UNITED NATIONS

General Assembly

FORTY-EIGHTH SESSION

Official Records

SIXTH COMMITTEE
29th meeting
held on
Monday, 15 November 1993
at 3 p.m.
New York

SUMMARY RECORD OF THE 29th MEETING

Chairman: Mrs. FLORES (Uruguay)

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Distr. GENERAL
A/C.6/48/SR.29
22 December 1993

ORIGINAL: ENGLISH

The meeting was called to order at 3.20 p.m.

AGENDA ITEM 152: QUESTION OF RESPONSIBILITY FOR ATTACKS ON UNITED NATIONS AND ASSOCIATED PERSONNEL AND MEASURES TO ENSURE THAT THOSE RESPONSIBLE FOR SUCH ATTACKS ARE BROUGHT TO JUSTICE (continued) (A/48/144; A/C.6/48/L.2 and L.3)

1. Mr. KIRSCH (Canada), Chairman of the Working Group on the Question of Responsibility for Attacks on United Nations and Associated Personnel, established by the Sixth Committee on 21 October 1993, said that the Working Group had held three meetings between 21 and 22 October and two additional meetings on 12 and 15 November 1993.

2. The Working Group had observed that United Nations and associated personnel had been called upon with increasing frequency to perform their functions in extremely hazardous conditions, affecting countries in many regions. It had accordingly concluded that it was time to determine whether existing legal instruments were capable of meeting those new challenges and, if not, to find ways of filling any legal gaps. To that end, some delegations had endorsed the idea of elaborating a non-binding declaration: such an instrument could be developed more quickly than a treaty, would be a significant gesture on the part of the international community, and would help States to sort out substantive issues in preparation for the elaboration of a binding instrument. Nevertheless, a number of delegations had voiced serious reservations with regard to the idea of a declaration, pointing out that previous non-binding instruments had been ignored by those involved in attacks on United Nations personnel. Moreover, elaborating a declaration might unnecessarily delay the preparation of a binding instrument.

3. Another possibility was to draft an additional protocol to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, an idea that had received some support in the Sixth Committee. While finding the idea interesting, the Working Group had in the end failed to endorse it, for several reasons. First, an additional protocol might not indicate forcefully enough the importance of the issue to the international community. Secondly, States that were not parties to the 1973 Convention would be excluded from participation in an additional protocol. Thirdly, the 1973 Convention was designed to deal with the vulnerability of diplomatic personnel to acts of terrorism, which was a different issue from that under consideration by the Working Group. Lastly, legal difficulties might arise from an attempt to expand the scope of the Convention.

4. The third possibility, which had been suggested by the Secretary-General in his report on the security of United Nations operations (A/48/349, para. 34), was to elaborate a new international instrument. In that connection, the Working Group had had before it three documents: a proposal by New Zealand for a draft convention on responsibility for attacks on United Nations personnel (A/C.6/48/L.2); a proposal by Ukraine for a draft international convention on the status and safety of the personnel of the United Nations force and associated civilian personnel (A/C.6/48/L.3); and a conference room paper (A/C.6/48/RESP/CRP.1) submitted jointly by New Zealand and Ukraine on matters to be addressed in the elaboration of a convention under agenda item 152.

(Mr. Kirsch, Canada)

5. The draft convention submitted by Ukraine represented an effort to codify and develop international law relating to the security and safety of United Nations personnel, based on current multilateral and bilateral treaties, including existing status-of-forces and troop-contributing agreements and customary international law. Issues to be dealt with would include the status of United Nations and associated personnel, general obligations of States parties, and provisions applicable to breaches of the convention bearing on States parties and the United Nations itself.

6. The approach taken by New Zealand in elaborating its proposed draft convention was somewhat different. While acknowledging that some aspects of the issue of the security and safety of United Nations personnel were already dealt with in existing instruments, the New Zealand draft suggested that, at least initially, the focus should be on responsibility for attacks on United Nations and associated personnel that was not dealt with elsewhere. The basic goal was to ensure that offenders were prosecuted or extradited, with special reference to the 1973 Convention.

7. The Working Group had concluded that the approaches suggested by Ukraine and New Zealand were not mutually exclusive and had, in fact, the same ultimate goal. It was agreed that any new instrument to be elaborated should contain provisions relating to the punishment of offenders. The question had then been raised as to whether it was possible to deal with all the issues relating to the matter in one binding instrument. Some members had been in favour of elaborating an instrument whose only aim was the punishment of offenders; the remaining issues could be considered at a later time. Others had endorsed the idea of considering all the issues at one time, paying special attention to the status of United Nations personnel and their rights and duties. In that connection, the delegations of Ukraine and New Zealand had submitted, prior to the Working Group's second set of meetings, a joint paper (A/C.6/48/WG/RESP/CRP.1) on matters to be addressed in the elaboration of a convention, which was essentially a listing of issues rather than a common approach to them.

8. While not ruling out entirely the idea of a declaration or an additional protocol, the Working Group had, at its three latest meetings, been operating on the assumption that its work would take the final form of a new, autonomous, self-contained binding instrument. At the same time, some delegations had made it clear that they were not yet ready to take a stand on precisely which elements would be included in such a convention and that they viewed the Working Group as a forum for gaining a better understanding of the issues involved.

