A/CN.4/SER.A/1985

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 1985

Volume I

Summary records of the meetings of the thirty-seventh session

6 May-26 July 1985

UNITED NATIONS

YEARBOOK OF THE INTERNATIONAL LAW COMMISSION

1985

Volume I

Summary records of the meetings of the thirty-seventh session
6 May-26 July 1985

UNITED NATIONS
New York, 1986

NOTE

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

References to the *Yearbook of the International Law Commission* are abbreviated to *Yearbook ...*, followed by the year (for example, *Yearbook ... 1980*).

The *Yearbook* for each session of the International Law Commission comprises two volumes:

Volume I: summary records of the meetings of the session;

Volume II (Part One): reports of special rapporteurs and other documents considered during the session;

Volume II (Part Two): report of the Commission to the General Assembly.

All references to these works and quotations from them relate to the final printed texts of the volumes of the *Yearbook* issued as United Nations publications.

*

* *

This volume contains the summary records of the meetings of the thirty-seventh session of the Commission (A/CN.4/SR.1875-A/CN.4/SR.1939), with the corrections requested by members of the Commission and such editorial changes as were considered necessary.

A/CN.4/SER.A/1985

UNITED NATIONS PUBLICATION

Sales No. E.86.V.4

ISBN 92-1-133341-5
ISSN 0082-8289

03500P

CONTENTS

	Page
Members of the Commission	x
Officers	x
Agenda	xi
Abbreviations	xii
Principal conventions cited in the present volume	xiii
Check-list of documents of the thirty-seventh session	xiv

SUMMARY RECORDS

1875th meeting

Monday, 6 May 1985, at 3.10 p.m.

Opening of the session ... 1
Tribute to the memory of Mr. Robert Q. Quentin-Baxter and Mr. Constantin A. Stavropoulos ... 1
Congratulations to Mr. Jens Evensen and Mr. Zhengyu Ni, elected Judges of the International Court of Justice ... 1
Statement by the outgoing Chairman ... 1
Election of officers ... 2

1876th meeting

Tuesday, 7 May 1985, at 10.20 a.m.

Election of officers (*concluded*) ... 2
Adoption of the agenda ... 2
Organization of work of the session ... 2

1877th meeting

Wednesday, 8 May 1985, at 10.10 a.m.

Organization of work of the session (*continued*) ... 3

1878th meeting

Wednesday, 8 May 1985, at 12.35 p.m.

Filling of casual vacancies in the Commission (article 11 of the statute) ... 4

1879th meeting

Thursday, 9 May 1985, at 10.10 a.m.

Welcome to Mr. Tomuschat ... 4
Draft Code of Offences against the Peace and Security of Mankind
Draft articles submitted by the Special Rapporteur ... 4

1880th meeting

Monday, 13 May 1985, at 3.05 p.m.

Welcome to Mr. Arangio-Ruiz and Mr. Roukounas ... 12
Organization of work of the session (*concluded*) ... 12
Drafting Committee ... 12
Gilberto Amado Memorial Lecture ... 12
Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 13

1881st meeting

Tuesday, 14 May 1985, at 10.05 a.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 21

1882nd meeting

Wednesday, 15 May 1985, at 10.05 a.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 28

1883rd meeting

Friday, 17 May 1985, at 10.05 a.m.

Welcome to Mr. Huang ... 35
Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 35

1884th meeting

Monday, 20 May 1985, at 3 p.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 41

1885th meeting

Tuesday, 21 May 1985, at 10.05 a.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 47

1886th meeting

Wednesday, 22 May 1985, at 10 a.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 55

1887th meeting

Thursday, 23 May 1985, at 10.05 a.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) ... 62

Page

1888th meeting

Friday, 24 May 1985, at 10.05 a.m.

Draft Code of Offences against the Peace and Security of Mankind (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Articles 1 to 4 (*continued*) 69

1889th meeting

Tuesday, 28 May 1985, at 3 p.m.

Draft Code of Offences against the Peace and Security of Mankind (*concluded*)
Draft articles submitted by the Special Rapporteur (*concluded*)
Articles 1 to 4 (*concluded*) 78

1890th meeting

Wednesday, 29 May 1985, at 10 a.m.

State responsibility
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles)
Draft articles submitted by the Special Rapporteur
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 84

1891st meeting

Thursday, 30 May 1985, at 10.05 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 91

1892nd meeting

Monday, 3 June 1985, at 3 p.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 95

1893rd meeting

Tuesday, 4 June 1985, at 10.25 a.m.

Welcome to the participants in the International Law Seminar 103
Programme, procedures and working methods of the Commission, and its documentation
Membership of the Planning Group of the Enlarged Bureau 103
State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)

Page

Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 103

1894th meeting

Wednesday, 5 June 1985, at 10 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 108

1895th meeting

Thursday, 6 June 1985, at 10.05 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 115

1896th meeting

Friday, 7 June 1985, at 10.05 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 121

1897th meeting

Monday, 10 June 1985, at 3 p.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 127

1898th meeting

Tuesday, 11 June 1985, at 10.05 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 135

Page

1899th meeting

Tuesday, 11 June 1985, at 3 p.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 140

1900th meeting

Wednesday, 12 June 1985, at 10 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 146

1901st meeting

Thursday, 13 June 1985, at 10.05 a.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*continued*) 153

1902nd meeting

Thursday, 13 June 1985, at 3.05 p.m.

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) (*continued*) *and*
"Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles) (*concluded*)
Draft articles submitted by the Special Rapporteur (*concluded*)
Sixth report of the Special Rapporteur *and*
Articles 1 to 16 (*concluded*) 158

1903rd meeting

Friday, 14 June 1985, at 10.35 a.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
Draft articles submitted by the Special Rapporteur
Sixth report of the Special Rapporteur 163
Articles 23 and 36 to 43 164
Co-operation with other bodies
Statement by the Observer for the Asian-African Legal Consultative Committee 166

1904th meeting

Monday, 17 June 1985, at 3.05 p.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 168

1905th meeting

Tuesday, 18 June 1985, at 10.05 a.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 172

1906th meeting

Wednesday, 19 June 1985, at 10.05 a.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 177

1907th meeting

Thursday, 20 June 1985, at 10 a.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

Page

Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 184

1908th meeting

Friday, 21 June 1985, at 10.05 a.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 189
Co-operation with other bodies (*continued*)
Statement by the Observer for the Inter-American Juridical Committee 193

1909th meeting

Monday, 24 June 1985, at 3.05 p.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 196

1910th meeting

Tuesday, 25 June 1985, at 11 a.m.

Appointment of two new special rapporteurs 202
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

Page

Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 203

1911th meeting

Wednesday, 26 June 1985, at 10.05 a.m.

Fortieth anniversary of the United Nations 206
Visit by a member of the International Court of Justice . 206
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 207
Draft articles proposed by the Drafting Committee
Articles 28 to 32, 34 and 35 208
Article 28 [21] (Duration of privileges and immunities) 208

1912th meeting

Thursday, 27 June 1985, at 10.05 a.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles proposed by the Drafting Committee (*continued*)
Articles 28 (*continued*) to 30 212
Article 28 [21] (Duration of privileges and immunities) (*continued*) 212
Article 29 [22] (Waiver of immunities) 214
Article 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag) 215

1913th meeting

Friday, 28 June 1985, at 10.05 a.m.

Visit by a member of the International Court of Justice . 217
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles proposed by the Drafting Committee (*continued*)
Articles 31 to 35
Article 31 [24] (Identification of the diplomatic bag) 218
Article 32 [25] (Content of the diplomatic bag) ... 220
Article 33 220
Article 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport) 220
Article 35 [27] (Facilities accorded to the diplomatic bag) 221
Draft articles submitted by the Special Rapporteur (*continued*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)

Page

Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*continued*) 222

1914th meeting

Monday, 1 July 1985, at 12.10 p.m.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*)
Draft articles submitted by the Special Rapporteur (*concluded*)
Article 23 (Immunity from jurisdiction)
Article 36 (Inviolability of the diplomatic bag)
Article 37 (Exemption from customs inspection, customs duties and all dues and taxes)
Article 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)
Article 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)
Article 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)
Article 42 (Relation of the present articles to other conventions and international agreements) *and*
Article 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags) (*concluded*) 224

1915th meeting

Monday, 1 July 1985, at 3.05 p.m.

Jurisdictional immunities of States and their property
Draft articles submitted by the Special Rapporteur
Article 19 (Ships employed in commercial service) *and*
Article 20 (Arbitration) 227
Seventh report of the Special Rapporteur *and*
Articles 21 to 28 228
Co-operation with other bodies (*continued*)
Statement by the Observer for the European Committee on Legal Co-operation 232

1916th meeting

Tuesday, 2 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 19 (Ships employed in commercial service) *and*
Article 20 (Arbitration) (*continued*) 234

1917th meeting

Tuesday, 2 July 1985, at 3.05 p.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 19 (Ships employed in commercial service) *and*
Article 20 (Arbitration) (*continued*) 241

1918th meeting

Wednesday, 3 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*continued*)

Page

Draft articles submitted by the Special Rapporteur (*continued*)
Article 19 (Ships employed in commercial service) *and*
Article 20 (Arbitration) (*concluded*) 247

1919th meeting

Thursday, 4 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 21 (Scope of the present part)
Article 22 (State immunity from attachment and execution)
Article 23 (Modalities and effect of consent to attachment and execution) *and*
Article 24 (Types of State property permanently immune from attachment and execution) 250

1920th meeting

Friday, 5 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 21 (Scope of the present part)
Article 22 (State immunity from attachment and execution)
Article 23 (Modalities and effect of consent to attachment and execution) *and*
Article 24 (Types of State property permanently immune from attachment and execution) (*continued*) 255

1921st meeting

Monday, 8 July 1985, at 3.05 p.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 21 (Scope of the present part)
Article 22 (State immunity from attachment and execution)
Article 23 (Modalities and effect of consent to attachment and execution) *and*
Article 24 (Types of State property permanently immune from attachment and execution) (*continued*) 260

1922nd meeting

Tuesday, 9 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 21 (Scope of the present part)
Article 22 (State immunity from attachment and execution)
Article 23 (Modalities and effect of consent to attachment and execution) *and*
Article 24 (Types of State property permanently immune from attachment and execution) (*continued*) 265

Page

1923rd meeting

Wednesday, 10 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*continued*)
Article 21 (Scope of the present part)
Article 22 (State immunity from attachment and execution)
Article 23 (Modalities and effect of consent to attachment and execution) *and*
Article 24 (Types of State property permanently immune from attachment and execution) (*continued*) 272

1924th meeting

Thursday, 11 July 1985, at 10 a.m.

Jurisdictional immunities of States and their property (*continued*)
Draft articles submitted by the Special Rapporteur (*concluded*)
Article 21 (Scope of the present part)
Article 22 (State immunity from attachment and execution)
Article 23 (Modalities and effect of consent to attachment and execution) *and*
Article 24 (Types of State property permanently immune from attachment and execution) (*concluded*) 277

1925th meeting

Monday, 15 July 1985, at 3.05 p.m.

Relations between States and international organizations (second part of the topic)
Second report of the Special Rapporteur 283

1926th meeting

Tuesday, 16 July 1985, at 10.05 a.m.

Relations between States and international organizations (second part of the topic) (*continued*)
Second report of the Special Rapporteur (*continued*)
Title I (Legal personality) (*continued*) 289

1927th meeting

Wednesday, 17 July 1985, at 10.05 a.m.

Relations between States and international organizations (second part of the topic) (*continued*)
Second report of the Special Rapporteur (*continued*)
Title I (Legal personality) (*continued*) 294

1928th meeting

Wednesday, 17 July 1985, at 3.05 p.m.

International Law Seminar 300
The law of the non-navigational uses of international watercourses
Preliminary report of the Special Rapporteur 301
International liability for injurious consequences arising out of acts not prohibited by international law
Preliminary report of the Special Rapporteur 304

1929th meeting

Thursday, 18 July 1985, at 10.05 a.m.

Relations between States and international organizations (second part of the topic) (*concluded*)
Second report of the Special Rapporteur (*concluded*)
Title I (Legal personality) (*concluded*) 305
International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*)
Preliminary report of the Special Rapporteur (*concluded*) 307

Page

State responsibility (*continued*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) (*continued*)
Draft article proposed by the Drafting Committee
Article 5 307

1930th meeting

Thursday, 18 July 1985, at 3.10 p.m.

State responsibility (*concluded*)
Content, forms and degrees of international responsibility (part 2 of the draft articles) (*concluded*)
Draft article proposed by the Drafting Committee (*concluded*)
Article 5 (*concluded*) 312
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*)
Draft articles proposed by the Drafting Committee (*concluded*)
Article 23 and articles 28 and 29 (*concluded*)
Article 23 [18] (Immunity from jurisdiction) 314
Article 28 [21] (Duration of privileges and immunities) *and*
Article 29 [22] (Waiver of immunities) (*concluded*) 316

1931st meeting

Friday, 19 July 1985, at 12.05 p.m.

Co-operation with other bodies (*concluded*)
Statement by the Observer for the Arab Commission for International Law 317
Programme, procedures and working methods of the Commission, and its documentation (*concluded*)
Recommendations by the Planning Group 318
Jurisdictional immunities of States and their property (*continued*)
Draft articles proposed by the Drafting Committee
Article 19 (Ships engaged in commercial service) *and*
Article 20 (Effect of an arbitration agreement) 318

1932nd meeting

Monday, 22 July 1985, at 10.05 a.m.

Jurisdictional immunities of States and their property (*concluded*)
Draft articles proposed by the Drafting Committee (*concluded*)
Article 19 (Ships engaged in commercial service) *and*
Article 20 (Effect of an arbitration agreement) (*concluded*) 321
Draft report of the Commission on the work of its thirty-seventh session
Chapter I. Organization of the session 325
Chapter VIII. Other decisions and conclusions of the Commission
A. International liability for injurious consequences arising out of acts not prohibited by international law 325
B. Programme and methods of work of the Commission 325
C. Co-operation with other bodies 325
D. Date and place of the thirty-eighth session 325
E. Representation at the fortieth session of the General Assembly 325
F. Gilberto Amado Memorial Lecture 325
G. International Law Seminar 325

1933rd meeting

Tuesday, 23 July 1985, at 10.05 a.m.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)
Chapter VIII. Other decisions and conclusions of the Commission (*concluded*)

Page

B. Programme and methods of work of the Commission (concluded) ... 326
C. Co-operation with other bodies (concluded) ... 326
Chapter II. Draft Code of Offences against the Peace and Security of Mankind
A. Introduction ... 326
B. Consideration of the topic at the present session 327

1934th meeting

Wednesday, 24 July 1985, at 10.05 a.m.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)
Chapter II. Draft Code of Offences against the Peace and Security of Mankind (*continued*)
B. Consideration of the topic at the present session (*continued*) ... 329

1935th meeting

Wednesday, 24 July 1985, at 3.05 p.m.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)
Chapter II. Draft Code of Offences against the Peace and Security of Mankind (*continued*)
B. Consideration of the topic at the present session (*concluded*) ... 333
Chapter V. Jurisdictional immunities of States and their property
A. Introduction ... 334
B. Draft articles on jurisdictional immunities of States and their property
Subsection 1 (Texts of the draft articles provisionally adopted so far by the Commission) ... 336
Subsection 2 (Texts of articles 19 and 20, with commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session)
Commentary to article 19 (State-owned or State-operated ships engaged in commercial service) ... 336

1936th meeting

Thursday, 25 July 1985, at 10.05 a.m.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)
Chapter V. Jurisdictional immunities of States and their property (*continued*)
B. Draft articles on jurisdictional immunities of States and their property (*continued*)
Subsection 2 (Texts of articles 19 and 20, with commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session) (*continued*)
Commentary to article 19 (State-owned or State-operated ships engaged in commercial service) (*continued*) ... 337

1937th meeting

Thursday, 25 July 1985, at 3.05 p.m.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)
Chapter V. Jurisdictional immunities of States and their property (*concluded*)
B. Draft articles on jurisdictional immunities of States and their property (*concluded*)
Subsection 2 (Texts of articles 19 and 20, with commentaries thereto, provisionally adopted by the Commission at its thirty-seventh session) (*concluded*)
Commentary to article 19 (State-owned or State-operated ships engaged in commercial service) (*concluded*) ... 340
Commentary to article 20 (Effect of an arbitration agreement) ... 341
Chapter II. Draft Code of Offences against the Peace and Security of Mankind (*concluded*) ... 343
Chapter III. State responsibility
A. Introduction ... 343
B. Draft articles on State responsibility (part 2 of the draft articles)
Commentary to article 5 ... 345

1938th meeting

Friday, 26 July 1985, at 10 a.m.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)
Chapter III. State responsibility (*concluded*)
B. Draft articles on State responsibility (part 2 of the draft articles) (*concluded*)
Commentary to article 5 (*concluded*) ... 345
Chapter VI. Relations between States and international organizations (second part of the topic) ... 348
Chapter IV. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
A. Introduction ... 348
B. Consideration of the topic at the present session 348

1939th meeting

Friday, 26 July 1985, at 3.05 p.m.

Draft report of the Commission on the work of its thirty-seventh session (*concluded*)
Chapter IV. Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*)
C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier
Subsection 1 (Texts of the draft articles provisionally adopted so far by the Commission) ... 349
Subsection 2 (Articles and commentaries provisionally adopted by the Commission at its thirty-seventh session)
Commentary to paragraph 2 of article 12 (The diplomatic courier declared *persona non grata* or not acceptable) ... 349
Commentary to article 23 [18] (Immunity from jurisdiction) ... 349
Commentary to article 28 [21] (Duration of privileges and immunities) ... 349
Commentary to article 29 [22] (Waiver of immunities) ... 349
Commentary to article 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag) ... 350
Commentary to article 31 [24] (Identification of the diplomatic bag) ... 350
Commentary to article 32 [25] (Content of the diplomatic bag) ... 350
Commentary to article 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport) ... 351
Commentary to article 35 [27] (Facilities accorded to the diplomatic bag) ... 351
B. Consideration of the topic at the present session (*concluded*) ... 351
Chapter VII. The law of the non-navigational uses of international watercourses
A. Introduction ... 351
B. Consideration of the topic at the present session 351
Closure of the session ... 352

MEMBERS OF THE COMMISSION

Name	Country of nationality
Chief Richard Osuolale A. AKINJIDE	Nigeria
Mr. Riyadh Mahmoud Sami AL-QAYSI	Iraq
Mr. Gaetano ARANGIO-RUIZ	Italy
Mr. Mikuin Leliel BALANDA	Zaire
Mr. Julio BARBOZA	Argentina
Mr. Boutros BOUTROS GHALI	Egypt
Mr. Carlos CALERO RODRIGUES	Brazil
Mr. Jorge CASTAÑEDA	Mexico
Mr. Leonardo DÍAZ GONZÁLEZ	Venezuela
Mr. Khalafalla EL RASHEED MOHAMED AHMED	Sudan
Mr. Constantin FLITAN	Romania
Mr. Laurel B. FRANCIS	Jamaica
Mr. Jiahua HUANG	China
Mr. Jorge E. ILLUECA	Panama
Mr. Andreas J. JACOVIDES	Cyprus
Mr. Satya Pal JAGOTA	India
Mr. Abdul G. KOROMA	Sierra Leone
Mr. José Manuel LACLETA MUÑOZ	Spain
Mr. Ahmed MAHIOU	Algeria
Mr. Chafic MALEK	Lebanon
Mr. Stephen C. MCCAFFREY	United States of America
Mr. Frank X. NJENGA	Kenya
Mr. Motoo OGISO	Japan
Mr. Syed Sharifuddin PIRZADA	Pakistan
Mr. Edilbert RAZAFINDRALAMBO	Madagascar
Mr. Paul REUTER	France
Mr. Willem RIPHAGEN	Netherlands
Mr. Emmanuel J. ROUKOUNAS	Greece
Sir Ian SINCLAIR	United Kingdom of Great Britain and Northern Ireland
Mr. Sompong SUCHARITKUL	Thailand
Mr. Doudou THIAM	Senegal
Mr. Christian TOMUSCHAT	Federal Republic of Germany
Mr. Nikolai A. USHAKOV	Union of Soviet Socialist Republics
Mr. Alexander YANKOV	Bulgaria

OFFICERS

Chairman: Mr. Satya Pal JAGOTA
First Vice-Chairman: Mr. Khalafalla EL RASHEED MOHAMED AHMED
Second Vice-Chairman: Sir Ian SINCLAIR
Chairman of the Drafting Committee: Mr. Carlos CALERO RODRIGUES
Rapporteur: Mr. Constantin FLITAN

Mr. Georgiy F. Kalinkin, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary of the Commission.

AGENDA

The Commission adopted the following agenda at its 1876th meeting, held on 7 May 1985:

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

ABBREVIATIONS

ASEAN	Association of South-East Asian Nations
ECAFE	Economic Commission for Asia and the Far East (now ESCAP)
ECSC	European Coal and Steel Community
EEC	European Economic Community
ESCAP	Economic and Social Commission for Asia and the Pacific
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
IAEA	International Atomic Energy Agency
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
ILO	International Labour Organisation
IMF	International Monetary Fund
INTERPOL	International Criminal Police Organization
ITU	International Telecommunication Union
OAS	Organization of American States
OAU	Organization of African Unity
OPEC	Organization of Petroleum Exporting Countries
PCIJ	Permanent Court of International Justice
SEATO	South-East Asia Treaty Organization
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPU	Universal Postal Union
WHO	World Health Organization
IBRD / World Bank	International Bank for Reconstruction and Development

*

* *

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

PRINCIPAL CONVENTIONS

cited in the present volume

Vienna Convention on Diplomatic Relations (Vienna, 18 April 1961) (United Nations, *Treaty Series*, vol. 500, p. 95)

Vienna Convention on Consular Relations (Vienna, 24 April 1963) (United Nations, *Treaty Series*, vol. 596, p. 261)

Vienna Convention on the Law of Treaties (Vienna, 23 May 1969) (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 140)

Convention on Special Missions (New York, 8 December 1969) (United Nations, *Juridical Yearbook 1969* (Sales No. E.71.V.4), p. 125)

Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (Vienna, 14 March 1975) (United Nations, *Juridical Yearbook 1975* (Sales No. E.77.V.3), p. 87)

CHECK-LIST OF DOCUMENTS OF THE THIRTY-SEVENTH SESSION

Document	*Title*	*Observations and references*
A/CN.4/384	Survey of State practice relevant to international liability for injurious consequences arising out of acts not prohibited by international law, prepared by the Secretariat	Mimeographed.
A/CN.4/385	Provisional agenda	*Idem*. For the agenda as adopted, see p. xi above.
A/CN.4/386	Filling of casual vacancies in the Commission (article 11 of the statute): note by the Secretariat	Reproduced in *Yearbook ... 1985*, vol. II (Part One).
A/CN.4/386/Add.1	*Idem*—Addendum to the note by the Secretariat: list of candidates and curricula vitae	Mimeographed.
A/CN.4/387 [and Corr.1]	Third report on the draft Code of Offences against the Peace and Security of Mankind, by Mr. Doudou Thiam, Special Rapporteur	Reproduced in *Yearbook ... 1985*, vol. II (Part One).
A/CN.4/388 [and Corr.1]	Seventh report on jurisdictional immunities of States and their property, by Mr. Sompong Sucharitkul, Special Rapporteur	*Idem.*
A/CN.4/389 [and Corr.1]	Sixth report on the content, forms and degrees of international responsibility (part 2 of the draft articles); and "Implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes (part 3 of the draft articles), by Mr. Willem Riphagen, Special Rapporteur	*Idem.*
A/CN.4/390 [and Corr.1]	Sixth report on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, by Mr. Alexander Yankov, Special Rapporteur	*Idem.*
A/CN.4/391 and Add.1 [and Add.1/Corr.2]	Second report on relations between States and international organizations (second part of the topic), by Mr. Leonardo Díaz González, Special Rapporteur	*Idem.*
A/CN.4/392 and Add.1 and 2	Draft Code of Offences against the Peace and Security of Mankind: observations of Member States and intergovernmental organizations received pursuant to General Assembly resolution 39/80	*Idem.*
A/CN.4/393	Preliminary report on the law of the non-navigational uses of international watercourses, by Mr. Stephen C. McCaffrey, Special Rapporteur	*Idem.*
A/CN.4/394	Preliminary report on international liability for injurious consequences arising out of acts not prohibited by international law, by Mr. Julio Barboza, Special Rapporteur	*Idem.*
A/CN.4/L.382	Topical summary, prepared by the Secretariat, of the discussion in the Sixth Committee on the report of the Commission during the thirty-ninth session of the General Assembly	Mimeographed.
A/CN.4/L.383 and Add.1-3	Relations between States and international organizations (second part of the topic). The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities: supplementary study prepared by the Secretariat	*Idem.*
A/CN.4/L.384	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Texts adopted by the Drafting Committee: articles 28 to 32, 34 and 35	Texts reproduced in summary records of the 1911th to 1913th meetings.

Document	*Title*	*Observations and references*
A/CN.4/L.386	Draft report of the International Law Commission on the work of its thirty-seventh session: chapter I (Organization of the session)	Mimeographed. For the adopted text, see *Official Records of the General Assembly, Fortieth Session, Supplement No. 10* (A/40/10). The final text appears in *Yearbook ... 1985*, vol. II (Part Two).
A/CN.4/L.387 and Add.1	*Idem:* chapter II (Draft Code of Offences against the Peace and Security of Mankind)	*Idem.*
A/CN.4/L.388 and Add.1	*Idem:* chapter IV (Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier)	*Idem.*
A/CN.4/L.389 and Add.1 [and Add.1/Corr.1] and Add.2 and 3	*Idem:* chapter V (Jurisdictional immunities of States and their property)	*Idem.*
A/CN.4/L.390 and Add.1	*Idem:* chapter III (State responsibility)	*Idem.*
A/CN.4/L.391	*Idem:* chapter VI (Relations between States and international organizations (second part of the topic))	*Idem.*
A/CN.4/L.392	*Idem:* chapter VII (The law of the non-navigational uses of international watercourses)	*Idem.*
A/CN.4/L.394 and Add.1-3	*Idem:* chapter VIII (Other decisions and conclusions of the Commission)	*Idem.*
A/CN.4/L.395	Draft articles on State responsibility (part 2 of the draft articles). Text adopted by the Drafting Committee: article 5	Text reproduced in summary record of the 1929th meeting, para. 26.
A/CN.4/L.396	Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier. Text adopted by the Drafting Committee: article 23	*Idem*, 1930th meeting, para. 27.
A/CN.4/L.397	Draft articles on jurisdictional immunities of States and their property. Texts adopted by the Drafting Committee: articles 19 and 20	*Idem*, 1931st meeting, para. 12.
A/CN.4/SR.1875-A/CN.4/SR.1939	Provisional summary records of the 1875th to 1939th meetings of the International Law Commission	Mimeographed. The final text appears in the present volume.

INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE THIRTY-SEVENTH SESSION

Held at Geneva from 6 May to 26 July 1985

1875th MEETING

Monday, 6 May 1985, at 3.10 p.m.

Outgoing Chairman: Mr. Alexander YANKOV
Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Opening of the session

1. The OUTGOING CHAIRMAN declared the thirty-seventh session of the International Law Commission open and extended a warm welcome to members, to the Legal Counsel, to the Secretary of the Commission and to all the secretariat staff.

Tribute to the memory of Mr. Robert Q. Quentin-Baxter and Mr. Constantin A. Stavropoulos

2. The OUTGOING CHAIRMAN expressed members' shock and sadness at the deaths some months after the thirty-sixth session of Mr. Robert Quentin-Baxter and Mr. Constantin Stavropoulos. As international jurists, colleagues and gentlemen of the highest order, both men would be sorely missed.

At the invitation of the outgoing Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Robert Quentin-Baxter and Mr. Constantin Stavropoulos.

Congratulations to Mr. Jens Evensen and Mr. Zhengyu Ni, elected Judges of the International Court of Justice

3. The OUTGOING CHAIRMAN said that the Commission would also miss two other valued colleagues, Mr. Jens Evensen and Mr. Zhengyu Ni, who had been elected Judges of the ICJ. It could, however, take pride in those elections and all its members would no doubt wish him to convey their warmest congratulations to the two new Judges.

Statement by the outgoing Chairman

4. The OUTGOING CHAIRMAN said that he had presented the report of the Commission on the work of its thirty-sixth session (A/39/10) to the General Assembly at its thirty-ninth session; it had been well received and carefully considered in the Sixth Committee. A topical summary of the Sixth Committee's debate on the subject had been circulated by the Secretariat (A/CN.4/L.382). In presenting the report, he had indicated the progress achieved in the Commission and had stressed the permanent and dynamic nature of the interrelationship between the Sixth Committee and the Commission. He had also paid tribute to the late Prime Minister of India, Mrs. Indira Gandhi, for her valuable contribution to the strengthening of international peace and understanding.

5. By its resolution 39/85, the General Assembly had expressed appreciation for the Commission's work at its thirty-sixth session. It had also recommended that the Commission should continue its work on all the topics in its current programme, while taking into account the comments of Governments.

6. By its resolution 39/80, the General Assembly had requested the Commission to continue work on the draft Code of Offences against the Peace and Security of Mankind and, specifically, to prepare an introduction as well as a list of offences, taking into account the progress made at the Commission's thirty-sixth session and the views expressed at the thirty-ninth session of the General Assembly. It had also decided to include in the provisional agenda for its fortieth session an item on the draft code, for consideration in conjunction with the report of the Commission.

7. By its resolution 39/86, the General Assembly had decided that the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations should be held at Vienna from 18 February to 21 March 1986. It had further decided that the draft articles adopted by the Commission at its thirty-fourth session[1] should be referred to the Conference as the basic proposal for its consideration and had requested the Secretary-General to arrange for the presence at the Conference of Mr. Paul Reuter, Special Rapporteur for the topic.

8. The Commission had been represented at the annual sessions of the Asian-African Legal Consultative Committee, the European Committee on Legal

---

[1] See *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

Co-operation and the Inter-American Juridical Committee by Mr. Sucharitkul, Sir Ian Sinclair and himself, respectively.

9. He expressed appreciation to all members of the Commission for their co-operation and to the Legal Counsel, the Secretary of the Commission and members of the secretariat for their assistance during his term of office.

Election of officers

Mr. Jagota was elected Chairman by acclamation.

Mr. Jagota took the Chair.

10. The CHAIRMAN expressed gratitude to Mr. Yankov for his able guidance as Chairman of the Commission and for his excellent report to the General Assembly on the work of the thirty-sixth session of the Commission. He was also grateful for Mr. Yankov's warm tribute on behalf of the Commission to the memory of Mrs. Indira Gandhi.

11. He thanked all members for the confidence reposed in him by his election and expressed appreciation for the kind words spoken in support of his nomination.

12. The Commission, the world's premier international law institution, represented all the major legal systems and regional groups. Its membership reflected unique expertise and experience in international law and diplomacy and its contribution to the codification and progressive development of international law had accordingly been substantial. The Commission had served the international community well and had been guided by that community's responses to its contributions.

13. In following on from Mr. Reuter, Mr. Francis and Mr. Yankov, it was his hope that a collective endeavour would be made to complete the Commission's work in certain areas by 1986, as required by the General Assembly.

14. In the forthcoming elections to fill casual vacancies, the Commission was faced with repairing the loss of much wisdom and expertise. It also had to appoint two special rapporteurs to succeed Mr. Evensen and Mr. Quentin-Baxter for their respective topics: the law of the non-navigational uses of international watercourses, and international liability for injurious consequences arising out of acts not prohibited by international law.

15. Consultations between members would be desirable to elect the other officers of the Commission and he suggested that the meeting should be adjourned to allow them to take place.

It was so agreed.

The meeting rose at 4.05 p.m.

1876th MEETING

Tuesday, 7 May 1985, at 10.20 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Election of officers (*concluded*)

Mr. El Rasheed Mohamed Ahmed was elected First Vice-Chairman by acclamation.

Sir Ian Sinclair was elected Second Vice-Chairman by acclamation.

Mr. Calero Rodrigues was elected Chairman of the Drafting Committee by acclamation.

Mr. Flitan was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/385)

1. The CHAIRMAN invited the Commission to adopt the provisional agenda (A/CN.4/385), on the understanding that it would have to take a decision later on the recommendations of the Enlarged Bureau concerning the order in which the various substantive items should be considered.

The provisional agenda (A/CN.4/385) was adopted.

Organization of work of the session

[Agenda item 1]

2. The CHAIRMAN suggested that the Enlarged Bureau, consisting of the officers of the Commission, its past chairmen and the special rapporteurs, should be invited to examine a number of questions: (1) the order in which the various topics should be taken up, especially during the first four weeks of the session; (2) the question of the filling of casual vacancies in the Commission (agenda item 2); (3) the appointment of two new special rapporteurs for agenda items 7 and 8, to replace Mr. Evensen, elected a Judge of the ICJ, and the late Mr. Quentin-Baxter; (4) the appointment of a Planning Group, to be chaired by the First Vice-Chairman. The Enlarged Bureau would report to the Commission on those matters so that it could take decisions thereon.

3. Mr. BOUTROS GHALI proposed that casual vacancies should be filled as quickly as possible so that the Commission could resume its consideration of the items on its agenda.

4. Mr. KOROMA suggested that the filling of casual vacancies should begin the following day.

5. Mr. CASTAÑEDA said that nearly all members of the Commission had been present for the opening of the current session, an unusual occurrence of which advantage should be taken to fill casual vacancies without delay. He himself might be called back to his country at any time. Perhaps the vacancies could be filled now.

6. Mr. LACLETA MUÑOZ said that the filling of casual vacancies should take place either the following day or within the next few days at the latest. When the Commission had adopted its agenda, it had decided to leave aside the question of the order in which the various topics would be taken up; that decision obviously related only to items 3 to 9, namely those concerning substantive issues. Once the discussion of the question of the organization of work, which was the subject of agenda item 1, had been completed, the Commission should, of course, go on to item 2 concerning the filling of casual vacancies.

7. Mr. BOUTROS GHALI said that, if memory served, at the last session at which the Commission had had to fill a vacancy, it had done so as early as its second meeting.

8. The CHAIRMAN said that several vacancies had to be filled at the current session and that account had to be taken of the new procedure adopted by the General Assembly in its resolution 36/39 of 18 November 1981, the relevant passage of which had been reproduced in the note by the Secretariat (A/CN.4/386 and Add.1). The Enlarged Bureau would study the question as a matter of priority in order to make specific recommendations to the Commission the following morning.

9. Mr. REUTER said that the filling of casual vacancies had higher priority than the appointment of new special rapporteurs or the order in which the agenda items would be discussed. The Enlarged Bureau should therefore meet as soon as possible.

10. The CHAIRMAN said that the views of all members would be taken into account by the Enlarged Bureau and that the question of the filling of casual vacancies would be considered with all necessary dispatch.

The meeting rose at 11.40 a.m.

1877th MEETING

Wednesday, 8 May 1985, at 10.10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Organization of work of the session (*continued*)

[Agenda item 1]

1. The CHAIRMAN informed members that the Enlarged Bureau had met the previous day, 7 May 1985, and had decided to make the following recommendations for consideration by the Commission.

(*a*) With regard to agenda item 2 (Filling of casual vacancies in the Commission), the Commission should proceed that day, 8 May 1985, to fill the four casual vacancies that had arisen in the Commission, in accordance with article 11 of its statute. A note prepared by the Secretariat in that connection (A/CN.4/386 and Add. 1) had been circulated, as well as a note setting forth the communications received concerning candidatures (ILC(XXXVII)/Misc.1). The elections would be held by secret ballot at a private meeting and the results would be announced later at a public meeting of the Commission.

(*b*) With regard to the substantive work of the Commission, the Enlarged Bureau recommended that the Commission should take up first the question of the draft Code of Offences against the Peace and Security of Mankind (agenda item 6). Accordingly, if the elections were completed that day (8 May 1985), the Commission would take up item 6 the following day, 9 May 1985. The decision to make that recommendation had been reached in consultation with the special rapporteurs.

(*c*) The Enlarged Bureau should meet again either on Thursday, 9 May 1985, or on Friday, 10 May 1985, to make further recommendations regarding the organization of work during the first four weeks of the session and other related matters.

2. If there were no objections, he would take it that the Commission approved the recommendations of the Enlarged Bureau.

It was so agreed.

3. The CHAIRMAN then invited the Commission to adjourn so that elections could be held in a private meeting to fill the casual vacancies that had arisen in the Commission.

The meeting rose at 10.15 a.m.

1878th MEETING

Wednesday, 8 May 1985, at 12.35 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues,

Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Filling of casual vacancies in the Commission (article 11 of the statute) (A/CN.4/386 and Add.1, ILC(XXXVII)/Misc.1)

[Agenda item 2]

1. The CHAIRMAN announced that, at a private meeting held that morning, the Commission had elected, in conformity with its statute and taking into account General Assembly resolution 36/39, Mr. Gaetano Arangio-Ruiz, Mr. Jiahua Huang, Mr. Emmanuel J. Roukounas and Mr. Christian Tomuschat to fill the casual vacancies caused by the election of Mr. Zhengyu Ni and Mr. Jens Evensen to the International Court of Justice and by the deaths of Mr. Robert Q. Quentin-Baxter and Mr. Constantin A. Stavropoulos.

2. He intended to send telegrams to the four new members of the Commission, congratulating them on their election and inviting them to participate as soon as possible in the present session.

The meeting rose at 12.45 p.m.

1879th MEETING

Thursday, 9 May 1985, at 10.10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Castañeda, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Welcome to Mr. Tomuschat

1. The CHAIRMAN congratulated Mr. Tomuschat on his election and, on behalf of the Commission, extended a warm welcome to him.

Draft Code of Offences against the Peace and Security of Mankind[1] (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

2. The CHAIRMAN recalled that the General Assembly, in paragraph 1 of its resolution 39/80 of 13 December 1984, had requested the Commission

> ... to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind by elaborating an introduction as well as a list of the offences, taking into account the progress made at its thirty-sixth session, as well as the views expressed during the thirty-ninth session of the General Assembly.

3. In the same resolution, the General Assembly had also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the conclusions contained in paragraph 65 of the report of the Commission on the work of its thirty-sixth session.[5] The replies of Governments would be communicated to members of the Commission when received. One reply had already been circulated (A/CN.4/392).

4. He invited the Special Rapporteur to introduce his third report (A/CN.4/387), together with the draft articles contained therein, which read:

PART I

SCOPE OF THE PRESENT ARTICLES

Article 1

The present articles apply to offences against the peace and security of mankind.

PART II

PERSONS COVERED BY THE PRESENT ARTICLES

Article 2

First alternative

Individuals who commit an offence against the peace and security of mankind are liable to punishment.

Second alternative

State authorities which commit an offence against the peace and security of mankind are liable to punishment.

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17).

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] *Yearbook ... 1984*, vol. II (Part Two), p. 17.

PART III

DEFINITION OF AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 3

First alternative

Any internationally wrongful act which results from any of the following is an offence against the peace and security of mankind:

(*a*) a serious breach of an international obligation of essential importance for safeguarding international peace and security;

(*b*) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples;

(*c*) a serious breach of an international obligation of essential importance for safeguarding the human being;

(*d*) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment.

Second alternative

Any internationally wrongful act recognized as such by the international community as a whole is an offence against the peace and security of mankind.

PART IV

GENERAL PRINCIPLES (PENDING)

PART V

ACTS CONSTITUTING AN OFFENCE AGAINST THE PEACE AND SECURITY OF MANKIND

Article 4

The following acts constitute offences against the peace and security of mankind.

A (*first alternative*). The commission [by the authorities of a State] of an act of aggression.

(*a*) Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

Explanatory note. In this definition, the term "State"

(i) is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;

(ii) includes the concept of a "group of States", where appropriate.

(*b*) *Evidence of aggression and competence of the Security Council*

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression, although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

(*c*) *Acts constituting aggression*

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of subparagraph (*b*), qualify as an act of aggression:

(i) the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

(ii) bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(iii) the blockade of the ports or coasts of a State by the armed forces of another State;

(iv) an attack by the armed forces of a State on the land, sea or air forces or marine and air fleets of another State;

(v) the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(vi) the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(vii) the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein;

(viii) the acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

(*d*) *Consequences of aggression*

(i) No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression;

(ii) A war of aggression is a crime against international peace and security. Aggression gives rise to international responsibility;

(iii) No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

(*e*) *Scope of this definition*

(i) Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful;

(ii) Nothing in this definition, and in particular subparagraph (*c*), could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

(*f*) *Interpretation of the present articles*

In their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provisions.

A (*second alternative*). The commission [by the authorities of a State] of an act of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974.

B. Recourse [by the authorities of a State] to the threat of aggression against another State.

C. Interference [by the authorities of a State] in the internal or external affairs of another State.

The following, *inter alia*, constitute interference in the internal or external affairs of a State:

(*a*) fomenting or tolerating the fomenting, in the territory of a State, of civil strife or any other form of internal disturbance or unrest in another State;

(*b*) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

D. The undertaking or encouragement [by the authorities of a State] of terrorist acts in another State, or the toleration by such authorities of activities organized for the purpose of carrying out terrorist acts in another State.

(*a*) The term "terrorist acts" means criminal acts directed against another State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public.

(*b*) The following constitute terrorist acts:

(i) any wilful act causing death or grievous bodily harm to a head of State, persons exercising the prerogatives of the head of State, the successors to a head of State, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

(ii) acts calculated to destroy or damage public property or property devoted to a public purpose;

(iii) any wilful act calculated to endanger the lives of members of the public, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity;

(iv) the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

E. A breach [by the authorities of a State] of obligations under a treaty which is designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on strategic structures, or of other restrictions of the same character.

F. The forcible establishment or maintenance of *colonial domination* [by the authorities of a State].

5. Mr. THIAM (Special Rapporteur) said that he was aware of the difficulties of the topic, which lay at the meeting-point of law and politics and therefore touched everyone's sensibilities and deepest convictions. Thus he could only approach with humility the delicate problem of synthesis raised by the drafting of a code. It seemed useful to recall that, after long discussions in the Sixth Committee of the General Assembly and in the Commission, it had been agreed to confine the topic to the criminal responsibility of individuals, leaving aside the criminal responsibility of States, and not to include all international crimes in the draft code, but only offences against the peace and security of mankind. Furthermore, the Commission had decided to take as the basis of its work, subject to the necessary amendments and additions, the draft code that it had elaborated in 1954.

6. The plan he proposed for the future code would be divided into two parts. The first part would deal with the scope of the draft articles, the definition of an offence against the peace and security of mankind, and the general principles governing the subject; the second part would be devoted to acts constituting offences against the peace and security of mankind. Once the Commission had reached a decision on the problem of punishments, it would be advisable either to devote a third part to the implementation of the code, or simply to state a few principles in the code.

7. The general principles to be stated at the end of the first part could not be set out until the offences against the peace and security of mankind had been defined and their nature specified. A number of principles of universal scope could nevertheless be formulated at once, such as those the Commission had derived from the Charter and Judgment of the Nürnberg Tribunal (see A/CN.4/387, footnote 3).[6] Principles I to V and principle VII could be reaffirmed, after due critical screening. Principle VI went beyond the mere statement of a general rule and contained a list of acts qualified as crimes against the peace and security of mankind. A number of other principles, which had been formulated subsequently, could also be set out, such as that of the non-applicability of statutory limitations to offences against the peace and security of mankind, that of universal competence for the prevention and punishment of such offences, and its corollary, the obligation of every State to judge or to extradite.

8. However, there were still other principles governing the subject, including principles more limited in application, whether by reason of the nature of the offences, the status of the offenders or the circumstances. Thus it might be asked whether absolutory excuses, self-defence, or extenuating circumstances could be invoked in respect of certain offences against the peace and security of mankind, especially in cases of annexation, aggression or colonialism. Because the Commission would have to pronounce on all those questions, it would be advisable to leave the formulation of many of the general principles governing the subject until later. Attention must also be drawn to the principles deriving from the abundant jurisprudence of the Nürnberg Tribunal and the courts set up by the Control Council for Germany.

