafting Committee had thought it better to use the adjective *estatal* rather than *gubernamental*, which, in their opinion, related exclusively to the executive power. He was not entirely convinced that that

[11] *Yearbook ... 1985*, vol. II (Part Two), p. 57, footnote 206.

[12] *Ibid.*, p. 62, para. (7) of the commentary to article 19.

was so; as used in article 21, the word "governmental" had the meaning generally attached to it in public international law—it was synonymous with "State" in its adjectival form. In public international law, the term "Government" (*gobierno* in Spanish) signified more often than not the State, that was to say the Government, the territory and the people. Consequently, he would have no objection if the Spanish text were brought into line with the English and French by replacing the words *no estatales* by *no gubernamentales*.

91. Mr. USHAKOV said that the expression "non-governmental" had been translated into Russian by a term that was the exact equivalent of *no estatales* in Spanish. No other translation was possible.

92. Mr. CALERO RODRIGUES pointed out that, if the term *no estatales* was to be changed in article 21, it should also be changed in article 18.

93. Mr. RIPHAGEN, speaking as a member of the Commission, referred to the words in square brackets in the opening clause of article 21, "[or property in which it has a legally protected interest]". Article 21 dealt with three things: property of the State; property in the possession or control of the State; and property in which the State had a legally protected interest. In the last two cases, if proceedings were instituted against an owner who was not the State, or even against the physical object itself, article 7, paragraph 2, would apply. If the combined effect of article 21 and article 7, paragraph 2, was to make the physical object immune from measures of constraint, that would benefit the non-State owner of the property. In his view that result could be acceptable in the case of an object in the possession or control of a State, since measures of constraint on the use of the object were likely to affect the activities of that State. That did not apply, however, to legally protected interests in an object, which might indeed be manifold, but in the determination of which a foreign State often did not enjoy immunity. For that reason, he thought it would be best to delete the phrase in square brackets in articles 21 and 22.

94. Mr. KOROMA said that he found the expression "non-governmental" acceptable in article 21, subparagraph (*a*).

95. Mr. TOMUSCHAT said that he would like to place on record his view that subparagraph (*a*) was worded too restrictively. The phrase "and has a connection with the object of the claim" excessively limited the property subject to measures of constraint, particularly with respect to tort cases, and should perhaps be deleted.

96. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 21 [22].

Article 21 [22] was adopted.

ARTICLE 22 [23] (Consent to measures of constraint)

97. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 22 [23], which read:

Article 22 [23]. Consent to measures of constraint

1. A State cannot invoke immunity, in connection with a proceeding before a court of another State, from measures of constraint on the use of its property or property in its possession or control [, or property in which it has a legally protected interest,] if and to the extent that it has expressly consented to the taking of such measures in respect of that property, as indicated:

(*a*) by international agreement;

(*b*) in a written contract; or

(*c*) by a declaration before the court in a specific case.

2. Consent to the exercise of jurisdiction under article 8 shall not be held to imply consent to the taking of measures of constraint under part IV of the present articles, for which a separate expression of consent shall be necessary.

98. Article 22 corresponded to the former article 23,[13] which had undergone some drafting changes to make the new text consistent with other articles. For the reasons stated in regard to article 21, article 22 included a phrase in square brackets. The new wording stressed the "extent" of the express consent given and covered expressions of consent relating to measures of constraint, generally or as specified; to property, generally or in particular; or to both. The point was, of course, that a State was bound by its expressions of consent if they had been formulated in the manner indicated in article 22.

99. Mr. REUTER asked whether Mr. Riphagen's comments on the phrase "or property in which it has a legally protected interest", in article 21, also applied in respect of article 22.

100. Mr. RIPHAGEN, speaking as a member of the Commission, said that the context was somewhat different, for there were no limits to what a State could decide to consent to. If the phrase in question were deleted from article 21, it should probably also be deleted from article 22. Nevertheless, as the context was different, the phrase could, if necessary, be retained in square brackets in article 22 and deleted from article 21.

101. Mr. USHAKOV said that he would like to see the phrase "for which a separate expression of consent shall be necessary", in paragraph 2 of the English text, brought into line with the French text by deleting the words "expression of".