9. The Working Group had considered at length the issue of the scope of the future instrument with regard to categories of persons and types of operations. It had quickly become apparent that the two aspects were closely related, owing to the recent expansion and diversity of United Nations operations. There had been general agreement that any new instrument should include in its scope United Nations military personnel and civilian personnel, including staff of specialized agencies and entities with a defined legal connection to the United Nations, employed in any operation authorized by the Security Council, with the exception of enforcement operations. There had been differences of opinion with regard to a number of related questions: whether the new instrument should

(Mr. Kirsch, Canada)

cover enforcement operations; whether it should include contingents operating under a Security Council mandate but under national control; whether it should cover operations authorized by United Nations organs other than the Security Council; and whether there had to be a formal connection between the personnel to be covered and the United Nations. In each case, the differences had arisen from the need to reconcile two basic ideas: the desire to protect all persons, whatever their affiliation, working to pursue the goals of the United Nations, and the potential difficulties inherent in extending the scope of a legal instrument to situations which were unrelated to or not under the control of the United Nations.

10. Among the other issues discussed by the Working Group was the question of the prevention and repression of certain acts, in particular how to define the offences included in the instrument and whether the conduct of United Nations and associated personnel should be included in its scope. The Working Group had also discussed whether or in what manner a treaty negotiated by Member States was binding on the United Nations and whether the question of State responsibility should be treated in the convention.

11. In terms of its future work, the Working Group had first had to determine the scope of the future instrument. While it had been agreed that a new binding legal instrument should be elaborated, the precise elements to be included in that instrument were still a matter of debate. The joint paper (A/C.6/48/WG/RESP/CRP.1) submitted by New Zealand and Ukraine had the advantage of presenting all the issues in one document, but did not provide any indications as to how such elements could be incorporated in a convention or which ones deserved priority. In his view, all the elements listed in the joint paper should be given further consideration, bearing in mind the urgency of the matter and the need to develop law that reflected the views of the international community as a whole.

12. In terms of future meetings, it had generally been agreed that enough time should be allowed for real progress to be made on the issues, without setting artificial deadlines. Most members had favoured either two inter-sessional sessions of two weeks each, or a single session of three weeks. It had also been suggested that the matter should be taken up during the next session of the General Assembly by a Sixth Committee working group.

13. Many members had expressed concern that the absence of a single discussion paper might hinder future work on the convention. It had been suggested that an additional working paper should be elaborated, which would, if possible, transform all the elements listed in the joint working paper (A/C.6/48/WG/RESP/CRP.1) into the form of a draft convention, without prejudice to the final positions of delegations on the major issues. The new working paper could then serve as the basis for drafting the convention, and elements could be added or eliminated as required. It had also been suggested that the Secretariat might prepare a list of multilateral treaties dealing with the question of the punishment of offenders in certain circumstances, and an inventory of provisions applicable to United Nations personnel.

AGENDA ITEM 147: CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY (continued) (A/46/10, A/48/313, A/48/464; A/C.6/48/3, A/C.6/48/L.4 and L.5)

14. The CHAIRMAN said that the Working Group established under General Assembly resolution 46/55 and re-established, in accordance with General Assembly resolution 47/414, at the forty-eighth session of the General Assembly had held 13 meetings between 27 September and 8 October and had concluded its work on 11 November 1993 with the adoption of its report (A/C.6/48/L.4).

15. Mr. CALERO RODRIGUES (Brazil), Chairman of the Working Group on the Convention on Jurisdictional Immunities of States and their Property, introducing the report of the Working Group (A/C.6/48/L.4), said that the Group had continued its consideration of the issues of substance arising out of the draft articles on jurisdictional immunities of States and their property, adopted by the International Law Commission at its forty-third session (A/46/10), and of the question of convening an international conference for the purpose of concluding a convention on jurisdictional immunities of States and their property. The Working Group had been able to clarify its positions regarding the draft articles; it had also been able to arrive at generally acceptable conclusions with regard to a number of substantive issues. The Working Group had considered the following issues: definition of the terms "State" and "commercial transaction"; the question of the legal distinction between a State and certain of its entities in the matter of State immunity from foreign jurisdiction; the exception of "contracts of employment"; and the question of immunity from measures of constraint in connection with proceedings before a court.

16. In general, the debate in the Working Group had been constructive, assisted by valuable contributions from outside experts. The Working Group had been relatively successful in arriving at consensus on the substantive issues under consideration, although some differences of opinion remained. The members had agreed that consultations should continue, but in a less formal framework than that of the Working Group; it had also been agreed that, at its next session, the General Assembly should decide to convene an international conference for the elaboration of a convention.

17. On the basis of the Working Group's conclusions, he had elaborated the draft decision contained in document A/C.6/48/L.5, according to which the General Assembly would decide that consultations should be held at its forty-ninth session, within the framework of the Sixth Committee, from 26 to 30 September 1994, with a view to giving further consideration to those substantive issues for which the attenuation of differences was needed to facilitate the successful conclusion of a convention. The dates had been specified so that States could, if they wished, plan to send experts to those meetings. Under the proposed draft decision, the General Assembly would also decide to give full consideration to the recommendation of the International Law Commission that an international conference should be convened to examine the draft articles on the question of jurisdictional immunities of States and their property. There had been general agreement that the convening of a conference should be linked to the possibility of arriving at results by consensus.

(Mr. Calero Rodrigues, Brazil)

18. He hoped that the Sixth Committee would be able to adopt the draft decision, which had met with no opposition in the Working Group.

19. The CHAIRMAN said she appreciated the excellent results achieved by the Working Group under the able guidance of its Chairman. The Working Group had shown how the Sixth Committee's legal expertise could be used to the best advantage, in the service of the codification and progressive development of international law.

20. Mr. LEGAL (France) said that the question of jurisdictional immunities of States and their property was taking on increasing importance owing to the greater role of States in economic life. The draft article on that question would have to strike a balance between greater security for enterprises and protection of the sovereign rights of States with which they concluded contracts.