9. Consequently, the report under consideration dealt mainly with the scope of the draft code and with certain offences against the peace and security of mankind, in particular those listed in article 2, paragraphs (1) to (9), of the 1954 draft code. To stimulate discussion, he intended to revert to the question of the scope of the draft *ratione personae*. He noted that the authors of the 1954 draft, in referring to individuals, had used the terms "authorities of a State" and "private individuals" alternately. For all the offences mentioned in article 2, paragraphs (1) to (9), they had used only the expression "authorities of a State", but beginning with paragraph (10) they had added the term "private individuals". A distinction appeared to be really necessary. It seemed inconceivable that private individuals could be the main perpetrators of offences against the independence or territorial integrity of States, such as aggression, the threat of aggression, the preparation of aggression and all the other offences listed in the first nine paragraphs of article 2. Those offences could be committed only by individuals vested with power of command, and they were often analysed as abuse of sovereignty or misuse of power. As to the offences against humanity referred to in paragraphs (10) and (11), it did not seem possible for private individuals to commit all of them. Genocide, which was a systematic attempt to destroy a national, political, ethnic or religious group, could hardly be carried out by private individuals. Only the exercise of State power

[6] See also *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

could procure the means of destruction necessary to commit offences against the peace and security of mankind.

10. It was possible that the concepts of principal author and accomplice were being confused. If a head of State paid an individual to assassinate another head of State, he was committing an offence against the peace and security of mankind. As for the assassin, he might have committed an act of complicity, but he was not the co-perpetrator. He was not the perpetrator of an offence against the peace and security of mankind, but of a separate crime. The motivation was not the same for both acts, and the offences committed did not have the same basis. The head of State was required to respect the rules of international law and he had committed an international crime, whereas the private individual had committed a common-law crime. That being so, it might be questioned whether the draft code should really deal with private individuals. The main purpose of the draft was to impede the improper exercise of State power and to prevent the offences against mankind which could be committed by individuals who were authorities of a State (individuals-organs). He had therefore judged it useful to propose two alternatives for draft article 2 (Persons covered by the present articles). They laid down the principle of the responsibility of individuals and that of the responsibility of State authorities respectively.

11. No definition of an offence against the peace and security of mankind had yet been given. The Charter of the Nürnberg International Military Tribunal[7] contained a list of crimes which were considered to be of that nature, but no criteria for establishing a link between them. In 1954, when the Commission had prepared its draft code, it had kept to the method of the Charter of the Nürnberg Tribunal. Without defining them, it had divided the offences into three categories, namely crimes against peace, war crimes and crimes against mankind, and it had simply added, in article 1, that those were crimes under international law. However, it was not possible to distinguish offences against the peace and security of mankind from other crimes under international law. When the Commission had taken up the subject again, at its thirty-fifth session, it had decided that a general criterion must be found to characterize the offences in question, and it had adopted the criterion of extreme seriousness.[8] Some members, however, had rightly considered that that criterion was too subjective and too vague, and that another should be found. But it had to be recognized that criminal law was entirely pervaded by subjectivity: the seriousness of an offence was judged according to the degree of reprobation it provoked in society. As for the second criticism, a criterion was ultimately only a sign intended to eliminate the particular features of a concept and thus to bring out its essence.

12. It was precisely because the notion of a crime was extremely difficult to define that very few codes contained a definition of it. The French penal code defined a criminal offence only in terms of the seriousness of the penalty to which the offender was liable. When offences were divided into two or three categories, as was the case in most countries of Latin tradition, it was even difficult to define those in one category in relation to those in another, which explained the existence of police misdemeanours and offences tried by a court of summary jurisdiction. Despite the difficulties of the undertaking, it was important at the current stage to try to delimit the notion of offences against the peace and security of mankind more closely and to attempt to define it.

13. In part 1 of its draft articles on State responsibility, the Commission had included article 19, entitled "International crimes and international delicts",[9] which gave the curious impression of a child not wanted by everyone. That article had been criticized for laying down the principle of the criminal responsibility of the State, which some refused to accept. But if the Commission decided to confine itself to the criminal responsibility of individuals, that criticism would no longer apply. The approach of article 19 was acceptable in principle, in so far as that provision attempted to give responsibility an objective basis, namely the breach of an international obligation. In that connection, it would be necessary to establish which were the international obligations whose breach constituted an offence against the peace and security of mankind. When the Commission had drafted article 19, it had indicated that it was because of their extreme seriousness that certain internationally wrongful acts constituted international crimes. Among international crimes, those against the peace and security of mankind were characterized by the fact that they were especially serious for the international community. The particularly serious breaches given as examples in article 19, paragraph 3, were precisely those that constituted veritable crimes against the peace and security of mankind. They concerned the maintenance of international peace and security, the right of self-determination of peoples, the safeguarding of the human being and the safeguarding and preservation of the human environment. As indicated in the commentary to article 19:

> ... The rules of international law which are now of greater importance than others for safeguarding the fundamental interests of the international community are to a large extent those which give rise to the obligations comprised within the four main categories mentioned.[10]

14. It was in that spirit that he had drafted the first alternative of draft article 3 (Definition of an offence against the peace and security of mankind). The definition he had given was more precise than that which consisted simply of saying that offences against the peace and security of mankind were international crimes. But it was impossible to make the definition more precise without departing from article 19 of part 1 of the draft on State responsibility. Since the debates at previous sessions had shown that

[7] Charter annexed to the London Agreement of 8 August 1945 for the prosecution and punishment of the major war criminals of the European Axis (United Nations, *Treaty Series*, vol. 82, p. 279).

[8] *Yearbook ... 1983*, vol. II (Part Two), pp. 13-14, paras. 47-48.

[9] *Yearbook ... 1976*, vol. II (Part Two), pp. 95 *et seq.*

[10] *Ibid.*, p. 121, para. 67 of the commentary.

a shorter definition could nevetheless be formulated, he had proposed a second alternative according to which any internationally wrongful act recognized as such by the international community as a whole was an offence against the peace and security of mankind.

15. With regard to the unity of the concept of offences against the peace and security of mankind, he referred the Commission to the discussion of the matter in his third report (A/CN.4/387, paras. 26-39). The vast majority of writers considered that the concept of "offences against the peace and security of mankind" was indivisible, and he believed that that unity should be maintained if only because certain offences against peace were offences against security, and vice versa.

16. In chapter II of his report, dealing with acts constituting an offence against the peace and security of mankind, he had confined himself to offences against international peace and security, in other words to those listed in article 2, paragraphs (1) to (9), of the 1954 draft code. A distinction should be made between offences against international peace and security and offences against the peace and security of mankind. The former could be committed only by States. When a State, by its conduct, violated an international obligation to another State, the victim of that offence could only be a State. On the other hand, the perpetrators of offences against the peace and security of mankind might not be States. They might sometimes even be private individuals acting against State instructions, whose acts, in principle, did not engage State responsibility. Similarly, the victims might not be States, but ethnic groups or civilian populations, especially in the case of genocide or violations of humanitarian law. Offences against international peace and security generally threatened the independence and territorial integrity of a State.

17. The first of those offences was aggression. After long debates, a Definition of Aggression had been adopted by the General Assembly in 1974, based on both a general criterion and an enumeration.[11] Draft article 4, on acts constituting an offence against the peace and security of mankind, could either reproduce the full text of the 1974 definition or simply refer to that definition; the two alternatives he had proposed represented those two options.

18. It was open to question whether the threat of aggression should be retained in the code. In his third report (*ibid.*, para. 89), he had pointed out that the term "threat" could be understood to mean either a risk or sign of danger, or a manifest intention to do wrong or cause harm to another. In all the provisions of the Charter of the United Nations in which the threat resulted from "disputes" or "situations", that term was used as in the first meaning. In his opinion, a threat of aggression was tantamount to aggression and should be prevented and punished as such.

19. With regard to the preparation of aggression, some members of the Commission had asked when such preparation began and ended, and what distinguished it from "preparatory measures". Legal opinion was extremely divided: some writers assimilated preparation of aggression to aggression; others declined to do so if the aggression had not been consummated. In his opinion, the preparation of aggression should not, in principle, be included in the code. True, some national penal codes condemned the preperation of aggression, as did the Charter of the Nürnberg Tribunal. For practical reasons, however, it was doubtful whether "preparation" could really be prevented and punished. The Charter of the United Nations, especially Chapter VII, provided for a whole system of collective security, by which preventive measures could be taken against the preparation of aggression. But it was doubtful whether the preparation of aggression should be included in a code designed to prevent and punish completed acts. There were two possibilities. If the preparation of aggression did not end in aggression, how should it be prevented and punished? And if it ended in aggression, was it not part of the act of aggression?

20. Interference in the internal or external affairs of States raised, first, the problem of the meaning to be given to the notion of interference. It was well known that, at least in certain fields, such as that of human rights, the internal affairs of States were no longer as firmly based on the absolute sovereignty of the State as they had been in the past; to an increasing extent, States were having limits imposed upon them by international declarations or by *jus cogens*. Mention must also be made of the growing number of international treaties and agreements, and of regional organizations. Although interference was still considered to be taboo, a trend towards the delegation of competence was nevertheless discernible.

21. It might be wondered why civil war had been treated as a separate phenomenon in the 1954 draft code. Was the provocation by a State of civil war in another State really different from interference? It was perhaps because the 1950s had seen the birth of the first national liberation movements that some Powers had seen fit to maintain that civil war was an internal affair, which enabled them to justify the attitude they had adopted towards certain national liberation movements. Furthermore, the 1954 draft code did not mention, and distinguish from civil war, the disturbances or riots which one State could provoke within another. If that position were maintained, it would mean that a State which provoked disturbances, riots or even an insurrection in another State was not committing an offence against the peace and security of mankind. He had therefore thought it fit to depart from the 1954 draft code in that respect.

22. In the 1954 draft code, terrorism was considered to be an offence against the peace and security of mankind. That offence took several forms, depending on whether it was terrorism under ordinary law, political terrorism, internal terrorism or terrorism provoked by a State within another State. Only the last form of terrorism should be considered by the Commission. Terrorism was currently used for so many purposes and applied by so many different means

[11] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

that it might be wondered whether, for the purposes of the draft code, it should not be considered to be covered by certain acts already explicitly envisaged by the Commission, such as the hijacking of aircraft, the taking of hostages and acts of violence against persons enjoying special protection. Since he had been anxious to keep to the existing conventions, he had taken the Convention for the Prevention and Punishment of Terrorism (Geneva, 16 November 1937)[12] as a guide for the drafting of article 4.

23. With regard to mercenarism, the Commission had considered that it would be appropriate to take into account the work of the *Ad Hoc* Committee on that question.[13] It should be noted in that connection that the 1974 Definition of Aggression referred explicitly to mercenaries in the same paragraph as to armed bands. Hence he had not thought it necessary to draft a special provision on mercenaries or on armed bands.

24. Nor had he submitted a special provision on economic aggression, which could take place in two ways. If a State intervened militarily against another State in the name of defence of vital interests, the case was already covered by the Definition of Aggression. If coercion or pressure was brought to bear by one State against another to compel it to take or not to take a certain decision, that was a case of interference.

25. There remained the question of breach of agreements and treaties designed to ensure international peace and security. In article 4, section E, which was the provision corresponding to article 2, paragraph (7), of the 1954 draft code, he had simply replaced the term "fortifications", which was considered to be outdated, by the words "strategic structures".

26. Finally, he indicated that, on reflection, he was not proposing that the reference to forcible maintenance of colonial domination should be replaced by a reference to the right to self-determination, since that concept was too ambiguous.

27. Mr. REUTER said he was speaking at the current stage in the debate not because he had any fixed opinions on the many questions raised, but simply because he would soon have to leave. He would not discuss all the questions, or event most of them, but would deal mainly with questions of method.

28. He unreservedly endorsed the lines of thought apparent in the plan of work proposed by the Special Rapporteur and wished to dwell on some of the choices made. There was one that seemed to him to be extremely important, and he fully supported it: the Commission should be in no hurry to affirm general principles, in other words general rules applicable to all the offences or even to certain groups of offences. The Special Rapporteur had been perfectly clear on that point.

29. There was another point on which the Special Rapporteur had merely stated his preference, which he himself shared and would discuss, attempting to show how far they committed the Commission and what consequences they entailed. On the basis of the debates in the Commission and the Sixth Committee of the General Assembly, the Special Rapporteur had intimated that the Commission should concentrate its attention on offences committed by individuals. A very important question immediately came to mind, which the Special Rapporteur had mentioned in passing. The Commission was studying offences against international peace and security and against the peace and security of mankind in several contexts. In the context of part 1 of the draft articles on State responsibility, it had provisionally adopted on first reading article 19, entitled "International crimes and international delicts", and it had entrusted Mr. Riphagen with the delicate task of resolving the awkward problem of State offences. In the context of the draft Code of Offences against the Peace and Security of Mankind, it had before it a report dealing with offences by individuals. Hence it would not be considering State offences as such in that context. But a number of problems would still arise.

30. The Special Rapporteur rightly believed that the Commission should substantially follow the old military strategy of attacking where one was strong and not where one was weak. In other words, the Commission should first attack what was relatively easiest in the most difficult topic it had ever had to study, and not exclude, but take up later, what was most difficult. The easiest case was that of individuals committing offences in their capacity as agents of the State, the term "agent" being taken in the broadest sense of "any person through whom the State acts" —by analogy with the definition of the expression "agent of the United Nations" given by the ICJ in its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*,[14] namely "any person through whom [the Organization] acts". The Commission should deal with offences committed by individuals, but individuals who had been able to act because they were agents of the State. It was bound to adhere to that definition because it had already taken a position in part 1 of the draft articles on State responsibility. But in doing so, it would come up against a problem of obvious importance: it would have to examine the responsibility of the State for those offences, and do so in the context of the draft articles on State responsibility. Like the Special Rapporteur, he thought the Commission should begin by examining the individual, strictly criminal, responsibility of natural persons who had acted in the name of the State or on its behalf, because that was the most serious case, and perhaps also the most urgent and the easiest.

31. Nevertheless, at a later stage in its work on the draft code, the Commission might explore the possibility of broadening the concept of international crime to include activities carried out collectively by individuals. On that matter, he did not entirely agree with the Special Rapporteur, who had rather optimistically suggested that only through State machinery could large-scale crimes be committed.

[12] League of Nations, document C.546(1) M.383(1).1937.V.

[13] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*c*) (iv).

[14] *I.C.J. Reports 1949*, p. 174.

Unfortunately that was not the case. Indeed, some countries were now completely destabilized constitutionally, ruined, jeopardized by international gangs of drug traffickers—criminal interests, private certainly, but powerful. It was a fact that one great Power—the United States of America—was unable to guard its air frontiers in such a way as to stop the entry of substantial quantities of narcotic drugs into its territory. The United States was a political Power and its stability was not threatened, but what of the poor, underdeveloped States all over the world that could be destabilized in that way?

32. In taking such a firm position on working methods, he was not ruling out the possibility that the Commission might examine international offences by individuals within the framework of the draft code. He hoped, however, that it would do so at a later stage because, as the Special Rapporteur had pointed out, in dealing with that matter the Commission would be faced with confused and complex situations. The position was certainly clear with respect to narcotics, but less so in regard to mercenaries. There were mercenaries who were agents of a foreign State, and it was to them that the Commission should give attention first, whatever definition of "mercenarism" it adopted; and there were other forms of mercenarism. He was not trying to reduce the problem of mercenarism to the problem of international responsibility between States, but simply hoped that the Commission would begin by dealing with the problem of responsibility deriving from the acts of an individual who performed State functions.

33. In following that desirable course, the Commission would have to resolve many problems. First of all, there was the purely material, minor problem of the order of work. If the Commission began by examining the most important and serious cases concerning the individual responsibility of State agents, it would have to take a decision on the problem of the relationship between the definition of an international offence between States and the definition of an international offence by agents representing the State. It would therefore be quite natural to carry out the work on State responsibility and the work on the draft code concurrently, and it would even be natural to begin with State crimes. The practical difficulties were certainly great, but he wished to draw the attention of the Commission to one point. The Special Rapporteur had indeed stressed that it was impossible to separate the criminal responsibility of a leading politician who had ordered and prepared an act of aggression from the criminal responsibility of the State; in other words, it was impossible completely to separate the definition of aggression by a State from the definition of aggression by an individual. In that connection, he fully agreed with the Special Rapporteur that, in regard to individual responsibility, the Commission must rely on already existing material. There already existed a definition of aggression, which was an integral part of the definition of the individual crime of aggression. But was that conclusion absolute? Should not the Commission nevertheless adjust the definition of the individual crime in the light of the definition of the State crime?

34. On that point, he shared the doubts of the Special Rapporteur concerning the preparation of aggression. Personally, although he was prepared to modify it, he would for the moment be inclined to take the following position: the crime of aggression as a crime between States presupposed either a threat of aggression from outside or a beginning of consummation. He believed it would be difficult and unsatisfactory to include the preparation of aggression in the draft code, not only because of questions of evidence, but also because a crime between States had such international consequences and would require from the Commission a definition, an initiative on sanctions of such a nature that he agreed the preparation of aggression should be excluded from those offences, as the Special Rapporteur had proposed. But his position was not the same in regard to individual crimes, provided, of course, that the preparation of aggression was completely manifest and proven. Supposing that, in the historic case of the "Green Plan", a deliberately prepared act of aggression,[15] the 1944 plot of the German generals had succeeded before Munich: there would have been no international aggression, but the authors of the plot would have been the first to demand that those who had so meticulously prepared the aggression should be prosecuted, even though the aggression had not taken place.

35. The Commission should therefore consider, offence by offence, crime by crime, whether there was an international definition, accepted by the United Nations, of a crime between States. That was why he thought the Commission should begin with the crime of aggression, of which there was a definition. In the absence of a definition, the Commission should, in the context of the consideration either of State responsibility or of the draft code, first see what was the most reasonable definition it could give of an international crime between States according to the elements in its possession, and then proceed to examination and adaptation. As the Special Rapporteur had pointed out, the question of individual criminal responsibility involved criminological techniques relating to individuals, the circumstances of intent and knowledge, the conduct of the concerted action, complicity and machinations. The Commission would have to consider whether the individual responsibility of persons acting on behalf of a State needed to be adapted. He realized, of course, that solutions might differ according to the offence. He was glad, therefore, that in the plan he had proposed the Special Rapporteur had wisely reserved the general principles and enumerated a whole series of offences, beginning with the most serious, the best defined, the clearest, and those for the Commission already had very important elements available.

36. The foregoing remarks related both to the plan as a whole, on which his position was extremely firm, and to the scope of the draft. There, he was less decided in regard to principle, but very decided on method. He believed that the Commission should

[15] Plan for the invasion of Czechoslovakia secretly decided on in May 1938 but not carried out owing to the dismembering of that State in the months following the Munich Conference (29-30 September 1939).

begin with the specific case of the responsibility of individuals who had led a State to commit an international crime.

37. Referring again to article 19 of part 1 of the draft articles on State responsibility—an article which had been criticized, but which was the best the Commission had been able to produce—and stressing that, for the time being, that article was nothing less than a programme, a complete general directive, in which the Commission had listed three groups of international crimes and delicts, although without stating the régime applicable to an international crime, he raised the question what régimes would govern international crimes between States, and international crimes by individuals. The Commission did not yet know. It would know if it had defined the general principles and if it had taken a position on at least the minimum consequences. He stressed that point because the Special Rapporteur had cautiously made a brief reference, both in his report (A/CN.4/387, para. 63) and in his presentation of it, to what the minimum régime might be. What would be the régime governing individual international crimes? The maximum system would be an international court, which presupposed the obligation to punish or extradite which in turn simply presupposed the recognition of a universal jurisdiction, in other words the faculty, but not the obligation, to punish.

38. He had thought, listening to the Special Rapporteur presenting his report, that if the Commission had not taken a position it was because it could not do so. Indeed, for certain offences, certain crimes, the situation was not simple. It would be fairly easy to begin with the crime of aggression, but in the case of other offences, such as violation of the right of peoples to self-determination, the situation was much more complex, because some Governments would believe that peoples had a good right to self-determination—the historic decolonization, nearly completed—but other Governments would hold that there was another right of peoples to self-determination, designed, conceived and directed with a view to the complete destabilization of States which had not yet been able to demonstrate the advantages of their structures and to achieve national unity. He certainly did not reject the idea of making violation of the right of peoples to self-determination an international crime between States. He also accepted the idea that there could be an individual international crime by State agents in some cases. But there the Commission would come up against a formidable obstacle if it still wished to impose the obligation to judge or to extradite. Indeed, some very old countries which had suffered from excessive centralization, and were now faced with violent manifestations of unsatisfied regionalism, would not easily agree to bind themselves too absolutely and rigorously by obligations as strict as the obligation to punish or extradite under conditions which no longer really respected human rights.

39. In that connection, he recalled that the Commission had decided, in the context of the draft code under consideration, that an individual violation of a human right was not an offence against international peace and security;[16] and when considering article 19 of part 1 of the draft articles on State responsibility, it had clearly stated that the only violations covered were collective human rights violations involving action against an entire social group. Those were valuable pointers. Nevertheless, it should not be forgotten that there was individual protection of human rights, and that there could be conflict between such individual protection and the mechanisms the Commission would set up to punish a number of international crimes, individual certainly, but directed against peace, against security or against a community.

40. In conclusion, he stressed that the Commission could only begin by thoroughly examining the offences and international crimes, case by case, always bearing in mind the grid of general principles, to see how they were defined and when they applied in each particular case. As it advanced from the easiest and ripest cases to the most difficult, the Commission would gain understanding. The work would be long and arduous, but it was indispensable.

41. Mr. BOUTROS GHALI noted that, in chapter II of his excellent report (A/CN.4/387), dealing with "Acts constituting an offence against the peace and security of mankind", the Special Rapporteur had referred to aggression, the threat of aggression, preparation of aggression, interference in the internal or external affairs of a State, terrorism and colonial domination. He himself believed that a new concept, developed by OAU, could be included in that list, namely the concept of subversion, which was related to indirect aggression, terrorism and mercenarism, and which had been the subject of valuable work on doctrine, to which it would be useful to refer.

42. He pointed out, first, that the Charter of OAU,[17] in article III, paragraph 5, stated the principle of "unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring States or any other State". He then recalled that the heads of State and Government of OAU had adopted, at their second ordinary session, held at Accra in October 1965, resolution 27,[18] in which they had listed five possible forms of subversion: African subversive activity carried out from one African State against another; non-African subversive activity planned by non-African Powers and carried out from one African State against another; non-African subversive activity planned by non-African Powers and carried out directly against an African State; non-African subversive activity directed against the whole African continent; non-African subversive activity directed against OAU. They had also listed methods of subversion: launching or financing a press or radio campaign against any member State of OAU; causing dissension within a member State of OAU by fomenting racial, religious, linguistic or other types of disturbance; aggravating existing differences. That

[16] *Yearbook ... 1984*, vol. II (Part Two), p. 12, para. 37.

[17] United Nations, *Treaty Series*, vol. 479, p. 39.

[18] Declaration on the Problem of Subversion (AHG/Res. 27 (II)).

resolution had been discussed at length and had later been mentioned at various conferences of heads of State and Government of OAU.

43. He believed that subversion, together with State terrorism, would become a new form of aggression or threat of aggression, with which the Commission should attempt to deal. In so far as small States and developing States did not have the means to wage conventional wars or to resort to aggression as defined in the Definition of Aggression, they would resort to precisely those indirect forms of aggression, which could lead to destabilization and external interference, and were a definite threat to peace and security.

44. The Special Rapporteur could therefore try to take up that notion of subversion, which would probably enable the Commission better to define such concepts as terrorism, mercenarism and the other forms of indirect aggression, which were becoming more and more dangerous and threatening international peace, security and stability.

The meeting rose at 12.50 p.m.

1880th MEETING

Monday, 13 May 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov.

Welcome to Mr. Arangio-Ruiz and Mr. Roukounas

1. The CHAIRMAN congratulated Mr. Arangio-Ruiz and Mr. Roukounas on their election and, on behalf of the Commission, extended a warm welcome to them.

Organization of work of the session (*concluded*)*

[Agenda item 1]

2. The CHAIRMAN said that the Enlarged Bureau had held a meeting on Friday, 10 May 1985, at which it had decided to recommend that the Commission should adopt the following timetable:

Draft Code of Offences against the Peace and Security of Mankind (item 6)	9-24 May
State responsibility (item 3)	28 May-7 June
Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (item 5)	10-21 June
Jurisdictional immunities of States and their property (item 4)	24 June-5 July
Relations between States and international organizations (second part of the topic) (item 9)	8-10 July
International liability for injurious consequences arising out of acts not prohibited by international law (item 8) *and* The law of the non-navigational uses of international watercourses (item 7)	17-19 July
Draft report of the Commission and related matters	22-26 July

Consideration of a given topic would normally start on a Monday and finish on a Friday. If necessary, however, adjustments would be made and four reserve days, 11, 12, 15 and 16 July, had been set aside for that purpose. It had been suggested that only three days should be devoted to the consideration of agenda items 7 and 8, since two new special rapporteurs had to be appointed for those topics. The three days could, however, be extended to five days if need be.

It was so agreed.

Drafting Committee

3. The CHAIRMAN said that the Enlarged Bureau had also recommended that the Drafting Committee should be composed of the following members: Mr. Calero Rodrigues (Chairman), Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Sir Ian Sinclair and Mr. Ushakov, together with Mr. Flitan, *ex officio* member in his capacity as Rapporteur of the Commission. All members of the Commission, however, would be welcome to attend the meetings of the Drafting Committee if they so wished.

It was so agreed.

4. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that the Drafting Committee should hold its first meeting on Tuesday, 14 May 1985, and then meet every Tuesday and Thursday afternoon during the remainder of the session. He further suggested that the Drafting Committee should first deal with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

It was so agreed.

Gilberto Amado Memorial Lecture

5. The CHAIRMAN said that the Enlarged Bureau had further recommended that the informal consultative committee on the Gilberto Amado memorial lectures should be composed of the fol-

---

* Resumed from the 1877th meeting.

lowing members: Mr. Calero Rodrigues, Mr. Mahiou, Mr. Razafindralambo, Mr. Reuter and Mr. Ushakov.

It was so agreed.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 to 4[5] (*continued*)

6. Mr. JACOVIDES, congratulating the Special Rapporteur on his excellent third report (A/CN.4/387) and brilliant introduction, said that consideration of a code of offences against the peace and security of mankind was particularly appropriate at a time when international law was honoured more in the breach than in the observance, when the usefulness, and even the relevance, of the United Nations was increasingly being questioned, and when the Commission had been the target of unjustified criticism for not remaining sufficiently within the mainstream of international law. It was essential to approach the subject with all the seriousness and sense of urgency it deserved, since substantial progress in the area would do much to allay concern by contributing to strengthening international peace and security and thus to satisfying the expectations of the General Assembly and the international community.

7. Although the problems involved were formidable, the Commission undoubtedly had the resourcefulness and will to overcome them: a good start had already been made with the third report. It was important to tread carefully, avoiding pitfalls, while keeping clearly in view the ultimate objective, namely the timely elaboration of a code and appropriate machinery for its effective implementation, as a deterrent to aggressors and any others who offended against the peace and security of mankind. He therefore agreed that it would be advisable to concentrate first upon the areas that presented the least difficulties, and was gratified to note that that was precisely the approach the Special Rapporteur had adopted.

8. He was prepared for the time being to accept the arguments of the members of the Commission who were opposed to providing in the draft code for the criminal responsibility of States and who took the view that the responsibility of States for acts classified as international crimes should instead be dealt with in the context of the draft articles on State responsibility. As a general proposition, however, and bearing in mind the element of progressive development inherent in article 19 of part 1 of the draft articles on State responsibility,[6] he still maintained that the criminal responsibility of the State must also be recognized, otherwise serious offences, such as aggression and *apartheid*, which where committed by States, would go unpunished. Furthermore, to limit the scope of the code to the criminal responsibility of individuals would diminish its value as an instrument of deterrence and would largely disregard the progressive development of the law on the subject during the preceding 30 years. Nevertheless, he could agree that the issue should remain in abeyance until it was known how much progress could be made in dealing with the responsibility of States for international crimes under the aforementioned article 19. He trusted that, in the interest of the common objective, that spirit of compromise would be reciprocated in other areas of difficulty.

9. Turning to the Special Rapporteur's third report, he noted that real progress had been made and that a number of draft articles were now before the Commission. While he was in agreement with the general thrust of the report, he considered that, although the inclusion of general principles in the code was necessary, far more work on the Nürnberg Principles was required before they could be made to fit the requirements.

10. On the question of the delimitation of scope *ratione personae*, he agreed that primary offences against peace and security, whether such offences were directed against a State or against ethnic or religious groups, were committed by individuals acting in their capacity as authorities of a State. While there might be exceptions to that general rule, there could be no doubt that one of the main purposes of the code was to highlight the responsibility of those who, when in a position of power, misused that power to commit offences against the peace and security of mankind. Hitler, for instance, when embarking on the extermination of 6 million Jews, had asked who would remember the extermination of the Armenians. It was to be hoped that, with the code in place and provisions for its effective implementation, future violators would remember—or, if not, would be reminded.

11. As to the question of definition, there was little doubt that there was a certain unity to the concept of peace and security of mankind which linked the various offences. Each offence had its separate characteristics, but all were marked by extreme seriousness, which placed them in a narrower category than international crimes within the meaning of article 19 of part 1 of the draft on State responsibility. There had, moreover, been significant developments since the Second World War, including the emergence of the individual as a subject of international criminal law, the recognition of *jus cogens* as a source of obligations of a special nature and the appearance of a new category of internationally wrongful acts for which material compensation was not sufficient and

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1879th meeting, footnote 9.

which also gave rise to penal consequences. Accordingly, he would have no difficulty in accepting either of the two alternative definitions proposed by the Special Rapporteur, although he had a slight preference for the more synoptic definition (*ibid.*, para. 65), which combined brevity with flexibility.

12. As to acts constituting an offence against the peace and security of mankind, the crimes listed in chapter II of the third report covered only part of the range, but that was a good beginning and there was of course a wealth of legal materials to be taken into account in connection with draft article 4 of the code.

13. The Special Rapporteur had drawn an interesting distinction between the concepts of "international peace and security" and "peace and security of mankind" and had rightly pointed out that, whereas the former referred to peaceful relations between States, the latter also covered acts against peoples, populations or ethnic groups (*ibid.*, paras. 71-72).

14. Aggression, which rightly headed the list of offences to be included in the draft code, had been the subject of much earlier work of codification and progressive development, culminating in the adoption of the Definition of Aggression.[7] That definition, combining as it did two schools of thought, should properly form the basis of the Commission's work, particularly in view of the history of the matter and the fact that the lack of a definition had been used as a pretext for not proceeding with the 1954 draft code. It was also important to remember that the Definition of Aggression represented a fine balance between conflicting views. Although the definition was not perfect, it would be unwise to attempt to change it in any way. I should therefore form part of the code, either being included in full as in the first alternative of section A of draft article 4 or by a cross-reference, as in the second alternative. The latter version was probably preferable since it included five other crimes apart from aggression. Further crimes, including *apartheid* and genocide, should be added in due course. The important question of international drug trafficking, raised by Mr. Reuter (1879th meeting), deserved careful consideration to see whether it could be reflected in the draft code in generally acceptable legal terms.

15. He was in basic agreement with the Special Rapporteur on the reasons for including the threat of aggression, but not the preparation of aggression, in the code. He also agreed with the reasons given for including the offence of interference in the internal or external affairs of a State. The principle of non-intervention was well established in international law and, when properly delimited to take account of *jus cogens* and restrictions on sovereignty, it could even be regarded as a peremptory norm of international law. As used by the Special Rapporteur, the term was certainly broad enough to include subversion, especially in the context of the work undertaken by OAU.

[7] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

16. Terrorism, likewise rightly included in the list of offences, was a complex subject, one problem being that one man's terrorist was another man's freedom fighter. The kind of terrorism with which the draft code was concerned, however, was that which was liable to endanger international peace and security. While it might be practised either by an individual or by a group, it derived its international dimension from the fact of State participation in its conception or execution, together with the fact that it was directed against another State. There were several forms of terrorism, but for the time being the code should be concerned with State-sponsored terrorism, defined by reference to the status of the perpetrators and the victims. In the context of the draft, it was important to remember that acts of terrorism were organized from outside and found support in a foreign State which made its territory and resources available to the terrorist enterprise. It was interesting to note, in that connection, that the Special Rapporteur had observed that civil strife was the preferred weapon against weak States, whereas terrorism was more often used against well-organized States with great national unity.

17. While he had no strong views on the question of the inclusion in the code of violations of the obligations assumed under certain treaties, some thought might perhaps be given to the possibility of including such violations under some other more general category, on the basis of the same reasoning as with regard to interference in internal or external affairs.

18. Colonialism, while clearly important enough to be included in the draft code, needed to be carefully circumscribed if it was to be generally acceptable and not open to misinterpretation and abuse. Although the expression "violations of the right to self-determination" might be considered, "self-determination" had on occasion been used ambiguously. In the present context, it related to self-determination for colonial countries and peoples and was not just a convenient slogan to pave the way for secession by national minorities in already established States. That was all the more unacceptable when the national minority concerned purported to act in an area controlled by a foreign army of occupation which was there in violation of the Charter of the United Nations, the relevant treaties and the peremptory norms of international law. His own country, Cyprus, was currently experiencing the illegal effects of an attempt to abuse the principle of self-determination with a view to consolidating the international crime perpetrated against Cyprus since 1974. He therefore agreed with the expression proposed by the Special Rapporteur, namely "the forcible establishment or maintenance of colonial domination".

19. With regard to economic aggression, a case for its inclusion in the draft code could be made out on the grounds that economic aggression was a form of interference in the affairs of another State. As for mercenarism, what was involved was not the age-old practice of using foreigners to make up armies, but the use of foreigners who had no connection whatever with a national army and who had been especially recruited for the purpose of attacking a

country to destabilize or overthrow the established authorities.

20. It was a matter of considerable satisfaction to him that significant progress had been made in the consideration of an item with which he had been associated for many years. However frustrating it was to know that painstakingly agreed legal instruments such as the Definition of Aggression were ignored in practice, it was none the less a matter of consolation that, in the Commission at least, everything possible was being done to promote the international legal order and the rule of law in international relations.

21. Mr. CALERO RODRIGUES said that he had doubts about the possibility of achieving a truly useful and effective code, mainly on political grounds. The more he considered the replies from Governments and the debates in the General Assembly, the more he became convinced of the difficulties that would arise. From the legal point of view, however, the task was a challenging and even an exciting one. The Commission was entering new territory, working as it were on the international law of the future, a law for a community effectively ruled by law and by an adequately implemented system of clear-cut rules.

22. The Special Rapporteur's third report (A/CN.4/387) reflected the same qualities as his two earlier reports and, indeed, his own personal qualities. His horizons were broad, yet without wild flights of fancy. He was not short-sighted, but endeavoured to work steadily towards goals that were possible. The report proposed four articles which, if he understood correctly, were being put forward on a preliminary basis and were intended merely as signposts on the road which the Commission was to follow.

23. Referring first to the general part of the report, he noted that the Special Rapporteur had left aside for the time being such general principles of criminal law as *nulla poena sine lege*, imputability, extenuating circumstances and statutory limitations, so that the general part of the report was limited to an effort to define the scope of the draft code *ratione materiae* and *ratione personae*.

24. With regard to the vexed question of scope *ratione personae*, the Special Rapporteur was rightly moving towards a decision that the code should be concerned solely with the responsibility of individuals. That was a matter that had been discussed at length and frequent reference had been made to the draft articles on State responsibility and, in particular, to article 19 of part 1 of that draft. Under that article, which was not yet in its final form, States would be responsible for "delicts" and "crimes"; the legal consequences of those two categories of internationally wrongful acts of the State would be set out in part 2 of the draft articles. In a manner that was not altogether satisfactory, article 19, paragraph 2, defined international crimes in the following terms:

2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.

The reference, in the commentary to article 19, to the legal consequences of international crimes and specifically to two particularly relevant factors, namely the content of certain international obligations and the fact that their fulfilment affected the realities of life in the international community,[8] suggested that the code did not have to interfere with the provisions of the draft articles on State responsibility as far as offences against the peace and security of mankind were concerned.

25. The draft articles on State responsibility would establish a special régime of international responsibility for the State, while the code would "concurrently" make individuals (individual-organs, agents of the State) personally responsible and liable to punishment. In certain cases, offences could have been committed only by individuals as organs or agents of the State, but the possibility should not be ruled out that individuals as such or as members of non-State organizations could commit certain offences against the peace and security of mankind. Given modern technological advances, even genocide could be committed by a group of individuals independently of the action of any State, and that could occur in other cases as well. He was therefore very much in favour of the Special Rapporteur's proposed solution, as reflected in the first alternative of draft article 2, which read: "Individuals who commit an offence against the peace and security of mankind are liable to punishment." For the reasons indicated, he believed that the Commission should refer to "individuals" rather than to "State authorities"; the commentary could at an appropriate point explain that the term "individuals" would in many cases mean "State authorities".

26. As to scope *ratione materiae*, dealt with in section B of chapter I of the third report and also in draft article 3 (Definition of an offence against the peace and security of mankind), a provision to "define" such offences was not strictly necessary in the code. The code would list a number of acts which constituted offences and which would be punished as such. To be listed in the code, however, an offence had to have some connection with "the peace and security of mankind". It seemed to have been agreed that such a criterion was necessary, since the code was not going to deal with all international crimes, but only with those against the peace and security of mankind.

27. In the analysis of the question in his third report (*ibid.*, paras. 26-38), the Special Rapporteur had concluded that there was unity of notion and that it would be impossible to distinguish between crimes against the peace and crimes against the security of mankind. That conclusion was in keeping with the opinions of most learned writers. The Special Rapporteur had also noted that offences against the peace and security of mankind were marked by the "same degree of extreme seriousness" (*ibid.*, para. 38), and that seriousness was "measured according to the subject-matter of the obligation breached" (*ibid.*, para. 61), and he had gone on to say

[8] *Yearbook ... 1976*, vol. II (Part Two), pp. 103-104, commentary to article 19, para. (21).

that some interests should be placed at the top of the hierarchical list, namely international peace and security, the right of peoples to self-determination, the safeguarding of the human being and the preservation of the human environment (*ibid.*). It was on that basis that the first alternative of draft article 3 was proposed, and the list contained in subparagraphs (*a*), (*b*), (*c*) and (*d*), of the article corresponded exactly to that contained in article 19, paragraph 3, of part 1 of the draft on State responsibility. Consequently, if the definition contained in draft article 3 were accepted, the concept of offences against the peace and security of mankind would be practically the same as the concept of an international crime. The question that then arose was whether, in that case, there was any specificity in the offences in question or whether virtually all international crimes were covered.

28. There were also echoes of article 19 in the second alternative of draft article 3, whereby any internationally wrongful act "recognized as such by the international community as a whole" would be an offence against the peace and security of mankind. It might, however, prove rather difficult to ascertain whether the international community as a whole recognized an act as an offence against the peace and security of mankind and, if that definition were accepted, it would be necessary, before including an act in the code, to be sure that the international community as a whole recognized it as such an offence. Even if that were the case, it could be argued that the element of recognition by the international community as a whole was lacking and that the act in question was in fact not an offence.

29. Such a definition might, in his view, jeopardize any attempts to establish an internationally effective code, and he therefore believed it would be preferable not to include a definition in the code. It would be better to be guided by the criterion that certain acts, by reason of their seriousness and the fact that they violated interests essential to the peace and security of mankind, should be included in the list. While that was of necessity a subjective criterion, recourse could be had to existing international instruments and the opinions of those who had studied the subject, including the Commission. It would be better to apply such a criterion correctly than to accept a definition that would be a sort of Procrustean bed.

30. In his first report,[9] and particularly in his second report (A/CN.4/377, para. 79), the Special Rapporteur had examined the question of including a list of offences against the peace and security of mankind in the draft code. Draft article 4, submitted in the third report, contained such a list. In that connection, the following passage from the report of the Commission on its thirty-sixth session should be borne in mind:

> ... the acts selected would, at this stage, be in the raw state, independent of any rigorous terminology or classification. A precise terminology and typology would be worked on later, when all the material had been selected and determined.[10]

[9] *Yearbook ... 1983*, vol. II (Part One), p. 137, document A/CN.4/364.

[10] *Yearbook ... 1984*, vol. II (Part Two), p. 12, para. 40.

31. Draft article 4 did not contain a complete list: it was limited to six offences set forth in sections A to F of the article. It was to be hoped that, when the draft code took final shape, each act constituting an offence would form the subject of a separate article, in the interests of clarity and in accordance with the usual legislative technique in criminal law.

32. The proposed list covered two categories of offences: first, violations of obligations aimed at safeguarding international peace and security, and, secondly, violations of obligations aimed at safeguarding the right of peoples to self-determination. In that presentation, the Special Rapporteur had followed the categorization proposed in paragraph 3 (*a*) and (*b*) of article 19. At the risk of appearing unduly conservative, he himself preferred to abide by the old division of crimes into three categories: crimes against peace, crimes against humanity and war crimes. That remark made in passing, however, did not affect the consideration of the offences listed by the Special Rapporteur.

33. The first offence, set forth in section A, was that of aggression, and no one would disagree that it should be included, and indeed be placed at the top of the list. Two alternatives were proposed. The first merely repeated the Definition of Aggression adopted by the General Assembly in 1974. The second, which he personally favoured, simply stated: "The commission [by the authorities of a State] of an act of aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974." In his third report (A/CN.4/387, para. 66), the Special Rapporteur admitted that the second definition had "the advantage of being brief and concise", but also noted that "it does not sufficiently emphasize the various subject-matters to which a breach of the obligation in question may apply". The first definition, according to the Special Rapporteur (*ibid.*), "has the merit of being coherent. It takes as its starting-point the same approach and formulation as article 19. It emphasizes the two elements that are at the basis of a criminal transgression: the subjective element (the opinion of the international community) and the objective element (the subject-matter of the obligation violated)."

34. He himself could not agree with that argument. When an offence was listed in the draft code, the Commission should not be thinking all the time of article 19. Its main concern should be to indicate clearly—and as objectively as possible—certain forms of conduct, certain acts and, possibly, certain omissions which constituted offences and for which individuals were punishable. In the case of aggression, if the Commission used the term "aggression" and referred to the Definition of Aggression, which had been so painstakingly elaborated by the General Assembly and contained all the elements characterizing aggression, it would have accomplished its task.

35. The Special Rapporteur had included in the draft code the threat of aggression (section B of draft article 4), but was not in favour of including the preparation of aggression. He agreed with the Special Rapporteur that: "The concept of preparation does not appear to add much, apart from an element of

confusion, and it could be eliminated." (A/CN.4/387, para. 101 *in fine.*) He was inclined to think the same with regard to the threat of aggression. While it was true that the threat of aggression was prohibited by international law, including the Charter of the United Nations, and that it engaged the responsibility of the State, it was nevertheless doubtful, whether it could be deduced therefrom that the threat of aggression should be included in the draft code as an offence that made its authors liable to punishment. Criminal law attached particular importance to results and the Special Rapporteur had himself stated: "It has sometimes been asked whether a threat of itself, not followed up, could be comparable with aggression. Certainly, the threat is not the act of aggression, but the use of threats is designed to bring pressure to bear on States and to disrupt international relations." (*Ibid.*, para. 92.) The question nevertheless arose whether such an attempt to use pressure or to disrupt international relations was of sufficient gravity to justify the subjection of individuals to international criminal responsibility and consequent punishment. He accordingly urged that aggression as such, and only aggression, should be included as an offence in the draft code and that both preparation and threats should be left aside. The possibility of the punishment of attempted aggression under the general provisions of the draft code would, of course, not be precluded.