102. Mr. McCAFFREY said that the phrase in square brackets was more important in article 21, where it was intended to cover all kinds of property and interests. It should be retained there at least until such time as comments had been received from Governments. For reasons of symmetry it could for the time being also be retained in article 22.

103. Mr. KOROMA said that the reservations of certain members concerning the phrase in square brackets, at least in respect of article 21, appeared to have been answered. He therefore suggested that the phrase should be retained.

104. The CHAIRMAN noted that no clear position had emerged on the question of deleting the square brackets around the phrase "or property in which it has a legally protected interest". If there were no objections, he would take it that the Commission agreed pro-

[13] *Ibid.*, p. 57, footnote 206.

visionally to adopt article 22 [23] as proposed by the Drafting Committee.

It was so agreed.

Article 22 [23] was adopted.

ARTICLE 23 [24] (Specific categories of property)

105. Mr. RIPHAGEN (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 23 [24], which read:

Article 23 [24]. Specific categories of property

1. The following categories of property of a State shall not be considered as property specifically in use or intended for use by the State for commercial [non-governmental] purposes under subparagraph (*a*) of article 21:

(*a*) property, including any bank account, which is in the territory of another State and is used or intended for use for the purposes of the diplomatic mission of the State or its consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences;

(*b*) property of a military character or used or intended for use for military purposes;

(*c*) property of the central bank or other monetary authority of the State which is in the territory of another State;

(*d*) property forming part of the cultural heritage of the State or part of its archives which is in the territory of another State and not placed or intended to be placed on sale;

(*e*) property forming part of an exhibition of objects of scientific or historical interest which is in the territory of another State and not placed or intended to be placed on sale.

2. A category of property, or part thereof, listed in paragraph 1 shall not be subject to measures of constraint in connection with a proceeding before a court of another State, unless the State in question has allocated or earmarked that property within the meaning of subparagraph (*b*) of article 21, or has specifically consented to the taking of measures of constraint in respect of that category of its property, or part thereof, under article 22.

106. Article 23 was based on the former article 24,[14] which had undergone considerable change and adjustment in the light of the Commission's debate. The new paragraph 1 listed certain property which was not to be considered as being in use by a State "for commercial [non-governmental] purposes" under subparagraph (*a*) of article 21. The various subparagraphs of the former article 24 had been modified for greater clarity and precision, the territorial link had been stressed and, in the case of the new subparagraphs (*d*) and (*e*), so had the non-placement on sale of the property. The former subparagraphs (*c*) and (*d*) (property of a central bank and property of any other monetary authority) had been merged, and a new provision had been added concerning property forming part of an exhibition.

107. Paragraph 2 nevertheless allowed such categories of property to be subject to measures of constraint if the State had allocated or earmarked the property under subparagraph (*b*) of article 21 or if it had specifically consented to the taking of measures of constraint under article 22.

108. Mr. McCAFFREY said that, in his understanding, paragraph 1 (*c*) referred to property of the central bank which was held for its own account.

[14] *Ibid.*, pp. 57-58, footnote 206.

109. After a procedural discussion, the CHAIRMAN proposed that the beginning of paragraph 2 should be amended to read: "No property or part thereof belonging to the categories listed in paragraph 1 shall be subject ...". The French text would read: *Aucun bien ou partie d'un bien entrant dans une des catégories visées au paragraphe 1 ne peut* ...; and the Spanish text would be adjusted accordingly.

110. If there were no further comments, he would take it that the Commission agreed provisionally to adopt article 23 [24], subject to any drafting changes required for concordance of the different language versions.

It was so agreed.

Article 23 [24] was adopted.

The meeting rose at 1 p.m.

1969th MEETING

Wednesday, 18 June 1986, at 10 a.m.

Chairman: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*concluded*)* (A/CN.4/387,[2] A/CN.4/398,[3] A/CN.4/L.398, sect. B, ILC(XXXVIII)/Conf.Room Doc.4 and Corr.1-3)

[Agenda item 5]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

SUMMING-UP OF THE DISCUSSION

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

2. Mr. THIAM (Special Rapporteur) said that the Commission's wide-ranging, detailed discussion of his fourth report on the topic (A/CN.4/398) would enable him to widen his field of study. Although he could not,

* Resumed from the 1967th meeting.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook ... 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook ... 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[3] Reproduced in *Yearbook ... 1986*, vol. II (Part One).