21. His Government had been favourable to the idea of preparing draft articles on that topic since the beginning, despite the difficulties involved. The topic had given rise to numerous disagreements, for it was difficult to find compromise solutions that were acceptable to all, understandable in all legal systems and clear enough to avoid any juridical uncertainty for the parties. That complexity rendered the work of codification all the more urgent.

22. The most delicate questions were the definition of commercial transactions and the scope of measures of constraint. The question of the criteria for determining the character of the contract, dealt with in draft article 2, paragraphs 1 (c) and 2, was fundamental, inasmuch a State could not, under the draft articles, invoke immunity in the case of a contract having a commercial character. That character depended both on the nature of the contract, namely its object and its form, and on its purpose. As the State had prerogatives that lay outside of ordinary law, yet might, in view of its special responsibilities, conclude, without using those prerogatives, contracts of a commercial character for purposes connected with the exercise of its sovereign powers, it was important that it should enjoy immunity in such cases.

23. His Government accepted to some extent the value of the nature of the contract as a criterion, but felt that a court, in determining whether a contract had a commercial character, must also take its purpose into account. The proposal of the Chairman of the Working Group in connection with draft article 2, paragraph 2 (A/C.6/48/L.4, para. 44), whereby courts would be allowed to take into account the purpose of the contract provided that it was a relevant criterion under the applicable law of the State party to the contract, was appropriate in that it took account of the diversity of legal systems.

24. Some delegations had expressed the wish that a condition be added requiring that the other party be informed, before the conclusion of the contract, of the circumstance of purpose being deemed a relevant criterion of the character of the contract. He wondered, however, how the court would ascertain whether such information had been given. Would such a requirement not entail the inclusion of an express clause in the contract, which would run counter to the consideration of the criterion of purpose, which was not a material criterion?

(Mr. Legal, France)

Should it not be the responsibility of the parties to examine the legal environment before entering into a contract? The new wording of article 2, paragraph 1 (c), proposed by the Chairman of the Working Group seemed far clearer, as it provided a general definition of commercial transactions before taking up a specific point.

25. Regarding the delicate question of measures of constraint, dealt with in draft article 18, his Government had expressed reservations concerning the appropriateness of dealing with immunity from execution in a text pertaining to immunity from jurisdiction, for the two had neither the same foundation nor the same scope. In view of the progress made on that subject by the Commission and the advanced stage of the draft, however, those reservations did not amount to an objection in principle. The diversity of legal systems required great caution in dealing with measures of constraint. He recalled the importance attributed by his Government to the three conditions laid down in draft article 18, paragraph 1 (c), for the exercise of measures of constraint against a State and felt that those conditions, taken together, would ensure the balance between respect for the rights of the contracting parties and the free exercise of governmental authority. The Commission's draft represented a difficult compromise among highly divergent positions on that question, and it seemed dangerous to try to modify it in its entirety. France could not agree to the elimination of the connection with the claim or with the agency or instrumentality, for that condition appeared sufficiently broad not to be harmful to claimants, yet was the only one that might be compatible with respect for the prerogatives of a sovereign State.

26. He feared that article 19, which provided a non-exhaustive list of categories of property which were not to be "considered as property specifically in use or intended for use ... for other than government non-commercial purposes", and were thus not subject to measures of constraint, might be dangerous, for, despite all the precautions that might be taken to stress the non-exhaustive character of the list, it would entail a negative presumption in respect of categories which, though not listed, should enjoy immunity. He therefore questioned the relevance of such an article.

27. Concerning the draft provisions on the definition of the State or the question of State enterprises, considerable progress had been made in resolving differences. He also welcomed the agreement currently being reached on the extension of article 16 to aircraft and spacecraft.

28. Though progress had unquestionably been made and compromises were conceivable on the essential provisions, difficulties still remained. The drafting of certain articles might be improved for greater clarity and greater acceptability by all, and France still had a number of concerns. In view of the excellent progress made, however, France was in favour of the principle of convening a diplomatic conference on the topic, though the time was not yet ripe. Since a convention would be useful only if widely ratified, the diplomatic conference must be prepared with the utmost care. Additional work must therefore be done to smooth out the remaining difficulties so that such a conference might be convened as soon as possible. He felt certain that the

(Mr. Legal, France)

well-balanced draft decision prepared by the Chairman of the Working Group would be adopted by consensus.

29. Mr. NEUHAUS (Australia), speaking also on behalf of Canada and New Zealand, said that, while the three delegations had hoped for general agreement at the current session on all outstanding major issues relating to the draft articles on jurisdictional immunities of States and their property, they were encouraged by the progress made.

30. They believed the primary objective should be to secure a widely supported convention on the matter, for it was one of the areas of international law with which domestic courts were frequently called upon to deal. Such a convention would provide a certainty and predictability that would benefit the States themselves, the individuals and juridical persons with whom they dealt and their legal advisers, in addition to contributing to the process of codification and progressive development of international law.

31. Due to disagreement on certain issues between States with different economic systems and even among States with similar systems but different principles of domestic law, the Commission's task had been difficult. Thanks to the decade-long work of the Commission, leading to the adoption of the draft articles, and the detailed consideration given to certain provisions by the Working Group, differences on certain issues of principle had been narrowed. Some differences, nevertheless, still remained, and it would be unfortunate if a diplomatic conference, when convened, failed to achieve agreement or led to a convention that failed to gain satisfactory ratification. The three delegations therefore strongly felt that a date for a diplomatic conference should not be set until all outstanding issues of principle had been settled.

32. On the questions of the definition of a "State" (art. 2, para. 1 (b)) and of a "commercial transaction" (art. 2, para. 1 (c)) and the issue of contracts of employment (art. 11), the three delegations felt that the Working Group had identified the elements of an acceptable compromise and that agreement could probably be reached quickly on the provisions in question. Concerning article 2, paragraph 1 (b) (iii) and (iv), dealing with subdivisions, agencies and instrumentalities of the State, they would invite States to reconsider the desirability of including a provision along the lines of proposal B in the annex to the report of the Working Group (A/C.6/48/L.4). They would not, however, oppose any agreement on article 5, although some details still required further discussion.