36. The second offence, set forth in section C of draft article 4, was that of "interference in the internal or external affairs of another State". He pointed out that the term *intervention* used in the original French text would be better translated into English by "intervention", which had been widely used, for instance in the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty.[11] Interference or intervention in the affairs of another State was of course a violation of the rules of international law and engaged the international responsibility of the State. It nevertheless had many different aspects. The sending of a diplomatic note, a speech by an ambassador, or the opening of a diplomatic bag could constitute acts of "interference" or "intervention", but it was clear that they did not have the seriousness that would justify their inclusion in the draft code as offences for which their authors should be punished. However, other acts that fell within the general category of intervention might deserve to be included in the draft code. The Special Rapporteur seemed to be aware of that fact, for, after referring, in draft article 4, to interference, he had added:

The following, *inter alia*, constitute interference ...

(*a*) fomenting or tolerating the fomenting ... of civil strife or any other form of internal disturbance or unrest in another State;

(*b*) exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.

37. With regard to subparagraph (*a*), he pointed out that the words "internal disturbance or unrest" were not an accurate translation of the French words *troubles ou soulèvements intérieurs*. That wording constituted an attempt to introduce the precision that the entire draft code should have: interference or intervention was objectively translated into certain specific acts, such as fomenting internal troubles or exerting political or economic pressure. The provisions suggested by the Special Rapporteur came almost untouched from the 1954 draft code. In his third report (*ibid.*, para. 112), the Special Rapporteur raised the question "why the fomenting of civil strife in a State and interference in the internal or external affairs of that State should be the subject of two separate provisions". If he was not mistaken, however, that was not the case in the 1954 draft code, which did not contain a general provision on intervention. Intervention was mentioned in article 2, paragraph (9), only in so far as it took the form of "coercive measures of an economic or political character"; and that provision referred to such measures, not to intervention in general.

38. On that basis, and since there was a wide variety of forms of intervention, as the Special Rapporteur himself recognized (*ibid.*, para. 111), it would be wise for the Commission not to consider intervention in general as an offence, but to break down the concept of intervention and list only the specific acts that constituted intervention. Two such acts were indicated by the Special Rapporteur in his draft articles and, on the basis of other examples given in his report (*ibid.*, para. 110), he would be able to add to the list.

39. The Special Rapporteur proposed that terrorism should be included in the list of offences. The opening paragraph of section D of draft article 4 was an almost word-for-word repetition of article 2, paragraph (6), of the 1954 draft code. The Special Rapporteur had then added a subparagraph (*a*), which gave a definition of terrorist acts, and a subparagraph (*b*), which listed four types of acts constituting "terrorist acts". He himself was not at all certain that those subparagraphs were really necessary. Unlike intervention, terrorism was a concept that was clearly understood by all and the term "terrorist acts" was quite clear both in legal terms and in ordinary language. He therefore suggested that the Commission should use only the term "terrorist acts", without definition or exemplification.

40. Section E of draft article 4 dealt with acts prohibited under treaties which placed restrictions or limitations on armements, strategic structures, etc. That text differed in two ways from article 2, paragraph (7), of the 1954 draft. The first difference was simply a question of modernization of terminology: the term "fortifications", which was obsolete, was replaced by "strategic structures". The other difference, however, might give rise to some doubts. The 1954 draft referred to "acts ... in violation" of a State's obligations under certain treaties, whereas the draft under consideration referred to "a breach" of such obligations. For the sake of consistency, it was better to speak of "an act": an act was clearly imputable to an individual, whereas the breach of an obligation would be attributable to a State. He was inclined to agree with Mr. Jacovides that the question of treaties imposing restrictions or limitations on

[11] General Assembly resolution 2131 (XX) of 21 December 1965.

armaments was largely historical in nature. The Commission should nevertheless not overlook the possibility of such restrictions being established by treaty. That provision should therefore be retained.

41. The last offence in the proposed list was colonialism. Section F of draft article 4 thus read: "The forcible establishment or maintenance of colonial domination [by the authorities of a State]." At the previous session, he had expressed doubts regarding the reference to colonialism, which had historical implications.[12] He would have preferred a reference to the more modern concept of self-determination. In view of the absence of a definition of self-determination and of the political implications of that term, however, he could now accept, on a provisional basis, the reference to colonial domination in the provision under consideration. At the same time, he urged the Special Rapporteur to give further consideration to the matter with a view to arriving, if possible, at a more precise definition of "colonial domination". The Special Rapporteur should also consider whether the establishment or maintenance of colonial domination constituted "an act" and hence a crime for which individuals could be punished.

42. Mr. MALEK said that the Special Rapporteur indicated at the beginning of the introduction to his very well thought-out third report (A/CN.4/387, para. 2) that the draft code had to be limited to the criminal responsibility of individuals, apparently because that had been the general view expressed in the Sixth Committee of the General Assembly. Although, as matters now stood, the Special Rapporteur shared that view, he nevertheless pointed out (*ibid.*, para. 16) that "it must never be forgotten that the aim is also—and indeed primarily—to erect a barrier against the irrational and lawless acts to which the exercise of power may give rise, and that what must be prevented are the crimes and exactions of those who possess the formidable means of destruction and annihilation that threaten mankind today". He stated further that, even if the subject of law, in the case of offences against the peace and security of mankind, was the individual, it must also be remembered that the individual in question was first and foremost an authority of a State. In his own view, the subject of law in question was, rather, the State, particularly a State with a genuinely democratic régime, in other words a State where the individual or individuals who took decisions on its behalf were vested with such power directly or indirectly by the nation itself in accordance with a constitutional procedure on which it had freely agreed in advance. Why, for example, if such a State committed an act of aggression, should account be taken only of the criminal responsibility of its leaders, agents or authorities, whereas in fact and in law such responsibility was actually attributable to the nation as a whole?

43. In the relatively recent past, it had been extremely difficult to establish that an individual could be regarded as a subject of international law. The Nürnberg Tribunal had helped to show that was in fact the case when it had stated, in its judgment, that it had long been agreed that international law established duties and responsibilities for natural persons and that crimes against international law were committed by men, not by abstract entities, and that only by punishing individuals who committed such crimes could the provisions of international law be enforced. Those conclusions, however, had taken a long time to become part of the legal conscience of the international community. Although the 1954 draft code had dealt only with the criminal responsibility of individuals, no reasons for that choice had been given in the text of the draft, either in the commentaries to its articles or in the preparatory work. The fact was that that draft had derived directly from Nürnberg law, whose purpose, in view of the *de facto* situations leading up to its formulation, had been the trial and punishment not of a particular State, but of war criminals whose offences had had no particular geographical location. Neither the 1945 London Agreement and the Charter of the Nürnberg International Military Tribunal annexed thereto[13] nor the resulting trial, which had been the real starting-point for the modern-day development of international criminal law, had contained any provisions on the guilt of the State as such. At that time, recourse to legal channels had apparently not been desired or regarded as desirable. In that connection, he recalled that, soon after the judgment of the Nürnberg Tribunal had been rendered, the President of the United States of America had stated, in the General Assembly of the United Nations, that 23 Members of the United Nations had bound themselves by the Charter of the Nürnberg Tribunal to the principle that planning, initiating or waging a war of aggression was a crime against humanity for which individuals as well as States should be tried before the bar of international justice.[14]

44. On the basis of a proposal by the United States delegation, the General Assembly had, on 11 December 1946, adopted its resolution 95 (I), in which it had affirmed the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of that tribunal. Moreover, it had directed the recently established Committee on the codification of international law to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the tribunal. The aim had thus been only to codify the Nürnberg Principles. In accordance with that resolution and with General Assembly resolution 177 (II) of 21 November 1947, the Commission had in 1950 formulated the Nürnberg Principles of international law[15] and, in 1951, prepared a draft Code of Offences against the Peace and Security of Mankind,[16] taking those principles fully into account.

[12] *Yearbook ... 1984*, vol. I, p. 32, 1820th meeting, para. 26, and p. 45, 1822nd meeting, para. 43.

[13] See 1879th meeting, footnote 7.

[14] Speech delivered on 23 October 1945 (*Official Records of the Second Part of the First Session of the General Assembly, Plenary Meetings*, 34th meeting).

[15] See 1879th meeting, footnote 6.

[16] *Yearbook ... 1951*, vol. II, pp. 134 *et seq.*, para. 59.

45. The 1951 version of the draft code, as revised in 1954, endorsed the principle of the criminal responsibility of the individual, but did not rule out the responsibility of the State as such, and determined, in the text of the articles or in the commentaries thereto, the degree of responsibility that could be attributed to individuals as a result of the commission of any of the offences listed therein. The commentary to the offences listed in article 2, paragraphs (1) to (8), of the 1954 draft code thus indicated that such offences could be committed only by the "authorities of a State", although the criminal responsibility of individuals under international law could be engaged as a result of the application of the provisions of the draft article relating to conspiracy, direct incitement, attempts and complicity. The commentary to the offences listed in paragraphs (9) to (11) made it clear that such offences could be committed either by the authorities of a State or by private individuals. However, according to article 2, paragraph (11), of the 1954 draft code, concerning offences against mankind, for an act to be characterized as an offence in that category it must have been committed by the authorities of a State or by private individuals "acting at the instigation or with the toleration of such authorities". That condition had not been laid down in the corresponding definition contained in the Charter of the Nürnberg Tribunal. The Commission had added it in order to prevent every inhuman act committed by private individuals from being regarded as a crime under international law. In his view, instigation or express or tacit toleration by the authorities of a State, if not one of the elements of offences against mankind, was at least one of the basic characteristics of that category of offences, including genocide, which, because of its nature and proportions, could in no case be committed by private individuals acting on their own initiative and by their own means without State support.

46. In any event, it should be clearly understood that the Commission would subsequently be able to change its mind about limiting the draft code to the criminal responsibility of individuals. A final decision on that issue should be taken by the General Assembly itself.

47. Turning to section B of chapter I of the report, dealing with the definition of an offence against the peace and security of mankind, he pointed out that paragraphs 20 to 39 related not to offences against peace and offences against mankind, as indicated in the title preceding those paragraphs, but to offences against the peace and security of mankind. Confusion between the two very different concepts of "an offence against mankind" and "an offence against the security of mankind" was always possible and it was moreover such confusion that had made one of the ideas he had expressed in his statement on the topic at the previous session totally meaningless.

48. Having explained the origin of the concept of an offence against the peace and security of mankind, established its unity and defined its meaning, the Special Rapporteur had proposed a definition in his report (draft article 3). He had, however, also described the problem involved in defining the concept of crime, particularly international crime, and, if he seemed to believe that it was possible to define an offence against the peace and security of mankind, that was because he had apparently been encouraged in that belief by the definition of a serious crime contained in article 19 of part 1 of the draft articles on State responsibility.[17] The first alternative definition proposed by the Special Rapporteur was based primarily on the definition contained in that article 19 and it had all the drawbacks and defects of that definition. The main feature of the second alternative was that it was of a very general nature. Although he himself would reserve his position with regard to the two alternatives, he questioned whether a definition of the concept of an offence against the peace and security of mankind was really necessary. The fact that the Commission had not tried to define that concept in its 1954 draft was not without some significance in that regard.

49. In chapter II of his report, dealing with acts constituting an offence against the peace and security of mankind, the Special Rapporteur paid particular attention to an act of aggression and had also proposed two alternatives in defining that concept (draft article 4, sect. A). The first was based entirely on the provisions of the Definition of Aggression adopted by the General Assembly in 1974,[18] while the second merely referred to that definition. Both alternatives were feasible, and from the legal point of view it would not make much difference which one was used.

50. In preparing the draft code, the Commission must not lose sight of the fact that the code would very probably one day be applied by an international criminal court. In that connection, he recalled that the first Special Committee on the Question of Defining Aggression had been expressly requested, by General Assembly resolution 688 (VII) of 20 December 1952, to study "the problems raised by the inclusion of a definition of aggression in the Code of Offences against the Peace and Security of Mankind and by its application within the framework of international criminal jurisdiction". In its report,[19] the Committee had indicated that some of its members were in favour of the inclusion of such a definition, as well as of the establishment of an international criminal jurisdiction. In that connection, the representative of the Netherlands had stated that, although a definition of aggression to be applied by the political organs of the United Nations could play only a negligible part in the maintenance of international peace and security, since it would bind neither the Security Council nor the General Assembly, such a definition would have a great chance of succeeding in the domain of international criminal jurisdiction. He had also said that the objections that could be raised to a definition of aggression intended to be applied under the system of collective security would not all apply to a definition to be used in the more restrictive field of international criminal jurisdiction. He had stressed, however, that two problems might arise from the application by an international criminal

[17] See 1879th meeting, footnote 9.

[18] See footnote 7 above.

[19] *Official Records of the General Assembly, Ninth Session, Supplement No. 11* (A/2638).

court of a definition of aggression: first, a decision by such a court bearing on a case of aggression might hamper the Security Council in its essential function, which was to maintain international peace and security; secondly, the Security Council and the international criminal court might pronounce contradictory decisions on a case of aggression brought simultaneously before both of them.[20]

51. Some representatives in the Sixth Committee of the General Assembly had stated that the Commission had taken the wrong approach to the preparation of the draft code (A/CN.4/L.382, para. 38). The Commission had given the impression of having focused entirely on the compilation of a list of offences and of thus no longer having the intention, expressed in its report on its thirty-fifth session,[21] of preparing, in the initial stage, an introduction dealing with the general principles of criminal law to be covered by the draft code; the formulation of such principles was to make it easier to draw up the list of offences. It nevertheless had to be admitted that, in confining itself for the time being to the preparation of a list of offences, the Commission did not thus far appear to have encountered any problems owing to the absence of a decision on a particular general principle of criminal law. It might even be said that it would be rather surprising to proceed to consider the general principles of criminal law relating to penalties without first identifying the offences which had to be punished and those to which such principles would apply.

52. It would be interesting to know whether the Special Rapporteur thought that it was now possible to deal with other questions raised by the preparation of the draft code and, in particular, the question of the implementation of the code. At its second session, in 1950, the Commission had expressed the view that it was both desirable and possible to establish an international judicial organ to try persons accused of offences which, under international conventions, would be within that organ's jurisdiction.[22] Although the consideration of that question involved a number of problems, which were not, incidentally, insurmountable, the study of other questions raised by the preparation of the code was probably much less problematic in view of the development of international law in that regard, the relevant conventions in force and the work carried out by the Commission itself. It had thus often been proposed that general principles of criminal law should be included in the draft code and the Special Rapporteur had begun to consider them in the introduction to his third report. It was to be hoped that those principles, or at least some of them, would be studied in depth in the next report.

53. The principle of the legality of charges and penalties or its corollary, the principle of the non-applicability of statutory limitations, was a general one that was closely related to the list of offences to be included in the draft code. The draft code adopted by the Commission in 1951[23] contained an article 5 on penalties, which read:

> The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.

In the light of the comments made by a number of Governments and on the recommendation of the Special Rapporteur of the time, for whom that draft article did not properly take account of the generally accepted principle *nulla poena sine lege,* the Commission had not included article 5 in the 1954 draft code. In that connection, he pointed out that the Commission could not submit to the General Assembly a draft code that did not refer to the applicable penalties. The ideal provision in that regard would not be the above-mentioned article 5, but rather an article which, as in national penal codes, prescribed a penalty for every offence or category of offences defined in the code. That might also be the provision which, under existing international law, would prescribe the harshest penalties for all the offences defined in the code, which were the most serious of international crimes. At least for the time being, however, it was neither desirable nor possible for the Commission to formulate such a provision, particularly if it was to take account both of the principle of the criminal responsibility of individuals and of the principle of the criminal responsibility of States.

54. Accordingly, the Commission should perhaps reconsider the draft article 5 that had been deleted in 1954 only after a great deal of hesitation. That article would at least offer the advantage of enhancing the effectiveness of the code by clearly showing that the offences listed therein would not deliberately go unpunished. The fact that, under that article, the competent court would be free to determine penalties would not necessarily be contrary to the principle *nulla poena sine lege*. Where the competent court was a national court, it would apply the penalties prescribed by internal law. If an international criminal court was established and given jurisdiction to try the offences defined in the code, it might be required to apply the penalties prescribed either by existing international law, under which penalties up to and including the death sentence could be imposed, at least for crimes against peace, crimes against humanity and war crimes, or by any international instrument that was directly binding on it, such as the instrument establishing it and conferring jurisdiction on it.

55. In that connection, he recalled that the draft statute for an international criminal court prepared in 1951 by the Committee on International Criminal Jurisdiction contained an article 32 relating to penalties which stated:

> The Court shall impose upon an accused, upon conviction, such penalty as the Court may determine, subject to any limitations prescribed in the instrument conferring jurisdiction upon the Court.[24]

---

[20] *Ibid.*, p. 12, para. 96.

[21] *Yearbook ... 1983*, vol. II (Part Two), p. 16, para. 67.

[22] *Yearbook ... 1950*, vol. II, p. 379, document A/1316, para. 140.

[23] See footnote 16 above.

[24] *Official Records of the General Assembly, Seventh Session, Supplement No. 11* (A/2136), p. 23.

That article, which had been retained as it stood in the draft statute for an international criminal court prepared by the 1953 Committee on International Criminal Jurisdiction,[25] was almost identical with draft article 5 of the 1951 draft code. The opinion had however also been expressed that it did not take account of the principle of the legality of penalties.

56. It would be quite natural to refer to the two aspects of the principle of the non-retroactivity of criminal laws and to try to take them fully into account at the current stage in the preparation of the draft code, and in general at the current stage in the process of the formation and development of international criminal law, namely the branch of law that was taking shape as a result of international agreements and of international efforts to prevent and punish international crimes, particularly the most serious crimes, such as crimes against peace, crimes against humanity and war crimes. In that connection, it should be noted that the term *droit international pénal* had no equivalent in legal writings in English. The term "international penal law" did not exist in English. The subject-matter covered by what was usually called *droit international pénal* formed part of the branch of international law known in English as "international criminal law". In French, however, that branch of law covered offences that differed from offences under internal criminal law only in that they involved an element of extraneousness which affected the perpetrator, the victim, the place and the purpose of the offence and which gave rise to conflict of laws and jurisdiction. Such law formed part of the internal law of each State.

57. According to one school of thought, the principle *nullum crimen sine lege, nulla poena sine lege* had absolute value not only in internal criminal law, but also in international criminal law. It therefore had to be decided whether and to what extent the Commission would be able to take that principle into account in preparing the draft code. The preparation of the draft meant that the offences to be covered had to be defined as precisely as possible on the basis of conventions and other relevant instruments in order to take account of the first part of the principle, namely *nullum crimen sine lege*. It would have to be decided, however, whether a special provision should be included in order to allow for the possibility of other charges, which would be characterized as offences against the peace and security of mankind under conventions or other international instruments that would be applicable in future. That question might arise in connection with the offences which were dealt with in existing conventions and other international instruments and which, for one reason or another, would not be covered in the code, but might one day be characterized as offences against the peace and security of mankind.

58. He did not see how the Commission could take account of the second part of the principle, namely *nulla poena sine lege,* without drafting a general provision that would be similar to article 5 of the 1951 draft code. It the Commission decided to include States as active subjects of the offences provided for in the code, its task might be even more difficult. It might be better advised merely to adopt a text that would leave the competent court free to determine, in each case, which sanction or penalty should be imposed in accordance with the applicable law. A national court would base itself on the penalties prescribed by internal law, whereas an international criminal court would apply the penalties prescribed or the sanctions recognized by existing international law, which of course offered a number of useful indications in that regard.

59. With regard to the prevention and punishment of such crimes under international law, the Commission should not attach too much importance to the principle of the non-retroactivity of criminal laws, whether in connection with charges or in connection with penalties. Most writers were of the opinion that that principle of internal law should not, for the time being, be incorporated in international law. In that connection, Georges Scelle had pointed out,[26] immediately before the vote on the proposed deletion of article 5 from the 1951 draft code, that the rule *nulla poena sine lege* could apply only in a society which had reached a very advanced stage of legal organization—which was not yet true of the international community. That was why he had found it absolutely essential to give the competent court full freedom in that regard.

60. Since he himself had not yet carefully studied the text of the draft articles contained in the report under consideration, he reserved the right to refer to them at a later stage.

The meeting rose at 6 p.m.

1881st MEETING

Tuesday, 14 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

---

[25] *Ibid., Ninth Session, Supplement No. 12* (A/2645), p. 25.

[26] *Yearbook ... 1954,* vol. I, p. 139, 268th meeting, para. 47.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. THIAM (Special Rapporteur) said that, in prompting a discussion on the distinction between "authorities of a State" and "private individuals" (*particuliers*), he had not expected the Commission to go beyond the context of a code of offences against the peace and security of mankind and take up other international offences. Yet several members had wondered about international offences which could be perpetrated by private individuals but which did not fall within the category of offences against the peace and security of mankind, for instance wide-scale drug trafficking. Offences of that kind were international solely because States were able to prosecute and then punish the perpetrators only by concluding agreements for international co-operation. On the other hand, offences against the peace and security of mankind were offences that came directly under international law. Too much should not be made of the distinction between "authorities of a State" and "private individuals", since all fell within the same legal category covered by the term "individuals" (*individus*). Regardless whether the offences were committed by individuals or by the authorities of a State, they were in the end always committed by individuals. On further reflection, he considered that the distinction between "authorities of a State" and "individuals" might well be left aside to some extent, more particularly because it was difficult to make in some instances, as in the case of national liberation movements, which could be both public and private in character.

2. Mr. CALERO RODRIGUES asked whether, in the Special Rapporteur's view, the code would apply only to individuals who were State agents, or whether criminal acts under the code could also be committed by individuals who were not agents of the State, in which case they too would be subject to the code.

3. The CHAIRMAN, speaking as a member of the Commission, said that he too would appreciate some clarification from the Special Rapporteur regarding the formula "authorities of a State". In English, it conveyed the idea that the reference was to organs or institutions, rather than to individuals. Actually, the intention in the code would appear to be to refer to individuals having State powers rather than to State authorities.

4. Mr. THIAM (Special Rapporteur), replying to Mr. Calero Rodrigues, said that the term "individuals" might in some instances be taken to mean agents of the State and, in others, agents of the State or private individuals. By using the term "individuals" alone, the Commission retained the opportunity of considering, in each case, whether an offence could be committed only by the authorities, or by private individuals, or by both.

5. In reply to the question by the Chairman, he pointed out that the formula could in the circumstances signify only agents of the State and not institutions, otherwise account would have to be taken of the criminal responsibility of the State, something that the Commission had in fact ruled out.

6. Sir Ian SINCLAIR, after congratulating the Special Rapporteur on the quality of his third report (A/CN.4/387), said that his first major area of concern—a concern he had voiced at previous sessions and which had not been entirely dissipated—referred to the relationship between the draft code and the topic of State responsibility. It was fortunate that, at the current session, consideration of that topic would follow immediately on the debate on the draft code, so that the Commission would have an opportunity to consider carefully and dispassionately the relationship between the two topics.

7. At the previous session, the Commission had reached the conclusion—now in effect endorsed by the General Assembly—that its efforts in the context of the draft code "should be devoted exclusively to the criminal responsibility of individuals" and that "the question of international criminal responsibility should be limited, at least at the present stage, to that of individuals".[6] He himself fully subscribed to that conclusion but found the qualification "at least at the present stage" over-cautious. The draft code must be confined to the criminal responsibility of individuals. Indeed, that limitation was forced upon the Commission by the nature of things. In a crucial passage, the judgment of the Nürnberg Tribunal had rightly stressed: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[7]

8. Of course, an individual could commit an offence against the peace and security of mankind in his capacity as an agent of the State. If so, the same act for which he, as an individual, was criminally responsible might also be attributable and imputable to the State, whose international responsibility would be engaged under the Commission's parallel draft on State responsibility. But the responsibility of the State would not be *criminal* responsibility. If, for example, the offence was that of waging a war of aggression, it could be the special form of responsibility envisaged in article 19 of part 1 of the draft articles on State responsibility; it could, however, equally be the responsibility appropriate to an international delict if the offence did not fall within the

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] *Yearbook ... 1984*, vol. II (Part Two), p. 11, para. 32.

[7] United Nations, *The Charter and Judgment of the Nürnberg Tribunal. History and Analysis*, memorandum by the Secretary-General (Sales No. 1949.V.7), p. 41.

scope of that article 19. In other words, there was no necessary coincidence between the substantive scope of the code and the substantive scope of article 19. It was vitally important to distinguish clearly between the potential criminal responsibility of the individual —including the individual acting in the capacity of an agent of the State—and the parallel responsibility of the State when the individual was acting in that capacity.

9. The Commission itself had sounded a warning on that point in paragraph (21) of its commentary to article 19.[8] It had stressed that

> ... it would be wrong to identify the right-duty of certain States to punish individuals who have committed such crimes [i.e. the "crimes" described in article 19] with the "special form" of international responsibility applicable to the State in cases of this kind.

After recalling the responsibility of a State to punish individuals guilty of crimes against the peace, against humanity and so on, the Commission's commentary went on to point out that such punishment

> ... does not *per se* release the State itself from its own international responsibility for such acts. Conversely, as far as the State is concerned, it is not necessarily true that any "crime under international law" committed by one of its organs for which the perpetrator is held personally liable to punishment, despite his capacity as a State organ, must automatically be considered not only as an internationally wrongful act of the State concerned, but also as an act entailing a "special form" of responsibility for that State.

10. The Special Rapporteur had expressed some anxiety (*ibid.*, paras. 11-17) about limiting the scope of the code *ratione personae* to the criminal responsibility of individuals, pointing out that offences jeopardizing the independence, safety and territorial integrity of the State could be committed only by State entities. That was perhaps often true, but in the present strife-torn world the principal perpetrators of such offences could in certain instances be private individuals holding no official position. There had been recent cases of political exiles seeking secretly to recruit mercenaries abroad in order to secure the overthrow of the Government of a small State. He could himself think of at least one case in which private criminal elements had engaged in similar activities, fortunately without success.

11. Accordingly, he could not subscribe to the view that such offences could be committed only by the authorities of a State, nor was he convinced that genocide and other crimes against humanity could not be committed by individuals or groups of individuals. Communal violence was all too frequent a feature of modern society and the power of the machine-gun exercised by anarchic, terrorist or even religious groups had in many societies challenged, and at times even replaced, the power of the State.

12. It was for those reasons that he favoured the first alternative of draft article 2 proposed by the Special Rapporteur, while accepting that in many instances an offence might have been committed by individuals acting in their capacity as State agents. The second alternative appeared to ignore the fact that offences against the peace and security of mankind were not always committed by State authorities.

13. Turning to the question of the definition of an offence against the peace and security of mankind, he noted that no general definition was contained in the 1954 draft code. Perhaps such a general definition was beyond the Commission's reach, but the Commission's critics in the Sixth Committee of the General Assembly and elsewhere had called not so much for a definition as for the elaboration of criteria for determining whether a proposed offence fell within the narrow category of offences to be covered by the code. The identification of such criteria would not appear to be an impossible task. In that regard, the seriousness of the offence was obviously a starting-point, and so was the concept that offences against the peace and security of mankind constituted a narrower category than did State crimes as described in article 19 of part 1 of the draft on State responsibility. That was precisely the consideration that led him to discard as unacceptable the definition proposed in the Special Rapporteur's first alternative for article 3. To equate offences against the peace and security of mankind with State crimes as described in article 19 was not only to fail to find the narrower category of offences in the broader description of so-called State crimes, but also to blur the distinction between offences against the peace and security of mankind and those so-called State crimes.

14. In that search for suitable criteria to distinguish offences against the peace and security of mankind from other crimes under international law, he referred to the reasons given by the Special Rapporteur (*ibid.*, paras. 5-9) for deferring the elaboration of the general principles governing the subject. He himself remained unconvinced by the reasons advanced by the Special Rapporteur. Articles 1, 3 and 4 of the 1954 draft code contained general principles; other general principles could be found in Principles I to V and VII of the Nürnberg Principles, as formulated by the Commission in 1950.[9] Of course, those principles would have to be reviewed, but if the Commission proceeded in parallel with the elaboration of general principles and the drawing up of a tentative list of offences, there would be a helpful and positive interaction between the two. On the one hand, the Commission might conclude that a particular offence should not be included in the list because it fell outside the framework of the general principles; on the other hand, it might wish to consider supplementing the general principles in order to accommodate particular offences which should be included.

15. It was for those reasons that he could not follow the Special Rapporteur in his efforts to find a definition of the term "offences against the peace and security of mankind" by reference to the description of so-called State crimes in article 19 of part 1 of the draft on State responsibility. That definition, precisely because it took "as its starting-point the same approach and formulation as article 19" (*ibid.*, para. 66), ran the risk of producing intolerable confusion between the offences to be included in the draft code

[8] *Yearbook ... 1976*, vol. II (Part Two), pp. 103-104.

[9] See 1879th meeting, footnote 6.

under consideration and the category of State crimes under article 19. A much more fruitful approach would be to attempt to elaborate general principles at the same time as drawing up a list of offences, so that progress on the one could influence progress on the other.

16. As to chapter II of the Special Rapporteur's third report, it was clear that the waging of a war of aggression constituted an offence that must be covered by the code. The basic materials to be taken into account in formulating offences involving aggression were paragraphs (1) to (6) and possibly paragraph (8) of article 2 of the 1954 draft code, and the Definition of Aggression adopted by the General Assembly in 1974,[10] a definition on which the Special Rapporteur had relied heavily in his tentative formulation of the various offences involving the commission of an act of aggression.

17. It had to be remembered, however, that the Definition of Aggression had been adopted for the purpose of giving guidance to United Nations organs competent to consider matters relating to the maintenance of international peace and security—in particular the Security Council; the question therefore arose whether that definition was altogether apt as a model for the formulation of criminal offences. Some of the provisions of the Definition of Aggression had very little to do with aggression as a crime under international law attracting the criminal responsibility of individuals. One example lay in article 5, paragraph 3, of the Definition of Aggression, which was reproduced in the first alternative of section A, subparagraph (*d*) (iii), of draft article 4 submitted by the Special Rapporteur.

18. A problem also arose in connection with the safeguard embodied in article 4 of the Definition of Aggression—and reproduced by the Special Rapporteur in the first alternative of section A, subparagraph (*c*) (viii), of draft article 4—to the effect that the acts enumerated were not exhaustive and that the Security Council might determine that other acts constituted aggression under the provisions of the Charter of the United Nations. That safeguard clause was very appropriate in the context of a definition of aggression intended to offer guidance to political organs, but it was surely quite inappropriate for inclusion in a criminal code, since it would offend against the principle *nullum crimen sine lege*.

19. One of the essential elements of a criminal code was that it should prescribe clearly and specifically the acts which, subject to any possible defence, would attract criminal responsibility. Accordingly, the 1974 Definition of Aggression could not be incorporated in the code as it stood; it would have to be examined carefully to see what adaptations had to be made to it.

20. The Special Rapporteur did not favour including preparation of aggression as a separate offence under the code. Mr. Calero Rodrigues (1880th meeting) not only shared that view but was also of the opinion that threats of aggression should be excluded from the code. For his own part, he was not convinced by either of those arguments and his approach was rather similar to that of Mr. Reuter (1879th meeting); proof of any charge of preparing aggression would undoubtedly be very difficult, but if preparation of a war of aggression was proved, the criminal responsibility of the individuals involved should be attracted.

21. The next item on the Special Rapporteur's list was that of interference (or rather intervention, as Mr. Calero Rodrigues had pointed out) in the internal or external affairs of another State. The problem was a very difficult one. There was first of all the controversial issue whether the fomenting by the organs of one State of civil strife in another State constituted an act of indirect aggression or an unlawful form of intervention. Much would depend on whether the process whereby a State's authorities sought to foment civil strife in another country involved the commitment of its own military or paramilitary forces or of armed bands. If it did, the case might well constitute one of indirect aggression coming under the rubric of aggression and need not be specified separately. Conversely, the question would arise whether acts not possessing such characteristics should be covered by the code. He was doubtful whether that form of intervention which fell short of indirect aggression should be characterized as an offence against the peace and security of mankind, notwithstanding its inclusion in article 2, paragraph (5), of the 1954 draft code.

22. Similar considerations applied to the specification as an offence against the peace and security of mankind of the concept of exerting pressure, of taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind. That formulation was unacceptably vague as a definition of any crime, still more so of an offence against the peace and security of mankind. The principle of non-intervention was of overriding concern to small States in particular, but it should not be forgotten that there could exist forms of unlawful intervention which did not constitute offences against the peace and security of mankind.

23. He favoured, on the other hand, the inclusion of terrorist acts in the code provided that not only State-sponsored terrorism, but also other forms of terrorism were covered. In that connection, he was puzzled by the Special Rapporteur's reference (A/CN.4/387, para. 136) to the concept that the offence should be confined to State-sponsored terrorism. He could not agree with that suggested limitation. There were many instances of terrorist activities which did not directly and immediately involve the participation of the authorities of a State. The damage to the fundamental values the Commission was seeking to protect was none the less the same. From the point of view of the innocent victims of a terrorist act, the motivation of the perpetrator or the goal he was seeking to achieve were immaterial. State-sponsored terrorism was a particularly vicious offence, but terrorism in all its forms, and by whomsoever committed, surely called for condemnation as an offence against the peace and security of mankind.

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

24. With regard to breaches of restrictions upon armaments and so on, he was inclined to share the views of Mr. Jacovides and Mr. Calero Rodrigues (1880th meeting) that the matter was now largely of historical interest. He very much doubted whether a breach of such restrictions should be characterized as a separate offence to be included in the code.

25. Lastly, on the question of the establishment or maintenance of colonial domination by force, he recalled his statements at previous sessions on the dangers of formulating a penal code in terms of popular slogans. Colonial domination was such a slogan; its content was undefined and probably undefinable with sufficient specificity to qualify as a criminal offence. He accordingly joined Mr. Calero Rodrigues in appealing to the Special Rapporteur to re-examine the matter so as to produce a more precise definition of the offence he had in mind. Unless the Special Rapporteur did so, he himself would have to reserve his position on the suggested inclusion of that offence in the draft code.

26. Chief AKINJIDE paid a tribute to the Special Rapporteur for an excellent third report (A/CN.4/387) on a difficult topic, and expressed his agreement with the general thrust of the report. He was concerned about the length of time that had already been spent on the topic. The 1954 draft code, drawn up 31 years earlier, had been taken as the starting-point; but even as far back as the period between the two world wars there had been statements of principle regarding the need for codification of such a kind. He had in mind in particular the statement made by Justice Francis Biddle in a 1946 report addressed to President Truman.[11] The question that arose, therefore, was why had it been impossible so far to reach agreement on a draft code of offences against the peace and security of mankind.

27. Since 1954, there had been three major developments. First, there had been a dramatic change in the nature of weapons of war, a change that had had a great effect on Governments, particularly those of the super-Powers. Secondly, since 1954, almost 100 nations had attained independence. Those nations, albeit weak economically and weak in terms of weapons of war, were none the less members of the international community, and their stability was highly relevant to the subject under discussion. Thirdly, a number of treaties and other legal instruments had been adopted since 1954 by the General Assembly, the Security Council and various regional bodies.

28. As he saw it, there was little to fear from the great Powers, since what might be termed a "balance of terror" had been struck. It was most unlikely that any of those Powers would be the first to use its huge arsenals of weapons and, even if it did do so, the ensuing war would not last for more than a few hours and the world, as it now existed, would certainly be destroyed.

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

29. The real danger therefore lay not in a war between the USSR and the United States of America, but elsewhere, namely in the developing countries, and many of the offences suggested by the Special Rapporteur for inclusion in the draft code were of particular concern to those countries. For instance, two reports commissioned by the Security Council and relating to Benin[12] and Seychelles[13] made it clear that the mercenaries who had invaded those countries had not been acting alone but had probably been working with foreign Governments. The Commission could perhaps profit from the experience of the authors of the reports in question. The newly independent States of Africa, Asia and Latin America—debt-ridden, famine-ridden and poverty-ridden—therefore stood to benefit more from a draft code than did the great Powers.

30. Hence it was urgent to set down the law that dealt with those new developments as soon as possible, and to take account of the weak position of the developing countries. What baffled him was why nations which voted for the resolutions of the Security Council and the General Assembly and signed the various regional agreements and treaties then proceeded to do the exact opposite of what was required of them under those instruments. In that connection, he drew attention to the compendium of relevant international instruments prepared for the topic under consideration (A/CN.4/368 and Add.1), from which members would note that, as far back as 1923, the League of Nations, in article 1 of a treaty of mutual assistance, had declared all aggressive war to be an international crime (*ibid.*, p. 13); and yet the Second World War had still taken place. The Protocol for the Pacific Settlement of International Disputes, also adopted by the League of Nations, on 2 October 1924, had asserted that "a war of aggression constitutes ... an international crime" (*ibid.*, p. 15); and the compendium contained the text of the Moscow Declaration on German Atrocities (*ibid.*, p. 29), signed by Roosevelt, Churchill and Stalin on 30 October 1943, when the Second World War had still been in progress. That Declaration had particular relevance to the role of the individual as criminal, since it made clear that the German officers and men and members of the Nazi Party who had committed atrocities would be sent back to the countries in which they had committed their crimes to be tried and punished. That warning by the Allies had in fact been ignored by the inviduals concerned, who had subsequently been arraigned and brought to trial at Nürnberg and Tokyo. It was therefore very important to emphasize the role of the individual and he could not agree that superior orders should be a defence. Lastly, he noted that the compendium of relevant instruments also contained the text of the London Agreement of 8 August 1945, signed by the Allied Powers, regarding the conduct of the trial of war criminals (*ibid.*, p. 30).

[12] *Official Records of the Security Council, Thirty-second Year, Special Supplement No. 3*, document S/12294/Rev.1.

[13] *Ibid., Thirty-seventh Year, Special Supplement No. 2*, document S/14905/Rev.1, and *Special Supplement No. 3*, document S/15492/Rev.1.

31. With regard to draft article 4 submitted by the Special Rapporteur, the first alternative of section A contained a subparagraph (*b*) concerning evidence of aggression and competence of the Security Council. However, he doubted the utility of involving the Security Council in the matter at all. If a permanent member of the Security Council was involved, that member could use its veto to block the matter, so that it would never reach the international criminal court; even if it was not involved, it could use the right of veto on behalf of a friendly State or ally for the same purpose. He would therefore urge that the Security Council be left out of the picture entirely, so that the issue could be decided between the two States concerned, with the international criminal court acting as arbitrator.

32. Mr. USHAKOV said that, initially, it might be desirable for the Commission to consider only chapter I of the report under consideration (A/CN.4/387), which related to the scope *ratione personae* of the draft code and to the definition of an offence against the peace and security of mankind. He would confine himself for the moment to that chapter.

33. By stating that the report would seek to specify the category of individuals to be covered by the draft (*ibid.*, para. 10), the Special Rapporteur acknowledged that the draft would apply to individuals. It was a choice that involved some drawbacks and would not fail to raise difficulties which he (Mr. Ushakov) would indicate later.

34. To begin with, it seemed essential to emphasize the need to forget for the time being part 1 of the draft articles on State responsibility, and particularly article 19.[14] The fact that those texts exsisted could not prevent the Commission from preparing a draft code of offences against the peace and security of mankind perpetrated by individuals. When the Commission had elaborated the 1954 draft code, the concept of crimes committed by States had certainly not been widely accepted by the international community. Moreover, some offences against the peace and security of mankind had been defined in article 6 of the Charter of the Nürnberg Tribunal.[15] None of that had prevented the Commission from preparing a draft code of offences against the peace and security of mankind for which individuals were held responsible. Again, one category of international offences, war crimes, which had existed for centuries, consisted of offences committed by private individuals and involved no notion of responsibility by the State. From an historical standpoint, it could be seen that offences committed by individuals could indeed be dealt with independently of offences which could be committed by States.

35. The responsibility of States and the responsibility of individuals did not have the same basis. Any offence, whether an act of a State or of an individual, included a subjective element, namely conduct, and an objective element, namely breach by such conduct of the requirements of the law. However, the elements were not the same according to whether the offence was committed by a State or by an individual. Under article 3 of part 1 of the draft articles on State responsibility, the subjective element of an internationally wrongful act by a State was "conduct consisting of an action or omission ... attributable to the State under international law". In the case of an offence committed by an individual, the subjective element could not be an action or omission attributable to him under international law or even under a State's criminal law. So far as a State was concerned, the conduct had to be attributable to it under international law and the conduct was often that of an organ of the State, whereas in the case of an individual it was not enough to establish conduct: if the conduct was criminal it had to be accompanied by fault. Fault signified that the party concerned was in a position to appreciate his conduct; in the absence of will, or in a case of failure of will, there was no fault. When the will could be properly expressed, the fault could be the result of premeditation or of negligence. The notion of circumstances precluding the wrongfulness of an internationally wrongful act by a State had been introduced precisely because the notion of fault was not applicable to States.

36. Nor could the objective element of an offence be the same when the offence was committed by a State as when it was committed by an individual. Again, under article 3, the requirement in the first case was conduct, constituting "a breach of an international obligation of the State", something that plainly could not apply to individuals, for under internal criminal law, and even more under international law, individuals had only duties, not obligations. States agreed to assume obligations, either by custom or by concluding agreements, but individuals were subject only to the duties prescribed by law, through the State, such as the duty to render assistance to a person in danger. But individuals themselves did not incur such duties, for they were prescribed by law, and particularly by international law in the case of some crimes recognized as having a universal character.

37. A "criminal offence" by individuals—which he qualified in that way so as to distinguish it from an "administrative offence" or "administrative delict", two notions which existed in the Soviet Union—consisted of acts that could not be attributed to a State. That was true, for example, of the acts constituting an offence against the peace and security of mankind that were enumerated in article 2, paragraph (13), of the 1954 draft code; the notions of conspiracy, direct incitement, complicity and attempts existed only in internal criminal law and comparative criminal law, but they did not exist under international law in regard to an internationally wrongful act by a State.

38. Again, there was a difference between the responsibility of individuals and the responsibility of States. For the most serious "criminal offences", responsibility on the part of individuals led either to a penalty of deprivation of liberty or to the death sentence. State responsibility could entail measures of coercion, including military measures, under Chapter VII of the Charter of the United Nations: for example, a State could be deprived of some territory as a result of its international responsibility for certain

[14] See 1879th meeting, footnote 9.

[15] *Ibid.*, footnote 7.

offences, particularly the crime of aggression, or a State's sovereignty might be curtailed, or it might be required to take a particular measure within its own territory, but no such steps were comparable to a penalty of deprivation of liberty or the death sentence. Admittedly, some steps taken in that way against a State could be characterized as "criminal measures". However, to do so was to sow confusion, for the Commission's view was that the international responsibility of States took two forms: political responsibility and material responsibility.

39. Moreover, individuals could be held criminally responsible only under criminal proceedings consisting of pre-trial investigations, indictment and a judgment. However, no criminal or any other proceedings existed in the case of States. The concept of an offence by the State linked with an offence committed by an individual therefore had to be ruled out. Each incurred its or his own responsibility: the State for its internationally wrongful act and the individual for his own conduct, action or omission. Each was accountable for itself or himself. Indeed, that was illustrated by Principle VI of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[16] The crimes against peace enumerated therein were recognized as such, not as acts or wars of aggression by a State, but as acts by an individual. Planning, preparation, initiation or waging of a war of aggression could be viewed as the conduct of an individual but not as an offence by a State, or indeed as an internationally wrongful act by a State. Admittedly, the guilty individuals concerned might form part of a State's authorities, but the authorities could not be held guity *en bloc*. The draft under consideration must take account of that aspect of the matter.