33. Opinions were still divided on two important issues: the use of the criteria of nature and purpose for characterizing a transaction as commercial and the question of measures of constraint. On the former, the Working Group had considered a proposal by a small group for replacing article 2, paragraph 2, with four new paragraphs, the last of which, reformulated by the Chairman (A/C.6/48/L.4, para. 44), required that a court, in determining whether a contract or transaction was a "commercial transaction", should take into account its purpose, provided that the purpose was a relevant criterion under the law of

(Mr. Neuhaus, Australia)

the State party to the contract or transaction and that the other party had been informed of that circumstance before the contract or transaction was concluded. The discussion had included the question whether the State was required to give express notice in writing to the other party to the transaction.

34. The main concern of the three delegations was to ensure that both parties to the contract or transaction knew with certainty, before it was concluded, where they stood. The Chairman's suggestion that the connection requirement should be removed in cases of post-judgement execution, while retaining such a requirement for cases of interim or pre-judgement attachment, might provide the basis for a compromise. The delegations did not think it reasonable to expect the other party to consult the legislation and case law of the State concerned, since the State clearly knew its own law and could easily inform the other party of the applicability of the purpose criterion. They would nevertheless be willing to consider other possibilities of providing the necessary certainty in commercial relations.

35. The provision contained in the Chairman's suggestion to the effect that no measures of constraint should be taken against the property of a State before that State was given adequate opportunity to comply with the judgement (A/C.6/48/L.4, para. 78) would render it unnecessary to maintain the connection requirement in cases of final execution in order to protect the interests of the States concerned. Regarding draft article 18, paragraphs 1 and 3 of the Chairman's suggestion must be viewed as complementary elements of a compromise.

36. On the subject of pre-judgement measures of constraint, the possibility of limiting such interim measures to certain agencies and instrumentalities of the State would have to be considered as a possible means of reconciling opposed views on the need for such measures.

37. A clear assessment of the progress made in the Working Group during the year and of the work remaining to be done would be possible only when States had expressed their considered views on the various proposals. Consultations should continue during 1994 within the framework of the Sixth Committee, concentrating on the results of the discussions of the Working Group. A meeting of experts might be helpful, and States should be encouraged to send their experts to the Sixth Committee consultations during the coming year.

38. States should submit their written comments on the proposals discussed in the Working Group and those comments should be distributed by the Secretariat, so as to facilitate consideration of the question at the forty-ninth session of the General Assembly. The three delegations suggested that comments on article 2, paragraph 2, should be concentrated on the proposal by the small group for replacing that paragraph, as amended by the Chairman's subsequent proposal, for that would help to identify the degree of agreement achieved. Also, because the question of a dispute settlement clause was connected with the question of measures of constraint, it would be useful if the Secretariat drafted alternative dispute settlement clauses based on suggestions made in the Working Group, for consideration at the forty-ninth session.

(Mr. Neuhaus, Australia)

39. The three delegations suggested that, prior to the forty-ninth session, it would be useful for the issues to be considered by regional gatherings of international lawyers, such as the Asian-African Legal Consultative Committee, and the regular consultations of international lawyers under the auspices of the Council of Europe, with a view to eliciting the views of a wide range of States.

40. They recognized that a diplomatic conference might be necessary, but felt that its timing should not be premature, for a conference which failed would set back the progress that had been made.

41. Ms. BROOKES (United Kingdom) said that the basic position of the United Kingdom with respect to the draft articles was that, in the light of contemporary State practice, the old rule of absolute immunity was obsolete. Persons who entered into transactions with a foreign State in its non-sovereign capacity should be able, if a dispute arose, to have it resolved by ordinary process of law, without being barred by a plea of sovereign immunity. Some of the provisions pivotal to the draft articles did not seem consistent with that approach.

42. It was disappointing that no consensus had yet emerged on the underlying principles involved, not to mention the wording of the criteria to be applied, in determining whether a transaction was a "commercial transaction" or on measures of constraint.

43. In connection with the definition of the State given in article 2, paragraph 1 (b), the United Kingdom had an open mind regarding the change in terminology from "sovereign authority" to "governmental authority" in article 2, paragraph 1 (b), and would give it further consideration. If the new terminology assisted in determining when immunity might be invoked and when not, the change would be welcome.

44. In the Working Group, the United Kingdom had made a separate proposal to deal with what it viewed as real procedural problems in the adoption of an approach to agencies or instrumentalities of the State and other entities ("separate entities") that brought them within the definition of a "State" whenever they performed acts in the exercise of the sovereign authority of the State. The difficulty was that when they enjoyed immunity, they would be treated as if they were the State, and the draft articles would apply to them only sometimes. The draft articles did not seem to deal with the practical problems which that would cause. Someone would have to decide at the outset whether the draft articles applied; would it be the national court of the forum? If so, how was the national court to determine whether a separate entity fell within the definition of a "State"? Under the current text, it would have to determine whether the entity was entitled to perform acts in the exercise of sovereign authority and whether in relation to the particular transaction it was performing such an act. The court would find that difficult; yet under draft article 6, the forum courts must determine that immunity (if it existed) was respected. That would not be easy in view of the elements on separate entities currently included in the definition of a "State".

(Ms. Brookes, United Kingdom)

45. The procedural position of the plaintiff was also affected. How was the plaintiff to deal with service of process until it was determined whether the separate entity fell within the definition of a "State" for the purposes of article 2? Should the plaintiff serve process on the separate entity or on the State in accordance with article 20? And how could the plaintiff break out of the vicious circle except by commencing proceedings in the courts?