40. Hence, the draft under consideration should not draw on article 19 or on the other articles of part 1 of the draft on State responsibility, since an offence by a State and a criminal offence by an individual were two quite different things and the basis for responsibility was not the same in each case.

41. In connection with the Special Rapporteur's third report, he referred first to chapter I, section A, entitled "Delimitation of scope *ratione personae*: authorities of a State or individuals?" The title seemed ill-advised, even though it drew on article 2 of the 1954 draft code, which spoke of "authorities of a State". That expression, wrongly utilized, was taken in that draft to mean "agents of a State" or "politicians". But it was impossible to place individuals and State authorities on the same footing, to juxtapose them and compare them. One individual could be compared only with another individual. For the purposes of the draft under consideration, individuals could be divided into "agents of the State" and "private individuals" or private persons; it had been possible for some crimes to be committed by individuals only because those individuals had acted in their capacity as agents of the State. However, contrary to what was affirmed by the Special Rapporteur, that was not true in every case. Only agents of the State could be held guilty of planning, preparing, initiating or waging a war of aggression, in other words of committing an offence against peace, for private persons would not be in a position to commit such acts. Yet the same was not true of, for example, genocide: organized groups of persons who were not necessarily agents of the State, or agents of the State acting outside their official capacity, could engage in an act of genocide—perhaps with the tacit consent or at the instigation of the State, but also in some instances against the wishes of the State, whether or not the latter effectively controlled the whole of its population throughout its territory. Hence it was possible, and sometimes necessary, to divide individuals into agents of the State and private individuals, but no comparison or parallel could be made between the authorities of the State on the one hand, and private individuals on the other.

42. He would not take up the question of general principles because the Special Rapporteur had not yet done so, and would simply comment that the general principles included in the draft under consideration should be the principles of internal criminal law, of comparative criminal law, stemming from the principle of *nullum crimen sine lege*.

43. As to the definition of an offence against the peace and security of mankind, discussed in chapter I, section B, of the report under consideration, the general, international definition of a criminal offence against the peace and security of mankind should be established not on the basis of article 19 of part 1 of the draft articles on State responsibility, but on the basis of comparative criminal law. Contrary to the affirmation of the Special Rapporteur (*ibid.*, para. 18), a definition of an offence against the peace and security of mankind existed, in the 1954 draft code. It was contained in article 1, which read: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished." Moreover, such offences must be recognized as such by the international community, in the light of international law. It was a definition by enumeration, and not a general definition. With regard to the French text of article 1, the expression *crimes de droit international* was not correct and it would have been better to speak, as did the English text, of "crimes under international law". Crimes by the State were *crimes de droit international*, crimes defined as such by international law, whereas international criminal offences by individuals were crimes under international law. The nuance was important.

44. It was none the less possible to give a general definition of an offence against the peace and security of mankind and to do so on the basis of the concept of a criminal offence in general: the Special Rapporteur stated in a number of passages in his report that there was not, in French criminal law for example, a definition of that kind. A general definition of a criminal offence existed in the USSR: a criminal offence was an act by a socially dangerous individual or group of individuals that, in itself, constituted a danger to society, society being viewed in that instance as the sum of all individuals. Similarly, there was a category of criminal offences of a universal

[16] *Ibid.*, footnote 6.

character, recognized as such by the international community of States, or by States parties to certain agreements or treaties. Therefore it was possible to give a general definition of an international criminal offence as an act by an individual, or group of individuals, that presented a danger to mankind as a whole, such as piracy or issuing counterfeit money. An international criminal offence against the peace and security of mankind would be defined as an act by an individual, or group of individuals, which constituted a danger to the maintenance of the peace and security of mankind, a danger to the maintenance of international peace and security, and which was recognized as such by the international community.

45. Moreover, in his opinion it would be essential to specify in the future draft the persons whose responsibility could be incurred and which concrete acts by them could incur such responsibility. In that regard, he considered the second alternative proposed by the Special Rapporteur for draft article 2 unsuitable, namely: "State authorities which commit an offence against the peace and security of mankind are liable to punishment." What punishment could be meted out to the authorities of a State, as opposed to agents of the State who, within such authorities of the State, were responsible for an offence against the peace and security of mankind?

46. As to the phrase "Any internationally wrongful act ... is an offence against the peace and security of mankind", used in both the alternatives proposed by the Special Rapporteur for draft article 3, he queried whether it was possible to speak of an internationally wrongful act in the case of an individual, whether an individual could be held guilty of a serious breach of an international obligation when he had no national obligations and still less any international obligations.

47. In short, for the purpose of preparing the draft under consideration, it was impossible to draw on article 19 of part 1 of the draft articles on State responsibility, and a general definition could be given of an international criminal offence against the peace and security of mankind. Concrete offences that constituted a danger to the maintenance of peace and security of mankind, to the maintenance of international peace and security, would still have to be defined on the basis of the decisions of the international community in that matter, and on treaties which had been concluded.

48. He reserved the right to speak later on the draft articles submitted by the Special Rapporteur. In his view, the Commission should consider them one by one and, for the moment, confine itself to discussing the Special Rapporteur's proposals, without making suggestions for the incorporation of any particular offence, which would make the work even more complex.

The meeting rose at 1 p.m.

1882nd MEETING

Wednesday, 15 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. MAHIOU said that with the Special Rapporteur's third report (A/CN.4/387) the Commission was taking up what might be the most difficult part of its work on the topic: the more thorough specification of concepts and definitions. As he would have to be absent, he would confine himself, although with regret, to making a few comments.

2. His first comment concerned the general approach to the topic. He always preferred an analytical, concrete approach, and in the present case he favoured the approach of trying to characterize and define offences or categories of offences so as to make concrete progress in the work. He supported the general plan submitted by the Special Rapporteur, although he was aware of the importance of the general principles. Like Sir Ian Sinclair (1881st meeting) he wondered whether the Commission could really make progress in defining and identifying offences if it did not concurrently study the question of general principles. Of course a starting-point had to be chosen, and the Special Rapporteur had preferred, for the time being, to concentrate on the definition of offences and of concepts. For his own part, he supported that position, but he would like the Commission at the same time to begin thinking about the general principles; for the parallel consideration of the definition of offences and concepts and of general principles might enable it to make real pro-

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

gress in preparing the draft code. He was sure the Special Rapporteur would take that point into account when drafting his next report.

3. His second comment concerned the problem of the criminal responsibility of the State, which had been set aside for the present and was still controversial. He believed indeed that, in order to make progress in its work, the Commission should, for the time being, concentrate first and foremost on individual responsibility, it being understood that State responsibility, which was difficult to characterize at the current stage, must be borne in mind. That raised the problem of the relationship between the topic of State responsibility and the draft code. Those two topics might sometimes appear to overlap, but in his opinion that was not really the case. For if the Special Rapporteur for State responsibility and the Special Rapporteur for the draft code were concerned with the most serious international crimes, those against the peace and security of mankind, the two approaches, which were complementary, did not encroach upon one another. The former Special Rapporteur was mainly required to study consequences, in other words secondary rules. The latter, on the other hand, was required to identify concepts and define offences, in other words to state primary rules: that was a characterization phase. Thus, as matters now stood, the two areas were clearly defined, even though there were probably close links between them. But there was also perhaps a closer link between part 1 of the topic of State responsibility and the draft code, to which he would revert later when he came to allude to article 19 of part 1 of the draft articles on State responsibility.[6]

4. His third comment concerned the authors of offences, whom the Commission was called upon to identify, and the offences attributable to them. The Special Rapporteur's third report provided elements for reflection on those matters; but perhaps it was too elliptical on some points and might raise doubts in the Commission. It was true that the statements made so far had thrown some light on the question of offences and their perpetrators. Although, at the previous meeting, the Special Rapporteur had asked the Commission not to dwell too much on the concepts of individuals, State authorities, State agents and the State, he (Mr. Mahiou) felt bound to discuss them, since they formed the heart of the subject: it was necessary to know who would be punished. The Special Rapporteur explained in his third report (A/CN.4/387, para. 11), that the draft under consideration dealt only with the criminal responsibility of individuals. Thus the individual became a central concept, which required a sufficiently clear definition to prevent any misunderstanding about the content of the word "individual". But perhaps the ambiguity arose from the report itself, in particular, he thought, from two sentences. The Special Rapporteur indicated (*ibid.*, para. 12) that, in the case of certain offences, such as those jeopardizing the independence or territorial integrity of a State, only State entities could apply the necessary means; and, referring to other classes of offence, such as genocide and other inhuman acts, he said (*ibid.*, para. 13) that the participation of individuals, which was unimaginable in theory, seemed to be impossible in practice.

5. For his own part, he was not sure that those affirmations were absolutely true in all cases. Taking the frequently cited example of mercenaries, who had sometimes successfully threatened the stability of certain States and Governments, he noted that some States had been accused of hiding behind those operations. But in fact such operations could be carried out even without States being really involved in them. It was not impossible for groups of individuals to commit genocide or other inhuman acts at the instigation of a State or with its complicity, but in weak States, such groups might also attack a particularly weak minority and try to exterminate it by action that might be called independent. In other words, the material acts in question could be committed at the instigation of a State or with its help, but they could also be committed autonomously. The problem thus arose whether, in the latter case, such acts were offences against the peace and security of mankind. That was the problem of legal characterization, which involved reference back to the definition of offences against the peace and security of mankind. Depending on the definition adopted, any particular act might or might not be characterized as an offence against the peace and security of mankind.

6. Without prejudice to the future work of the Special Rapporteur, he believed that, if the Commission were simply to decide that criminal intention, for instance the intention to overthrow a Government or exterminate a minority, an intention by which a Government could be animated just as much as a group of individuals, was the constituent element of an offence against the peace and security of mankind, there would then be an offence against the peace and security of mankind, even though the corresponding material acts were carried out by individuals. If, on the other hand, the Commission decided that such intention was not sufficient and that there must also be presence of State agents or State authorities, the same material acts carried out by individuals would not fall within the category of offences against the peace and security of mankind. But the situation was complex. There were three possible cases. The first was the case of individuals acting in the name of the State as State agents and committing a crime characterized as an offence against the peace and security of mankind: that was a clear situation, which was the very heart of the subject. The second case, quite the contrary, was that of individuals trying to destabilize a Government, to commit an act of genocide or other inhuman acts, apparently without the participation of the State, and it would be necessary to characterize that situation. The third case, which was an intermediate one, was that where the acts were committed by individuals at the instigation and with the encouragement—incidentally, very difficult to prove—of a State. In a word, it was the case where there was indirect intervention by a Government. The problem was whether those three factual situations could be legally characterized in the same way, or whether they should not be differently characterized, with different results in regard to consequences. That was a complicated problem.

[6] See 1879th meeting, footnote 9.

7. If the Commission adopted a very narrow definition of an offence against the peace and security of mankind, in other words a definition which necessarily required the implication of a State or of State authorities, its work would be simplified: it would be able to identify much more clearly the offences to be included in the draft code, as well as the individuals to be prosecuted. But it would then be disregarding the existence of a number of much more complicated situations which were difficult to apprehend, such as the case of acts committed by individuals whose relations with the State were unclear, and *a fortiori* the case of acts by individuals who apparently had no connection with the State. The Commission would thus be in danger of omitting from the draft code a number of offences which a weak State, notwithstanding its will to do so, could neither prevent nor punish. If the perpetrators of such offences took refuge in another country, on what basis could they be prosecuted and punished, since they would escape the internal law of the country in which they had committed their crime? Thus the question arose whether the Commission wished to cover such situations or whether, on the contrary, it wished to exclude them from the code and, if so, why.

8. His fourth comment concerned the link which the definition of offences against the peace and security of mankind made it necessary to establish between the draft code under consideration and article 19 of part 1 of the draft articles on State responsibility. It was only natural that there should be differences of opinion, for the drafting of article 19 itself had given rise to a debate. In his third report (*ibid.*, para. 66), the Special Rapporteur, after making a choice himself, invited the Commission to take a position on the question whether the definition of offences against the peace and security of mankind should be associated with article 19 or whether it should be drafted in a different way. There could be no doubt that the differences of opinion also showed that there were ambiguities. Mr. Calero Rodrigues (1880th meeting) had criticized the Special Rapporteur for not proposing a definition that was independent of article 19, and had questioned the usefulness of drafting a code of offences against the peace and security of mankind which was not independent of that article. Mr. Ushakov (1881st meeting) believed that article 19 and the draft code, which differed as to their bases and consequences, had nothing to do with each other, even though there might be a link between them. He himself thought the situation was probably much more complicated. He feared that it might not always be easy to draw a distinction between crimes within the meaning of article 19 and the offences to be included in the draft code. There might indeed be cases where crimes under article 19 and individual offences to be covered by the draft code were different, but the same act would often be both a State crime within the meaning of article 19 and an individual offence such as the Commission would wish to include in the draft code. That was where the difficulty lay.

9. Taking aggression as a more concrete example, he cited the case where a head of State ordered aggression against another State: the only act was the signing of the order for aggression. But that act could be characterized in two ways: it was a crime by the State—one State committed aggression against another—but at the same time it was an individual crime by the head of State who had ordered aggression. It was thus the same act, attributable to an individual, that ultimately engaged the responsibility both of the State and of the individual who had given the order. That problem was not entirely new. The same situation could be found in internal law. Although conscious of the difficulty of applying the terminology and concepts of internal law to international law, he would try to illustrate the point by an example taken from internal law. Under the law of some countries, including his own, Algeria, there were cases where the same act engaged two responsibilities, in other words there were two different characterizations in regard to consequences: that applied to the administrative responsibility of the State. The State could be responsible for the act of its agents, officials or civil servants. A distinction was generally made between the personal fault of the official, which engaged his own responsibility, and the fault of his department, which engaged the responsibility of the administration. But it sometimes happened that one and the same act generated both types of responsibility. For the State, being an abstraction, a legal person, acted only through individuals: it was to individuals that the acts were attributable. An act was always attributable to an individual, but there was twofold attribution of responsibility: responsibility of the State and responsibility of the individual. If a civil servant committed a crime in the performance of his functions, he must answer for that crime personally before a criminal court. But as the crime had been committed in the performance of his official functions, the civil responsibility of the State was engaged. There was thus criminal responsibility of the individual who had committed the crime and civil responsibility of the State, which must indemnify the victim or his assigns. One and the same act committed by an individual entailed two different responsibilities.

10. That comparison with internal law made it possible to understand the relationship that could exist between the responsibility of the State and the responsibility of persons committing offences against the peace and security of mankind, each being liable to prosecution under a different régime and with different consequences. In other words, the link between article 19 of part 1 of the draft articles on State responsibility and the draft code lay in the fact that the crime committed by an individual would have the dual consequence indicated. The State as such, like every other legal person, did not materially commit any act. Materially speaking, it was always an individual who committed the act on its behalf..A State did not commit a crime in fact: it did so only legally, in the sense that the crime was legally attributed to it.

11. That distinction should be taken into account in order to grasp the link between article 19 and the draft code. Analysis was difficult because of the terminology, since everyone referred, implicity or expli-

citly, to internal criminal law and was influenced by the definitions and concepts of internal law, which were not necessarily adapted to international law. Whether the reference was to State crimes within the meaning of article 19 or to individual offences under the draft code, it was the same word, *crime*, that was used in French. But they were two different things. He reminded the Commission that, at the previous meeting, Mr. Ushakov had used the expressions *crime pénal* and *crime administratif*. The expression *crime pénal* was a pleonasm, although it was helpful in understanding the problem of characterization. In spite of the identical terminology, in French, a State crime was not the same thing as an individual crime. It was criminal law that characterized the crimes and concepts, and the same should apply in international law. What was in question was the autonomy of characterization in international law, which was similar to the classical autonomy of a legal discipline in relation to any other discipline. In internal law, the characterizations of fiscal law were not the same as those of civil law or commercial law, and the consequences entailed were not the same; the characterization of administrative law could be different from those of civil law.

12. An individual crime and a State crime were two different things, and if the Commission came closer to overcoming the difficulties of defining those concepts, it would be better able to understand the link existing between part 1 of the draft articles on State responsibility, in particular article 19, and the draft code. The expression "crime of the State" could be replaced by the expression "wrongful act of the State" to avoid any confusion between the notions of internal law and those of international law. There were after all wrongful acts or faults by the State and there were crimes by the State; and that was where the controversial notion of "criminal responsibility" came into play. To speak of the criminal responsibility of the State amounted to referring back to the "criminal responsibility of individuals". In his view, there was a responsibility of the State for a wrongful act, but that responsibility was different from the criminal responsibility of an individual. As Mr. Ushakov had pointed out, the criminal responsibility of a State and the criminal responsibility of an individual had neither the same legal basis nor the same consequences. But unlike Mr. Ushakov, he would not say that the Commission should therefore exclude State crimes from the draft code; for if it had to define sanctions against States, the question was whether, after all, it should not do so at a later stage in the preparation of the draft code, after having resolved the problem of the criminal responsibility of individuals. Article 19 remained, in fact, a framework to be filled in, perhaps through work on the draft code—although those were two different spheres.

13. Referring to the list of offences against the peace and security of mankind in chapter II of the third report, he observed that the Special Rapporteur placed aggression first. It was universally recognized that aggression should be one of the first offences to be included in the draft code. The Commission's work on the subject was made easier by the Definition of Aggression adopted by the General Assembly in 1974.[7] But rather complex problems arose: the question was how that definition should be integrated in the draft code. It could not be included as it stood, because it contained many elements—definition of aggression, evidence of aggression, competence of the Security Council and consequences of aggression. He agreed with Chief Akinjide (1881st meeting) that it would be difficult to mention the Security Council in the draft code. He also believed that evidence of aggression had no place in the definition: it belonged elsewhere. Finally, he noted the reference in draft article 4 to territorial acquisition as one of the consequences of aggression (first alternative of section A, subparagraph (*d*) (iii)). However, that consequence was already included in part 1 of the draft articles on State responsibility, where it properly belonged.

14. The threat of aggression should undoubtedly be included in the draft code, but perhaps on condition that it was precisely characterized. On the other hand, it was difficult to conceive that preparation of aggression, which was a vaguer notion, could be considered as an offence against the peace and security of mankind, unless it was presicely defined and characterized. Some members had already said that the difficulty lay mainly in the problem of evidence. The Commission would no doubt have to revert to that point.

15. Interference in internal or external affairs was a "hold all" category, which was not unlike a similar notion in internal law, that of an "act against the internal or external security of the State", which was often opposed by criminologists and jurists because it was difficult to define and easy to extend. Such acts should of course be included in the draft code, but subject to being precisely defined. In his view, the formulation in the 1954 code draft was not entirely satisfactory. In connection with interference in the internal or external affairs of a State, Mr. Boutros Ghali (1879th meeting) had mentioned the interesting and useful work of OAU on subversion, but that work was not altogether satisfactory. In any case, the notion of subversion was too vague and would have to be made more precise before it could be characterized as an offence against the peace and security of mankind.

16. With regard to terrorism, he was inclined to share the views expressed by the Special Rapporteur in two passages of his third report (A/CN.4/387, paras. 126 and 136), subject to one particular. Sir Ian Sinclair (1881st meeting) had pointed out that, according to the Special Rapporteur, there was an offence against the peace and security of mankind when terrorism was organized by one State and directed against another; those two conditions must be satisfied for an act of terrorism to be covered by the draft code. That was true, but all cases of terrorism might not be covered. There could be acts of terrorism organized by a State which were not directed against another State: for example, when a Government persecuted its political opponents or a foreign minority. Did such cases represent an offence

[7] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

against the peace and security of mankind? He himself did not think that the words "directed against another State", used in the two passages he had mentioned, were satisfactory.

17. It was obvious that colonial domination constituted an offence against the peace and security of mankind. It only remained to find the most satisfactory wording. He was prepared to support the formulation proposed by the Special Rapporteur (A/CN.4/387, para. 158, *in fine*), namely "the establishment or maintenance by force of colonial domination", although he thought it could be further improved.

18. He was inclined to regard mercenarism as being linked with aggression, as suggested by the Special Rapporteur (*ibid.*, para. 164). It might be advisable to link mercenarism and aggression, to review the definition of aggression and to clarify the concept of mercenarism in connection with aggression.

19. His comments on economic aggression were the same as those he had made on interference in internal or external affairs and on the preparation of aggression. The Commission must identify economic aggression in its concrete manifestations. It must try to analyse the seriousness of the act, so as to distinguish between economic retaliation or economic hostility, which formed part of the economic policy of States, and real economic aggression, which was intended to disrupt the economic structure of a country and to impair its independence or its economy. There again, the main problem was probably that of evidence: at what point could it be proved that an act relating to a State entailed such a threat to its integrity? But in his opinion, once the security or economic independence of a State were threatened by an act, conduct or an economic measure of another State, there was no doubt that aggression had been committed—economic aggression it was true, but aggression all the same. The concept of economic aggression should be included in the draft code, subject to being more precisely defined.

20. Mr. BALANDA said that he supported the provisional outline proposed by the Special Rapporteur in his third report (A/CN.4/387, para. 4). He agreed that the best way to proceed was to start from what was most certain and move on to what was less so. Thus, at the same time as it was trying to determine and define the offences to be included in the draft code, the Commission could make some progress in outlining a few basic principles, which would help to clarify the subject under study.

21. In his third report, the Special Rapporteur raised the question of the scope of the draft code and, following what he called the general opinion, proposed that the work be confined to the criminal responsibility of individuals. For his own part, he would note in that connection that the word "individual" applied to natural persons, as well as to legal persons. As it stood, the draft code would thus apply mainly to the activities of natural persons. But could it never apply to the activities of legal persons? He himself was prepared to believe that the debate on the problem of State responsibility—whether characterized as criminal or otherwise—was by no means closed. It was, indeed, rather difficult to accept the statement that: "The general view which emerged ... was that, in the current circumstances, the draft should be limited to offences committed by individuals." (*Ibid.*, para. 2). In the Commission, the majority opinion was in favour of taking account of the responsibility of States as such. In the case of the Sixth Committee, it was difficult to speak of a "general view", since at the thirty-ninth session of the General Assembly only 13 interventions had been made on item 125 of the agenda, entitled "Draft Code of Offences against the Peace and Security of Mankind". Although, for the time being, the Commission should concern itself only with the criminal responsibility of individuals, it should not yet renounce consideration of the question of the responsibility of States or of other legal persons or entities. For as Mr. Mahiou had pointed out, there were cases of dual responsibility—of the individual and of the State. Moreover, in his second report (A/CN.4/377, paras. 2-4), the Special Rapporteur had left open the question of the content of the topic *ratione personae*.

22. He wondered whether, at the conceptual level, it was impossible to envisage the criminal responsibility of a State. In the Sixth Committee, some representatives had maintained that the criminal responsibility of a legal person was inconceivable. That might be true under certain legal systems. But the Commission should not, for that reason, renounce consideration, in the light of the different legal systems, of the possibility of establishing, at the conceptual level at least, the concept of the criminal responsibility of certain entities. The legal system of Zaire, which derived from the Franco-Belgian legal system, recognized civil responsibility and, as Mr. Mahiou had pointed out, the Algerian legal system included administrative responsibility, both of which could be applied to legal persons. That being so, was it impossible to envisage the criminal responsibility of legal persons at the conceptual level? In his opinion, responsibility deriving from the commission of acts covered by a penal code could not be characterized otherwise than as criminal responsibility. It would therefore be possible, as part of the progressive development of international law, for the Commission to consider making an effort in that direction.

23. On the relationship between article 19 of part 1 of the draft articles on State responsibility [8] and the draft code, he endorsed Mr. Mahiou's comments. At the 1881st meeting, Mr. Ushakov had said that the Commission should ignore article 19, and Sir Ian Sinclair had expressed the same view, although perhaps in a different form. He himself would also point out that a number of acts could be attributable both to individuals and to entities, so that the Special Rapporteur's third report was ambiguous when he tried to identify the authors of offences against the peace and security of mankind. At its previous session, the Commission had decided to adopt, as the criterion for the selection of offences to be included in the draft code, that of extreme seriousness;[9] and that element appeared in article 19. That being so, the Commission could advance in the preparation of

[8] See 1879th meeting, footnote 9.

[9] *Ibid.*, footnote 8.

the draft code independently of its work on article 19. As Mr. Ushakov had rightly pointed out, the basis of responsibility was different in the two cases. Article 19 dealt with the political responsibility of States, whereas the draft code would deal with criminal responsibility, the subjects of which he would not identify for the moment, since the Commission was not unanimous on that point. There was a further difference: the internationally wrongful act referred to in article 19 could just as well be an omission as a positive act, whereas the draft code could apply only to positive acts. Moreover, article 19 related to acts of States, which were subjects of international law, whereas the draft code would relate to acts committed by individuals and perhaps also to acts by certain entities. It was the element of fault that should be adopted as the criterion for differentiating between the two régimes. In international law, the basis of responsibility was wrongfulness, whereas in criminal law the concept of fault came into play in judging the conduct attributable to a natural or legal person.

24. He thought it would be difficult to include article 19 of part 1 of the draft articles on State responsibility, as it stood, as a definition in the draft code. It would have to be adapted to the draft code, in particular with regard to aggression. Like Sir Ian Sinclair, he emphasized that the Commission should try to adopt a different position according to whether the characterizing authority was a political or a jurisdictional body. In the case of the draft code, the characterization was obviously a legal one: the characterizing body should be jurisdictional, or in any case not political. In the Definition of Aggression adopted by the General Assembly in 1974,[10] it was provided that the Security Council, in the light of the circumstances, might determine that other acts than those enumerated constituted aggression. On that point he agreed with Sir Ian Sinclair that it would be difficult to accept that a political body could characterize as aggression acts other than those enumerated in the code, since that would be contrary to the principle *nullum crimen sine lege*.

25. With regard to the definition of an offence against the peace and security of mankind, he doubted whether it was advisable to define as precisely as possible the concepts to which the draft code would refer. It was certainly desirable to clarify the meaning of the terms used in a text of that kind, to make it easier to understand; but in the present case such an undertaking might have certain drawbacks. It should be noted first that a definition, by the very fact of making a concept more precise, excluded everything that it did not include. In addition, too strict a definition would be an obstacle to further development, in particular to the possibility of enlarging its scope. It would therefore be advisable for the Commission to confine itself to a general definition of an offence against the peace and security of mankind, without defining the various acts which could be considered as falling within that category of offences.

[10] See footnote 7 above.

26. It should also be noted that in internal law, and particularly in criminal law, the rules were strictly interpreted. Contrary to international law, internal law formed a complete and effective system. Moreover, if some people sometimes considered that international law was not real law, it was precisely because of its lack of effectiveness as compared with internal law. As internal law constituted a complete whole, it lent itself to definitions, which made it possible to check the application of the concepts covered. In the sphere of legal appeals, for example, it was by determining whether the lower court had duly applied the law that the appeals court could exercise its supervision; to that end it must be in a position to establish whether an act considered to be criminal by the lower court came within the legal definition of the crime in question. But the system was not the same at the international level, where the administration of justice was not generally subject to a check by a higher court. Consequently, too precise definitions of certain concepts might freeze them unnecessarily and impede their development. In following reasoning based on concepts of internal law, the Commission might also, by seeking precision, move towards the preparation of an international penal code, whereas its task was only to draft a code of offences against the peace and security of mankind. If, in carrying out its task, it burdened itself with elements belonging to internal law, it could only expect difficulties, since international law was not as well equipped as internal law.

27. The autonomy of international law and its progressive development, as distinct from that of internal law, had been publicized by the Nürnberg Tribunal, which, faced with the need to prosecute the major war criminals, had not hesitated to sweep away a number of pinciples considered as fundamental in the criminal law of States. Among the principles and concepts set aside by the Nürnberg Tribunal were those of prescription, non-retroactivity and territoriality, as well as the principle *nullum crimen, nulla poena sine lege*. The Commission, too, should avoid adherence to the concepts and mechanisms of internal law, in view of the possible drawbacks of too close analogies between international law and internal law.

28. In his view, the notion of an offence against the peace and security of mankind, of which the Special Rapporteur emphasized the unity, was in fact a notion *sui generis*, which included both offences against international peace and security and crimes against humanity. As the Special Rapporteur pointed out, offences of the first kind were those concerning the state of non-belligerency, whereas those of the second kind involved a situation that went beyond inter-State relations and involved the protection of the human race. It was thus a matter of protecting the right to life, from the point of view both of physical integrity and of the economic and political existence of States.

29. As to the list of offences against the peace and security of mankind contained in chapter II of the report under consideration, it should not be taken as a starting-point, since it required completion. The first offence mentioned, aggression, should be re-

tained, but it should be given a definition that took account of the requirements of the draft code and was not simply taken over from part 1 of the draft articles on State responsibility. In particular, it was necessary to ensure that the characterization of that offence did not emanate from a political body.

30. Although it was often difficult to determine when there was a threat of aggression or preparation of aggression, those two offences should be included in the draft code; perhaps the emphasis should be placed on the material act, which could be identified and punished.

31. Interference in the internal or external affairs of a State was another offence which should certainly be taken into consideration, if only because it concerned a concept which had been established by Article 2, paragraph 7, of the Charter of the United Nations, but which needed to be more precisely defined. That offence was so serious that it endangered the sovereignty of States and violated the principle of the sovereign equality of members of the international community. Rather than give a definition of the offence, which was not beyond common understanding, the Commission could confine itself to giving a few examples.

32. Subversion was also an offence that had its place in the draft code, despite the difficulties which characterization of the act might involve. In that connection he emphasized the special situation of the developing countries, which were more sensitive than others to certain realities by reason of their vulnerability. Thus the stability of a developing country and its institutions might be endangered by subversive statements broadcast by a neighbouring radio station, whereas a great Power was not so vulnerable.

33. In the case of terrorism, the Special Rapporteur wished to retain only State terrorism. That was not doubt the easier solution, but it raised some difficulties. The Commission would have to try to distinguish between acts of terrorism committed by individuals, which came under ordinary law, and acts in which the State had a hand. In view of the difficulties of producing evidence in such cases, it would probably be better only to mention terrorism and to give some examples. Complicity in terrorism should also be included in the code, since it endangered international peace and security. As the Special Rapporteur had pointed out, such complicity should be distinguished from civil war, which was an act of nationals who opposed the established order, whereas terrorism was an act of foreign subjects who endangered the stability of the State. There was absolutely no doubt that the case of freedom fighters should be excluded, since the legitimacy of their activities had been confirmed, in particular, by the General Assembly in its resolution 3103 (XXVIII) of 12 December 1973.

34. The offences constituted by the breach of obligations under certain treaties, which the Special Rapporteur also proposed to include in the draft code, appeared rather to belong to the topic of State responsibility. For the time being, however, the code was concerned with the responsibility of individuals, the responsibility of States being nevertheless reserved.

35. Although it was difficult to define the notion of colonial domination, that expression was certainly not a slogan, as Sir Ian Sinclair had affirmed (1881st meeting). It implied, in particular, inequalities, injustices, the denial of human rights or rights to natural resources and wealth, discrimination, exploitation or harassment. Any effort to reconquer the sovereignty of a State in order to subject it was not a slogan, but a reprehensible reality. The expression "colonial domination" clearly described a concrete situation which the world had known during a certain period.

36. In view of the unfortunate experiences of his own country in regard to mercenarism, he favoured the inclusion of that offence in the draft code, but he was not sure that it should not rather be treated as aggression. For mercenarism implied disregard of a fundamental principle of the Charter of the United Nations, that of territorial integrity. In any case it did not appear that the work of the *Ad Hoc* Committee on the question of mercenarism should prevent the Commission from taking that subject into consideration.

37. Lastly, economic aggression appeared to be a form of the crime of aggression, which should be redefined from a viewpoint different from that of article 19 of part 1 of the draft articles on State responsibility.

38. Under General Assembly resolution 39/80, the Commission was requested to continue its work on the elaboration of the draft code, taking into account the progress made at its thirty-sixth session as well as the views expressed during the thirty-ninth session of the General Assembly. As the question of nuclear armament had been debated in the Sixth Committee and as any recourse to nuclear weapons constituted a repudiation of humanity, that question should be taken up by the Special Rapporteur in his fourth report.

39. As to the draft articles proposed by the Special Rapporteur, he noted that the Special Rapporteur was much influenced by article 19. But that article dealt with the responsibility of States, whereas for the time being the Commission was concerned only with the criminal responsibility of individuals, without, however, excluding the criminal responsibility of certain entities. In those circumstances, he provisionally supported both alternatives for article 2, the first of which expressed a consensus, while the second suggested the implications of the problem of the criminal responsibility of legal persons.

40. As he was in favour, not of a definition of an offence against the peace and security of mankind, but of a general criterion followed by a non-exhaustive enumeration, he thought the method followed in the 1954 draft code, and by the Special Rapporteur in draft article 4, was the best.

41. Mr. THIAM (Special Rapporteur) said that his third report (A/CN.4/387) dealt only with certain offences and that the next report would cover war crimes and crimes against humanity. It was therefore

desirable that members of the Commission should confine their comments to the offences referred to in the report under consideration.

The meeting rose at 12.45 p.m.

1883rd MEETING

Friday, 17 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Welcome to Mr. Huang

1. The CHAIRMAN extended a warm welcome to Mr. Huang and congratulated him on his election to fill the vacancy in the Commission caused by the election of Mr. Ni to the ICJ.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

2. Mr. RIPHAGEN said that his own experience as Special Rapporteur for the topic of State responsibility had perhaps made him over-sensitive about too absolute a distinction—or even a separation—between primary rules, secondary rules, tertiary rules (implementation or *mise en œuvre*) and what he himself, in one of his reports on State responsibility, had called "pre-primary" rules, which related *inter alia* to the "sources" of the other rules and involved a temporal element, in other words the emergence, the transformation and the extinction of primary rules.

3. It was of course easy to express moral indignation about acts of aggression, intervention or colonial domination, but it was less easy to describe in abstract legal terms the primary rules and all the legal consequences of their violation, as well as the temporal elements involved, including retroactive effect and "non-prescriptibility".

4. In his view, it would be quite difficult, if not impossible, to draw up a code of offences against the peace and security of mankind—which would obviously embody primary rules—without having a clear idea of the other rules (secondary rules, etc.) connected therewith. He therefore agreed with the members of the Commission who could not accept the recommendation made by the Special Rapporteur in his third report (A/CN.4/387, para. 9) "to defer until a later stage the formulation of the general principles governing the subject", particularly since those general principles dealt with matters such as "universal competence for the punishment of the offences in question" and "the obligation of every State to prosecute and punish the offenders unless they are extradited". That rule of *aut dedere aut punire* of course raised the question of the attribution of the burden of prosecuting and punishing offenders. Unfortunately, the history of the hijacking of civilian aircraft showed that, all too often, the State most directly affected was not particularly anxious to demand the hijackers' extradition, since prosecution and punishment might make it the target of "counter-action"; for the same reasons, some Governments refused to allow hijacked aircraft to land in their territory. Those were facts that could not be ignored.

5. One general principle, which was, moreover, a secondary rule, had in fact been taken into account by the Special Rapporteur, who had established it as a framework for the drafting of the code when he had stated that his intention was to deal with offences for which the responsible individuals should be punished, such offences being characterized as "crimes under international law". In that connection, it was possible to adopt either of the following two approaches.

6. The first approach had been the basis of the early efforts that had been made. It was an operation that could be compared with that of giving "direct effect", within the sphere of internal law, to certain primary rules of public international law which had initially been meant to govern legal relationships between States. In view of the scope and seriousness of the internationally wrongful acts committed as between States before and during the Second World War, it had been considered insufficient to draw legal consequences only in respect of inter-State relations. There had been an awareness that, even in inter-State relations, almost anything that happened was the result of action by individuals who took decisions and executed them; the idea had accordingly emerged of holding such individuals responsible and liable to criminal punishment (criminal responsibility). That approach clearly underlay the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which had been formulated by the Commission in

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

1950.[6] It should be noted that, in Principle VI, (*c*), "crimes against humanity" were recognized as such only when committed "in execution of or in connection with any crime against peace or any war crime".

7. The second approach would be to recognize the existence of common values or values "shared" by all States. That approach was a very old one and consisted of treating certain individuals who were not vested with any governmental authority as enemies of mankind (*hostes generis humani*), piracy *jure gentium* being the prime example.

8. Actually, a third or intermediate approach was also possible. It would take account of the actual existence of organized groups of private individuals which in a way were an imitation of a "State", or at least of a "Government"; they exercised power in the immediate sense of being able, through the possession of arms and the application of violence, to influence the conduct of other persons and even of representatives of the State (State authorities). Such groups of individuals effectively challenged the normal, presupposed monopoly of power of the State authorities in order to use force within the territory of that State.

9. It was known to all that such *Potentaten* (to use a German term) existed and that they existed separately from Governments and States, which were the normal subjects of public international law. The question thus arose of how to deal with those "unofficial sovereigns" in international law and, in order to answer that question, it was necessary to fall back on one of the two approaches he had indicated earlier. In that connection, he had reservations with regard to some of the statements made by the Special Rapporteur in paragraph 15 of his third report and, in particular, in paragraph 141, where it was stated: "Terror is a means, not an end. The purpose of terrorism, depending upon its form, is either political, ideological or villainous." Power invariably corrupted and it was well known that many a "villainous" act had been committed on the pretext of "political" or "ideological" purposes. All the crimes committed during the Nazi era, for example, had been "politically" and "ideologically" motivated.

10. With regard to unofficial *Potentaten*, moral indignation about their offences and, in particular, about their disregard for the distinction between combatants and non-combatants, namely innocent bystanders who were the victims of their acts, would in principle be the same as in the case of similar offences committed by persons having governmental authority. "Villains" exercising actual power and "State authorities" committing "villainous" acts were morally in the same position. In that case, the approach adopted was in fact the second approach, namely that of identifying acts committed by "enemies of mankind". Legally, however, the mere fact that non-State authorities were involved meant that the States concerned had to take the necessary repressive measures and to provide jointly, in special agreements, for mutual support where the offences were of a "transnational" nature, as in the case of the hijacking of civilian aircraft.

11. Turning to the draft articles submitted by the Special Rapporteur, he said that his comments would be subject to the remarks he had just made on the general principles, which would, to some extent, have a bearing on the scope and formulation of the primary rules of the code.

12. His first comment was that the Commission could not escape engaging in the inverse operation to what it had had to deal with in connection with the topic of State responsibility. In the latter case, it had had to determine which acts—necessarily acts by individuals—were attributable to the State. In the present case, the problem was that of the attribution of acts by State authorities to an individual, bearing in mind the fact that the offences in question were offences under international law. As in the case of State responsibility, the issue of "complicity" (possibly as a result of "toleration") between State authorities and non-governmental groups would also have to be examined. Incidentally, he very much doubted whether any of the offences being dealt with in the context of the topic under consideration had been committed as a result of a decision that was genuinely democratic, either in form or in substance. The foregoing comments would make it clear that he preferred the first alternative proposed for draft article 2.

13. As to draft article 3, he could not accept the proposition that there was no link at all between "international crimes" within the meaning of article 19 of part 1 of the draft articles on State responsibility[7] and the topic under consideration. All the same, he had some doubts as to the wisdom of linking them as closely as had been done in the first alternative. Actually, a similar connection had been established in draft article 4 with regard to the Definition of Aggression adopted by the General Assembly.[8] Although, in relations between States, some measure of vagueness might be acceptable for primary rules, when dealing with criminal consequences for individuals much greater precision was necessary. In that connection, he recalled that the Definition of Aggression was accompanied by a reference to some parts of the report of the competent Committee and he urged that that point should be taken into account.

14. The second alternative of draft article 3, to his mind, was not really an alternative because it referred to a "pre-primary" rule. It dealt with the way in which acts were to be recognized as giving rise to individual criminal responsibility. He agreed with its wording, not as an alternative to the first version of article 3, but as a separate "pre-primary" rule indicating how acts by individuals could give rise internationally to individual criminal responsibility. In point of fact, such recognition was also a basic element of article 19. However, he could not agree with the Special Rapporteur's treatment (*ibid.*, para.

---

[6] See 1879th meeting, footnote 6.

[7] *Ibid.*, footnote 9.

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

51) of the recognition of such acts as a "subjective element"' on the same level as the "intention to commit an offence". The elements of "subjectivity" at issue in the present case were quite different.

15. It would be clear from the comments he had made that he could not accept the proposition that part IV (General principles) of the draft should be left "pending".

16. Referring to part V, containing the list of offences, and in particular to draft article 4, he said that it was impossible for him to agree that the criminal responsibility of any individual should be dependent upon the veto power of the permanent members of the Security Council. More generally, he found that article 4 did not take account of the distinction between rules governing relations between States and rules relating to the criminal responsibility of individuals. In that connection, the reference to the Definition of Aggression or its incorporation in the draft code created the same confusion as the reference, in the first alternative of section A, subparagraph (*e*) (ii), to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

17. With regard to the first alternative of section A of article 4 and, more specifically, to the rule of interpretation contained in subparagaph (*f*), it was difficult to see how such a rule, which would be quite understandable in a document concerning relations between States, could be included in what was, after all, a penal code.

18. As to sections B and C of article 4, he shared the doubts expressed by previous speakers. While some measure of vagueness was acceptable in rules governing relations between States, there was no way of holding an individual criminally responsible under rules whose interpretation depended on nice distinctions. More particularly, and in connection with the criminal responsibility of individuals, it was quite clear to him that subparagraphs (*a*) and (*b*) of section C referred to entirely different types of acts.

19. In the light of what was known about the international weapons trade, he was inclined to doubt the realism of the provisions of section D, (*b*) (iv), in so far as they related to the manufacture and supply of arms. He was in favour of the idea contained in subparagraph (*b*) (iv) but he was not at all convinced that the act in question had the "recognition of the international community as a whole".

20. With regard to intervention, he could not help thinking that it was often like bribery, in which both parties were at fault: the party offering the bribe and the party accepting it.

21. In conclusion, he urged that a contradiction between part III and part V should be avoided. As it now stood, part V singled out for attention "colonial domination", but that was only one example of the violation of the principle of the right of self-determination of peoples referred to in part III.

22. Mr. SUCHARITKUL congratulated the Special Rapporteur on his excellent report (A/CN.4/387) and noted that Mr. Jagota, the Chairman of the Commission at the current session, was the author of a study on the topic based on extensive research on the Tokyo trial, at which Judge Pal from India had played a key role in the progressive development of international law.

23. The title of the topic made it clear that the draft code to be prepared by the Commission would deal with offences against "the peace and security of mankind", a concept that formed an indivisible whole. In the Preamble to the Charter of the United Nations, the peoples of the United Nations had declared their determination to unite their strength to maintain "international peace and security", a term that was particularly precise in the French version of the Charter because the word "international" applied both to peace and to security. The main characteristic of the topic under consideration was that all mankind was included in its scope. That was an element that would contribute to the progressive development of international law and that involved human rights, humanitarian law, the law of war and of armed conflicts, and the law of the common heritage of mankind, as well as the law of offences against the peace and security of mankind. The concept of mankind also came into play with regard to the crime of piracy, a crime under international law that was recognized as such. The fact that the draft code related to the peace and security of mankind, and not only to international peace and security, made it broader in scope and meant that it must transcend borders and nationalities and was intended for all States, whether or not they were Members of the United Nations.