46. In the Working Group, the United Kingdom had suggested an approach to separate entities based on that used in the European Convention on State Immunity, according to which immunity would be accorded to the separate entity in its own right in respect of acts performed by it in exercise of governmental authority. The level of immunity would remain the same, but the practical problems referred to would not arise. Her delegation felt that alternative ways of dealing with those procedural difficulties were less satisfactory.

47. The question of the criteria for determining whether a transaction was a "commercial transaction" was perhaps the central issue in the draft articles, for many of the substantive provisions on immunity depended on it. Her delegation considered that the criterion of purpose might have some role in determining whether a transaction or contract was commercial if the parties had expressly so agreed, but allowing its application in other circumstances would create unjustifiable inequalities between the parties.

48. While the Chairman's compromise text on the first part of the definition of a "commercial transaction" set out in article 2, paragraph 1 (c), did not completely remove the circularity existing in the Commission's text, it was a definite improvement.

49. The report of the Working Group (A/C.6/48/L.4) suggested that the provisions concerning the relationship between the State and State enterprises and other entities having independent legal personality could be moved from article 10, paragraph 3, to article 5, an additional paragraph being added. It had become apparent in the Working Group that paragraphs 2 and 3 of article 5 were not concerned with State immunity at all. Their aim, rather, was to provide rules to determine when jurisdiction could be exercised over a State in respect of a commercial transaction entered into by a State enterprise or other entity, and when it could not, which related more to questions of State responsibility than State immunity. The United Kingdom had previously questioned the need to retain the provision, as its effect was unclear. Since clarification had been provided, the question remained whether the draft articles were the right place for such a provision.

50. In its written comments in 1992, the United Kingdom had said that no codification of the topic would be acceptable which did not provide a proper basis for measures of constraint. Although it was to be hoped that enforcement would rarely be necessary, a successful claimant was entitled to some guarantee that the judgement would be satisfied. Her delegation had also said previously that if judgements could be made against States but the judgements were difficult to enforce, tension between States would increase.

(Ms. Brookes, United Kingdom)

51. The restrictions in draft article 18, paragraph 1, on the property against which measures of constraint might be taken were so broad that they might often be impractical. In particular her delegation could see no justification for the requirement that the property should have a connection with the claim which was the object of the proceeding. If that property had been used, destroyed or, for whatever reason, was no longer owned by the State, the claimant would be unable, through no fault of his own, to have the judgement satisfied. On a separate but connected point, there was some merit in distinguishing between pre-judgement and post-judgement measures of constraint, with greater protection for the State at the pre-judgement stage.

52. Her delegation accepted that certain exceptions to measures of constraint were required for property in governmental non-commercial use. In the discussion in the Working Group, reference had been made to the need to protect certain types of property from measures of constraint. In the view of the United Kingdom that protection was provided by draft article 19, which made it all the more difficult to understand why draft article 18 was so restrictively worded.

53. Further work was needed on the draft articles. Important differences remained on the definition and scope of a "commercial transaction" and on measures of constraint, for example. The failure of an international codification conference would be a considerable setback and it should only be held if it had a good prospect of success, and, her delegation therefore supported the draft decision contained in document A/C.6/48/L.5.

54. Mr. MARTENS (Germany) said that a codification conference for a convention on immunities of States and their property should not be convened until fundamental differences of opinion had been cleared up. In the meantime, his delegation would welcome a continuation of the discussion on an expert level.

55. The Working Group had discussed criteria for determining whether a transaction was commercial or non-commercial. Although two criteria, namely, the nature and purpose of State transactions, were mentioned in draft article 2, his Government considered that only the objective nature of State transactions and not their subjective purpose could determine whether a country was entitled to immunity. Otherwise, it would be difficult to calculate the risk of legal transactions with other States even if it were left to the courts to determine the purpose of the transaction, because those courts would rely on the testimony of the State in question. The various compromise proposals put forward in the Working Group tended to put less emphasis on the criterion of purpose. Some of the proposals would refer to the purpose of State transactions if that purpose was relevant to the invocation of immunity according to the national law of the State in question. His delegation considered, however, that that would make it more difficult for a party involved in a transaction with a foreign State to predict whether it would be able to pursue a claim in court and would also raise the question of reciprocity, since the range of State immunity would necessarily differ according to applicable national law.

(Mr. Martens, Germany)

56. Another compromise proposal to the effect that the parties could expressly agree that a transaction should be determined as non-commercial regardless of its actual purpose, or that the purpose of the contract would be taken into account, was acceptable to his Government because the proposal did not leave the granting of immunity to the discretion of a foreign State; in cases of doubt, however, the objective nature of the transaction should be the decisive criterion. None the less, a solution based solely on the nature of the transaction would be preferable.

57. In the opinion of his Government, measures of constraint formed an essential component of the draft convention. Various proposals had been made concerning them, including one for draft article 18, paragraph 2, which seemed to distinguish between measures of constraint intended for purposes of temporary protection, and enforcement measures. It should be guaranteed that they were subject to the same limitations. The provision in article 18, paragraph 1 (c), that measures of constraint would be taken only against property that had a connection with the claim was a limitation of the liability of the foreign State 'mounting to a limited exemption from the financial consequences of commercial transactions entered into by such a State. His delegation considered it to be unacceptable.

58. With regard to the treatment of State agencies and other legal entities connected with the State, his Government noted that all the proposals excluded the possibility of recourse to the parent State, thus enabling the latter to avoid any financial liability for commercial transactions by setting up an independent entity. That would be particularly unfair when the financial situation of a foreign legal entity was not transparent to the other party. His Government would therefore prefer the convention to allow recourse to the parent State in accordance with the applicable law according to the principle of the piercing of the corporate veil.