24. With regard to the scope of the draft articles, the Special Rapporteur proposed an article 1 that merely indicated that the draft articles applied to offences against the peace and security of mankind. Such offences were defined in article 3, for which two alternatives were proposed. Although the Commission usually drafted definitions only after it had completed a set of articles, the meaning of certain terms had to be defined at the outset. The second alternative, which contained a general definition of an offence against the peace and security of mankind, was quite acceptable, but the first alternative was relevant as well because it placed emphasis on an element which the Commission had already found essential, namely the seriousness of the nature of the act in question and of its consequences. Four categories of serious breaches of an international obligation of essential importance were listed in the first alternative; they were based on article 19 of part 1 of the draft articles on State responsibility.[9]

25. As several members of the Commission had pointed out, a distinction had to be drawn between the international responsibility of the State and the criminal responsibility of the individual, both as far as their nature and as far as their consequences were concerned. Although the Commission had prepared its 1954 draft code without taking account of the criminal responsibility of the State, and although it

[9] See 1879th meeting, footnote 9.

should be able to do so now, even despite the existence of article 19, it could not entirely overlook that provision. Article 19, which could be described as a problem child—whose paternity, however, was not in dispute—gave only a glimpse of the direction which the Commission's future work would take. He personally would have no objection if the Commission dealt only, for the time being, with individual responsibility, since the international responsibility of the State came under a topic that was being studied by another special rapporteur. It should, however, be noted that the content of the concept of individual responsibility was very broad and that it could include not only the responsibility of individuals, but also that of authorities as agents of the State. One member of the Commission had even suggested that that concept might include the responsibility of legal persons other than States, such as commercial enterprises, which under the internal law of some countries had legal personality and could incur criminal responsibility. Because of the lack of consensus and although that opinion seemed to have been shared by the majority of the members of the Commission, it had been decided not to take account for the time being of the question of the international responsibility of the State.

26. The distinction between a professional offence and a personal offence, which was made in the administrative law of a number of countries and to which one member of the Commission had drawn attention, did not exist in the administrative law of his own country. In Thailand, an individual who had been the victim of an injurious act by an authority could not bring suit against the Government or the State, which did not have legal personality, but he could bring a civil suit against the authority concerned, which might, for example, be a ministry or a ministerial department. According to Thai administrative law, if the authority was convicted, it was the official at fault who would have to pay compensation, since responsibility was attributable only to natural persons, not to the authorities. He also drew attention to intent, an essential element to be taken into account in addition to the act itself. In that connection, he referred to the common-law maxim *actus non facit reum, nisi mens sit rea.*

27. Like other members, he was of the opinion that the Commission should study the general principles that governed offences against the peace and security of mankind. In addition to the seriousness of the nature of a wrongful act and of its consequences, it should consider the principle of the non-application of statutory limitations and the question of the application of the principle *nullum crimen, nulla poena sine lege*, a principle of internal law which would not necessarily automatically have to be applied to international crimes and, in particular, to offences against the peace and security of mankind. The Nürnberg and Tokyo judgments had, moreover, been criticized for having been rendered in the absence of a code of offences against the peace and security of mankind, and it was in response to such criticism that the Commission had been requested to prepare a code. Some of the other general questions that the Commission should study included attempts, conspiracy, penalties and the possibility of establishing an international criminal court.

28. As the Special Rapporteur had explained, the list of crimes contained in chapter II of the report under consideration was not exhaustive, since it was confined to crimes against peace. It would be completed by war crimes and crimes against humanity, which related, for example, to the dignity of man, the treatment of prisoners of war, forced labour, slavery and servitude. It was to be noted that war crimes had already been dealt with in the 1949 Geneva Conventions.[10] On the whole, he was in favour of the list drawn up by the Special Rapporteur, on the understanding that economic aggression should for the time being be left aside because it might be covered by the concept of aggression.

29. Referring to the Definition of Aggression, he recalled that, during the discussions in the General Assembly which had led to its adoption, the representative of Argentina, Mr. Ruda, had pointed out that such a definition would be quite useful in a number of areas.[11] With regard to the maintenance of international peace and security, for example, Article 39 of the Charter of the United Nations provided that the Security Council could decide what measures should be taken in the event of any threat to the peace, breach of the peace or act of aggression. The Security Council's competence to decide that an act was an act of aggression was one element of the definition that did not come into play in the topic under consideration, in which aggression was merely regarded as a crime. The threat of aggression and the preparation of aggression must also be regarded as crimes. The preparation of aggression was a completed act that had to be distinguished from preparatory measures and attempted aggression. Even if the preparation of aggression did not lead to an offence against the peace and security of mankind, it was in itself tantamount to such an offence, although it gave rise to many problems as far as the production of evidence was concerned.

30. Interference in the internal or external affairs of States was another crime that had to be included in the draft code. With regard to terrorism, it would be interesting to know what findings had been reached by the *Ad Hoc* Committee dealing with the question. The question of violations of the obligations assumed under certain treaties was a very broad field of study. Colonial domination, like colonization and annexation, also had to be regarded as offences against the peace and security of mankind and, in his view, they were denials of the right of peoples to self-determination. While he would prefer the term "colonial domination", he would have no objection if it were replaced by wording that was considered more acceptable. He pointed out that mercenarism was not necessarily an offence against the peace and security of mankind and that it was the use of mercenarism

[10] Geneva Conventions of 12 August 1949 for the Protection of War Victims (United Nations, *Treaty Series*, vol. 75).

[11] *Official Records of the General Assembly, Twenty-second Session, Plenary Meetings*, 1618th meeting, paras. 220-229.

that should be condemned as such. Perhaps mercenarism might be included in the concept of aggression.

31. Mr. FRANCIS congratulated the Special Rapporteur on his third report (A/CN.4/387), which was excellent. Expressing full agreement with the outline for the draft code (*ibid.*, para. 4), he said that, in his view, the single most important issue facing the Commission concerned the place that the introduction to the draft code, including the general principles, should occupy in the context of the general order of priority of its work. As was apparent from the report of the Commission on its thirty-sixth session,[12] two different approaches to the question had been advocated. The first was that the Commission should initially prepare a provisional list of offences and then deal with the introduction and, more particularly, the general principles. The second was that the principles should be taken up as a matter of priority and discussed together with the list of offences. He for his part considered it essential to arrive at a provisional statement of principles at the current session, particularly having regard to the priority the General Assembly expected the Commission to accord to the topic.

32. As soon as the Commission had been established, it had been asked to formulate the principles of international law embodied in the Charter and the Judgment of the Nürnberg Tribunal and to embark on the drafting of a code, as it had rapidly done in the early 1950s. The Special Rapporteur had already recommended that the draft code should include the offences covered by the 1954 draft, as well as a number of other offences, such as colonialism, *apartheid*, the taking of hostages and mercenarism (A/CN.4/377, para. 79). The Commission thus had an impressive list of offences which should enable it to arrive at its own list fairly quickly; that list would necessarily be provisional since other offences would in due course be added to it. Furthermore, by its resolution 38/132 of 19 December 1983, the General Assembly had invited the Commission to continue its work on the elaboration of the draft code by "elaborating, as a first step, an introduction in conformity with paragraph 67 of its report on the work of its thirty-fifth session, as well as a list of the offences in conformity with paragraph 69 of that report"; and, at its thirty-ninth session, the General Assembly had renewed that invitation.[13] There could therefore be no doubt that the Commission was required at its current session to prepare an introduction and to enunciate principles, at least on a provisional basis, for submission to the General Assembly.

33. It had been suggested that the Special Rapporteur might formulate some general principles which the Commission would consider at its thirty-eighth session, in 1986. In his own view, however, the issues had been discussed fully enough for the Commission to be able now to go on to the drafting stage, and it was in the introduction to the draft code that the whole question of general principles should be approached. Without seeking to make a formal proposal, he would suggest that the Commission should invite the Drafting Committee to appoint a subcommittee from among its membership to take a quick look at a provisional list of general principles or, alternatively, if the Drafting Committee's work-load was too heavy, to request the Chairman of the Commission and some members of the Drafting Committee to enunciate a few principles for consideration later in the session. Failing that, the quinquennium would end in 1986 without further progress having been made on the question of principles; and the ensuing quinquennium might well end without the topic having been concluded.

34. He could not agree with the statement in the Commission's report on its thirty-sixth session that: "It is not, indeed, impossible that on re-reading the relevant instruments certain expressions, such as the 'laws or customs of war', may appear outdated, since war is now outlawed."[14] One of the offences against the peace and security of mankind listed in the 1954 draft code was "acts in violation of the laws or customs of war" (article 2, paragraph (12)), and the 1949 Geneva Conventions[15] and its Additional Protocols[16] provided a prime example of the way in which the international community had outlawed war. No matter how regrettable it was, war had not been eradicated from the face of the earth and the laws of war should therefore be accepted for what they were worth, not dismissed as inappropriate in certain circumstances.

35. In his view, article 19 of part 1 of the draft articles on State responsibility[17] bore a very real relationship to the draft code. Its relevance, however, was not to be assessed so much in the context of the draft article 3 submitted by the Special Rapporteur as in the light of the answer to the difficult question whether a State or an individual incurred responsibility in a given situation. If, for instance, in a parliamentary democracy such as that of his own country, the cabinet decided to go to war, and if that decision had the full backing not only of individuals but also of the instrumentalities of power, namely the armed forces, and of the nation as a whole, could it be claimed that the State incurred no responsibility within the meaning of the code, although the individuals concerned did? Under article 19, of course, a State incurred criminal responsibility. The issue, therefore, was whether the code should remain silent on that point, with the result that only the members of the cabinet who had given the order to go to war would be held responsible. Those members of the Commission who came from the third world would undoubtedly take the view that, in such circumstances, criminal responsibility would be attributable to the State. In that connection, a reference to a "wrongful act of the State", as suggested by Mr.

[12] *Yearbook ... 1984*, vol. II (Part Two), pp. 11-12, paras. 33-40.

[13] General Assembly resolution 39/80 of 13 December 1984, para. 1.

[14] *Yearbook ... 1984*, vol. II (Part Two), p. 12, para. 40.

[15] See footnote 10 above.

[16] Protocol I relating to the protection of victims of international armed conflicts, and Protocol II relating to the protection of victims of non-international armed conflicts, adopted at Geneva on 8 June 1977 (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

[17] See 1879th meeting, footnote 9.

Mahiou (1882nd meeting), would afford a degree of flexibility, and it warranted consideration pending a decision by the General Assembly on whether the draft code should apply to States as well.

36. The Special Rapporteur rightly pointed out that an individual could be acting as such or as an agent of the State (A/CN.4/387, para. 17). It was essential to have such a nexus, as was apparent from the use of the expression "by the authorities of a State" in many of the offences listed in article 2 of the 1954 draft code. He considered that something was lacking in the first alternative of draft article 2 submitted by the Special Rapporteur, and that the second alternative was out of place in the context. He therefore suggested that the two alternatives should be combined to embody the idea that individuals who committed an offence against the peace and security of mankind might act as individuals or as agents of the State.

37. As to draft article 3, the first alternative was not appropriate and the second alternative was not clear. He had, however, been attracted by the wording suggested by Mr. Ushakov (1881st meeting), although he would like to see it in writing.

38. Lastly, with regard to acts that might constitute an offence under the draft code, Mr. Reuter (1879th meeting) had spoken of the extent to which drug trafficking was destabilizing small countries. Such countries were in fact not only being destabilized by trafficking in dangerous substances: their relations with other countries were also being seriously disturbed by the power cliques involved. The Commission might wish to give some thought to that problem.

39. Mr. FLITAN congratulated the Special Rapporteur on the clarity, concision and preciseness of his third report (A/CN.4/387), which was an important step forward in the study of a very difficult topic. He noted that, in that report, the Special Rapporteur had defined the content *ratione personae* and the minimum content of the draft code, had taken the 1954 draft code as a starting-point and had presented an outline. He agreed that the Commission should confine itself to the minimum content and take the 1954 draft as a basis for its work and, in principle, he endorsed the proposed outline (*ibid.*, para. 4), subject to further review when the outline had been filled in.

40. The question of the limitation of content *ratione personae* called for several comments. In its report on its thirty-sixth session,[18] the Commission had stated: "With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments." The question of State responsibility was thus still open to discussion, notwithstanding the probably much too positive statement of the Special Rapporteur, in paragraph 2 of his report, that: "The general view which emerged from the debate in the Sixth Committee of the General Assembly was that, in the current circumstances, the draft should be limited to offences committed by individuals." As clearly indicated in the topical summary of the debate in the Sixth Committee (A/CN.4/L.382, para. 26), some representatives had "made the point that restricting the scope of the draft code of offences to the criminal responsibility of individuals would diminish the value of the code as an instrument of prevention and deterrence, and would disregard the progressive development of the law on that subject over the past 30 years", and others had noted that: "The implications of the concept of the criminal responsibility of a State were not ... unrealistic and failure to achieve progress in that area would be tantamount to codifying, by omission, the current impossibility of ensuring strict observance of the principles of the Charter of the United Nations and of international law." It was in that spirit that the General Assembly had adopted resolution 39/80, the fourth preambular paragraph and paragraph 1 of which were particularly relevant in that regard. He therefore did not see why the Commission should not consider the question of State responsibility for offences against the peace and security of mankind, since it was, after all, States, not individuals, that were the principal perpetrators of such offences. Moreover, if that were not the case, the General Assembly would obviously not have requested the Commission to prepare a draft code of offences against the peace and security of mankind.

41. It was so true that it was always States that committed very serious offences which jeopardized the peace and security of mankind that, in paragraph 12 of his report, the Special Rapporteur noted—contrary to what he had stated in the above-mentioned paragraph 2—that "these offences [all offences jeopardizing the independence, safety or territorial integrity of a State] involve means whose magnitude is such that they can be applied only by State entities", and that "it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals", and, in paragraph 13, that: "Some of these crimes—*apartheid*, for example—can only be the acts of a State." Those were thus truisms.

42. The draft Code of Offences against the Peace and Security of Mankind could therefore not apply only to individuals and pass over in silence offences which were committed by States and which jeopardized the peace and security of mankind. It had to cover all offences and enunciate primary rules, naturally taking account of the work of the Special Rapporteur who was dealing with the topic of State responsibility and whose specific task was to enunciate secondary and tertiary rules.

43. The Special Rapporteur had rightly established a link between article 19 of part 1 of the draft articles on State responsibility[19] and the draft code by making extensive use, in the proposed first alternative of article 3, of the wording of article 19. During the discussion, several members of the Commission had

[18] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

[19] See 1879th meeting, footnote 9.

stated their views, either in favour of or against, State responsibility and the responsibility of individuals. Mr. Mahiou (1882nd meeting), for example, had explained—while in a way calling in question the Special Rapporteur's statements in paragraphs 12 and 13 of his report—that an act of aggression ordered by a head of State could engage both the responsibility of the head of State as an individual and the responsibility of the State. He had been careful not to refer to "criminal responsibility" and had indicated that it might be possible to use the term "State responsibility for a wrongful act", while Mr. Balanda (*ibid.*) had said that it might be possible to use the term "criminal responsibility of a State". He himself agreed with the comment by Mr. Mahiou, except that, in his own view, there were cases where it was impossible to make a distinction between the two consequences that the same act might have. Such a distinction might be made in the case of an act of aggression which was ordered by a head of State and which engaged, on the one hand, the responsibility of the head of State as an individual and, on the other, the responsibility of the State—which could be characterized either as criminal or otherwise. There were, however, cases where a particular act could not be attributed to any one individual: that was, for example, true of the crime of *apartheid* which could not be attributed to one or more individuals because it was committed by an entire State.

The meeting rose at 1 p.m.

1884th MEETING

Monday, 20 May 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

Draft articles submitted by the Special Rapporteur (*continued*)

Articles 1 to 4[5] (*continued*)

1. Mr. FLITAN, continuing the statement he had begun at the previous meeting, reiterated that in some cases offences against the peace and security of mankind could indeed only be an act by a State, but in some specific, exceptional cases, they could be "personalized" or "individualized". Generally speaking, it would be very difficult to "individualize" offences against the peace and security of mankind. In most instances, only the problem of the responsibility of the State would arise, but since the State, the State apparatus, even the leadership of the State, was a very nebulous concept, it would be very difficult, if not impossible, to identify the person or persons who might have committed an offence against the peace and security of mankind, whereas it was easy to identify a State which had committed such an offence.

2. Some people advocated excluding States from the scope *ratione personae* of the draft code, arguing that the responsibility of States would fall precisely under the draft articles on State responsibility and that the draft code should therefore deal exclusively with individuals, lest the two drafts interfere with each other and lest the autonomy of the future code be affected. In that regard he would reply that the fact that the code would define offences against the peace and security of mankind was in itself enough to establish its autonomy. Moreover, like other members of the Commission, he considered that the draft code should set forth secondary rules particular to offences against the peace and security of mankind, a matter the Special Rapporteur would have to examine in his next report. The tertiary rules need not be enunciated immediately, for the Commission would do so in due course, when the political organs of the international community, which were alone competent in the circumstances, provided guidance for the Commission in that regard. It should be remembered that the enunciation of secondary or tertiary rules had not been laid down as a prerequisite for elaborating part 1 of the draft articles on State responsibility.

3. Again, if the draft code was to apply only to individuals, how, for instance, could punishment be meted out in the case of aggression committed by a head of State, or by a State? What would the penalties be? Who would determine that the head of State, as an individual, was to be judged by a national court, an international tribunal or a political organ?

4. In his opinion, there would be two separate instruments: on the one hand, articles on State responsibility, which might take the form of a convention, a sort of general law on the matter, applying in all cases to all international crimes and delicts, including offences against the peace and security of mankind as well as delicts—which would not be covered by the code; and on the other hand, a code of

[5] For the texts, see 1879th meeting, para. 4.

offences against the peace and security of mankind containing a definition of such offences and setting forth the relevant secondary rules.

5. He wondered whether a code of offences against the peace and security of mankind that excluded States from the scope *ratione personae* would be truly useful for mankind, for the majority of such offences were unquestionably committed by States. Some members of the Commission who were in favour of excluding States had cited as an example the Charter of the Nürnberg Tribunal,[6] which related only to individuals. There was no proper foundation for such an argument. Admittedly, the Nürnberg Charter could be used as an example inasmuch as it had been a great step forward in the progressive development of international law, but the delegations in the Sixth Committee of the General Assembly that had spoken on the draft code and the Governments that had communicated their written comments—particularly delegations and Governments convinced of the merits of the code—had been unanimous in maintaining that the future code should be an effective instrument for prevention and deterrence.

6. It had also been asserted, in support of the argument for excluding States from the scope *ratione personae* of the draft code, and in the light of internal law, that all offences against the peace and security of mankind could be "personalized" and that everyone should answer for his acts. In a case of intervention in the internal or external affairs of a State, however, who was to determine the person who had committed the offence? Was it to be a national court? The same question arose in regard to subversion, which had been proposed for inclusion in the code at the current session.

7. Sanctions, or penalties, were also a matter that posed some questions. What was the value of a sanction against an individual and what was the value of a sanction against a State? In the case of a head of State who had ordered aggression, what would be the value of the sanction taken against the head of State, and who would adopt the sanction? If the head of State disappeared, would the responsibility be extinguished or would proceedings still be taken in connection with the offence committed by the State? Needless to say, sanctions applicable to States had to be different from sanctions applicable to individuals. For instance, a State could be required to pay a fine, to place limits on a certain type of arms or restrict the numbers of its military forces. The Special Rapporteur would have to study the matter.

8. Again, he did not think that the absence of rules of criminal procedure applicable to States was enough to justify the exclusion of the criminal responsibility of States. The Commission could not find an argument to say to the General Assembly that only individuals could commit offences against the peace and security of mankind and be punished accordingly, when the General Assembly knew that usually it was States that committed offences against the peace and security of mankind.

[6] See 1879th meeting, footnote 7.

9. In connection with chapter II of the report, concerning acts constituting an offence against the peace and security of mankind, he agreed that aggression should figure first and foremost in the future code. The Commission should none the less avoid giving aggression a definition different from the one adopted by the General Assembly in 1974.[7] A straight referral to that definition would suffice. The threat of aggression certainly seemed to constitute, as did aggression itself, an offence against peace, as the Special Rapporteur concluded in his report (A/CN.4/387, para. 91). On the other hand, preparation of aggression should not be included among the offences against the peace and security of mankind. The code should include interference in the internal or external affairs of States, but the word "affairs" should not be qualified, because the distinction between internal affairs and external affairs was not sufficiently sharp. In the case of terrorism and violations of obligations assumed under certain treaties, he endorsed the Special Rapporteur's proposals. Colonial domination, an all too well-known offence, should also find a proper place in the code. With reference to mercenarism, however, account should be taken of the work being done by the *Ad Hoc* Committee on the elaboration of a convention on that question. Lastly, economic aggression should be included in the code, but the concept should be clarified in relation to aggression properly speaking.

10. With regard to the draft articles submitted by the Special Rapporteur, he could accept article 1. However, in order not to exclude State responsibility, he thought that the wording of article 2 might be altered to read: "Any perpetrator of an offence against the peace and security of mankind is liable to sanction." The word "sanction" was preferable to the word "punishment". Similarly, he favoured the second alternative of section A of article 4 and thought that, there again, in order to avoid adopting a position one way or the other, the expression "by the authorities of a State", in square brackets, should be deleted from the entire article.

11. Mr. OGISO said that the Special Rapporteur's meticulous and lucid analysis in his third report (A/CN.4/387) was yet another major contribution to the Commission's work. Noting that the Commission was required by General Assembly resolution 39/80 of 13 December 1984 to elaborate an introduction as well as a list of offences against the peace and security of mankind, he said that he had some doubts about the conclusion reached by the Special Rapporteur at the outset of his third report (*ibid.*, para. 9) to the effect that the formulation of general principles should be deferred until a later stage. The Special Rapporteur gave two reasons for that conclusion (*ibid.*, paras. 6, 7 and 9): the first concerned Principle VI of the Nürnberg Principles, which was not really a principle since it consisted of a list of acts, and the second related to the difference in scope of the various principles involved.

[7] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

12. Apart from Principle VI, which he agreed was inappropriate, there was no other principle in his view which *prima facie* did not provide a proper basis for discussion of the general principles of the draft code. Principles I, III and IV, which had been incorporated in the 1954 draft, had a close bearing on the question of delimitation of the scope *ratione personae*, while Principles II and V were universally applicable and their inclusion in the draft code should cause no problems. There also seemed no reason why the other principles to which the Special Rapporteur referred in his report (*ibid.*, para. 9) could not likewise be considered by the Commission.

13. Even if there was a slight difference in the scope of application of all those principles—and he did not think that there was—there was no imperative reason for not considering the general principles at an early stage. Those principles, by definition, were applicable *mutatis mutandis*; and the very concept presupposed that each principle would be applied on a case-by-case basis. He therefore supported those members who thought that some of the general principles should be considered promptly, together with the acts constituting offences against the peace and security of mankind.

14. The Nürnberg Principles, however, should not provide the only basis for the Commission's work. There were other important and universally applicable principles, such as *nullum crimen sine lege*, the principle of non-retroactivity, and probably a principle concerning complicity. Delimitation of the scope *ratione personae* and the definition of offences against the peace and security of mankind could perhaps also more properly be considered in conjunction with the general principles.

15. Another important principle concerned international criminal jurisdiction, which included the régime of interpretation, application and enforcement of the draft code, and the establishment of a permanent international criminal court. It had been said that the criterion of seriousness was too vague and subjective, but as the Special Rapporteur pointed out (*ibid.*, paras. 40-48), such criticism was to some extent unavoidable. An international criminal jurisdiction was essential to ensure the objective, fair and equitable application of the code. If such a code was applied by national courts, it would very probably increase the subjective element and inevitably attract the criticism that the code was applied according to the procedure and interpretation adopted by the conqueror, or stronger party. That would be in direct conflict with the spirit of the law.

16. Since a permanent international court could not be set up immediately, some transitional mechanism could possibly be devised with a view to guaranteeing the necessary objectivity; for instance, *ad hoc* international tribunals so constituted as to reflect the opinions of different interest groups might be advisable. Alternatively, to make it clear that the establishment of an international criminal jurisdiction was the ultimate aim, States could be required to enact the necessary legislation for the trial and punishment of persons charged with offences under the code, pending the establishment of such a court.

17. For all those reasons, he was hesitant about the idea of postponing consideration of the general principles, and even considered that it might be rather dangerous to embark on the formulation of a list of offences without considering the general principles. Such principles would provide an indication of the general nature of the concept of offences against the peace and security of mankind and should therefore be discussed in parallel with the scope *ratione personae*, a definition of the offences, and the list of the offences.

18. He agreed that for the time being the draft code should be confined to offences committed by individuals. He also agreed that individuals who perpetrated offences against the peace and security of mankind were generally vested with power or authority deriving from the State. It was entirely conceivable, however, that a private individual or a group of private individuals, with considerable power and highly organized, might commit some of the offences covered by the draft code, independently of any control by the State. Indeed, numerous acts of terrorism had been carried out by such persons. There was therefore no compelling reason at the current stage to confine the scope *ratione personae* of the draft to the "authorities of a State". Also, the concept "authorities of a State" was not very easy to understand, since it could cover either an individual who held an official post or an organ of a State. Hence he would prefer the term "individuals", in order to indicate the scope *ratione personae* of the draft code.

19. The concept of an offence against the peace and security of mankind had a certain unity, but the second definition suggested by the Special Rapporteur (*ibid.*, para. 65) was perhaps too vague. He was also reluctant to adopt the wording of article 19 of part 1 of the draft articles on State responsibility.[8] The four major breaches covered by that article entailed the responsibility of the State, but not necessarily the criminal responsibility of individuals. Moreover, as the Special Rapporteur implied (*ibid.*, para. 61), the scope of offences against the peace and security of mankind should, by virtue of their extreme seriousness, be narrower than that of international crimes in general. There was no reason, however, why the Commission should not use as a basis for further discussion the three categories referred to in article 6 of the Charter of the Nürnberg Tribunal,[9] as listed in the report under consideration (*ibid.*, para. 57).

20. The vagueness of the general definition and the difficulty of clarifying the offences involved again underlined the need for an international criminal jurisdiction to implement the draft code.

21. Turning to chapter II of the report, on acts constituting an offence against the peace and security of mankind, he said that, in the absence of guidelines concerning the general principles or introduction, his comments would necessarily be of a tentative nature.

[8] See 1879th meeting, footnote 9.

[9] *Ibid.*, footnote 7.

22. In his view, the Definition of Aggression adopted by the General Assembly in 1974[10] should be used without change. The formulation of any other definition would lead to confusion and have an undesirable effect on the relationship between the Commission and the General Assembly. It would also be impracticable to reopen discussion on a difficult problem on which the General Assembly had spent many years. In addition, since the Definition of Aggression had been adopted as a resolution and had not taken the form of a legal instrument, he considered that the format should not be disturbed and therefore preferred the second alternative of section A of draft article 4 submitted by the Special Rapporteur.

23. With regard to the "threat of aggression", inasmuch as it was unlikely that anyone would manifest an intention to commit an act of aggression, he would prefer the expression "threat or use of force", which was used in the Charter of the United Nations.

24. He agreed entirely that preparation of aggression should be omitted from the list of offences. Under the existing machinery for the maintenance and restoration of peace, a decision on whether a certain act constituted aggression was taken when the act had started, not at the stage of preparation. Preparation for aggression was difficult to distinguish from legitimate measures of defence. Those preparing for aggression could claim to be preparing their self-defence, and *bona fide* preparations for self-defence could be converted into aggression at the last moment. In any case, if an act was punishable once it had been shown to amount to aggression there would be no need to punish the same offender for the preparation of the same act of aggression. Also, pending the establishment of an international criminal jurisdiction, the inclusion of preparation of aggression would make the scope of the code even more vague and arbitrary.

25. The question of interference in internal or external affairs had already caused problems at the sixth session of the Commission, in 1954: three members of the Commission had abstained in the vote on the 1954 draft code, partly because of article 2, paragraph (9), which provided for an offence of intervention.[11] The scope of that offence had been so vague that even economic or political coercive measures not accompanied by the use of force against the potential aggressor could be construed as intervention; the new code should not be open to any such interpretation. However, as some members had pointed out, the wording used in the report was so vague that even legitimate and normal diplomatic activities could be regarded as interference. As Mr. Lauterpacht had remarked in 1954,[12] international political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another so as to influence its will; if the Commission treated legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning.

26. He was not altogether convinced that terrorism could be limited to State-sponsored terrorism directed against another State, as was suggested by the Special Rapporteur (*ibid.*, para. 126). He would prefer to regard as terrorism any act threatening the State authority or the public indiscriminately, whether or not the terrorist had a specific political aim or was State-sponsored and whether or not his acts were directed against a particular State.

27. He shared the view that, if a violation of the obligations assumed under certain treaties was to be dealt with in a separate article, the article should be confined to breaches of obligations under treaties in the field of disarmament, such as the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water; the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; the 1971 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; and the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (see A/CN.4/368, p. 108).

28. As to colonial domination, while he had no difficulty in accepting the proposed expression (A/CN.4/387, para. 158), he recognized that not all members were entirely convinced. He trusted that a generally acceptable formulation could be found.

29. Lastly, he considered that the problem of mercenarism had been settled by the Definition of Aggression in 1974. He also thought that economic aggression, as a separate item, should be omitted from the list of offences. Economic aggression was an offence if it constituted an offence under the Definition of Aggression or in the context of interference in the internal affairs of another State, provided that the concept of interference was carefully refined and bearing in mind his comments on interference.

30. Mr. RAZAFINDRALAMBO said he fully appreciated the difficult work the Special Rapporteur had been called upon to perform in preparing his third report (A/CN.4/387), a task of research to begin with, and then one of analysis to synthesize concepts of crucial importance, since the aim was to help to maintain and safeguard the peace and security of mankind. The Special Rapporteur's proposed outline for the draft code (*ibid.*, para. 4) consisted of a first part on the scope *ratione personae* and on the definition of an offence against the peace and security of mankind, which would be supplemented by general principles, and a second part containing a list of the acts constituting offences against the peace and security of mankind. The outline was a logical and familiar one, since it was in keeping with the classic division under national codes between one part setting forth the general principles of criminal law and the other part dealing with the various offences. He fully endorsed the proposed outline.

[10] See footnote 7 above.

[11] *Yearbook ... 1954*, vol. II, p. 151, document A/2693, footnote 6.

[12] *Yearbook ... 1954*, vol. I, p. 151, 271st meeting, para. 20.

31. Two questions of fundamental importance arose in connection with the future of the draft code: the persons covered, and the definition of an offence against the peace and security of mankind. On the first point, the Special Rapporteur noted, from the start of the report (*ibid.*, para. 2), that the general view which had emerged from the debate in the Sixth Committee of the General Assembly was that in the current circumstances the draft code should be limited to offences committed by individuals. The Special Rapporteur inferred that the draft code should be confined to the criminal responsibility of individuals and he was therefore proposing a draft article 2 in which the two alternatives related respectively to "individuals" and "State authorities", the latter being taken to mean individuals who performed or who ordered the performance of government decisions. Hence criminal responsibility on the part of the State, as a legal person, was excluded from the draft code.

32. Normally, the definition the Special Rapporteur then proceeded to give for an offence against the peace and security of mankind, in draft article 3, would thus be confined to acts by individuals. Yet in order to define such an offence, the Special Rapporteur reverted to the definition of international crimes set out in article 19 of part 1 of the draft articles on State responsibility.[13] For his own part, he shared the reservations expressed in that connection by several members of the Commission, and for a number of reasons. In the case of article 19, in the absence of a suitable term, the Commission had characterized an "international crime" as an internationally wrongful act resulting from a serious breach by a State of an obligation essential for safeguarding the fundamental interests of the international community. Moreover, paragraph 4 of article 19 specified that any internationally wrongful act which was not an international crime constituted an international "delict", a concept that was similar to that of "civil offence" in Roman law, as opposed to "criminal offence". Such a distinction could perhaps make for an understanding of the exact scope of an international "offence": an internationally wrongful act would be a kind, of "civil offence" as opposed to a "criminal offence", as Mr. Ushakov (1881st meeting) had rightly pointed out. The definitions in article 19 therefore applied to breaches which might, albeit improperly, be characterized as "offences", but which did not display any of the conventional characteristics of a criminal breach falling under the jurisdiction of the criminal courts.

33. His reservations about taking into consideration article 19 also stemmed from the fact that the objective element of an internationally wrongful act lay in a breach of an international obligation, which could only be a State obligation, whether its origin lay in customary law, treaty law or any other law. Article 18 of part 1 of the draft articles on State responsibility even required the obligation to be in force for the State concerned. Such requirements therefore meant that the international "crimes" covered by article 19 could be attributed only to State bodies. International law could conceivably impose obligations on individuals, but the obligations should be incorporated in the internal systems of States, for the individual was not a subject of international law. In any event, it was plain that any legal construction of the draft on State responsibility was based only on inter-State relations and left no room for the individual, except as an organ of the State, as provided for in article 5 of part 1 of that draft. Consequently, the fact that the international crimes covered by article 19, paragraph 3 (*a*), (*b*) and (*c*)—aggression, colonial domination, slavery, genocide and *apartheid*—were identical with the "crimes under international law" enumerated in the Nürnberg Principles and the offences against the peace and security of mankind listed in the 1954 draft code was not enough to warrant borrowing the definition in article 19, formulated for "civil offences", and applying it to "criminal offences". So far as that definition was concerned, the responsibility of the individual was ruled out.

34. Like other members of the Commission, he rejected any reference to article 19, but for different reasons. Even though offences against the peace and security of mankind formed only one special category of international offences that were marked by their extreme seriousness, as the Special Rapporteur affirmed, those members rejected any reference to article 19 because they could not admit criminal responsibility on the part of the State. Personally, he thought it was inconsistent to confine the draft code to the criminal responsibility of individuals and then proceed by transposition from what had been done in connection with the international responsibility of States in the case of international crimes, in other words of "civil offences". He hesitated to resort to article 19 in defining an offence against the peace and security of mankind because, in his view, a separate and independent definition of that concept was perfectly conceivable. Such a definition should contain both an intentional element and a material element, as for any criminal breach that was of some seriousness. It should not *a priori* rule out the possibility of criminal responsibility on the part of States.

35. In that regard, however, some passages of the report had sown confusion. The Special Rapporteur referred to an opinion or general trend in favour of a "minimum content" (A/CN.4/387, para. 3), in other words only the criminal responsibility of individuals. Both Mr. Balanda (1882nd meeting) and Mr. Flitan (1883rd meeting) had demonstrated that no such inference could be drawn from anything in the documents of the thirty-ninth session of the General Assembly, and more particularly in the topical summary of the discussions held in the Sixth Committee (A/CN.4/L.382, sect. B). Moreover, in resolution 39/80 of 13 December 1984, the General Assembly had invited the Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind, taking into account the results achieved by the process of the progressive development of international law. The resolution could not be interpreted as an invitation to leave aside, even provisionally, the question of applying the draft code to States themselves. Admittedly,

[13] See 1879th meeting, footnote 9.

in that resolution, the General Assembly also requested the Secretary-General to seek the views of Member States and intergovernmental organizations regarding the Commission's conclusions, and more particularly its intention of confining itself for the moment to the criminal responsibility of individuals. But it seemed to be widely accepted, as could be seen from the current discussion, that the various parts of the draft were interdependent. For instance, Sir Ian Sinclair (1881st meeting) had highlighted the interaction between the general principles and the identification of offences, and Mr. Riphagen (1883rd meeting) had sounded a warning against a premature definition which might well contradict the list of offences, because the future of the draft was tied in with the tertiary rules, in other words with implementation. Personally, he took the view that the concept of an offence against the peace and security of mankind depended on the content *ratione personae* of the code, namely the question whether the State could be held as a person subject to the jurisdiction of an international criminal court. If so, the elements of the offence could be perceived in a different way from offences committed by private individuals. In short, the choice was more political than legal, and one that should be of no concern to the Commission. The Commission's only duty, under the terms of its mandate, was to elaborate an introduction and a list of crimes.

36. Since members' term of office was to end in 1986, the suggestion by Mr. Francis (*ibid.*) that a working group should be set up to prepare a provisional list of the general principles and to study the relationships between article 19 and the draft code, if it met with the agreement of the Special Rapporteur, could help to dispel some of the uncertainty that the problem of the criminal responsibility of the State cast over the future of the draft.

37. As to the elaboration of the list of offences against the peace and security of mankind, which was to form the second part of the code, the Special Rapporteur was confining himself, as stated in his previous report (A/CN.4/377, para. 6), to the offences covered by the Nürnberg Principles and codified by the Commission in its 1954 draft code. The offences now being enumerated already commanded consensus, not only in the Commission, but also in the General Assembly. However, before reviewing the various offences listed by the Special Rapporteur, he wished to state that it would have been preferable for each one to be covered by a separate article, even in the case of offences that could be included under a broader heading. For example, mercenarism should form the subject of a special provision and not of a mere subparagraph in the article on aggression. Again, each offence covered by a separate article should have a special heading.

38. So far as aggression was concerned, the Special Rapporteur could define it only by drawing on the Definition of Aggression adopted by the General Assembly,[14] or by making a reference to that definition. Yet neither the comprehensive, nor the condensed alternative proposed by the Special Rapporteur in section A of draft article 4 was entirely satisfactory. The provisions relating to the role of the Security Council had no place in a legal instrument intended for application by a jurisdictional body. Furthermore, the text of the definition in question contained provisions that were political in character and covered solely acts that were acts by a State. The definition selected must be completely consistent with the provisions that were to determine the scope *ratione personae*. The remaining part—the various subparagraphs relating to the acts constituting aggression—met entirely with his agreement.

39. The threat of aggression, of which recent history afforded unquestionable examples, was generally accepted, but preparation of aggression did not seem to command unanimity. Yet preparation of aggression, like threat of aggression, had already appeared in the 1954 draft code. Technically speaking, there seemed to be no notable differences between the two acts: a threat was credible only if it went hand in hand with preparations for the use of force, since a threat was in some way the corollary to preparation for aggression and was truly felt only because of such preparation. When one State concentrated and trained troops or built landing-strips on the borders with another State, while threatening to overthrow the Government of that State, there was hardly any difference of degree between the threat of aggression and the preparation of aggression. Hence it would be logical to retain both as offences.

40. In the case of mercenarism, the Special Rapporteur simply kept it, as did the 1954 draft, as a particular form of aggression. However, since that time, the offence had formed the subject of many international instruments, in particular a Convention of OAU[15] and a provision of an Additional Protocol to the 1949 Geneva Conventions,[16] not to speak of the work now being done by the *Ad Hoc* Committee on the Drafting of an International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Tying mercenarism in with aggression could well make it exclusively a State offence, but the most characteristic examples of the use of mercenaries pointed, at least in appearance, to individuals who had no official connection with an existing Government or armed groups financed by former government leaders who had been overthrown.

41. Intervention in a State's internal or external affairs was the subject of the same special provisions as in the 1954 draft code. Among the acts of "intervention", a term that was preferable to "interference", which had a more political connotation, it would be advisable to include acts of subversion, which were a masked form of intervention and were commonly practised against countries of the third world. The decisions taken by OAU bodies could help in elaborating a provision on intervention that included the concept of subversion.

42. Economic aggression could also be taken as a form of intervention in a State's internal affairs. It

[14] See footnote 7 above.

[15] OAU, document CM/817 (XXIX). See also A/CN.4/368, p. 64.

[16] Article 47 (Mercenaries) of Protocol I (see 1883rd meeting, footnote 16).

was a common act and one that was suffered especially by developing countries. In that connection, he drew attention to a particular case of economic aggression which had plunged one Latin American State into chaos and economic bankruptcy: the acts of a multinational corporation had provoked an insurrection of the army and the overthrow of the legitimate Government. It was therefore an offence that could be attributable to individuals.

43. State terrorism called for a particularly precise definition in order to distinguish it from terrorism by individuals, which did not constitute a breach of the peace and security of mankind. Accordingly, the text proposed by the Special Rapporteur was acceptable.

44. A State's obligations under a treaty on arms limitations or restrictions were of crucial importance because of the proliferation of nuclear weapons and the threat of such weapons to the whole of mankind. Violation of such obligations constituted an offence which required a special provision. Mention should also be made in the draft of the prohibition of certain weapons, such as nuclear weapons, without prejudice to the special provision announced by the Special Rapporteur (A/CN.4/377, para. 53).

45. Lastly, the offence of establishing or maintaining colonial domination by force was but one application of a principle generally regarded as part of *jus cogens*, namely the right to self-determination. The Special Rapporteur properly preferred to tackle the issue from the standpoint of "colonial domination" rather than from that of "self-determination", which could be invoked by separatist minorities. In the present context, the point at issue was colonial domination over an entire people, deprived of its right to national sovereignty. Furthermore, it should be emphasized that the offence historically termed colonialism could be attributed full well to groups of individuals, usually settlers without any official standing, who by force, if necessary, opposed the process of decolonization embarked upon by the Government of their own country.

46. As the Special Rapporteur had stated, the list of offences in his third report was not exhaustive. For his own part, he would refrain from discussing genocide and *apartheid*, although such offences posed the problem of the exact status of the perpetrators.

The meeting rose at 5.45 p.m.

1885th MEETING

Tuesday, 21 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. NJENGA said he would follow the outline proposed by the Special Rapporteur in his third report (A/CN.4/387, para. 4) and deal first with the scope of the code *ratione personae*. It was true that the criminal responsibility of a State could not be governed by the same régime as that of individuals, but that fact could not be taken to mean that the State was exempt from all criminal responsibility for acts committed by its agents in the performance of their functions. The nature and scope of most of the offences covered by the draft under study were such that the direct culpability of the State could not be avoided. In most cases, the role of the individual was that of an accomplice whose criminal responsibility arose from his acts as an agent of the State. To attribute criminal responsibility to the agent personally was fully justified, but the State itself could in no case be exonerated.

2. By their very nature, such international crimes as aggression, colonialism and *apartheid* had States as their main perpetrators, individuals becoming responsible either as such or as State agents. In his analysis of the deliberations in the Sixth Committee of the General Assembly, Mr. Balanda (1882nd meeting) had shown that the small participation could not justify the Special Rapporteur's conclusion that "the draft should be limited to offences committed by individuals" (A/CN.4/387, para. 2). Analysing the same deliberations, Mr. Flitan (1883rd meeting) had in fact demonstrated that the majority of speakers had supported the attribution of criminal responsibility to the State. In the Commission itself, the majority of members did not accept the idea of restricting the draft code to individuals and leaving the responsibility of States to article 19 of part 1 of the draft articles on State responsibility.[6] The two drafts dealt with separate topics, neither of which should be

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1879th meeting, footnote 9.

subordinated to the other. In its report on its thirty-sixth session, the Commission had stated its intention[7] that the content *ratione personae* of the draft code "should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments". The issue of the criminal responsibility of States thus remained very much an open question, as was indeed required by the written comments of Governments (A/39/439 and Add. 1-5), of which he cited in particular those of Botswana, Czechoslovakia, Peru and Suriname.

3. As to the definition of an offence against the peace and security of mankind, he thought that the absence of such a definition from the 1954 code did not constitute a fatal defect. Most national penal codes did not define the notion of "crime". In any case, if a definition was to be included in the draft code, it would be necessary to rework draft article 3 and identify the essential constituent elements of all the international offences against the peace and security of mankind. The first alternative proposed for draft article 3 by the Special Rapporteur appeared to rely exclusively on article 19 of part 1 of the draft articles on State responsibility, and that approach did not seem appropriate. For his part, he preferred the second alternative, which provided that: "Any internationally wrongful act recognized as such by the international community as a whole is an offence against the peace and security of mankind." That formulation was sufficiently flexible to cover the whole list of international crimes, while leaving room for development of the law in that field. It was necessary to specify, however, that only the most serious wrongful acts constituted offences against the peace and security of mankind.

4. He agreed with the Special Rapporteur that the expression "peace and security of mankind" was indivisible (A/CN.4/387, para. 38). He also endorsed the Special Rapporteur's test of "extreme seriousness" for determining which crimes should be placed on the list of offences against the peace and security of mankind. It was the seriousness of the violation and the importance attached by the international community to the obligation violated that should justify characterization as an offence against the peace and security of mankind. The Special Rapporteur, after observing (*ibid.*, para. 61) that all international crimes were characterized by the breach of an international obligation essential for safeguarding the fundamental interests of mankind, rightly added: "But some interests should be placed at the top of the hierarchical list. These are international peace and security, the right of self-determination of peoples, the safeguarding of the human being and the preservation of the human environment." In that context, he joined Mr. Francis (1883rd meeting) and other members of the Commission in appealing to the Special Rapporteur to include in the draft an indispensable statement of general principles, and expressed the hope that the Special Rapporteur would avail himself of the offer of assistance by an *ad hoc* working group.