59. In connection with the guarantee of immunity in the case of contracts of employment, his Government supported protection of the employee to the greatest possible extent and therefore considered the proposed Australian amendment to draft article 11, paragraph 2 (a) (A/C.6/48/L.4, proposal Q) a good basis for discussion.

60. It had been observed repeatedly that a State should be obliged to provide securities for the cost of legal proceedings in cases where the State was the plaintiff. According to draft article 22, paragraph 2, the State should not be required to make such provisions, and that constituted an unreasonable risk for the defendant. His Government would favour a change in that provision.

61. In conclusion, it was essential that provisions for the settlement of disputes concerning the interpretation of the convention should be included in the draft articles.

62. Mr. DEREYMAEKER (Belgium) said that some of the issues dealt with in the Working Group, although important, were technical, such as the definition of the term "State", and draft article 19. Although generally acceptable solutions had not yet been found to those problems they were not insurmountable. On the other hand, important substantive questions remained to be resolved before a codification conference with a realistic chance of success could be convened.

63. For instance, the term "commercial transaction" must be defined if work on the draft articles was to be successfully completed. His delegation considered that the commercial character of a transaction should be determined by taking into account only the legal nature of the transaction, and not its purpose. None the less, if reference must be made to the criterion of purpose, his delegation believed that the compromise proposal of the Chairman of the Working Group was most likely to meet with general approval and, in the spirit of compromise, his delegation found the proposal acceptable.

64. The question of measures of constraint, contained in draft article 18, was fundamental, as was the exception of contracts of employment in draft article 11. Belgium's position on those points was reflected in its written comments contained in document A/48/313.

65. His delegation fully supported draft decision A/C.6/48/L.5, which provided for consultations to be held in 1994 in the framework of the Sixth Committee. It would be preferable to wait until then before taking a decision on whether a diplomatic conference should be convened.

66. Mr. SIDI ABED (Algeria) said that a universal regime of jurisdictional immunities of States and their property must reflect the concerns of all categories of States, taking into account their various legal systems, economic situations and legitimate interests. Although his delegation had already said that the draft articles were a balanced and realistic synthesis of the various ideas on the subject, it had agreed to associate itself with attempts to take into consideration the specific difficulties experienced by certain delegations, with the intention of facilitating universal acceptance of the draft articles.

67. Differences of opinion remained concerning various questions, including the nature of commercial transactions. In that connection, it was unlikely that general agreement could be reached if the criterion of purpose was downgraded. By acknowledging the primacy of the criterion of nature, the general scope of non-commercial transactions would be diminished. The Commission's draft text contained a more balanced formulation.

68. The second issue which deserved particular attention and was absolutely fundamental was that of measures of constraint. His delegation considered that treating the State like a private party before the jurisdiction of a foreign court, particularly after judgement had been pronounced by that court, would undermine the principle of State immunity with regard to measures of constraint, which was a corollary to the principle of State sovereignty. An overly laxist solution to that question would only cause difficulties and problems between States, particularly if measures of constraint could be applied at the

(Mr. Sidi Abed, Algeria)

pre-judgement stage. In addition, there should be a connection between property subject to measures of constraint and the claim in question.

69. There were other substantive questions that should be looked at closely, including those relating to the property of a State located in a third State and dispute-settlement procedures.

70. Lastly, his delegation considered that the trend towards a more restricted concept of immunity did not preserve the balance of the Commission's initial draft text. Nevertheless, his delegation was in favour of continuing consultations within the Working Group.

71. Ms. ISOMURA (Japan) said that in order to make progress, theoretical arguments on the general principle of jurisdictional immunity of States should be avoided and every effort should be made to make the draft articles acceptable to as many States as possible.

72. Differences of opinion among States on the question of the criteria determining whether a transaction was "commercial" were gradually narrowing and her delegation considered it very important that a compromise formula should be reached incorporating both the nature and the purpose of the contract or transaction as criteria.

73. Regarding acts of State enterprises or other separate entities and the liability of the State, it was commonly understood that where a State enterprise or other separate entity was abused to permit the State to manipulate its obligation, it was appropriate to pierce the veil of separate personality and to look into the underlying motives of that State. However, her Government was concerned that, unless there was a clear-cut criterion establishing a State's liability with regard to acts of its State enterprises or other separate entities, formulating an article on State liability in that respect, including liability resulting from the State's acting as guarantor, would result in a private party filing a suit against the State itself as the body that established such an enterprise or entity. The suit could be filed simply because the plaintiff private party was unable to procure adequate compensation from the defendant State enterprise or entity, whether or not there existed actual acts of unjustifiable intervention by the State in the contract between the plaintiff and the defendant, or even in the situation where the State had no obligation to assume liability. Her delegation wished to receive clarification as to how, within the framework of the existing draft articles, cases of State liability were to be dealt with when such liability was incurred by acts of various State organs as defined in draft article 2, paragraph 1 (b). Furthermore, her delegation considered it necessary to return once more to the basic argument as to whether it was appropriate to deal with the issue of State liability within the framework of the draft articles.

74. With regard to the issue of measures of constraint, it was important to take a practical approach and focus on defining in concrete terms the range of properties against which measures of constraint might be taken and defining the

(Ms. Isomura, Japan)

degree of connection required between State properties and the object of the proceeding. Every effort should be made to ensure that the articles concerning the procedures for measures of constraint were as explicit as possible so as to rule out alternative interpretations and applications by each State party.