5. In the list of offences proposed by the Special Rapporteur, he found it appropriate that aggression should come first. Fortunately, the General Assembly had adopted a broadly accepted Definition of Aggression.[8] He did not agree that it was a political definition lacking legal content. Long years of effort had been required to arrive at a definition that was generally acceptable. Nevertheless, it would be preferable not to reproduce that definition verbatim, as was done in the first alternative of section A of draft article 4, because some of its provisions might not meet the purposes of the draft code. Reference had already been made to the provision on the power of the Security Council to determine whether an act constituted aggression or not. Once adopted, the code should be definitive and exhaustive, and he therefore preferred the second alternative of section A proposed by the Special Rapporteur.

6. He agreed with the Special Rapporteur (A/CN.4/387, para. 91) that the draft code should include the threat of aggression, already included in the 1954 draft, which was manifested by concrete material acts, such as the concentration of troops on common frontiers, and which, like aggression itself, could enable a powerful State to dictate to a weaker one.

7. Similarly, the acts of "planning, preparation, initiation or waging of a war of aggression", mentioned in subparagraph (*a*) (i) of Principle VI of the Nürnberg Principles (*ibid.*, footnote 3), were an integral part of the crime of aggression. Hence there was no reason to exclude the preparation of aggression from the code; the difficulty of proof was no justification for dropping a charge which would certainly have a deterrent effect.

8. In an increasingly lawless world in which large States used the many and varied means at their disposal to impose their will on weak emerging States, the list of offences must include the concept of interference by the authorities of a State in the internal or external affairs of another State. Acts aimed at the destabilization of other Governments, whether by fomenting civil war or any other form of internal disturbance or by economic blackmail and intimidation, must be included in the code.

9. As to mercenarism, it was important to put it in its proper perspective, stressing not only the pecuniary aspect, but also the motive of destabilizing a State. The OAU Convention for the Elimination of Mercenarism in Africa, which had been adopted at Libreville in 1977,[9] specified in its article 1, paragraph 2, that:

2. The crime of mercenarism is committed by the individual, group or association, representative of a State or the State itself who, with the aim of opposing by armed violence a process of self-determination, stability or the territorial integrity of another State, practises any of the following acts:

[7] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

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

[9] See 1884th meeting, footnote 15.

... In view of the role of mercenarism in the modern world, particularly in Africa, that crime should have a prominent place of its own in the draft code.

10. He could not agree that colonialism should not be mentioned because it had become past history. In fact, colonial domination in its classical form had not yet disappeared; Namibia was an example. Furthermore, a new form of colonialism had appeared: politico-economic domination which deprived newly independent States of the effective exercise of their right freely to dispose of their resources.

11. The crime of *apartheid* should also be included in the draft code, even though, as an institutionalized form of racial discrimination, it was practised only in South Africa. The definition given in the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[10] was much broader. Article II of that Convention specified that:

For the purpose of the present Convention, the term "the crime of *apartheid*", which shall include similar policies and practices of racial segregation and discrimination as practised in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

It was clear from that provision that the crime of *apartheid* could be committed elsewhere—an important point, given the increase of racism in many countries and the growing intolerance towards minorities.

12. He would reserve until later his comments on the question of economic aggression and how the Special Rapporteur proposed to deal with it, and on the problem of breaches of certain treaties designed to ensure peace and security.

13. As to terrorism considered as an offence against the peace and security of mankind, he noted the Special Rapporteur's intention to restrict that offence to State-sponsored terrorism directed against another State (*ibid.*, para. 136). An international instrument such as the draft code under discussion could not cover all forms of terrorism, which was in any case already punishable under internal law.

14. Finally, he expressed dismay at the omission from the draft code of the gravest of all offences against the peace and security of mankind, namely the use of nuclear weapons, particularly against States which did not possess them. The Commission would be failing in its duty if it did not consider the most serious threat against the very survival of mankind posed by nuclear weapons and by the arms race carried on by the super-Powers on the pretext of safeguarding international peace and maintaining nuclear deterrence. In contravention of existing international conventions and General Assembly resolutions and declarations, that reckless arms race was now being extended to outer space, with incalculable consequences for mankind. Faced with that ominous development, the Commission surely could not remain silent.

15. Mr. THIAM (Special Rapporteur) said that, in order to prevent the discussion from going astray, he must point out that he had never written or said that he was leaving aside the problem of State responsibility, but only that it was necessary at the current stage to confine the work to the responsibility of individuals. Moreover, in its report on the work of its previous session, the Commission had said that it intended the content *ratione personae* of the draft code to be limited, at the current stage, to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility.[11] Hence the Commission should no longer discuss a problem that had not been definitely set aside, but was simply reserved.

16. Moreover, at the 1882nd meeting he had asked members of the Commission to confine their comments to the offences referred to in his third report (A/CN.4/387). They should therefore refrain from speaking of war crimes and crimes against humanity, both of which were in categories separate from the only category considered in the report under consideration, that of offences against the peace and security of mankind.

17. Mr. BARBOZA said that, in commenting on the Special Rapporteur's excellent report (A/CN.4/387), he would follow the order in which the questions it dealt with were presented. With regard to the content *ratione personae* of the draft code, he thought it necessary, at the risk of delaying the debate, to revert briefly to the question of the criminal responsibility of States. In a previous intervention,[12] he had intimated that he did not find it conceptually impossible that States should assume responsibility of that kind. He appreciated the practical difficulties of the problem, in view of which some members of the Commission would prefer to leave it aside. For the time being, it would be better not to reopen a debate on the substance. As was its custom, the Commission should first seek the areas of agreement and leave until later the more controversial questions, while keeping them constantly in mind. For there was no doubt that it would be necessary, in the end, to take a clear decision on the question of the criminal responsibility of States.

18. With regard to the two alternatives proposed by the Special Rapporteur for draft article 2, the discussion seemed to show quite clearly that the text should not refer to "State authorities" but to "individuals", a term which covered both State authorities and private persons. The perpetrators of certain crimes, such as genocide, were not necessarily agents of the State. As was clear from article IV of the Convention on the Prevention and Punishment of the Crime of Genocide,[13] that crime could be committed by Governments, public officials or private individuals. Unlike the Special Rapporteur, he believed that the purpose of the code was not solely to prevent the abuses of those vested with power. In his view, it would be desirable for the code to apply to all those who could commit offences against the peace and

[10] United Nations, *Treaty Series*, vol. 1015, p. 243.

[11] See footnote 7 above.

[12] See *Yearbook ... 1983*, vol. I, pp. 12-13, 1757th meeting, para. 11.

[13] United Nations, *Treaty Series*, vol. 78, p. 277.

security of mankind, as perpetrators or as accomplices. War crimes, in particular, could be committed in practice by any armed individual, from a general to a private soldier.

19. The peace and security of mankind, in the view of the Special Rapporteur, was an indivisible concept, wider than that of international peace and security. In addition to the crimes included in the 1954 draft code, the draft code that was being prepared covered some other offences. The 1954 draft had already been based not only on the principles derived from the judgment of the Nürnberg Tribunal, but also on some other concepts. But the situation had evolved since then, and the Nürnberg Principles were quite specific, relating to specific crimes. Crimes against peace were those relating to the preparation, conduct, etc. of war, and crimes against humanity, or crimes of *lèse*-humanity, were those that violated the highest human values and caused horror by their atrocity. War crimes properly so called were those that violated the usages and customs of war. In modern times, however, the notion of peace and security had become less specific and referred to a kind of international public order, and the only criterion for classifying those offences was that of their seriousness. In some systems of internal law, as was known, offences were divided into crimes, delicts and contraventions according to their seriousness. At the international level, offences against the peace and security of mankind, international crimes and international delicts were distinguished according to their seriousness. It appeared that, apart from offences against the peace and security of mankind, there were not many other international offences, it being understood that piracy, for example, had already been expressly set aside. Crimes coming under internal law, but the punishment of which required international co-operation, should not, of course, be taken into account. It therefore seemed that the proposed division might be rather unbalanced, since offences against peace and security were far more numerous than those in the other category of international offences. Perhaps it would have been better to include all international offences in the draft code.

20. The procedure followed by the Special Rapporteur in trying to give a definition of the concept of an offence against the peace and security of mankind was correct; a national legislator would not proceed otherwise in drafting a penal code. Article 19 of part 1 of the draft articles on State responsibility[14] was a good starting-point, but nothing more. In his opinion, a definition should not be formulated until the outlines of the subject became clearer. The examples listed in article 19 gave only an initial idea of the offences to be included. After further examination, perhaps only some of them would be decided upon as offences and used for the definition.

21. During the discussion, which had turned on the relations between the topic under discussion and article 19, the question of the criminal responsibility of States had frequently been raised. Did that question belong to the subject-matter of parts 2 and 3 of the draft articles on State responsibility being prepared by Mr. Riphagen? It should be noted first that article 19 of part 1 of that draft only listed a number of offences, without defining them; it did not specify what State conduct constituted the offences. Article 19 only indicated that certain forms of State conduct, which violated certain obligations, were to be considered, having regard to their consequences, as particularly serious and characterized as "crimes". In the draft articles of part 2 prepared by Mr. Riphagen, the wrongful acts were not defined; only their consequences were dealt with. Logically speaking, the Commission should confine itself to saying that, in the case of State conduct considered by the international community as a whole to constitute an international crime, such conduct would have such and such consequences. That, moreover, was the course Mr. Riphagen had tried to follow in the draft articles submitted in his fifth report (A/CN.4/380).[15] According to article 5, subparagraph (*e*), the expression "injured State", in the case of an international crime, meant any State suffering injury. According to article 14, an international crime entailed all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as were determined by the applicable rules accepted by the international community as a whole. Those rules, however, were not stated in the article, the purpose of which was not to formulate them. It was then stated that an international crime committed by a State entailed an obligation for every other State not to recognize as legal the situation created by such a crime; not to render aid or assistance to the State which had committed such a crime in maintaining the situation created by it; and to join other States in affording mutual assistance in carrying out the obligations previously specified.

22. So far, the draft code in preparation dealt only with part 1 of the secondary rules. For penal rules did not describe primary obligations, but the conduct which constituted breaches of them. They were not drafted in terms such as "Thou shalt not kill", but in terms such as "Whosoever kills another person is liable to the penalty of imprisonment". Thus a penal rule was a typical secondary rule. So far, the draft had been confined to describing criminal violations. If the Commission did not provide for the criminal responsibility of States in the draft code prepared by Mr. Thiam, and if it did not adopt provisions sanctioning the conduct of States, that task would not devolve on Mr. Riphagen as Special Rapporteur for the topic of State responsibility. It would then be necessary either to prepare a third set of draft articles, if the international community considered that necessary, or to abandon the task altogether.

23. The example given by Mr. Mahiou (1882nd meeting) showed that, under internal law, a crime committed by an official in the performance of his functions could have consequences both in criminal law and in administrative law. The reason why he had given that example was to show that in international law the conduct of an individual could also give rise to double responsibility: that of the indivi-

[14] See 1879th meeting, footnote 9.

[15] See 1890th meeting, para. 3.

dual and that of the State. If the draft code dealt only with the criminal responsibility of individuals, to the exclusion of that of States, an act of aggression committed by a head of State would engage only his individual criminal responsibility. But for the State in question that act would also entail consequences relating to civil responsibility. Under article 14 of part 2 of the draft on State responsibility, that act would be attributed to the State with all the consequences deriving from the commission of an internationally wrongful act, as enumerated in draft article 6 of that part. Civil responsibility was mainly concerned with reparation for the injurious consequences of a wrongful act. But if the principle of criminal responsibility of a State was laid down in the draft code, certain conduct might be attributable both to a State and to an individual. But then the responsibility of the State would not be an indirect responsibility, as it was in internal law. The conduct could give rise to a double criminal charge, against an individual and against a State, and to double responsibility. He was not opposed to that possibility, which was not inconceivable in law, but wished to draw the Commission's attention to it.

24. He was surprised that the question of the formulation of general principles should have given rise to so much discussion. The Commission had before it a list of general principles derived from the Charter and Judgment of the Nürnberg Tribunal, some of which seemed incontestable. On the basis of that list it should be able to identify a certain number of offences, but would probably find it very difficult to formulate all the applicable principles precisely without knowing exactly what offences would be included or whether the criminal responsibility of States would be taken into consideration. The Commission should follow its usual method, which was to start from preliminary general ideas and then consider the concrete situation, before reverting to general considerations and trying to identify general principles. It should therefore begin by specifying the offences to be included, while bearing in mind the problems raised by the definition of offences against the peace and security of mankind, the formulation of general principles and the consideration of the criminal responsibility of the State.

25. The considerations he wished to put forward concerning the acts constituting offences against the peace and security of mankind were only of a preliminary nature. With regard to aggression, the discussion had shown that the Commission should not adopt the second alternative proposed by the Special Rapporteur for section A of draft article 4, which contained only a reference to the Definition of Aggression adopted by the General Assembly.[16] Not only should the text of that Definition be reproduced, but it should also be adapted to the situation created by the fact that the criminal responsibility of individuals was being considered. In his view, aggression was the typical example of a crime which only States could commit, to the exclusion of individuals; but, at the same time, certain individuals could be held responsible for it. It was therefore necessary to describe the conduct of the State, not of State authorities, and to attribute responsibility to individuals whose conduct corresponded to the act of the State.

26. At the beginning of the first alternative of section A of draft article 4, the words "The commission [by the authorities of a State] of an act of aggression" should be replaced by the single word "Aggression", subparagraph (*a*) remaining unchanged. With regard to subparagraph (*b*), which dealt with evidence of aggression and competence of the Security Council, it had been rightly observed that the Security Council was a political, not a legal body, and that its competence should not be relied upon for the characterization of an act of aggression. It was for the judge to determine whether an act of aggression had taken place. In subparagraph (*c*) (viii), it was provided that it was the Security Council that could characterize as aggression acts other than those enumerated in draft article 4. That provision had provoked the same objection to the Security Council; on the other hand, if a competent court existed, it could not be excluded from making such a characterization, especially as in doing so it would not be violating the principle *nullum crimen, nulla poena sine lege*, provided that the act that was being judged fell under the general definition of aggression, even if it was not one of the acts expressly referred to in the Definition adopted by the General Assembly. Subparagraph (*d*), entitled "Consequences of aggression", began by stating an interpretative criterion rather than a true consequence of aggression: "no consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression". That criterion, which could be applied by a court, certainly had no place under that heading. It suggested the notion of preventive aggression. It was then specified in subparagraph (*d*) that a war of aggression was a crime against international peace and security and that aggression gave rise to international responsibility; that was perfectly acceptable, although it should be stated who would be the subject of international responsibility. Finally, subparagraph (*d*) provided that no territorial acquisition or special advantage resulting from aggression was or should be recognized as lawful—a matter that might be treated as part of the topic of State responsibility, for which Mr. Riphagen was Special Rapporteur. Subparagraph (*f*), on interpretation of the articles, might not be necessary, since it provided for a perfectly normal technique for the interpretation of treaties.

27. The threat of aggression, dealt with in section B of draft article 4, should be included in the draft code, since it constituted a very serious crime which disrupted the international public order and threatened international peace and security. The preparation of aggression and preparatory measures for aggression had a place in the draft code only in so far as they could be proved. While it was true that it was often difficult to establish the existence of the preparation of aggression in the sense of a more or less theoretical planning, the same did not generally apply to material preparations, which did not constitute aggression, even though they were also a very serious offence.

[16] See footnote 8 above.

28. With regard to interference in the internal or external affairs of another State, he agreed that among such acts there were those that were more or less serious, and that it was difficult to distinguish between the internal and the external affairs of a State. The formulation proposed by the Special Rapporteur in section C of draft article 4—mention of interference followed by examples, such as the fomenting of civil strife—provided a good starting-point and gave an idea of the degree of seriousness which the interference must have if it was to be characterized as an offence against the peace and security of mankind. He thought it would be possible to include a general definition of interference, such as that given in article 18 of the Charter of OAS,[17] which incidentally had been drawn on in the Definition of Aggression adopted by the General Assembly, and which contained important elements. Under the terms of that Definition, any attempted threat against the personality of the State or against its political, economic or cultural elements constituted interference. In other words, in order to be characterized as an offence against the peace and security of mankind, interference must affect the constituent elements of the personality of the State.

29. Among the acts having the character of interference in the affairs of another State, the Special Rapporteur mentioned terrorism directed against a State at the instigation of another State. That was justified, but it was equivalent to leaving aside the terrorism that might not be secretly instigated by a State but that was nevertheless to be universally condemned because of the horror inspired by its methods. The question therefore arose whether terrorism should be included in the category of acts constituting interference in the affairs of another State, or whether the Commission should make it a separate offence against the peace and security of mankind, especially as terrorism was already the subject of international conventions, as Mr. Njenga had pointed out.

30. The same applied to mercenarism, although it might well be said that a separate mention was necessary, since mercenary action could succeed in destabilizing small, weak countries.

31. As to breaches of obligations under certain treaties, they went back to a historic event—the violation of the 1919 Treaty of Versailles by Germany. But it was also a contemporary problem or one that might arise in the future: there existed multilateral treaties providing for the demilitarization of certain zones or countries, as well as bilateral ones, such as the Treaty on territorial delimitation concluded between Argentina and Chile in 1881,[18] article V of which provided for the permanent neutralization of the Straits of Magellan, and there also existed agreements establishing peace zones or denuclearized zones.

32. Lastly, the forcible establishment or maintenance of colonial domination should be included in the future code in that formulation, which was preferable to "violation of the right to self-determination", since the term "self-determination" could cover secessionist aspirations or the machinations of countries wishing to maintain one or other of the various forms of colonial situation.

33. Mr. McCAFFREY complimented the Special Rapporteur on his third report (A/CN.4/387) and on the trenchant manner in which he had dealt with the difficult issues involved. Referring first to general principles, he said he felt bound to express serious reservations about the viability of the topic. That was no reflection on the Special Rapporteur, but was inherent in the subject. It was extremely doubtful whether States would be able to accept a draft code of the type envisaged, for a number of reasons, including the vague and indefinite nature of many of the offences contemplated and the lack of any mechanism for implementing the code. Those two considerations interacted inasmuch as, without a universally accepted criminal tribunal and a set of procedures to implement the code, what was left was universal jurisdiction and the "obligation" to prosecute or extradite. Very few States would feel comfortable with, and therefore be able to accept, universal jurisdiction to try and punish offences that were so loosely defined as to vest a largely unfettered discretion in any State happening to lay hands on a hapless alleged perpetrator. Moreover, the less precise the definition of the offences and the less sure the means of implementation, the less effective would any code be as a deterrent, which was one of the prime functions, if not the prime one, of a system of criminal law.

34. He approved of the outline for the future code proposed by the Special Rapporteur (*ibid.*, para 4), but considered it necessary for the Commission to work on general principles at the same time as on the offences themselves, if not before the elaboration of a list of offences. As he had already had occasion to say, he found it difficult to see how the acts or practices to be covered by the code could be identified without any criteria for such identification other than the vague standard of seriousness. General principles should cover matters such as an indication of the manner in which the code was to be implemented, the availability of defence, and the types of punitive consequences that a tribunal might impose, failing which it would be very difficult to evaluate the candidates for inclusion in a list of offences. It would also be very difficult for States to accept the different offences, since they would in many respects be signing a blank cheque.

35. While he sympathized with the Special Rapporteur's view that it was difficult to list general principles at the current stage, the Commission would none the less be greatly assisted if it had at least a provisional set of principles on which to base its work, which could be revised as and when necessary. Indeed, the Special Rapporteur had already started on the difficult task of formulating a set of principles, since he examined (*ibid.*, paras. 7 and 9) some of the questions that would have to be faced. As Mr. Ogiso (1884th meeting) had pointed out, the principles referred to in those two paragraphs could serve as a valid basis for discussion along with the Nürnberg

[17] United Nations, *Treaty Series*, vol. 119, p. 3.

[18] C. Parry, ed., *The Consolidated Treaty Series*, vol. 159 (1881-1882) (Dobbs Ferry (N.Y.), Oceana Publications, 1977).

Principles—apart from Principle VI—and other universally recognized principles. The question that arose, however, was what was the nature of the evidence required, in both quantitative and qualitative terms, to support the inclusion of a particular notion in the list of general principles. For instance, in the case of the principle of the non-applicability of statutory limitations, referred to in paragraph 9 of the report, there was at least one form of empirical evidence available which suggested that that principle was not universally accepted. That evidence was to be found in the fact that, as could be seen from the compendium of relevant international instruments (A/CN.4/368/Add.1, p. 4), only seven out of 51 African States, four out of 40 Asian States, two out of 33 Latin American States and no Western European or other States had become parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Furthermore, while a case could be made out to show that universal jurisdiction and the notion that a State must either extradite or prosecute had been accepted by a number of States so far as piracy and hijacking were concerned, it was by no means clear that those principles were generally accepted in the case of any —let alone all—of the offences under discussion by the Commission. Again, the question arose: what should be required as evidence of the general acceptance of such a principle?

36. On the matter of general principles, therefore, he would conclude by encouraging the Special Rapporteur to pursue his efforts to elaborate at least a provisional working set of general principles for consideration by the Commission at an appropriate early stage.

37. Commenting on chapter I of the report, he first expressed his general agreement with the Special Rapporteur's conclusions concerning the scope *ratione personae* of the draft code. For reasons developed at length at the thirty-fifth and thirty-sixth sessions of the Commission, he believed it would be a mistake to seek to make States subject to the code. That did not mean, however, that States should be absolved from responsibility duly incurred for acts committed by their officials, in so far as the State concerned was involved in such acts. Rather, there were different régimes of responsibility for individuals on the one hand, and States on the other, and the draft code should be concerned with the régime governing individuals. As noted in the topical summary of the discussion in the Sixth Committee of the General Assembly at its thirty-ninth session (A/CN.4/L.382, paras. 20-21), a number of representatives had agreed that the scope of the draft code should be confined to individuals, at least provisionally; certain other representatives had even gone so far as to say that a principle of criminal responsibility of States did not exist in international law—a view which he shared.

38. The difficulty of determining the appropriate penal consequences for States, together with the dubious acceptability of such consequences for the international community as a whole, reinforced the soundness of the decision to exclude States from the scope of the code. An added reason for their exclusion was that, if they were included, the draft code might interfere—if not be frankly inconsistent—with the mechanisms established under Chapter VII of the Charter of the United Nations.

39. He agreed with the position taken by the Special Rapporteur (A/CN.4/387, para. 17) that it was mainly acts by individuals who wielded power that the draft code sought to deter. He recognized, however, like Mr. Reuter (1879th meeting), that some groups, such as those involved in drug trafficking, could produce effects similar to those which the draft code was intended to prevent. The subject merited further study and it would be useful to obtain the views of Governments.

40. He agreed broadly with the position that the concept of the peace and security of mankind was a unitary one (A/CN.4/387, para. 38), and he welcomed the Special Rapporteur's careful examination of what was a threshold issue to be dealt with before the Commission further refined the criteria. Although it was too early for him to offer an informed opinion on the statement that all the offences were "marked by the same degree of extreme seriousness" (*ibid.*), *prima facie* it seemed to him to be questionable.

41. The Special Rapporteur's analysis of the difficult conceptual issues raised by the notion of an offence against the peace and security of mankind (*ibid.*, paras. 40 *et seq.*) showed the difficulty of the task that lay ahead. The Special Rapporteur had pointed out that many of the available criteria were essentially subjective, and that was certainly true of the notion of seriousness. For his own part, however, he was not convinced that it was also true of the requirement, under article 19 of part 1 of the draft articles on State responsibility,[19] that an international crime must be recognized as such by the international community as a whole. In many cases such recognition could perhaps be established by an empirical analysis of State practice, as revealed mainly by the ratification records of the principal international instruments relevant to the offences in question. In so far as the term "subjective" was used to refer to the attitude of States as revealed by their practice, he agreed that such recognition was a subjective element.

42. As to the relationship of article 19 to the draft code, he did not believe that the criminal responsibility of the State existed as such under international law, especially as there was no definition of, let alone agreement on, the consequences of the so-called "crimes". However, taking article 19 to refer to a category of especially serious internationally wrongful acts, he believed that there was some relation between the criterion for identifying such acts and that for identifying offences against the peace and security of mankind, in that the act or practice in question had to be recognized as an offence against the peace and security of mankind by the international community as a whole. Beyond that, however, he saw very little connection between article 19 and the draft code. That was particularly true of

[19] See 1879th meeting, footnote 9.

many of the examples listed in article 19 and the manner in which they were described, which was much too vague to comply with the maxim *nullum crimen sine lege*. Moreover, the draft code, as currently defined, did not deal with all international crimes, but only with the most serious. For all those reasons, he would prefer a general and flexible definition on the lines of the second alternative proposed for draft article 3.

43. With regard to chapter II of the report (Acts constituting an offence against the peace and security of mankind), he was not at all sure that the 1954 draft code provided a sound basis for the Commission's work. That code had been controversial in 1954 and the passage of time had not rendered it, nor indeed the whole concept of a draft code of offences against the peace and security of mankind, more acceptable to States. Much had been made of his country's early involvement in the effort to produce such a code, but by 1954 it had become evident to many countries, including the United States of America, that such an instrument did not accord with the realities of the post-war world. The 1954 code had not been received with open arms, as was apparent from a statement made by Mr. Charles H. Mahoney, the United States representative in the Sixth Committee of the General Assembly, in 1954. Explaining his vote on a draft resolution on the draft code, Mr. Mahoney had said that the United States considered that the formulation of a draft code of offences under international law was inappropriate and that differences of view among Governments on important matters of international obligation rendered impossible the development of a meaningful international criminal code applicable to individual persons.[20]

44. A similar cautionary note should perhaps be sounded in regard to the Nürnberg Principles, which should be assessed in the factual context in which they had been developed and having regard to the manner in which they had been applied in specific cases. On the facts, the Nürnberg Tribunal had remained within the confines of what could truly be said to be universally recognized crimes that were not only *malum in se*, but were also of the most horrific character. Detached from their factual context, the Nürnberg Principles did not have that specific character. That caveat was borne out by General Assembly resolution 95 (I) of 11 December 1946, which reflected an endorsement of the principles under the special circumstances rather than a blanket endorsement of abstract principles for all purposes. Hence it was not possible simply to transplant the Nürnberg Principles or the 1954 draft code into the draft under consideration without taking account both of the context in which those instruments had been elaborated and of the fact that, when drafted, neither had been accepted as having application in all circumstances and for all time.

45. A second general point, to which he had already referred, concerned the nature of the evidence, both qualitative and quantitative, required to establish that a given act or practice amounted to an offence against the peace and security of mankind in the eyes of the international community as a whole. Care was needed in evaluating State practice in that regard, lest the project be stillborn, just as in the case of the 1954 code.

46. A third general point was that, inasmuch as for the time being the subjects of the draft code were individuals, it seemed appropriate to refer to the International Covenant on Civil and Political Rights,[21] and specifically to its article 15. According to the standards set out in that article, there were three criteria for basing individual criminal responsibility on general principles of law: (*a*) the principle must have been established when the act was committed, which was indicative of codification rather than of norm-creation; (*b*) there must be universal consensus in regard to the principle; (*c*) the act or practice in question must be of a *malum in se* character such that its criminal wrongfulness was evident even to the average person.

47. Thus, in identifying acts that constituted an offence against the peace and security of mankind, evidence of actual custom and practice was required. A comparative study of municipal criminal law would seem indicated, to determine what constituted actual custom and practice; it would be interesting, for example, to carry out research into the municipal military law of different countries on the defence of superior orders. The main point, however, was that great care should be exercised in drawing up a code of offences of the magnitude of those involved; in that connection, he endorsed the Special Rapporteur's statement concerning the coercive nature of criminal law and its strict interpretation (*ibid.*, para. 131).

48. Of the specific acts listed for inclusion in the draft code, aggression, which was the most fundamental of the offences against the peace and security of mankind, should definitely have a place. While he understood the reasons for the Special Rapporteur's suggestion that the full text of the Definition of Aggression adopted in 1974[22] should be incorporated in the code, that approach raised several problems. In the first place, that definition had been developed for the guidance of the political organs of the United Nations and it was extremely doubtful that it would be appropriate for use in the context of criminal proceedings, mainly because of the vagueness of its language and because come of its provisions were simply inapposite. Secondly, the use of the Definition of Aggression raised questions regarding the role of the Security Council in regard to the draft code. Possibly the Security Council should have a role when only individuals were concerned, but that involved the question of implementation, which had not yet been explored. Thirdly, great care must be taken not to interfere with the Definition of Aggression or to open the door to attempts to use the draft code as a means of circumventing the mechanism provided by the Charter of the United Nations, particularly in Chapter VII. Subject to any decision taken regarding implementation, a possible third

[20] *Official Records of the General Assembly, Ninth Session, Sixth Committee*, 425th meeting, para. 46.

[21] United Nations, *Treaty Series*, vol. 999, p. 171.

[22] See footnote 8 above.

alternative for section A of draft article 4 might be: "The commission of an act of aggression as determined by the Security Council pursuant to General Assembly resolution 3314 (XXIX) of 14 December 1974."

49. In his view, the threat of aggression should not be included in the draft code. It was extremely difficult, if not impossible, to determine exactly what amounted to a threat of aggression. For instance, would the test be a subjective one? Would an overt act be required as evidence of a threat, and, if so, how would such a threat be distinguished from defensive conduct by a small or weak State? Must the threat of aggression be imminent? Must there be a clear and present danger that the threat would be carried out? None of that should be taken to impugn the prohibition of the threat or use of force laid down in Article 2, paragraph 4, of the Charter, which was a norm that served different purposes and had its own implementation procedure. The drafting of that provision had not required the same precision as a code which was to be used for the criminal prosecution of individuals.

50. Similar considerations applied to the preparation of aggression, which he agreed should not be included in the draft. As pointed out by the Special Rapporteur in his report (*ibid.*, para. 100), nearly all nations engaged in preparations to use armed force for defensive purposes, and it would be virtually impossible to prove that such preparations involved plans for aggression. It might be possible to envisage making preparations criminal when, and only when, an act of aggression had been committed, in which case threats and premeditated preparation could constitute aggravating circumstances.

51. Interference in internal or external affairs should not be included either, unless more precise wording could be found, which seemed doubtful. He agreed with the Special Rapporteur (*ibid.*, para. 119) that the distinction between the internal and external affairs of a State was now antiquated. As to coercive measures of an economic or political nature, which apparently did not involve the use of force, they did not rise to the level of an offence against the peace and security of mankind. "Coercion" was a vague term, with implications ranging from subtle forms of non-violent influence to armed aggression. It could even be interpreted to outlaw diplomacy and *inter alia* the withholding of benefits, restrictions on exports of strategic goods and on exports of or access to natural resources, conditions imposed by international lending institutions, and import quotas. Such measures had always been regarded as legitimate means of diplomacy and should, if anything, be encouraged as non-violent means of making a political point or expressing displeasure *vis-à-vis* another State. Care should be taken not to do anything that would deprive States of the opportunity of having recourse to those peaceful measures.

52. "Economic aggression" was a puzzling term. In the case of aggression as defined in the Definition of Aggression, or as ultimately defined in the draft code, the motives seemed irrelevant. But if the use of force or violence was not involved, there was no "aggression", and his remarks on economic coercion applied. If it could be proved that the sole motive for the use of economic coercion was the destruction or absorption of an existing State, the use of economic measures for that purpose would be unlawful. It would, however, be extremely difficult to prove and would be of such rare occurrence as not to warrant the inclusion of the offence in the draft code.

53. Terrorism should of course be included and, while he agreed that the code should be concerned primarily with State-sponsored terrorism, he also considered that, at the current stage, terrorist acts committed by private groups which interfered with interests protected under the code should not be excluded.

54. His main difficulty with violations of obligations under certain treaties was that not every violation of one of those treaties would amount to a criminal offence, and that it was very difficult to define those that would. Possibly, a perceived imminent threat of aggression could justify measures taken in the exercise of a legitimate right of self-defence, such as those contemplated in section E of draft article 4. To label such acts as criminal *a priori*, therefore, would not appear to be well advised.

55. As to colonial domination, he would prefer not to use the the words "colonialism" or "colonial", which had a primarily historical connotation, and, since they did not accurately describe the practice the code sought to proscribe, ran foul of the principle *nullum crimen sine lege*. It would be more accurate to use wording that described the phenomenon involved, namely subjection of a people against its will to alien subjugation, domination and exploitation, in violation of that people's right to self-determination. Such wording would be more precise and also more capable of application in criminal proceedings.

56. He agreed that "mercenarism" could be covered by "aggression", but would reserve his position pending further refinement of the latter offence.

The meeting rose at 1.05 p.m.

1886th MEETING

Wednesday, 22 May 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. YANKOV said that the Special Rapporteur had once again displayed outstanding competence in dealing with the difficulties inherent in a highly political topic. One of the undoubted merits of his third report (A/CN.4/387) was that it served as a catalyst for the rich debate at the current session. As to the conceptual approach and methodology advocated by the Special Rapporteur, the outline for the future code as proposed in his third report (*ibid.*, para. 4) would provide an appropriate working hypothesis for the Commission's deliberations, although the elements of that outline were not exhaustive. The Special Rapporteur should also have the necessary flexibility to proceed with his study and introduce such modifications as he might find necessary.

2. The Special Rapporteur had raised the issue of the inclusion of general principles as a conceptual and legal foundation for the draft code. Thus far, no one had disputed the need for such principles and the only question now was the point at which it would be appropriate to formulate them. While some members agreed with the Special Rapporteur that it would be difficult to list the general principles at the current stage, others had emphasized the need to consider the general principles as soon as possible, matching their formulation with the elaborating of a list of offences against the peace and security of mankind. For his own part, he considered that, inasmuch as a tentative list of offences had been proposed and considered by the Commission and by the General Assembly, an attempt should be made to indicate general criteria governing the notion of offences against the peace and security of mankind and to formulate the general principles relating to those offences on a preliminary basis. That interplay between general principles and specific offences could prove very useful and should be maintained throughout the elaboration of the draft code. There were already a number of ground rules which might be relevant for the purpose, such as the general principles of penal law, the provisions of articles 1, 3 and 4 of the 1954 draft code, the Nürnberg Principles, certain elements of the draft articles on State responsibility, and possibly also State practice, as evidenced by treaties and United Nations practice.

3. With regard to the delimitation of scope *ratione personae* and, specifically, the position of individuals, the Special Rapporteur might further elaborate the main categories of individuals, namely individuals as agents of the State and individuals as private persons, acting as a group or individually, who could commit offences against the peace and security of mankind. The question was whether an individual could be the principal or only perpetrator of offences against the peace and security of mankind—a question the Special Rapporteur had answered in the negative in the case of all offences that jeopardized the independence, safety or territorial integrity of a State (*ibid.*, paras. 12-13). The Special Rapporteur had given two reasons for that view: first, the magnitude of the means involved and, secondly, the need to be vested with a power of command or, in other words, with State authority. Although justified as a general rule, that conclusion was somewhat too categorical and failed to take account of certain cases where it was possible for groups of private individuals to commit offences against the peace and security of mankind. In defining the scope of the draft code *ratione personae,* due account had to be taken of such cases, for otherwise they might unjustifiably remain outside the scope of offences against the peace and security of mankind.

4. The question of the international criminal responsibility of individuals and of States was an aspect of the scope of the code *ratione personae* that had been under discussion since the commencement of the study. For practical reasons, the Commission had concentrated on the international criminal responsibility of individuals and had left aside for the time being the question of the criminal responsibility of States and State entities, on which substantial differences of opinion persisted. His own view was that the principle of the criminal responsibility of States did not exist in international law, given the very nature of the contemporary system of international relations, which was based essentially on sovereign States. There was no equivalent international system to serve as a basis for the operation of a viable régime governing the criminal responsibility of the State.

5. The problem was not only that of the penalties and procedural rules which would be applicable to States, but also that of the nature and structure of the contemporary system of international relations and international law as essential components of the international system as a whole. There was of course no question whether the same penalties could be imposed on States and on individuals. Obviously, a State could not be imprisoned, although it could be abolished by the action of Governments; there had been many instances throughout history of States which had disappeared, been partitioned or subjected to severe sanctions with social and economic implications. Rather, the question was whether the structure of the international community as it existed allowed for sanctions other than those provided for under the Charter of the United Nations or established State practice and, if so, whether the results in terms of the functioning of the sanctions would be the same. International law was a law of co-ordination, unlike internal penal law, which was a law of subordination, and the rules of the former derived

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

not from the will of a single State, but from the co-ordinated will of States. Nor could there be any question of a progressive approach versus a conservative approach, since the progressive development of international law was also based on the co-ordinated will of States. Members of the Commission might, as private individuals, advocate that there should be a criminal responsibility of States, but it was always necessary to take account of how States themselves would react.

6. The non-existence of the principle of the criminal responsibility of States did not mean that States could not, as subjects of international law, be punished for internationally wrongful acts, including international crimes. For instance, article 5, paragraph 3, of the Definition of Aggression[6] stipulated that territorial acquisition resulting from aggression should not be recognized; article 14 of part 2 of the draft articles on State responsibility embodied the same principle of the non-recognition of a situation arising out of a crime; and other sanctions were available under Chapter VII of the Charter of the United Nations. The problem, therefore, was not whether there would be a lacuna in the international legal order but, rather, what was the most appropriate way of dealing with States that had committed international crimes. The criminal responsibility of individuals, whether State agents or private persons, would thus be governed by a separate régime based on the draft code. The draft articles on State responsibility, including article 19 of part 1 of that draft,[7] would in fact help considerably in making a clearer distinction between the main elements of the criminal responsibility of individuals and of the responsibility of States for internationally wrongful acts, including international crimes.

7. There would thus be two distinct yet parallel régimes: the régime of the criminal responsibility of individuals for offences against the peace and security of mankind, and the régime of State responsibility for internationally wrongful acts, including offences against the peace and security of mankind. There was no criminal act of a State or of a State organ that could not be committed by individuals acting as the agents of that State and there was no act of a State organ, acting in that capacity, which could not be attributed to that State. There was, of course, a difference between the scope *ratione materiae* of the topic under consideration and that of article 19 of part 1 of the draft articles on State responsibility, in other words between offences against the peace and security of mankind and international crimes and delicts. As the Special Rapporteur rightly pointed out (*ibid.*, para. 45), offences against the peace and security of mankind constituted a "special category of international crimes".

8. He particularly welcomed the fact that the Special Rapporteur had raised the question of the unity of the concept of offences against the peace and security of mankind. Despite the semantic distinction, the two notions had always been regarded as indivisible in the context of the Charter of the United Nations and other international instruments. The proposition postulated by the Special Rapporteur to the effect that the peace and security of mankind had a certain unity that linked the various offences (*ibid.*, para. 38) could therefore prove very useful in ensuring clarity.

9. In analysing the subjective and objective aspects of the main criteria for the definition of an offence against the peace and security of mankind, the Special Rapporteur had drawn attention to three elements. The first was the extreme seriousness of the transgression. Although the Special Rapporteur regarded that criterion as too subjective and too vague, his own view was that its use could not be avoided, given the nature of the offence. The second element, with which he agreed, was that, in every instance, there had to be a breach or violation of an obligation essential for the protection of the fundamental interests of the international community; and the third element, with which he also agreed, related to general recognition by the international community as a whole. The last element was essential to the notion of an offence against the peace and security of mankind and, although it involved some ambiguity, certain international instruments, such as the 1969 Vienna Convention on the Law of Treaties, could provide guidance on the point. Those three elements should therefore provide a sound basis for further study, although the search for other elements should continue. He further agreed with the statement made by the Special Rapporteur that the subjective and objective elements were inextricably linked in the definition of any criminal act (*ibid.*, para. 51).

10. As to the definition of an offence against the peace and security of mankind proposed by the Special Rapporteur in draft article 3, the first alternative, in his own view, was too closely modelled on article 19 of part 1 of the draft on State responsibility. The expression "serious breach of an international obligation" referred to subjects of international law, namely States or State entities, not individuals; in that connection, he endorsed the views expressed by Mr. Ushakov (1881st meeting). The second alternative might therefore provide a better basis for the elaboration of a definition. It avoided the confusion that could arise from the reference to "a serious breach of an international obligation of essential importance" and embodied the essential element of recognition by the international community as a whole that an internationally wrongful act was an offence against the peace and security of mankind. Such general or universal recognition had to be a key element of the legal definition of the offence, especially under the existing international system.

11. Turning to chapter II of the report (Acts constituting an offence against the peace and security of mankind), he said he could agree that the Special Rapporteur should, at the current stage, confine the list to certain offences on the understanding that the list would not be exhaustive. For instance, the scope of the draft code *ratione materiae* would, in his view, be very incomplete if the use of nuclear weapons and other weapons of mass destruction were omitted. He understood, however, that those offences would be dealt with in the Special Rapporteur's next report.

[6] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

[7] See 1879th meeting, footnote 9.

12. With regard to aggression—the first offence in the list and the most serious one against the peace and security of mankind—he fully agreed that the basis should be the Definition of Aggression adopted in 1974,[8] which was itself based on the prohibition in the Charter of the United Nations on war of aggression.

13. Although the threat of aggression and the preparation of aggression were difficult to distinguish from aggression itself, for the purposes of the study at least and until all aspects had been explored, they must not be overlooked, especially in view of the relevance of premeditation to aggression.

14. He particularly appreciated the Special Rapporteur's attempt to identify the main features of the concept of interference in the internal or external affairs of a State and the variety of its forms, especially with regard to civil strife and intervention by coercive measures of a political and economic nature. He also agreed with the Special Rapporteur's suggestion that civil strife should be considered in close connection with other forms of interference (A/CN.4/387, para. 118).

15. Terrorism as an international phenomenon had acquired special significance in terms both of its gravity and of its international dimensions and, basically, he shared the views expressed in the report, particularly regarding State-sponsored terrorism. As to whether an enumerative method or a general definition, or both, should be adopted, he would favour a general concept, illustrated by an enumeration of the various acts involved. He also considered that it would be advisable, for the time being, to treat terrorism as a separate offence, while exploring all its features, and to decide later whether it should in fact come under the heading of aggression.

16. In the case of violations of the obligations assumed under certain treaties, he understood that the treaties in question had to be of such significance for the maintenance of international peace and security that a violation of their provisions would amount to an offence against the peace and security of mankind. That offence had been included in article 2, paragraph (7), of the 1954 draft code because of the influence of the Second World War and a series of treaty violations. He would therefore like the Special Rapporteur to explore the implications of such violations of treaty obligations.

17. With regard to colonial domination, he endorsed the Special Rapporteur's reasoning and agreed that an attempt should be made to determine the juridical context of colonialism, as distinct from other forms of oppression or interference. A much greater variety of reliable legal sources was available than had been the case 20 years earlier. Colonialism could not be said to be outdated or merely a historical notion: one had only to look at Namibia to realize that the existence of colonialism in its worst form could not be denied.

18. The use of mercenaries specially recruited for the purpose of infringing State sovereignty, destabilizing existing political régimes or opposing national liberation movements was a political phenomenon that could endanger international peace and security. In its modern form, mercenarism had acquired special features: the foreigners concerned did not always form part of a national army, but could constitute separate units of their own. The Special Rapporteur should therefore be encouraged to pursue his study of the various aspects of mercenarism and its relationship to acts of aggression as provided for in the Definition of Aggression before deciding to classify mercenarism as a separate offence or to incorporate it in the concept of aggression.

[8] See footnote 6 above.

19. As to economic aggression, two points required further examination: the first concerned the main characteristics and legal definitions of economic measures of coercion; the second concerned the distinction between economic coercive measures and interference in the internal and external affairs of another State by means of coercive measures of an economic character. It was not the label attached to an offence that was important, but the substance of the act against the peace and security of mankind.

20. Lastly, he suggested that draft article 1 on the scope of the draft articles should be referred to the Drafting Committee; draft article 4, however, would have to be further elaborated before it was submitted. He had already stated his preference for the second alternative of draft article 3 and, with regard to draft article 2, he considered that the two proposed alternatives, although different in substance, might perhaps be combined.

21. Mr. THIAM (Special Rapporteur) drew the attention of Mr. Yankov and of Mr. Barboza, in particular, to the fact that the proposed article 4, section D, presented terrorism as a separate offence. Moreover, the sections identified by a capital letter all referred to separate offences.

22. Mr. DÍAZ GONZÁLEZ said that, on the whole, he was in favour of the approach adopted by the Special Rapporteur in his third report (A/CN.4/387). Having explained that the draft code was limited to offences committed by individuals and that it was based on the 1954 draft code, which referred to "private individuals", the Special Rapporteur had endeavoured to define the concept of "individuals", stating that the individuals referred to in the draft were individuals acting as authorities or agents of a State, since private individuals could not commit certain offences against the peace and security of mankind. That was quite true, but it was also true that some offences against the peace and security of mankind were committed by individuals acting in their private capacity, even though they sometimes had State support. That was, for example, the case of the destabilization of a Government by transnational corporations, some of which were States within a State. It was also true in the case of drug trafficking, to which Mr. Reuter (1879th meeting) had referred, and which was not in the realm of science fiction, for Latin America was being hard hit by that problem. The survival or disappearance of the Governments of some States depended on whether or not they allowed drug trafficking. There were groups of private individuals that had the material means not only

to engage in drug trafficking, but also to overthrow a Government or jeopardize the territorial integrity of a State.

23. The Special Rapporteur had thus been right to deal with offences committed by individuals, but he had confined himself to individuals who were subjects of international law. He himself was of the opinion that the concept of an "individual" should also include those who, like transnational corporations, were not for the time being subjects of international law, but whose offences against the peace and security of mankind should be punished under international law.

24. The definitions which the Special Rapporteur had proposed, and which might be too closely modelled on those adopted by the Commission in article 19 of part 1 of the draft articles on State responsibility,[9] offered both advantages and disadvantages. Article 19 did, however, exist. Having raised the problem, the Special Rapporteur had concluded that the concept of an offence against the peace and security of mankind had a certain unity. He himself agreed that it was an indivisible notion, since any offence against security was an offence against peace. The aim was, in fact, to maintain international public order or, in other words, to establish that an international offence against the peace and security of mankind was, as Mr. Ushakov (1881st meeting) had suggested, an act of an individual or a group of individuals who represented a danger for the maintenance of the peace and security of mankind and for the maintenance of international peace and security. The solution to the problem of definitions probably lay in the unity of the concept of an offence against the peace and security of mankind. It was of course difficult to define all the characteristics of such an offence, for, as the Special Rapporteur pointed out (A/CN.4/387, para. 40), each offence was committed in its own particular circumstances. There were, for example, very obvious reasons why the Nürnberg Tribunal could not have taken account of offences such as colonialism or the use of nuclear weapons.

25. In his view, the Commission had to follow the main lines of the definitions adopted for article 19 of part 1 of the draft articles on State responsibility, although it did not have to be too closely bound by them, particularly with regard to the obvious corollary of the draft code, namely the punishment of an offence. Article 19 brought the Security Council into play, but the Security Council was neither a legal organ nor a court, and some of its members had the right of veto. It was therefore impossible to empower it to determine an act of aggression, for example, or any other offence against the peace and security of mankind. To do so would be to kill the draft code in the making.

26. Turning to chapter II of the report, on acts constituting an offence against the peace and security of mankind, he said that he fully supported the Special Rapporteur's approach of taking the Definition of Aggression adopted by the General Assembly[10] as a working basis for an act of aggression. In addition to aggression, however, that definition referred to the threat or use of force. The preparation of, or preparatory measures for, aggression had also been discussed at length. Aggression required preparation and preparatory measures and the preparation of aggression was thus in itself an act of aggression. It was a threat and an act of aggression to mine the territorial waters of a State or to station 10,000 soldiers on the border of a small State, and it was economic aggression to take economic sanctions against another State. The preparation of aggression therefore had to be regarded as an offence against the peace and security of mankind and as part and parcel of aggression, even if it did not culminate in an act of aggression. Psychologically, a threat would in itself destabilize the political system of a State, particularly when that State was small and weak.

27. As to interference in the internal or external affairs of a State, he was of the opinion that no distinction should be made between "internal affairs" and "external affairs", which were now inextricably linked, since a State's external policy was only a reflection of its internal policy, and that intervention by an international organization such as the United Nations with a view to eliminating colonialism should not be regarded as interference. In that connection, he recalled that article 18 of the Charter of OAS[11] defined interference in fairly explicit terms and formally prohibited it. Interference should therefore be included as a separate offence in the future code.

28. Terrorism was very difficult to define: individual terrorism at the internal level was different from State terrorism or what was known as guerilla terrorism. When German troops had occupied France during the Second World War, the French patriots who had taken to the Maquis had been called terrorists; in a colonized country or a country occupied by a colonial Power, patriots who died in prison or who were killed by the colonial Power's army were also called terrorists. When those countries regained their freedom, however, those terrorists became leaders. Indiscriminate terrorism, which took the lives of innocent persons, could and must be condemned and punished, but it could be asked whether a soldier of a colonial Power who imposed State terrorism on those being colonized was innocent. The problem was thus to determine what kind of terrorism would be covered by the future code and how terrorism would be defined. The Convention on the prevention and punishment of terrorism adopted by OAS[12] established distinctions, and the Commission must do so as well. Terrorism had to be covered by the future code, but it would have to be carefully defined, for not everything that was known as terrorism was actually terrorism. The problem was a serious and complex one, but it would not be impossible to resolve.

29. The violation of obligations assumed under certain treaties designed to safeguard international

[9] See 1879th meeting, footnote 9.

[10] See footnote 6 above.

[11] See 1885th meeting, footnote 17.

[12] OAS, Treaty Series No. 37 (Washington (D.C.), 1971).

peace and security was an offence that had to be included in the draft code.

30. Colonialism was another serious offence that had to be included in the list of offences against the peace and security of mankind. It had been stated that colonialism was only a historical concept, not a legal one, but all concepts were, initially, of a historical, sociological, economic or other nature and they acquired a legal character only when they had been embodied in a code. An act could be characterized as an offence only if it was provided for in a code. Genocide, for example, had been only a historical concept until it had been covered by the Charter of the Nürnberg Tribunal[13] and had later formed the subject-matter of an international convention. It was paradoxical that the genocide condemned by the international community had been the historical genocide committed by the Nazis and that the crimes of genocide which had been committed since the entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide[14] continued to go unpunished because some members of the Security Council had the right of veto. When colonialism had been characterized as an offence, it would, legally, become an offence. It was not a thing of the past but, rather, a fact of life, as illustrated by examples to be found in Latin America. It was an offence that had to be condemned not only because its existence had been historically established, but also because it had been referred to in various United Nations resolutions and in the Charter itself. With regard to the terms to be used in defining that offence, the Commission had a choice between a reference to "self-determination" or a reference to "the forcible establishment or maintenance of colonial domination". He personally preferred the second alternative, which took account of the two types of colonization that had been identified by the General Assembly in its Declaration on the Granting of Independence to Colonial Countries and Peoples,[15] and by OAS: colonial territories and colonial peoples, on the one hand, and occupied territories, on the other. The principle of self-determination, however, could give rise to misinterpretations and might even lead to the partitioning of States as a result of manoeuvres by other States.

31. The majority of the members of the Commission appeared to want mercenarism to be included in the draft code. It was not possible to apply the 1949 Geneva Conventions[16] to mercenaries who were involved in the offence and used in certain colonial wars. It was, of course, often difficult to know whether a mercenary was serving a good cause or a bad one. It was primarily new States that faced wars waged with the assistance of mercenaries. The Special Rapporteur would probably be able to propose a definition of mercenarism that would be generally acceptable. That definition might be based on the resolutions and the Convention of OAU[17] relating to the condemnation of acts of mercenarism.

32. It had been claimed by some that coercive measures of an economic nature should not be characterized as acts of aggression, which would mean limiting the notion of aggression to that of armed aggression. Economic measures, however, were extremely effective in many cases. They were better than massive destruction by means of weapons of war for asphyxiating a State and condemning its population to die of starvation. In a number of instruments, the United Nations had endeavoured, if not to define economic aggression, at least to explain it. It was thus a serious offence against the peace and security of mankind which was designed to destabilize States or to subject one State to another's rule, and it must therefore be included in the draft code.

33. He had no problems with the first of the four articles submitted by the Special Rapporteur. With regard to article 2, he preferred the first alternative, which referred to individuals, not to State authorities; however the category of individuals in question would have to be specified. The first alternative of article 3, as proposed by the Special Rapporteur, was perhaps based too closely on article 19 of part 1 of the draft articles on State responsibility, but that article existed and it had to be taken into account. The second alternative, which contained only a general definition, was somewhat too vague, for, if an offence against the peace and security of mankind was to be recognized as such by the international community as a whole, it had first to be expressly provided for. It would not be desirable for the international community to have to decide in each particular case.

34. Like the Special Rapporteur, he was of the opinon that the members of the Commission should have a clearer idea of the content of the draft code before they went on to enunciate the general principles to be included in part IV.

35. The acts consituting an offence against the peace and security of mankind, as listed in draft article 4, raised the question whether the Security Council, which was not a court, could characterize an act as an offence against peace and security. In his view, it would be dangerous to attribute such competence to the Security Council, because that would mean relying on a few persons to take the serious decision of defining an offence *a posteriori.*

36. Subparagraph (*c*) of the first alternative of section A of draft article 4 stated that any of the acts listed therein would, "regardless of a declaration of war", qualify as an act of aggression. The reference to a declaration of war should be deleted because the Charter of the United Nations itself prohibited war and the Kellogg-Briand Pact[18] had outlawed it. Subparagraph (*c*) (viii) of the same provision stated that the Security Council could determine that acts other than those listed constituted aggression. It was difficult for a jurist to agree that exclusively legal and

[13] See 1879th meeting, footnote 7.

[14] See 1885th meeting, footnote 13.

[15] General Assembly resolution 1514 (XV) of 14 December 1960.

[16] See 1883rd meeting, footnote 10.

[17] See 1884th meeting, footnote 15.

[18] League of Nations, *Treaty Series,* vol. XCIV, p. 57.

non-political functions should be entrusted to the Security Council, whose decisions, moreover, could, always be vetoed.

37. In subparagraph (*b*) (iii) of section D, the Special Rapporteur stated that terrorist acts included "any wilful act calculated to endanger the lives of members of the public, in particular the seizure of aircraft, the taking of hostages and any other form of violence directed against persons who enjoy international protection or diplomatic immunity". Since some of those offences had already been specifically covered by international conventions, the wording of that provision might be simplified.

38. Subparagraph (*b*) (iv) of section D, which read, "the manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act", raised the question of the meaning of the term "terrorist act". To which form of terrorism did that provision apply? In the case of terrorism in countries under colonial régimes, it should be noted that the international community had recognized the inalienable right of those countries to independence and freedom, as well as their right to rebellion against the colonial power. Every national liberation movement needed weapons and could obtain them only if it had sources of supply.

39. In his view, the proposal to set up a working group was inappropriate. When the Commission had begun its study of the topic, it had established a working group to identify the steps to be followed in preparing the draft code. Once the working group had completed the task entrusted to it, the Commission had appointed a Special Rapporteur for the topic. The Commission and the Sixth Committee of the General Assembly were, in a way, working groups which could advise the Special Rapporteur. The establishment of another working group would only complicate matters because problems that had already been considered would be reopened for discussion. He was therefore opposed to a proposal which he found unnecessary and inappropriate.

40. Mr. FRANCIS said that his suggestion had been misunderstood by Mr. Díaz González. What he had suggested at the 1883rd meeting was that the members of the Commission should consider whether the Drafting Committee might not be asked to appoint a sub-committee from among its members to examine a provisional list of general principles.

41. The CHAIRMAN said that, as he recalled, it had been suggested during the debate that a small working group should be set up to assist the Special Rapporteur. The suggestion had been made for the consideration of the Special Rapporteur, not as a formal proposal, and Mr. Díaz González's comments on that point were only the expression of an opinion, not an objection to a formal proposal.

42. Mr. USHAKOV, continuing the statement he had made at the 1881st meeting, recalled that he had emphasized the need to forget for the time being article 19 of part 1 of the draft articles on State responsibility. The draft articles which had been submitted by the Special Rapporteur and on which he would now comment showed that the Special Rapporteur himself had sometimes forgotten to draw inspiration from that provision. The threat of aggression, interference in the internal or external affairs of another State, terrorist acts and violations of the obligations assumed under certain treaties were not international crimes within the meaning of article 19, paragraph 3. Several members of the Commission had, moreover, proposed that crimes other than those referred to in article 19 should be included in the draft code.

43. He also noted that, as they now stood, the draft articles submitted by the Special Rapporteur did not make it clear whether they applied to States or to individuals, since neither the former nor the latter were expressly referred to therein. The reference in square brackets to the authorities of a State was not of much help in that regard because it could be taken to mean both the State itself and the individuals who were the authorities of a State. It seemed quite clear that the Special Rapporteur's intention was to deal only with individuals. It had not been his task to prepare a list of the offences that could be committed by States.

44. Three categories of crimes, namely crimes against peace, war crimes and crimes against humanity, were listed in the Charter of the Nürnberg Tribunal and had been reproduced in Principle VI formulated by the Commission on the basis of the Charter and Judgment of that Tribunal.[19] On the basis of the crimes in those three categories, which obviously belonged in the draft code, he proposed to draft an article modelled on article 2 of the 1954 draft code. The article would begin with an introductory phrase, which might read:

> "The following persons shall be recognized as responsible under international law for offences against the peace and security of mankind and shall be liable to punishment";

and it would be followed by a list of the offences that could be committed by individuals. The list would begin with

> "persons planning, preparing, initiating or causing an act of aggression to be committed or a war of aggression to be waged by a State".

Since the meaning of the word "persons" was very broad, no distinction should be drawn between agents of a State and mere private individuals, who would in most cases be agents of a State. Reference would also be made to:

> "persons ordering, committing or inciting acts in serious violation of the laws or customs of war which include, but are not limited to, ill-treatment or deportation to slave labour, or for any other purpose, of civilian populations, murder or ill-treatment of prisoners of war or of persons on the seas, killing of hostages, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

That wording was based on Principle VI (*b*). It would be followed by a paragraph based on Principle VI (*c*), and referring to:

> "persons ordering, committing or inciting acts of murder, extermination, enslavement, deportation

[19] See 1879th meeting, footnote 6.

and other inhuman acts against any civilian population, or persecutions on political, racial or religious grounds".

All those provisions would apply to persons who were guilty by reason of their own conduct, not by reason of the conduct of another person or of a State. A final paragraph would refer to "persons participating in a common plan or conspiracy for the accomplishment of any of the acts referred to in the preceding paragraphs".

45. With regard to the offences which he proposed to list first, namely an act of aggression and a war of aggression, he stressed the need to make it clear that the perpetrators of such offences were persons who had planned, prepared, initiated or caused an act of aggression to be committed or a war of aggression to be waged by a State. It was important to prove that such offences existed. At the Nürnberg Tribunal, it had been proved that certain leaders in Fascist Germany had methodically planned, prepared or caused a war of aggression to be waged against the Soviet Union, in accordance with a pre-established plan. It had then been possible to try and to convict those persons.

46. The Commission did not have to define the notion of aggression. It simply had to state that persons who had planned, prepared, initiated or caused an act of aggression to be committed or a war of aggression to be waged by a State were responsible for an offence against the peace and security of mankind, quite independently of the existence or absence of a definition of aggression and regardless of the organs empowered to determine the existence of an act of aggression.

47. Immediately following aggression, reference should be made to the offence which was perhaps the most serious threat to the peace and security of mankind, but for which the Special Rapporteur had not yet made any proposal, namely the offence committed by "persons planning, preparing or ordering the first use by a State of nuclear weapons". According to paragraph 1 of the Declaration on the Prevention of Nuclear Catastrophe,[20] "States and statesmen that resort first to the use of nuclear weapons will be committing the gravest crime against humanity."

48. Referring to section C of draft article 4, he pointed out that interference in the internal or external affairs of a State could take various forms, the most serious of which was probably armed intervention. He intended to include that offence in his list by adding a paragraph referring to:

> "persons planning, preparing, ordering or causing a State to engage in armed intervention in the internal affairs of another State".

That provision should be easy to accept because the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations[21] placed armed intervention on the same footing as aggression.

[20] General Assembly resolution 36/100 of 9 December 1981.

[21] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

49. With regard to terrorist acts, the most serious of which were committed by States, he proposed a paragraph referring to:

> "persons planning, preparing, ordering or causing terrorist acts to be committed by a State against another State".

Along the same lines, he proposed two other provisions which would refer to "persons planning, preparing, initiating or causing a State to commit serious violations of its international obligations in respect of arms limitations or disarmament" and to "persons planning, preparing, ordering or causing acts to be committed with a view to the forcible establishment or maintenance of colonial domination". As to mercenarism, he proposed to refer to "mercenaries who engage in armed attacks against a State which are so serious that they are tantamount to acts of aggression".

The meeting rose at 1.05 p.m.

1887th MEETING

Thursday, 23 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. HUANG thanked the Chairman and members of the Commission most sincerely for the warm welcome extended to him.

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

2. The importance of the work on the draft code had been repeatedly stressed both in the Commission and in the Sixth Committee of the General Assembly. At a time when aggression, subversion, military occupation and other illegal acts were constantly being committed, thereby endangering the sovereignty, territorial integrity and political independence of many States, especially small and newly independent States, the preparation of such an international legal instrument would help to strengthen international peace and security. Hence the priority which the General Assembly had requested the Commission to attach to the draft code.

3. An examination of the Special Rapporteur's three reports, and of the Commission's own reports, revealed that the Commission had been making steady progress and that it was moving ahead in the right direction. The present debate had given a clear picture of the questions that deserved most attention. The first was the delimitation of the scope *ratione personae* of the draft code. Generally speaking, the Commission endorsed the approach adopted by the Special Rapporteur, whereby the draft code should cover the criminal responsibility of individuals, an approach that had also been followed in the 1954 draft code. In article 1, that code defined offences against the peace and security of mankind as "crimes under international law, for which the responsible individuals shall be punished". A similar formulation was to be found in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal.[6]

4. The criminal responsibility of individuals under international law had thus long been recognized. There remained, however, the complex and difficult question of whether other entities, particularly States, could commit offences against the peace and security of mankind and should accordingly come within the scope of the draft code. He believed that the answer to that question should be in the affirmative. Article 19 of part 1 of the draft articles on State responsibility[7] made express provision for categories of internationally wrongful acts which constituted international crimes. The concept of States committing international crimes was no longer a mere conjecture. States had indeed been the perpetrators of such acts as aggression, colonial domination and *apartheid*, and most of the offences included in the 1954 draft code, as well as in the draft under consideration, could only be committed by States or with their connivance or encouragement.

5. While at the present stage limiting the application of the draft to individuals only, the Special Rapporteur pertinently asked in his third report (A/CN.4/387, para. 11) whether individuals could be the principal perpetrators of offences against the peace and security of mankind. He answered in the negative by adding:

> ... it is difficult to see how aggression, the annexation of a territory, or colonial domination could be the acts of private individuals. ...
>
> ... The same is true, moreover, of all crimes against humanity, which require the mobilization of means of destruction which the perpetrators can obtain only through the exercise of power. Some of these crimes—*apartheid*, for example—can only be the acts of a State. (*Ibid.*, paras. 12-13.)

6. Admittedly, some of those offences, such as genocide and terrorism, could be committed by private individuals, but it was none the less true that States were the principal authors of offences of that nature. It could hardly be the purpose of the Commission or of the General Assembly to devise an instrument that would penalize the smaller or secondary perpetrators while leaving the cardinal authors of the offences immune. It would be paradoxical to recognize that States were the most qualified candidates for the commission of offences against the peace and security of mankind yet concentrate efforts on the pursuit of less qualified perpetrators, namely individuals.

7. He was not unaware of the enormous theoretical and practical problems to be faced when crossing the dividing line between the criminal responsibility of individuals and the criminal responsibility of States. For his part, he simply wished to stress the dilemma the Commission was facing and strongly urged further study of the matter. At the present stage, it seemed clear that something more should be done than dealing solely with the criminal responsibility of private individuals. At least, the general principles to be drafted should make it clear that the punishment of individuals did not relieve the State of its responsibility for offences committed by it or by its agents. He also shared Mr. Balanda's view (1882nd meeting) that the Commission should not foreclose the possibility of applying the draft code to entities other than individuals. In view of the divergence of opinion on that point, and in the interests of advancing the Commission's work, he himself would agree provisionally with the Special Rapporteur's proposal regarding the scope *ratione personae* of the draft code. That approach was not inconsistent with the Commission's own conclusion that the draft code should be limited at the present stage to the criminal liability of individuals, "without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments".[8]

8. Defining the offences to be covered by the draft code was certainly a difficult task. Few domestic criminal codes, if any, tackled the issue. The definition in the 1954 draft code was not, strictly speaking, a definition at all. At previous sessions, the Commission had used the tests of gravity and extreme seriousness as criteria for characterizing an offence against the peace and security of mankind. In his third report, the Special Rapporteur submitted two definitions, each based on a criterion which took into account both subjective and objective elements, relying largely for that purpose on article 19 of part 1 of the draft articles on State responsibility.

9. From the standpoint of methodology, it was wise to take that article 19 as a point of departure or

[6] See 1879th meeting, footnote 6.

[7] *Ibid.*, footnote 9.

[8] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

reference. The two topics were so closely interrelated that resort to article 19 helped to maintain unity of approach in the Commission's work, and good use could also be made of the achievements in the progressive development of international law. But that did not mean that article 19 should be borrowed as it stood; rather, it should be adapted to the actual purposes of the code.

10. He understood the misgivings of those members who had expressed their concern that linking article 19 of part 1 of the draft articles on State responsibility with the draft code might involve the risk of confusing two different subject-matters or making work on the draft code even more difficult. He himself, however, did not share that concern because the scope *ratione personae* of the draft code had been confined to the criminal responsibility of individuals and article 19 applied only to States. Moreover, the provisions of the draft code could be appropriately termed "primary rules" and as such were unlikely to overlap with the provisions on State responsibility. Again, since article 19 recognized that States could commit international crimes but did not elaborate on the specific breaches falling within that category of crime, the work done on the draft code might well prove useful in understanding and applying article 19. He accordingly saw no good reason for completely separating the elaboration of the draft code from article 19.

11. Suggestions had also been made to dispense with a general definition or to adopt a definition by enumerating various concrete acts. In fact, that had already been done for some of the offences listed in article 4 of the Special Rapporteur's draft. In domestic criminal law, definition by enumeration was not uncommon and the method had also been frequently used in international codification. As he saw it, abstract definition, definition by enumeration, or a combination of the two could all be tried where appropriate, but account must be taken of the necessity for consistency in form.

12. With regard to the list of acts constituting offences against the peace and security of mankind, he noted that the Commission was unanimous in the view that aggression should be the first offence in the list. The question none the less arose how to integrate the concept of aggression in the draft code. The method of incorporating the complete text of the Definition of Aggression adopted in 1974[9] had, among other drawbacks, the uncertainty involved in leaving the determination of punishable acts to a political organ. The 1974 Definition, which constituted the most recent and comprehensive achievement in defining aggression, should be taken as a basis for elaborating a new definition in the light of the nature and characteristics of the draft code.

13. The threat of aggression was expressly prohibited in the Charter of the United Nations and in a number of other international instruments and should therefore come within the purview of the draft code.

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

14. Preparation of aggression was difficult both to define and to prove. Moreover, if it did not materialize in actual aggression, it might not cause much harm. Preparation of aggression, however, was often accompanied by discernible acts such as an order to mobilize the nation. Also, the preparations themselves, even if not followed by aggression, could indeed produce harmful consequences detrimental to international peace and security. The question should be the subject of further study and discussion.

15. Interference in the internal or external affairs of a State was almost universally condemned. With a proper formulation, that offence should therefore find its due place in the draft code.

16. Similarly, there should also be no hesitation about including terrorism in the list. The problem was rather that of determining what kind or what forms of terrorism were to be covered. The Special Rapporteur preferred to consider only State-sponsored terrorism, namely terrorism that involved the participation of State authorities, provided it was directed against another State. Doubts had been expressed, however, as to whether that choice might not be too limited and whether other terrorist acts might still have the effect of endangering the peace and security of mankind. In his opinion, further examination of the problem was required. With regard to the definition or the formulation of the offence of terrorism, he was inclined to agree with the suggestion made by the Special Rapporteur in his third report (A/CN.4/387, para. 149).

17. Some members viewed violations of the obligations assumed under certain treaties as a thing of the past. Although somewhat unfamiliar with the subject-matter, he considered that the offence might have a potentially wider dimension than was commonly imagined and, if it was to stay on the list, its intended objective and scope of application should be more clearly defined.

18. The reprehensible nature and universal condemnation of colonial domination qualified it as a primary candidate for inclusion in the list of offences against the peace and security of mankind. He approved of the Special Rapporteur's reference to "colonial domination", instead of "colonialism", since it not only retained the basic connotation of colonialism, but also constituted a more acceptable legal definition.

19. Mercenarism, which was still being used as a means of destabilizing or overthrowing the Governments of small and newly independent States or of undermining the struggle of national liberation movements, thereby threatened the peace and security of mankind and it should therefore be included in the list of offences, subject to a satisfactory definition.

20. With regard to economic aggression, the Special Rapporteur, in his well-founded analysis, favoured ranking it among the forms of interference in the internal affairs of another State. There appeared to be no better way of dealing with that offence.

21. With reference to the draft articles submitted by the Special Rapporteur, he had no comments to make on article 1, which was generally acceptable.

22. Two alternative were proposed for draft article 2, the first relating to individuals and the second to State authorities, and they reflected two different lines of thought in the Commission concerning the scope *ratione personae* of the draft code. In order to accommodate the different views, he suggested that the alternative versions should be merged in a single formulation along the following lines:

"Individuals, including State authorities, who commit an offence against the peace and security of mankind are liable to punishment."

The Commission might also adopt the first alternative, but make provision in the general principles for the idea embodied in the second alternative. A third possible course would be to adopt the first alternative and include explanatory notes in the commentary to the article.

23. Lastly, in view of his earlier comments on the linkage between article 19 of part 1 of the draft articles on State responsibility and the draft code, and on the list of offences, no observations on draft articles 3 and 4 were required.

24. Mr. ARANGIO-RUIZ thanked the Chairman and members of the Commission most sincerely for the warm welcome extended to him.

25. He had read with great interest the three reports of the Special Rapporteur on the present topic, admired the results achieved, and intended for his own part to contribute a few general thoughts and suggest a number of additions to the list of offences against the peace and security of mankind. Those general thoughts related to the *raison d'être* of the code under consideration and, in particular, to the general concept of the offences and their delimitation *ratione personae.*

26. As he saw it, the essence of the General Assembly's decision to revive consideration of the code after having postponed it in 1954 was the determination not to leave the protection of the peace and security of mankind to the imperfect rules and mechanisms by which—under the Charter of the United Nations or under other instruments—the so-called international community endeavoured to protect itself from the most serious evils of the modern world. The basic idea was to try to overcome—or reduce—the dramatic and centuries-old distinction between two domains: the inter-State domain of international law, on the one hand, and the inter-individual domain of national legal systems, on the other. Unfortunately, the distinction had tended so far to keep the individual out of the direct reach of the law of nations. Indeed, individuals were out of the reach of international law, whether they acted merely as private parties or as agents of States. The idea underlying the draft code seemed to be precisely to lift in part the barrier resulting from the distinction in question, so as to place individuals under the direct—or, more exactly, less indirect—reach of international law, at least in so far as certain offences against mankind were concerned.

27. The undertaking was undoubtedly an extremely difficult one. International law being what it was, in other words a radically and constitutionally inter-State (or inter-Power) law, States tended to maintain their exclusive control over all private individuals present on their territory. Individuals acting as State agents, for their part, tended to cover themselves—even in present times and in the freest of societies—with that sanctity and immunity which in the days of absolutism was the prerogative of kings.

28. To bring either class of individuals—private individuals and, so to speak, public individuals—under a more direct (or less indirect) rule of international law appeared at first sight a daring enterprise, especially since international law was far from perfect and almost totally lacking in adequate institutional apparatus; to bring individuals under its operation might therefore raise more problems than it would appear to solve. It was for that reason that he had much sympathy with the suggestion by Mr. Francis (1883rd meeting) that more work should be done at the present session on the general principles.

29. Since the beginning of work on the draft code, two sets of precedents had been under scrutiny. One was the disappointing experience of the period between the two world wars regarding the establishment of a common international criminal law and criminal jurisdiction; the other was the positive, successful, and in many ways unique experience represented by the London Agreement of 1945 for the prosecution and punishment of the major war criminals,[10] and the Charter of the Nürnberg Tribunal and the Judgment of the tribunal. It was hardly necessary to stress how circumscribed were the three classes of crimes envisaged in that Agreement and tried in those proceedings. It was precisely because of the difficulty of lifting the barrier between the law of nations and the law of human beings that, ever since the first years of the United Nations, efforts had been concentrated on the major offences against the peace and security of mankind, without extending the projected code to coincide with a common international criminal law. It was because of that difficulty that, even when one went beyond the 1954 list, one had to focus on the most serious among the offences in question.

30. As to the question of delimitation *ratione personae*, he agreed that, in view of the difficulties involved, the Commission should set aside for the time being the idea of extending the draft code to offences committed by States themselves. States were on a different level and it would be even more difficult to bring them before a court of justice than it was to do so in the case of individuals. In addition, the wrongful acts of States—whether termed delicts or crimes—were covered by other rules, and different machinery was applicable. He had in mind mainly the provisions of the Charter of the United Nations and of the draft articles on State responsibility. In that connection, he saw no point in arguing whether article 19 of part 1 of the draft articles on State responsibility[11] set forth a criminal or a civil liability of States, or perhaps some form of mixed liability.

---

[10] See 1879th meeting, footnote 7.

[11] *Ibid.*, footnote 9.

31. The code should deal both with individuals acting as private parties and with individuals acting as State agents. He agreed with those members who had expressed reservations with regard to the expression "State authorities", which seemed to involve the State itself. Whether as State agents or as private parties, individuals could have acted in isolation or in one or more groups. As a matter of fact, in most cases groups would be involved, but, even in that instance, the code should consider each individual on his own. There could be no such thing as collective criminal responsibility. The concept of "delinquent association" was of course known in the criminal law of most countries, yet it did not mean that a group of individuals would be punished as a whole. On the contrary, each member of the delinquent group was liable, in addition to the penalty attaching to the specific crime he was convicted of, to the further specific penalty attached to the distinct—and still individual—crime of "delinquent association".

32. Another matter which should not be confused with a form of collective criminal responsibility was the responsibility that might be incurred by a corporate body or, to use the French term, a *personne morale*. There was no obstacle to the subjection of such a corporate body to criminal law, with the reservation that it could not be made subject to any physical punishment. As a rule, it would be liable in a financial sense. Criminal liability as such should be confined to individuals.

33. As to the list of offences, on the whole he favoured the inclusion of all those indicated by the Special Rapporteur, subject of course to proper formulation and definition of each offence and also to the general principles.

34. He wholeheartedly supported the inclusion of drug trafficking in the list, as suggested by the representative of the Congo in the General Assembly and as so eloquently endorsed by Mr. Reuter during the present discussion (1879th meeting).

35. For his own part, he would also advocate a few additions to the list, in the light of certain events in his own country of which he had had personal experience. He had in mind the events which had paved the way for the series of acts of aggression committed by the "authorities" of the Italian State in the mid-1930s and for participation by those same authorities in the Second World War. He wished to stress the preparatory acts, because acts of aggression did not come out of the blue. The acts in question had been the violent seizure of power by the Fascists between 1922 and 1925; the complete suppression by 1925 of political rights and fundamental freedoms in Italy; the consequent establishment of the Fascist dictatorship and the systematic elimination of political opponents; the violation by the foregoing actions of the right of the Italian people to self-determination; the imposition on the Italian people of an aggressive foreign policy; the imposition on the Italian people of an unwanted—and unexpected—alliance with Hitler; the acceptance—partial but none the less monstrous—of the policies of racial discrimination against the Jewish citizens of Italy; and the acts of aggression or military interventions against Ethiopia, Spain, Albania, France, the United Kingdom, the USSR, Yugoslavia, Greece and other countries.

36. It would be recalled that Mussolini and his partners had been apprehended not by the allied forces, but by the Italian resistance movement and summarily executed. Had they been tried, like the Nazi war criminals, they would have been accused and found guilty in 1945 only of the offences contemplated in the 1945 London Agreement for the prosecution and punishment of the major war criminals, in other words crimes against peace, crimes against humanity and war crimes in the narrow sense. The Fascist leaders would have escaped trial and punishment for all the other crimes they had committed against the Italian people. The worst of those crimes had been to lead Italy into the Second World War, so that many Italian citizens had been forced to wish for the defeat which alone would have brought back the institutions under which they had lived before Fascism had taken over.

37. In the light of those remarks, he stressed the need to include in the draft code the preparation of aggression. Preparation for military action could sometimes be presented as preparation for self-defence. The establishment of Fascism, however, and the suppression of all opposition had been the best preparation for the multiple acts of aggression the Fascists were to commit later on. To deprive a whole people of their right to choose their own government was in itself one of the most serious offences against the peace and security of mankind.

38. Like other members, he supported the inclusion of terrorism in the draft code. At the previous meeting, Mr. Ushakov had proposed a text for the condemnation of acts of terrorism which indicated that they must be directed by one State against another. In his own view, however, such action would constitute not so much a form of terrorism as a form of intervention or indirect aggression. Terrorism should be taken to mean offences committed by more or less numerous and organized groups of persons who perpetrated the most wanton acts of violence under the utterly indefensible pretext of alleged "political" ends. In certain cases, of course, such acts of terrorism were encouraged, supported or even instigated from abroad, but they should be condemned whatever their presumed foreign connection. It was for him a matter of pride that the Italian State's reaction in such circumstances had been particularly civilized. It had respected, in particular, all the guarantees of fair trial and penalty—including non-application of the death penalty—but he could not help feeling that its attitude had perhaps been unduly lenient. On the other hand, the Italian State had encountered a number of obstacles in the tendency of some Governments to deny extradition—or other forms of judicial co-operation—on the absurd basis of the "political" qualification attached to those crimes by their authors. If certain forms of wanton terrorism were included among the offences covered by the draft code, international co-operation in the prevention and suppression of terrorism might be facilitated.

39. Lastly, the question of the general principles was connected with the relationship between the

inductive approach and the deductive approach. He had given an example of the inductive approach by dealing with past misdeeds committed in the name of his country—just as he could have dealt with Nazi crimes. Nevertheless, the Commission was perhaps being much too inductive and not sufficiently deductive when it proceeded to list offences without trying first to determine, at least provisionally, the essential principles for choosing the offences and the ways and means—international, national or mixed—whereby condemnation would be effectively implemented.

40. Mr. USHAKOV said that there was a very wide range of acts of terrorism: an act of terrorism that was perpetrated by a single person against another and could be considered as an international criminal offence for which the perpetrator should be punished by any State or extradited for punishment, but which did not affect the whole of mankind and was not an offence against the peace and security of mankind; an act of terrorism by an individual which constituted a danger to society and concerned only the State on whose territory it was committed; an act of international terrorism by an individual which endangered the interests of the community of States, such as the intentional commission of a murder, kidnapping or other attack on the person or liberty of an internationally protected person, or a violent attack on the official premises, private accommodation or means of transport of an internationally protected person likely to endanger his person or liberty, as listed in article 2, paragraph 1 (*a*) and (*b*), of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[12]

41. Other acts of terrorism by individuals that were international in scope could possibly be viewed as international criminal offences but, for the purposes of the draft code, the only ones that could and should be covered were the most serious, in other words acts of terrorism perpetrated by one State against another State and acts by persons who had planned, prepared, ordered or engaged in acts of State terrorism against another State.

42. The CHAIRMAN said that the Special Rapporteur would no doubt wish, in his summing-up, to give his view on the question whether it would be desirable, with regard to terrorism, to limit the scope of the draft code to State-sponsored terrorism or to expand that concept, and if so, how that should be done.

43. Sir Ian SINCLAIR said that he naturally agreed on the need to provide in the draft code for the case of nationals of one State who became involved in the preparation, execution or incitement of terrorist acts against another State. In his view, however, that was not enough, for there were at least two other classes of acts that had attained the same degree of gravity as those mentioned by Mr. Ushakov.

44. The first case was where persons acting as agents of a State engaged in the preparation, encouragement or financing of terrorist acts, or in other forms of complicity in such acts, in another State, and the acts were directed not against that other State or internationally protected persons but, for instance, against political opponents of the State to which the agents belonged. That was a very grave offence against the peace and security of mankind and should certainly be covered in the draft code.

45. The other case was where persons who, acting as agents of a State, financed, encouraged, or conspired or otherwise acted in complicity in the carrying out of terrorist acts by private individuals or groups, such terrorist acts again to be committed in another State, whether against the authorities of that State or against private individuals. To take account of such acts would of course mean widening the concept of terrorism under the draft code, but in the light of recent events consideration should be given to whether the Commission should not go at least that far, without entering the more difficult and controversial area to which Mr. Díaz González had referred at the previous meeting.

46. Mr. ROUKOUNAS thanked the Chairman and members of the Commission most sincerely for the warm welcome extended to him.

47. He also wished to thank the Special Rapporteur for a report (A/CN.4/387) that was excellent in every respect. In his comments, he would follow the sequence of the major sections of the report. With regard to the concept of an offence against the peace and security of mankind, in the terminology of modern international law at least six types of offence constituted offences under international law: an international offence, an offence against international peace and security, a crime against humanity, a war crime, a serious breach of humanitarian law and an offence against the peace and security of mankind. After the Second World War, international criminal justice had associated the concept of "crimes against humanity" with the concept of war crimes. Since then, however, the concept of a crime against humanity had evolved, particularly in treaty law, and had become markedly autonomous in character—for example, genocide, *apartheid*, the seizure and hijacking of aircraft—with legal consequences that exhibited some uniformity. As to offences against the peace and security of mankind, the topic now under discussion, the Special Rapporteur had taken care to emphasize the unity of the concept, for its two components were indivisible, and had then gone on to differentiate between such offences and offences against international peace and security by stating (*ibid.*, para. 28) that the two expressions "do not coincide exactly". Offences against international peace and security involved inter-State relations, whereas offences against the peace and security of mankind could cover different situations. The Special Rapporteur's clarification was therefore important: an offence against the peace and security of mankind, as conceived at the present time, would, depending on the steps ultimately taken to establish the list of offences, encompass either all of the concepts mentioned or a large number of them, but it might well relate to only some of the offences in those different categories.

[12] United Nations, *Treaty Series*, vol. 1035, p. 167.

48. He fully realized that, in order to work out a general definition of an offence against the peace and security of mankind that would effectively apply to all the acts punishable under the code, it was essential to determine the whole range of offences to be included; but a point of departure was needed and matters would become clearer as the work proceeded.

49. The Special Rapporteur had proposed, in draft article 3, two alternatives for a general definition, one alternative consisting of an analysis of the fundamental values to be protected and hence, implicitly, the relevant breaches to be punished, and another alternative consisting of a synthesis which adopted a frontal approach to the concept of the offence envisaged. It had been said of the first alternative, which related to breaches of "international obligations", that it lay more within the realm of the international responsibility of the State. Yet the Commission was engaged in preparing a text on the obligations of the individual under international law, obligations of such a kind that they did not necessarily introduce the concept of the State. It had also been said that the first alternative established too close a link with article 19 of part 1 of the draft articles on State responsibility.[13] Personally, he would not have any great objection to such a link if the two provisions covered the same types of offence. First, however, the perpetrators of the offences were different, and secondly, the offences to be covered by the future code were specific offences which included a number of breaches that were as serious as, but perhaps different in scope from, those in the draft articles on State responsibility. Accordingly, at a later stage some elements might well merge, whereas others might not, and in order to avoid confusion the point of departure should not be a formulation identical with that of article 19.

50. The second alternative proposed for article 3 seemed more appropriate, for it comprised two relevant elements: the international wrongfulness of the act, in other words the wrongfulness under international law, and recognition of the wrongfulness by the international community as a whole. Such "recognition" was admittedly not the same as the vague formula of the "universal conscience of mankind", so cherished by the literature of the nineteenth century: the international community in question was a community with a particular degree of institutionalization. But were those two elements enough to clarify the matter? The Special Rapporteur had frequently emphasized that an offence against the peace and security of mankind must be particularly serious and Mr. Ushakov had said that the act must constitute a danger to the international community. For his own part, he therefore suggested that the Special Rapporteur should continue his endeavours to arrive at a definition on the basis of the second alternative and take into consideration, apart from the wrongfulness of the act, its recognition by the international community, its seriousness and the danger it constituted, and the values involved, values which would be incorporated into the text not as subjective and abstract concepts, but as elements intrinsically bound up with the rules that best illustrated the modern international system.

51. In the matter of the persons covered, he noted that international responsibility had sometimes been regarded as a guarantee, either a principal or a subsidiary guarantee, for the purposes of the observance of international law. The problems of the relationships between the international responsibility of the individual and the international responsibility of the State had been amply discussed in the Commission, with very firm arguments. He would confine himself to a few comments on the criminal responsibility of the individual, as dealt with in the report of the Special Rapporteur. Clearly, the implication of the individual as an "international offender" was closely bound up with his status as an organ of the State, or rather an agent of the State and in the event of an offence, an individual-organ no longer enjoyed the customary jurisdictional immunity—the expression "agent of the State", in the broadest sense under both older and more recent international legal theory, being taken to mean not only a person vested regularly, and so to speak officially, with the power of the State, but also a person who acted occasionally, even on a secondary basis, on behalf of the State. Moreover, the concept of an organ of the State covered both "rulers" and "executants", and for that reason the use of the term "authorities of a State" which seemed to designate the former rather than the latter, would not be quite appropriate in the circumstances.

52. Immediately after the Second World War, the courts had not admitted the criminal responsibility of private individuals. Of course, the international military tribunals, under their mandate to punish crimes against peace, war crimes and crimes against humanity, had indeed judged individuals—in that instance, manufacturers—but the acts for which those persons had been judged had been linked with the perpetration of criminal acts on behalf of the State, or of acts which could not have been committed without the organs of the State violating international law, by commission or omission. But developments since then offered no room for doubt: private individuals could incur international criminal responsibility and could be prosecuted, tried and convicted for acts contrary to international law, provided, of course, that the acts seriously affected the interests of the international community. One problem of legal terminology also arose, for both the words "individual" and "person" were used in practice. Strictly speaking, "persons" could signify both legal persons and natural persons. Most of the relevant conventions and the corresponding resolutions of the General Assembly used either term, but the Commission should determine which term it would adopt.

53. Accordingly, the first alternative proposed for article 2 was preferable. However, the texts prepared by the international organizations were also instructive and he would suggest that the Commission should include an express mention of "agents of the State" by altering the draft article to read:

"Individuals who, whether or not acting in their capacity as agents of the State, commit an offence

---

[13] See 1879th meeting, footnote 9.

against the peace and security of mankind are liable to punishment."

That proposal was, moreover, similar to Mr. Huang's (paragraph 22 above).