75. Her Government believed that the issue of jurisdictional immunity of foreign armed forces should not be dealt with in the same manner as the jurisdictional immunity of other State organs. When armed forces of a State were stationed in another State, such matters as the status of the armed forces of the sending State and their privileges and immunities in the host State were usually stipulated in an international agreement between both States. Such agreements were, in general, concluded on the basis of a delicate balance of interests between their State parties, which reflected the unique bilateral relationship between them. Among the matters which might be subject to such agreements was the issue of jurisdictional immunity, which had various aspects, such as the immunity of armed forces personnel from the criminal jurisdiction of the host State and the jurisdictional immunity of the sending State itself; those aspects were usually closely interrelated and formed an integral part of the balance of interests.

76. Therefore, establishing unified multilateral rules on the matter of jurisdictional immunity of foreign armed forces from civil proceedings in the host State, to which the draft articles might eventually contribute, could easily affect the balance of interests of the two States and bring about a situation in which the treatment of the armed forces in the host State did not reflect the overall bilateral relationship between the two States.

77. From a more practical point of view, it should be noted that, since the hosting of foreign armed forces was often a highly controversial matter for the host State, there might arise random proceedings against foreign armed forces in the host State, should the scope of applicability of the principle of State immunity be uniformly limited under the draft convention. Such proceedings might obviously prevent the stationing of armed forces in the host State from being carried out smoothly.

78. Accordingly, her Government believed that the issue of jurisdictional immunity of foreign armed forces should, in accordance with past practice, be dealt with bilaterally between the sending State and the host State, and that armed forces of a State stationed in another State should be uniformly excluded from the scope of the draft articles.

79. Japan believed that consideration of the draft articles should continue with a view to arriving at a practical and appropriate solution that could be accepted by the overwhelming majority of States.

80. Mr. ČIŽEK (Czech Republic) said that his delegation welcomed the progress made on the topic of jurisdictional immunities of States and their property and believed that the draft articles provided a good basis for compromise. Nevertheless, his delegation disagreed with those members of the Committee who

(Mr. Čižek, Czech Republic)

advocated solutions based on domestic legislative and jurisdictional practice; that approach could lead to unlimited competence being given to the court of the forum State, resulting in a variety of national regimes instead of a unified approach based on the rules of international material law.

81. His delegation did not consider the Working Group to be the appropriate forum for reaching final agreement on the draft articles. The special features of the process of codification of international law made it necessary to convene an international conference of plenipotentiaries to examine the articles and to conclude a convention on the subject. His delegation supported the proposal made by the Chairman of the Working Group that consultations should continue in a less formal framework at the forty-ninth session of the General Assembly.

82. Mr. ZHANG Kening (China) said that the purpose of formulating a legal regime of jurisdictional immunities was to strike a balance between the need to reduce and prevent abuse of domestic judicial proceedings against a sovereign State, on the one hand, and to establish fair and reasonable means of dispute settlement, on the other hand. His delegation believed that the draft articles were generally acceptable and could serve as the basis for a future convention.

83. The question of the legal distinction between States and State enterprises was of extreme importance from the standpoint of safeguarding the principle of State sovereignty. State enterprises and other entities had legal personality and engaged in commercial transactions on their own behalf. They did not represent the State and could not be regarded as a component part of the State machinery. Accordingly, proceedings arising from their commercial transactions should not implicate the State of nationality, and proceedings arising from commercial transactions engaged in by the State should not implicate State enterprises. The draft articles would help to prevent the abuse of judicial proceedings in foreign courts against the State of nationality of the enterprises concerned.

84. With regard to draft article, paragraph 2, his delegation believed that the application of the "purpose test" in determining whether a contract or transaction was a "commercial transaction" reflected long-standing realities in international life. A contract or transaction concluded by a State might represent either a commercial activity or the exercise of its sovereign rights; accordingly the nature of a contract or transaction could not be the sole criterion for determining a State’s entitlement to jurisdictional immunity.

85. Draft article 18, which stipulated that the property of a State could not be subject to measures of constraint without the express consent of the State concerned, touched upon one of the most sensitive issues in the area of jurisdictional immunities. The immunity of State property from measures of constraint was a well-established principle of international law. If State property could be subject to such measures as attachment, arrest and execution on the basis of a decision by a court of a foreign State, that could seriously impair relations between States. Accordingly, as stipulated in the article, State property could not be subject to measures of constraint unless three

(Mr. Zhang Kening, China)

requirements were met. The requirement, provided for in paragraph 1 (c), of a connection with the claim in the attachment of State property, was especially relevant in respect of safeguarding the principle of national sovereignty. The article made it clear that a waiver of immunity from jurisdiction was not the same thing as a waiver of immunity from execution. At meetings of the Working Group, some delegations had supported the inclusion in paragraph 1 of pre-judgement conservatory measures, a proposal with which his delegation could not agree. Attaching the property of a State in order to obtain jurisdiction before a court had pronounced judgement on the merits of the case could seriously affect international economic and trade relations.

86. It was regrettable that consensus had not yet been reached in the Working Group on the definition of a commercial transaction and on conditions for the attachment of State property. His delegation supported the establishment of a working group or some other mechanism to hold consultations on the remaining unresolved issues. The item should remain on the Committee's agenda, with the aim of ultimately convening a diplomatic conference to conclude a convention.

87. Mr. DUTTA (India) said that the topic of jurisdictional immunities was of great importance, especially for developing countries, which faced innumerable problems stemming from actions brought against them, their missions and their property in foreign courts. The adoption of unilateral legislation on the subject by some States had considerably eroded the traditional concept in customary international law of jurisdictional immunities of States and their property.

88. His delegation believed that the draft articles struck an adequate balance between the various positions, since they dealt with the issue of contracts entered into between Governments and private parties and the claims arising therefrom. As most of those claims were litigated in jurisdictions foreign to the States concerned, there was a need for a universally acceptable regime of immunities.

89. While it was generally agreed that a State should enjoy immunity in respect of all its governmental functions, but not in respect of commercial transactions, there was no consensus as to what constituted a commercial contract. Under those circumstances, the draft articles, which defined the parameters of a commercial contract, should not be deviated from merely to satisfy the wishes of a few States.

90. With regard to the immunity from jurisdiction to be granted to a State in cases where the party involved in a commercial transaction was its agency or instrumentality, draft article 10, paragraph 3, stipulated that a State should enjoy immunity from jurisdiction in all proceedings relating to a commercial transaction engaged in by a State enterprise or other entity established by the State which had an independent legal personality.

91. With regard to draft article 11 (Contracts of employment), questions might arise in connection with the employment by diplomatic missions of persons

(Mr. Dutta, India)

recruited locally within the country of accreditation, where the employer must have the right to waive the legal rights granted by the country concerned by entering into an agreement to that effect.

92. Draft articles 18 and 19 made a significant contribution in terms of clarifying the scope and nature of the immunities of States and their property in legal proceedings relating to their commercial activities. However, the articles did not provide for any obligation on the part of a State to post a bond in connection with court proceedings in a foreign State, a matter which was often of great concern to developing countries. It should be possible for States to claim immunity under those articles through certification by the States themselves, if they so chose, in accordance with their law and practice.

93. His delegation supported the convening of an international conference to conclude a convention on the subject.

94. With regard to the United Kingdom proposal to replace draft article 2, paragraph 1 (b) (iv), by a new article, as referred to in paragraph 25 of document A/C.6/48/L.4, his delegation believed that, as the draft article already provided that the definition of a State included agencies or instrumentalities of the State and other entities only to the extent that they were entitled to perform acts in the exercise of the sovereign authority of the State, the proposal was unnecessary. A similar comment applied to the Chairman's proposal to replace article 10, paragraph 3, with a new paragraph, to be included in the current text of article 5 (A/C.6/48/L.4, para. 50).

95. Likewise, the proposed amendment to article 11, paragraph 2 (b) (A/C.6/48/L.4, para. 65) was unnecessary, as the Commission's commentary on the provision stated clearly that the rule of immunity applied to proceedings for recruitment, renewal of employment and reinstatement of an individual only, and that it was without prejudice to the possible recourse which might still be available in the forum State for compensation or damages for "wrongful dismissal" or for breaches of obligation to recruit or to renew employment (A/46/10, para. (10) of the commentary on draft article 11).

96. With regard to the question of under-capitalization of State enterprises, as referred to in paragraph 56 of document A/C.6/48/L.4, his delegation believed that, since any commercial transactions or any entity carrying on commercial activities would, in any case, not be immune to the forum of the State concerned, there was no need to refer to that issue.

97. Lastly, the legal distinction between States and their commercial agencies must be maintained, and States must not be held accountable in any way for the commercial transactions of State enterprises having an independent legal personality, nor should one State enterprise be held liable for the transactions of another State enterprise.

98. Mr. POLITI (Italy) reaffirmed his Government's interest in the adoption of a generally acceptable international convention on jurisdictional immunities of States and their property. Such an instrument would provide States and private parties with greater certainty in a wide range of litigation, and would also be of great benefit to international trade. In order to achieve that goal, it would be necessary to seek a synthesis of the solutions provided by different legal systems.

99. As a country with a long-standing tradition in the definition and application of jurisdictional immunities of States, Italy was prepared to make a constructive contribution to that search. However, it would make little sense to abandon established judicial practice in favour of a convention that would be applied only in a limited number of countries.

100. His delegation therefore supported the proposal that consideration of substantive issues on which agreement had not yet been reached should continue, and that consultations should be held in the framework of the Sixth Committee at the beginning of its forty-ninth session, in order to settle the residual differences which had so far prevented a date from being set for the convening of a diplomatic conference to conclude a convention. In that connection, Italy welcomed draft decision A/C.6/48/L.5.

101. Mr. ROSENSTOCK (United States of America) said that his delegation failed to understand the disinclination of some countries to provide notice to private parties in the clearest possible way - namely, in the contract - of any intention to assert the relevance of the purpose. If State parties failed to disclose their intentions, that inherently gave State entities an advantage over private parties.

102. If sufficient progress could be made in narrowing the areas of disagreement during the consultations at the forty-ninth session, it might then be possible to consider the question of convening a diplomatic conference. In the absence of the likelihood of general agreement, however, an unsuccessful conference would do far greater damage to the Commission's codification efforts than no conference at all. If the current Chairman of the Working Group could also preside over the consultations at the next session, that would increase the chances of a successful outcome. In that spirit, his delegation supported the draft decision.

103. Mr. CHAVES (Kyrgyzstan) said that document A/C.6/48/L.4 was satisfactory because it represented a compromise among various points of view and increased the prospects for conclusion of a generally acceptable international convention. His delegation shared the views expressed by the United Kingdom and hoped that the issues raised by France could be resolved so that consensus could be reached.

104. Draft decision A/C.6/48/L.5 was adopted.

105. Mr. HERNDL (Austria), explaining his delegation's position on the draft decision just adopted, said that the Committee was in agreement on the need for an international convention on the topic of jurisdictional immunities and on the desirability of convening an international conference of plenipotentiaries to elaborate that convention. Clearly, thorough preparations must be made for such a conference, and the principles to be embodied in the future convention must be widely accepted and universally applicable. His delegation looked forward to participating actively in the preparatory process and hoped that, in accordance with tradition, the conference would be held in Vienna.

The meeting rose at 6 p.m.