54. With regard to the list of offences proposed by the Special Rapporteur, the Commission could not establish an exhaustive list because it could not engage definitively in an interpretation of the treaties in force. The task of selection was an extremely delicate one, but it should be done from the standpoint of the development of international law. Some of the Special Rapporteurs's proposals were based on firm foundations, whereas others reflected newer trends. The Commission should study all of them in detail, even though it would select only those which seemed to be most in keeping with the criteria for a minimum list, for such a list was already an accepted principle.

55. Regardless of the offences that would ultimately be included, it was important to specify that codification by *renvoi* was not a sound method, particularly since the Commission still had to determine the legal nature, binding or not, of the instrument it was elaborating. Each offence should figure separately in the draft. Moreover, in setting forth the constituent elements of each offence, every effort should be made to avoid using the "telegraphic" style used in the 1954 draft code. The offences were special in character and the Commission should clarify each concept by stating it in an analytic fashion. Admittedly, it was not a technique normally used in criminal codes under internal law, but the Commission was not elaborating such a code and there was no certainty that it was elaborating an international criminal code.

56. It was gratifying to note that the Special Rapporteur's approach coincided with his own ideas on the topic. The proposed list included only a certain number of offences because the Commission was, as yet, only in the early stages of its work. He fully endorsed the inclusion in the future code of the threat of aggression, the preparation of aggression, intervention in a State's internal affairs, terrorism, mercenarism and colonial domination.

57. Among the offences to be incorporated in the draft code, there was one on which all members of the Commission agreed, namely aggression. In that connection, the Commission had postponed consideration of a code of offences against the peace and security of mankind in 1954 because it had experienced difficulties in defining aggression, pending the elaboration of such a definition by the United Nations. That definition now existed, regardless of what might be said of it, and, what was more, the General Assembly had adopted it by consensus[14] during a period of détente, for 1974 had also been the year of the Helsinki Conference. The Special Rapporteur had in his wisdom included in the list, on a preliminary basis, the whole of the Definition of Aggression. It was true that article 8 of the Definition, reproduced in subparagraph (*f*) of the first alternative of section A of draft article 4, stated that:

In their interpretation and application, the above provisions are interrelated and each provision should be construed in the context of the other provisions.

That was a warning against breaking up the text that should perhaps be taken into account. Another approach would be simply to make a *renvoi* to the General Assembly resolution, as the Special Rapporteur had also proposed. The answer would depend upon whom the future code was intended for: if it was intended for a judge, for example, he could not be expected to engage in research to determine the meaning of "aggression" in international law. An effort might well be made to provide a description of the constituent elements of each act of aggression.

58. On the other hand, article 5, paragraph 2, of the Definition, reproduced in subparagraph (*d*) (ii) of the first alternative of section A of draft article 4, stated that:

A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.

Yet, in his third report (A/CN.4/387, para. 28), the Special Rapporteur pointed out that there were grounds for making a qualitative distinction between offences against "international peace and security" and offences against "the peace and security of mankind", something which might warrant the inclusion of only some elements of the Definition in the future code.

59. Drug trafficking, a matter raised by Mr. Reuter (1879th meeting) had already been of concern to those who had drafted the Convention on the Prevention and Punishment of the Crime of Genocide,[15] for they had included "causing serious bodily or mental harm" to members of a group of persons (article II (*b*)) as an act constituting genocide, and that undoubtedly covered drug trafficking. In the 1954 draft code, the Commission had, in article 2, paragraph (10) (ii), used a similar formulation without making express reference to that Convention. Hence a precedent, albeit indirect, did exist and the Commission could well consider including and specifying the content of the abominable crime of drug trafficking in the draft code.

The meeting rose at 1.05 p.m.

[14] See footnote 9 above.

[15] See 1885th meeting, footnote 13.

1888th MEETING

Friday, 24 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLES 1 TO 4[5] (*continued*)

1. Mr. TOMUSCHAT expressed appreciation to the members of the Commission for their kind words of welcome and thanked the secretariat of the Commission for its assistance. He paid a tribute to the Special Rapporteur for his three reports, which reflected outstanding analytical skill and impressive legal precision.

2. As a new member, he had hesitated to speak at the current stage of the work, but the draft code was of paramount importance to Germany, since the ideas it embodied had emerged as a consequence, in particular, of the atrocities committed by Nazi Germany, and he had feared that his silence might lead to misunderstandings as to his attitude towards the basic premises of the draft code.

3. The Nürnberg Principles[6] were by no means outdated and they deserved the international community's full support. All too often, the fact that crimes were committed in the name of the State protected those responsible from criminal sanctions. The exercise of government power should not serve as a justification for criminal acts, especially the most abhorrent ones. The lessons of Nürnberg had to be borne in mind when framing the draft code of offences against the peace and security of mankind.

4. Two basic parameters should permeate the whole texture of the draft code: the first was the criminal responsibility of the individual *vis-à-vis* the international community, whether or not the individual in question had been acting as an agent of the State; the second was the particularly serious nature of the offence. He would also add a third criterion, which related to the purpose of the undertaking: the elaboration of the draft code should not be a mere exercise in political rhetoric, but a genuine attempt to shape an instrument which could, if adopted, serve as an effective deterrent. That goal would be achieved only if the draft code was confined to acts which the international community as a whole agreed should be condemned. If the scope of the substantive rules was stretched too far, they might never be implemented and any undue expansion of the list of offences would also weaken the system of implementation.

5. With regard to the scope of the code *ratione personae*, he agreed with the Special Rapporteur that it should apply to individuals. He was not altogether sure what the criminal responsibility of a State would entail, but logically it would have to derive from article 19 of part 1 of the draft articles on State responsibility[7] and would thus arise in the case of the most serious international crimes. The result would be a three-tiered structure of international responsibility consisting of ordinary internationally wrongful acts, international crimes and certain crimes that would be even more serious. Those issues should, in his view, be dealt with by the Special Rapporteur for the topic of State responsibility, since they involved the consequences of an international delict. In any event, the rules governing the responsibility of States and those governing individual criminal responsibility were of necessity entirely different and it would therefore be almost impossible to frame both sets of rules at the same time.

6. Furthermore, he perceived two main difficulties. The first stemmed from the fact that, broadly speaking, breaches of international obligations or, rather, of inter-State law provided the starting-point for the draft code. It was the general thrust of the code to hold responsible individuals who, as agents of a State, had wilfully acted in breach of the rules for the protection of the sovereign equality of States. However, although prohibitions addressed to States might be acceptable even if they were somewhat vague, criminal statutes had to be clear and precise. The maxim *nullum crimen, nulla poena sine lege* was recognized by all nations and represented an achievement that should not be lightly sacrificed. As had rightly been noted, therefore, the specificity of inter-State rules had to be adapted to the special requirements of modern criminal law. In that connection, it might be useful to have a provisional set of general principles to give the Commission an idea of what the process of adaptation would involve in specific terms. The suggestions made by Mr. Ushakov at the previous meeting could be a step in the right direction.

7. The second major difficulty arose from the complexity of some of the situations with which the Commission had to deal: even aggression could be extremely hard to identify. Although most members had stated that they were opposed to any power of determination by the Security Council, that organ might be in a far better position than any judge to know what had really occurred: a judge was normally concerned with individual cases and would, for instance, be unable to assemble all the facts required to clarify the relationship between enemy States prior to the onset of hostilities. It was for that reason that German courts were extremely reluctant to express themselves on foreign policy issues, an area in which they recognized that the executive had broad discretion. In that connection, he pointed out that, as early as 1951, the Treaty Instituting the European Coal and Steel Community[8] had included a provision (article 33, first paragraph) prohibiting the Court of Justice of the European Communities from reviewing

---

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1879th meeting footnote 6.

[7] *Ibid.*, footnote 9.

[8] United Nations, *Treaty Series*, vol. 261, p. 140.

the conclusions of the High Authority drawn from economic facts and circumstances. His point was that the more complex and subtle the rules, the less likelihood there was that any judge would be able to handle them as required by the principles of fair trial. Questions of implementation should therefore be taken into account at the standard-setting stage.

8. With regard to interference, economic aggression and subversion, which were burning issues, particularly for third world countries, he was not sure that it would be any easier to cope with them by labelling them as offences against the peace and security of mankind. It seemed to him that it would be much more profitable to strengthen the Security Council, so that, in such cases, States would be urged, if not forced, to comply with the relevant rules of international law. He would also advocate that the basic proposition that only the most serious offences should qualify as offences against the peace and security of mankind should carry two corollaries, namely that the draft code should be concerned with basic violations of the human right to life and dignity, as well as with the use of violent means.

9. He would point out that the example of Nazi Germany, rightly taken as a basis for consideration of the topic, was somewhat ambivalent: it was a good example in so far as it demonstrated the need for rules on the subject, but a bad one in that it made things seem almost too simple. For the most part, the situations that had arisen throughout history had been infinitely more complex and, although there had been no other such trial since the Nürnberg trial 40 years previously, the world had not for all that been free of barbarous atrocities.

10. Turning to the draft articles submitted by the Special Rapporteur, and specifically to draft article 2, he said that he preferred the first alternative. A reference to State authorities alone would be tantamount to saying that the State was responsible, whereas in most cases individuals would have to be held liable because, in exercising governmental authority, they had made criminal use of such authority. The two alternatives might, however, be combined.

11. He had some doubts about the two proposed alternatives for draft article 3. As he had already emphasized, a criminal statute should avoid all ambiguity. Yet those texts might give the erroneous impression that any conduct by an individual which corresponded to the definition in article 3 would automatically be regarded as an offence against the peace and security of mankind and therefore be punishable under the code. Such reasoning would not be in keeping with the Commission's approach inasmuch as article 3 was not regarded as establishing an offence. Moreover, the reference in the second alternative to recognition by the international community as a whole would leave the door open for the inclusion of other offences against the peace and security of mankind. Again, while there would be no objection to that approach in typical inter-State law, legislation in the field of criminal law had to be clear and precise. A list of punishable offences could not be supplemented by means of the same processes that applied in the case of amendments to inter-State law.

12. He fully endorsed the priorities which the Special Rapporteur had set in draft article 4 and agreed in particular that armed aggression should be placed at the top of the list. With regard to the method of drafting, however, the Commission was on the horns of a dilemma. Obviously, if it attempted to derogate from the Definition of Aggression adopted by the General Assembly,[9] it would be severely criticized, but it had to adapt that definition for the purposes of the draft code. The Definition of Aggression was tailored to inter-State situations and thus gave a prominent role to the Security Council, which was even empowered to determine that other acts which were not specifically listed constituted an aggression. In criminal law, that would be contrary to the principle *nullum crimen sine lege*. The only course would therefore be to reformulate the definition and to delete all the elements that had no bearing on individual responsibility, such as those contained in subparagraph (*c*) (ii) and (iii) of the first alternative of section A of draft article 4.

13. He wondered whether the threat of aggression (section B) was not typical of the kind of situation that should be considered by the Security Council, since that organ had devised its own methods of preventing wars. Would it really be a constructive contribution to peace to provide that the authors of a threat of aggression which had been successfully averted through available international machinery were liable to be punished for having committed an offence against the peace and security of mankind? That point called for careful consideration.

14. With regard to interference in the internal or external affairs of another State (section C), he noted that the report under consideration (A/CN.4/387) made no reference to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[10] He had already stated that he had reservations with regard to the inclusion of such an international delict in the draft code, since he very much doubted that any degree of precision could ever be attained. Indeed, the more he read about intervention, the less sure he was what it meant.

15. In the list of offences against the peace and security of mankind, the Special Rapporteur had rightly referred only to State-sponsored terrorism. Other forms of terrorism, which were no more than ordinary crimes whose authors should be punished or extradited, should not be given specific international recognition. There was, however, one major lacuna, namely terrorism used as a covert means of aggression. Terrorism, which by definition involved recourse to violent means in open defiance of the minimum requirements for civilized coexistence, was characterized by the insidious nature of its attacks, which were often aimed indiscriminately at civilians and members of the armed forces or police in circumstances that permitted no defence. Terrorists were not to be confused with insurgents or freedom fighters, as

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

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

recognized in the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts (Protocol II).[11] To benefit under that Protocol, a fighting group had to comply with minimum requirements, such as those set forth in its article 1, paragraphs 1 and 2, and those requirements were not met in the case of terrorists.

16. In his view, the provision of section E of article 4 relating to the breach of obligations under a treaty designed to ensure international peace and security was too broadly framed in the context of article 3, which marked the limits of what were to be regarded as punishable offences. He therefore suggested that that provision should be adapted to take account of developments in the past 30 years and, specifically, that it should refer explicitly to bacteriological weapons. Any violation of a ban on the use or production of such weapons should be characterized as an offence against the peace and security of mankind.

17. With regard to section F, the term "colonial" could be retained. However, although there would no longer be any trace of colonialism in the traditional sense of the term once Namibia had gained its independence, that would not put an end to alien domination and exploitation, and an appropriate provision should therefore be included in the draft to cover that type of situation.

18. In any social system, criminal law was the last line of defence after all other mechanisms of social control had failed. It would be unrealistic to expect too much of a criminal code. Criminal sanctions were but one element in the overall machinery for ensuring peace, order and justice. Accordingly, the Commission should be aware that it was drawing up an instrument of last resort whose use would normally be an indication that major damage had already occurred or that the political institutions of the United Nations had been unable to prevent the ensuing chain of events.

19. Mr. LACLETA MUÑOZ, referring to the scope *ratione personae* of the draft code, said that, while he agreed with the statement by the Special Rapporteur (A/CN.4/387, para. 2), that "the general view which emerged from the debate in the Sixth Committee of the General Assembly, was that, in the current circumstances, the draft should be limited to offences committed by individuals", he shared Mr. Balanda's opinion (1882nd meeting) that a majority of the members of the Commission wanted to deal not only with the criminal responsibility of individuals, but also with the responsibility, criminal or otherwise, of States, and that the Commission should pursue that effort. The Commission must, however, abide by the conclusion which it had reached in that regard at its thirty-sixth session and which it had stated as follows:

With regard to the content *ratione personae* of the draft code, the Commission intends that it should be limited at this stage to the criminal liability of individuals, without prejudice to subsequent consideration of the possible application to States of the notion of international criminal responsibility, in the light of the opinions expressed by Governments.[12]

[11] See 1883rd meeting, footnote 16.

[12] *Yearbook ... 1984*, vol. II (Part Two), p. 17, para. 65 (*a*).

20. His own view was that it would be unsatisfactory to limit the code to the responsibility of individuals. In explaining the concept of an international crime in his report (A/CN.4/387, paras. 44, 54 and 61 *et seq.*), the Special Rapporteur had drawn attention to article 19 of part 1 of the draft articles on State responsibility;[13] he had also referred to that article in his oral introduction to his report (1879th meeting) and several members of the Commission had referred to it as well. In his own statement on the topic at the Commission's thirty-fifth session, he had said that the Commission had to be consistent.[14] It therefore had to analyse the relationship between the draft code and the draft articles on State responsibility. As he saw it, that relationship was quite simple. In his fifth report on State responsibility, Mr. Ago, the then Special Rapporteur, had pointed out that:

... in making a distinction between internationally wrongful acts on the basis of the degree of importance of the content of the obligation breached we shall necessarily be obliged subsequently to draw a distinction also between the régimes of responsibility to be applied.[15]

The draft articles on State responsibility did not, however, define primary rules; they defined only secondary rules. In the case of that draft, the Commission thus merely had to take note of the existence of primary rules and determine which régime of responsibility applied in the event of a breach of those rules. That task had been undertaken by Mr. Riphagen, the Special Rapporteur for part 2 of the draft articles on State responsibility, who had had to categorize the primary rules violated in order to determine the legal consequences of their breach. The legal consequences of the breach of a primary rule which came within the category of primary rules whose breach constituted a crime were enunciated in articles 14 and 15 of part 2 of that draft.[16] Where were those primary rules listed? Article 19 of part 1 of the draft articles on State responsibility gave some examples, but it was obviously not a code of internationally wrongful acts of a particularly serious nature or, in other words, of international crimes. It was thus in the future code of offences against the peace and security of mankind that the Commission would have to enunciate those primary rules and determine which acts, not only by individuals, but also, in his view, by States, constituted offences against the peace and security of mankind.

21. For the time being, however, that was not the task with which the Commission would be dealing, at least not directly, even though it had to do so indirectly. For the present, its task was to prepare a list of offences against the peace and security of mankind that were committed by individuals. That was the result of the origin of its work on the draft code, on which it had started immediately after the Nürnberg and Tokyo trials in historical circumstances that were quite different from current circumstances. At that time, it had been looking at the recent past, when no

[13] See 1879th meeting, footnote 9.

[14] *Yearbook ... 1983*, vol. I, pp. 22-23, 1758th meeting, para. 38.

[15] *Yearbook ... 1976*, vol. II (Part One), p. 52, document A/CN.4/291 and Add.1 and 2, para. 146.

[16] See 1890th meeting, para. 3.

question of State responsibility had arisen, since the State responsible had been defeated and had surrendered unconditionally. Its criminal responsibility had not been in question: the only issue at stake had been the responsibility of its leaders and authorities. The draft code now under consideration must, however, be future-oriented and designed as a genuine code or as a set of applicable rules, and in legal terms it was only logical that it should contain all the rules relating to the definition of offences against the peace and security of mankind, including acts by a State that had to be regarded as such.

22. In chapter I, section A, of his excellent report, the Special Rapporteur explained why he was proposing two alternatives for draft article 2 (Persons covered by the present articles), one applying to "individuals" and the other to "State authorities". Several members of the Commission had suggested that the two alternatives should be combined and he himself agreed with that suggestion because he was of the opinion that the majority of the offences against the peace and security of mankind which would be included in the future code could be committed only by those who had the State's power apparatus behind them or, in other words, by the authorities of a State, and he did not see how an individual could, save in a very exceptional case, commit an offence against the peace and security of mankind. Such a case was, however, possible and he was therefore in favour of combining the two alternatives and of retaining the reference to "State authorities", if only to prevent that article from being taken to mean that the authorities of a State were covered by some kind of immunity, which would probably be invoked if State responsibility was not accepted. He thus found the wording proposed by Mr. Ushakov (1886th meeting) to be very clever, although at first it seemed to refer only to the individual responsibility of "State agents"—a term which was probably meant in the broadest sense—and not to take account of the obviously exceptional responsibility of an individual whose conduct could not in any case be attributed to a State. In that connection, he was not certain whether the words "persons planning, preparing, initiating or causing" an act of aggression, for example, were intended to refer to all persons, from head of State down to private individual, who might have taken part in the act of aggression. In his view, reference should be made only to an act by an authority whose orders had to be obeyed, not to an act by his subordinates. That was, moreover, probably one of the questions that would be dealt with in the part of the draft relating to general principles. If the future code made no reference to State responsibility or, consequently, to the individual responsibility of certain persons, namely the authorities of a State, that would be tantamount to overlooking the existence of the State.

23. With regard to chapter I, section B, of the report, relating to the definition of an offence against the peace and security of mankind, he agreed with the arguments put forward by the Special Rapporteur and, in particular, with his conclusion concerning the unity of the concept of an offence against the peace and security of mankind. However, he did not think it was possible to give a definition of an offence against the peace and security of mankind. Penal codes did not contain such definitions: they contained only a list of punishable acts, whose seriousness would determine which penalty was to be applied. In that connection, he fully agreed with Mr. Tomuschat. The Commission would none the less have to establish criteria for identifying the acts which would be included in the future code as offences against the peace and security of mankind. Those criteria had to be based on article 19 of part 1 of the draft articles on State responsibility, as the Special Rappporteur indicated in his report (A/CN.4/387, paras. 54 and 61 *et seq.*). In any event, a definition such as that proposed in either of the alternatives of draft article 3 should not be included in the body of the code, for its interpretation might be contrary to the penal-law principle of the specificity of offences and, in particular, to the principle *nullum crimen, nulla poena sine lege*. An explanation such as the one given in article 3 might, however, be included in the preamble to the draft code.

24. His position with regard to general principles was the same as the Special Rapporteur's. General Assembly resolution 39/80 of 13 December 1984, which governed the Commission's work on the draft code, did not require the Commission to formulate general principles before it drew up the list of offences. He would, of course, not have any objection if, in his next report, the Special Rapporteur included and analysed the general principles identified thus far that did not require any definition and did not give rise to any discussion, such as the principle *nullum crimen, nulla poena sine lege* and the principle of the non-applicability of statutory limitations.

25. On the basis of the Definition of Aggression adopted by the General Assembly,[17] aggression should definitely be regarded as an act constituting an offence against the peace and security of mankind. The role of the Security Council, as provided for in that Definition, did, of course, raise a serious problem. The suggestion by Mr. Roukounas (1887th meeting) was worth considering because neither the reproduction of the full text nor a reference to it would be satisfactory. It should also be noted that the provision contained in subparagraph (*b*) of the first alternative of section A of draft article 4, on evidence of aggression and competence of the Security Council, was not, strictly speaking, part of the definition of an act of aggression: it merely gave the Security Council an option with regard to evidence and referred only to the competence of the Security Council to determine, in the exercise of its functions, that an act of aggression had been committed. It was thus a procedural provision. The problem at hand was not so much one of definition as one that related to the implementation of the code, an extremely important issue with which the Commission would have to deal at a later stage.

26. He had doubts about the advisability of including the threat of aggression in the future code, for it was not an act that was easily imaginable. It might be preferable to refer, on the basis of the Charter of the United Nations, to the threat of the use of force.

[17] See footnote 9 above.

27. He had even stronger reservations with regard to the preparation of aggression. It would be more logical to consider that the "preparation" of aggression was not an offence in itself, but one step leading to an act of aggression, rather like an attempt. In any event, he did not think that it would be possible to prove that the preparation of aggression had occurred because, in view of modern military technology and modern weaponry, and in the absence of an act that had actually been committed, the difference between preparatory measures for an act of aggression and those carried out for defensive purposes could be established only by means of a prosecution for intent.

28. Interference in the internal or external affairs of a State could obviously be an offence against the peace and security of mankind, but that concept had to be further clarified. It was, however, difficult to define interference in external affairs: did diplomatic representations to obtain an advantage from a State qualify as interference in its external affairs, in the broad sense of the term? They undoubtedly did, just as negotiations, even the most friendly ones, did.

29. The question of terrorism was extremely important. In his view, the end never justified the means. It was one thing to refer to terrorism and quite another to speak of sabotage, raids or guerrilla activity, which could be and were entirely legitimate in some cases. Blind terrorism organized not only to obtain a material advantage by means of violence, but also for the sole purpose of creating terror could never be a legitimate means of defending any cause whatsoever. The definition of terrorism had given rise to an extremely interesting exchange of views and the one proposed by Mr. Ushakov (*ibid.*) was open to criticism because it did not take account of terrorist acts that were not carried out on behalf of, in the interest of, or with the assistance of a State. He himself agreed with Sir Ian Sinclair (*ibid.*) that the definition should be broader: terrorism was one of the rare cases in which acts by individuals or groups of individuals having no link to a State could constitute offences against the peace and security of mankind, taken not only in the sense of international peace and security, as had been emphasized many times, but perhaps also in the sense of the peace and security of any segment of mankind, including the population of a State or the population of a region of a State.

30. With regard to mercenarism, account should be taken of the work in progress on the drafting of an international convention against the recruitment, use, financing and training of mercenaries. It was, however, not in itself an offence to recruit and use mercenaries: the regular armed forces of many countries, including his own, Spain, had included or did include "mercenary" elements, in the sense of "elements on the payroll", some of whom might be foreigners. Mercenarism must therefore be regarded from the point of view of the purposes for which it was used. If it was used for aggression or interference, it was definitely an offence against the peace and security of mankind.

31. Economic aggression had to display the characteristics of genuine aggression in order to be regarded as an offence against the peace and security of mankind, but it was obviously very difficult to distinguish it from economic measures in the context of inter-State relations.

32. He fully supported the comments made by Mr. Díaz González (1886th meeting) concerning colonial domination. He saw no reason why the term "colonial domination" should not be used and did not think that that concept should be equated with the right to self-determination, which had other connotations.

33. He could not complete his statement without referring to the implementation of the code, whether or not it applied to State responsibility. The implementation of the code was, in any event, of major importance. He did not think that it would be of any use if it was not linked to appropriate implementation machinery, which would of necessity require an international jurisdiction. Moreover, if it was not so linked, it might become a dangerous weapon that could be used in the General Assembly or in the Security Council to implicate individuals, authorities or even a State as criminals. Worse still, it might become a terrifying weapon that could be used, for example, by a revolutionary Government which had overthrown an established Government as a justification for its action in accusing former leaders of being criminals and in punishing them with all the rigour of internal law. That was a serious danger which the Commission had to take into account. He would be able to support the work being done on the elaboration of a draft code and agree that it should, for the time being, be limited to offences committed by individuals only if the Commission took account of the absolute necessity of also providing for international machinery for the implementation of the code.

34. Mr. MALEK, commenting on a point which was worth emphasizing in order to avoid any possible confusion at a later stage, said that, in his third report (A/CN.4/387, para. 9), the Special Rapporteur had analysed some general principles which might be included in the draft code because they seemed to be universally applicable and had, by way of example, referred to the principle of the non-applicability of statutory limitations. During the debate, there had been some doubt whether that principle was universally applicable, apparently because only a relatively small number of States, which did not represent, or were not sufficiently representative of, all regions of the world, had so far ratified or acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.[18] Like the principle it embodied, that Convention was universally applicable, even though only 24 States had so far ratified it or acceded to it. The principle of the non-applicability of statutory limitations was, in fact, applicable under the internal law of a large number of countries. Many countries with different legal systems either had no such thing as statutory limitations or did not apply them in the case of serious offences. Moreover, in most countries where statutory limitations applied to all offences, they were formulated in such a way that it was open

[18] United Nations, *Treaty Series*, vol. 754, p. 73.

to question whether they were likely to produce any effect in the case of major crimes. Accession to the Convention, whose objective was to prevent war crimes and crimes against humanity from going unpunished, was therefore not necessary for all those countries, since that objective could be achieved through the application of the provisions of internal law.

35. The Convention enunciated the principle of the non-applicability of statutory limitations as one that already existed in international law. Article I thus stated that no statutory limitation would apply to the crimes referred to therein, irrespective of the date of their commission. The Convention applied specifically to crimes or categories of crimes that had been committed during a particular period in the past and which it was designed to remove from the scope of application of the internal rules relating to statutory limitations. It did so without regard for the principle of non-retroactivity, thus implying that that principle would not apply to those particular categories of crimes under international law. Since, according to the authors of the Convention, statutory limitations were neither explicitly nor implicitly provided for in international law, the principle of the non-applicability of statutory limitations had to apply to crimes that should originally have been punished under that law. Moreover, none of the reasons that were usually invoked in favour of the application of statutory limitations to ordinary crimes, such as the presumption of the offender's remorse or willingness to mend his ways and the disappearance of evidence, justified the application of statutory limitations to the international crimes in question.

36. In addition, no reasonable comparison could be made between crimes under internal law and crimes under international law as far as their effects on the conscience of mankind were concerned, for the latter violently rejected the idea that a serious crime under international law should be allowed to go unpunished. That was why the non-applicability of statutory limitations to such crimes tended to be regarded as a rule of *jus cogens*, a fundamental rule of public international order from which States could not derogate, even constitutionally.

37. There was another point to which attention should be drawn. As its title indicated, the Convention in question related only to war crimes and crimes against humanity—and that was so because its immediate purpose had been to ensure that the principle of the non-applicability of statutory limitations applied to those two categories of crimes, which had been committed during the Second World War and were within the sphere of the legal and legislative competence of States. The persons who had been guilty at that time of crimes against peace had had to be tried and punished by the Nürnberg and Tokyo international tribunals. The preamble to the Convention nevertheless contained two paragraphs that were extremely relevant in that regard. The fourth preambular paragraph stated that "war crimes and crimes against humanity are among the gravest crimes in international law", thus indicating that the States parties had not lost sight of the existence of other international crimes or categories of international crimes which were at least as serious as war crimes and crimes against humanity. The conclusion of a treaty on the question of the non-applicability of statutory limitations to those two categories of crimes only had in no way prejudiced the question of the applicability of statutory limitations to crimes such as crimes against peace and other equally serious crimes. Under the seventh preambular paragraph, the States parties had recognized "that it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application". The wording of that provision suggested that, for the time being, it was not necessary under the Convention to make the same affirmation with regard to other serious crimes under international law.

38. He hoped that his comments would help to encourage the Special Rapporteur not to change his views with regard to the principle of the non-applicability of statutory limitations. In any event, the efforts which the international community was making or would make with a view to the development of international criminal law should involve not only the elaboration of rules to prevent odious international crimes and crimes as serious as those to be included in the future code from going unpunished, but also, and in particular, the establishment of an international authority which would have all the necessary integrity to identify offenders, and not to protect them.

39. The CHAIRMAN, speaking as a member of the Commission, said that he had a few general observations to make before examining the main issues raised by the Special Rapporteur's third report (A/CN.4/387).

40. The political sensitivity of the topic under consideration was fully appreciated by the Commission, which had been dealing with it since its establishment in 1949, and had formulated the Nürnberg Principles in 1950[19] and prepared a draft Code of Offences against the Peace and Security of Mankind in 1954. In 1950, the Commission had also considered the desirability and feasibility of establishing an international criminal court to try persons who had committed genocide or other international crimes.

41. The question of the definition of aggression and that of the establishment of an international criminal jurisdiction had been dealt with by other United Nations bodies, whose work had led to the adoption of the Definition of Aggression by the General Assembly in 1974.[20] It was against that background that the General Assembly had, by its resolution 36/106 of 10 December 1981, invited the Commission to resume its work with a view to elaborating the draft code of offences and to review the 1954 draft code "taking duly into account the results achieved by the process of the progressive development of international law".

[19] See 1879th meeting, footnote 6.

[20] See footnote 9 above.

42. In its parallel treatment of the topic of State responsibility, the Commission had also dealt with the question of international crimes and international delicts in article 19 of part 1 of its draft articles on that topic,[21] the first reading of which had been completed in 1980.

43. In its work on the present topic, the Commission had been and should remain conscious of the work done in 1954. It should review and update that work in a realistic and forward-looking manner and seek to promote consistency with its work on State responsibility.

44. In his first report,[22] the Special Rapporteur had drawn attention to the ineffectiveness of a draft code which, in the absence of an international criminal jurisdiction, said nothing about penalties. The effective prosecution, trial and punishment of individuals for serious international crimes under the code would, moreover, be questionable except in the case of a defeat in war or when the accused were already in custody.

45. One reaction to those difficulties would be to conclude that the exercise of drafting the code was futile and that it would have no deterrent effect on the conduct of States or of their agents or spokesmen. A more positive reaction would be to proceed advisedly, step by step, in the conviction that the draft code would be useful and that it would have a deterrent effect. In the fourth preambular paragraph of its resolution 36/106 referring the topic to the Commission, the General Assembly had, for example, expressed the belief that the elaboration of the code "could contribute to strengthening international peace and security and thus to promoting and implementing the purposes and principles set forth in the Charter of the United Nations". That positive view was shared by most members of the Commission.

46. He broadly agreed with the outline of the draft code proposed by the Special Rapporteur (*ibid.*, para. 4). The code should be simple, clear and precise. It should be drafted along the lines of the 1954 draft code, which should be updated. The offences could, where necessary, be organized into separate groups. Provisions concerning procedure, penalties, jurisdiction and implementation could be examined later and included in the code in due course.

47. As to scope *ratione personae*, the draft code was restricted for the time being to individuals as subjects of international criminal law and to individual criminal responsibility. It did not refer to groups, States or other entities, although the content of certain grave offences clearly indicated that the acts in question could be committed only by decision of a State. That restriction of the scope of the draft code to individuals had been justified on the basis of the precedents of the Nürnberg and Tokyo judgments, the 1954 draft code and the argument that a State was an abstract entity, so that the crimes attributed to it were committed by men: only by punishing the individuals who committed the crimes could the provisions of international law be enforced. It had also been argued that a breach by a State of its international obligations engaged its international responsibility, which was dealt with in Chapter VII of the Charter of the United Nations and in the draft articles on State responsibility. It had accordingly been said that the concept of the criminal responsibility of a State was not part of existing international law and was unlikely to serve any useful purpose, and that attempts to include it in the draft code would involve the risk of making the code politically more unacceptable.

48. Actually, equally plausible arguments could be put forward in favour of the inclusion in the draft code of the concept of the culpability of States and other groups and entities—the groundwork for which had already been laid by developments which had taken place since the elaboration of the 1954 draft code and by the Commission's work on State responsibility. The Commission should certainly await further responses by Governments and comments in the Sixth Committee of the General Assembly before going into that question in depth. In connection with the draft on State responsibility, it would also be examining the consequences of an internationally wrongful act of a State. If it did not deal with the criminal responsibility of States under that topic—as would most likely be the case—it would have to revert to that matter under the present topic. The main question to be considered was whether a State could be prosecuted as an accused—or as a co-accused with individuals—in a criminal proceeding and, if so, with what consequences. The Commission should examine that question very carefully and formulate concrete suggestions in order to ensure against any legal void.

49. As to the question of the individuals to whom the draft code would apply, he agreed with the Special Rapporteur that, for the time being, account should be taken only of individuals who had acted as agents of, or on behalf of, the State or whose acts were attributable to a State because of its instigation, toleration, negligence or complicity.

50. He also agreed with the Special Rapporteur, that the concept of the "peace and security of mankind" was indivisible. Even within that unity, however, the offences in question could be divided into two categories, namely those relating to international peace and security and those relating to the peace and security of mankind. The latter category was broader and, in some cases, such as that of genocide, the subjects of the code might therefore have to include private individuals, as had been provided in article 2, paragraph (10), of the 1954 draft code. For the present, the first alternative of draft article 2 proposed by the Special Rapporteur could be retained, on the understanding that the intended meaning of the word "individuals" would be specified later.

51. Like the Special Rapporteur, he thought that it would be useful not only to draw up a list of offences, but also to give a definition of an offence against the peace and security of mankind. For that purpose, the Special Rapporteur had relied largely on article 19 of part 1 of the draft articles on State responsibility. Of the two alternative texts proposed for article 3, the

[21] See 1879th meeting, footnote 9.

[22] *Yearbook ... 1983*, vol. II (Part One), pp. 146-147, document A/CN.4/364, para. 50.

first, if properly delimited, would keep the scope of the draft code within the concept of offences against the peace and security of mankind and the Commission could then avoid embarking on the ambitious project of an international penal code. If the first alternative were adopted, it might prove necessary to organize the list of offences according to the four headings contained in that definition and to abandon the traditional headings of crimes against peace, war crimes and crimes against humanity. It would also be possible to use the 1954 list, which did not have any headings.

52. He preferred the second alternative of article 3, which was of a more general nature, but he suggested that, in order to emphasize the seriousness of the offence, the text should be amended to read:

"Any internationally wrongful act which, because of its seriousness, is recognized as such by the international community as a whole is an offence against the peace and security of mankind."

53. As to the general principles, they had a relationship of interaction with the content of the offences covered by the draft code. The Special Rapporteur had, however, preferred to leave the general principles pending until the content of the offences had been further clarified. During the debate, it had been suggested that a set of general principles might be adopted on a provisional basis. The matter would be best left to the discretion of the Special Rapporteur, who was fully familiar with the views of the members of the Commission in that regard.

54. The list of offences contained in the Special Rapporteur's third report was still not complete, referring as it did only to offences against international peace and security. With regard to aggression, one possible course would be to adapt the definition given in the first alternative of section A of draft article 4 by referring to the decisions of the international criminal jurisdiction rather than to those of the Security Council. A second course, which he himself would prefer for the sake of consistency, would, however, be to refer to the Definition of Aggression adopted by the General Assembly and to leave the adaptation of the content of the Definition to interpretation and application by the competent international criminal jurisdiction. The list of offences would thus be more concise, without losing any of its precision or effect. The wording of that second alternative should be reviewed in the light of the 1954 draft code and of article 1 of the Definition of Aggression. He suggested the following wording for the second alternative of section A of article 4:

"Any act of aggression, as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974, including the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations."

55. He supported the inclusion in the list of offences of the threat of aggression and saw no reason why the preparation of an act of aggression should be left out. Without such preparation, a threat could well become an empty threat. Moreover, a threat, when supported by adequate preparation, could have the same effect as the use of armed force. He therefore agreed with those members who had urged the inclusion of the preparation of aggression in the draft code. In order to differentiate between preparation for self-defence and preparation for an act of aggression, the text of article 2, paragraph (3), of the 1954 draft code could provide useful guidance.

56. He agreed with the idea of including offences arising out of interference and terrorism. In that connection, the suggestion by Mr. Boutros Ghali (1879th meeting) to include acts of subversion, either as a part of interference or as a separate offence, deserved serious consideration.

57. Mercenarism should also be dealt with separately, with proper emphasis on its objectives, such as destabilization and subversion.

58. Lastly, he said he agreed with the Special Rapporteur that economic aggression was covered by the offence of interference under section C, subparagraph (*b*), of draft article 4, although it would have been better if express reference had been made to the real injury caused to the sovereignty of the State over its natural resources and to its autonomy in determining its system of production, and if safeguards had been provided.

59. Mr. FRANCIS recalled the comments made by some members of the Commission on the role of the Security Council as a political body. In that connection, reference might be made to the role that legal experts played in internal law as draftsmen and advisers in the preparation of basic documents for approval by higher authorities. When the Commission prepared a draft, it acted as a body of legal experts and then submitted the text to the General Assembly. Even if the members of the Sixth Committee who examined the text were legal experts, they acted not as such experts, but as government representatives.

60. Thus, both in international law and in internal law, legal experts prepared the drafts, but political bodies made the law. That fact made it possible to place the role of the Security Council in its proper perspective. The Definition of Aggression adopted by the General Assembly enabled the Security Council to determine that certain acts were acts of aggression. If the Security Council decided that, in a given situation, a particular act constituted aggression, that did not mean that, in that case, an individual would be directly affected by that decision; if the decision had been taken after the individual concerned had committed the act in question, a court could certainly not take it into account, owing to the principle of non-retroactivity.

61. The CHAIRMAN recalled that the Commission was a creation of the United Nations and responsible to its principal organs. At the same time, however, the members of the Commission were elected in their personal capacity by the General Assembly. They therefore had a measure of freedom to assess situations and to make recommendations to the General Assembly, or to any other body concerned, in as responsible a manner as possible.

62. He declared closed the debate on agenda item 6 and said that, at the next meeting, the Special Rapporteur would sum up the debate and reply to the comments made by members of the Commission.

The meeting rose at 12.50 p.m.

1889th MEETING

Tuesday, 28 May 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*concluded*) (A/39/439 and Add.1-5, A/CN.4/368 and Add.1, A/CN.4/377,[2] A/CN.4/387,[3] A/CN.4/392 and Add.1 and 2,[4] A/CN.4/L.382, sect. B)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLES 1 TO 4[5] (*concluded*)

1. The CHAIRMAN extended a warm welcome to Mr. Suy, Director-General of the United Nations Office at Geneva.

2. He invited the Special Rapporteur to sum up the debate on the draft Code of Offences against the Peace and Security of Mankind and to make proposals concerning draft articles 1 to 4 and their possible referral to the Drafting Committee.

3. Mr. THIAM (Special Rapporteur) said that the interest shown in the topic by all members of the Commission and the fruitful debate prompted by his third report (A/CN.4/387) encouraged him to persevere with his work.

4. It was not surprising that there had not been unanimous agreement on the method to be followed in preparing the draft code, since working methods never secured unanimity. Two comments must, however, be made on that point. First, the fact that he had not yet formulated the general principles applicable to the subject did not mean that he was not thinking of them. Moreover, he had recalled some principles (*ibid.*, para. 5), which derived from the Statute and Judgment of the Nürnberg Tribunal; but he was well aware that other principles would have to be stated, since the subject had greatly evolved in recent decades. If he had opted for the deductive method, which some members advocated, he would probably have been reproached for stating abstract principles without being able to prove their universal application. When he had submitted his second report (A/CN.4/377), he had indicated that he intended to take existing international instruments as the basis, because they could not be contested. It should nevertheless be noted that even an instrument such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity[6] might not be considered to be unanimously accepted, either because it had not won the support of some particular group of States, or because some countries did not recognize statutory limitations. Other general principles, such as that of *nullum crimen sine lege*, were not recognized in all countries. As opinion on the method of work to be adopted had been very divided in the Sixth Committee of the General Assembly, it would be better to give further consideration to the general principles before trying to state them. Although it had always been clear to him that the draft code, when completed, would include an introduction laying down general principles, he had never asserted that the Commission must necessarily begin by stating those principles.

5. The second comment called for on the method of work related to the comparison often made between the elaboration of the 1954 draft code and the work now in progress. It could be seen from the Commission's reports on the 1954 draft code that the acts constituting offences against the peace and security of mankind had been studied before the general principles; so he had not introduced any innovation. It should also be noted that if the 1954 draft code had been so perfect it would not have been left aside for so long. But certain definitions, now considered unnecessary by some people, had seemed necessary at the time and had constituted a reason for suspending work on the code.

6. With regard to the scope *ratione personae* of the future code, some members had urged the need to examine forthwith the problem of the criminal responsibility of States. The Commission had, however, already decided to start with the criminal responsibility of individuals, without excluding the study of the criminal responsibility of States at a later stage. It was, indeed, always advisable to proceed from the simple to the complicated, and the criminal responsibility of individuals already raised so many problems that it would be better not to study it at the same time as the criminal responsibility of States. Besides, as Mr. Reuter had observed (1879th meet-

[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 ... 1984*, vol. II (Part Two), p. 8, para. 17.

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[4] *Ibid.*

[5] For the texts, see 1879th meeting, para. 4.

[6] See 1888th meeting, footnote 18.

ing), it would have to be decided sometime whether the criminal responsibility of States belonged in the subject-matter of the draft code or in that of State responsibility. The responsibility of States could have a material aspect, namely reparation for injury, as well as a criminal aspect, which did not necessarily pertain to the topic under consideration.

7. As for draft article 2, on persons covered by the draft code, the Commission appeared to prefer the first of the two alternatives, which referred to individuals and not to State authorities. It should be specified, in that connection, that the term "individuals" could mean either State agents or private persons. The expression "State authorities", used in the second alternative, could mean either institutions, such as a Government or administration, or agents of the State as understood in the jurisprudence to which Mr. Roukounas had alluded (1887th meeting). Thus an international crime could be committed by a State agent without the participation of an individual, in which case it came under international law. An international crime could also be committed by a State agent with the participation of an individual, in which case the crime of the individual came under international law because he had taken part in the commission of a State crime. Lastly, such a crime could be committed by an individual without the participation of a State agent, in which case it was open to question whether the crime came under international law.

8. Some members believed that the answer to that question depended on the magnitude of the crime. It could indeed be maintained that individuals belonging to groups of criminals or powerful economic, political or ideological groups, such as the Red Brigades, could commit large-scale crimes. But could such crimes be regarded as international crimes by reason only of their magnitude? If the Commission took the view that an individual who committed a crime of that kind committed an international crime, it would be including crimes by individuals in its draft codification. It could then be questioned whether that choice was in conformity with its initial option favouring a minimum content. If it broadened the scope of the code by taking into consideration not only the nature of the offence, but also its author, would the Commission not be drafting an international penal code rather than a code of offences against the peace and security of mankind? It would, indeed, be difficult to draw a line of demarcation between offences of that kind and other international crimes such as piracy, counterfeiting or the corruption of international officials, which the Commission had left aside because they did not necessarily endanger the peace and security of mankind.

9. Some disturbing examples had been given, however, such as the drug traffic. In his first report[7] he had asked whether, from a certain point of view, the traffic in narcotic drugs did not constitute a crime against humanity. Mr. Roukounas had held that the drug traffic, by injuring the mental health of a population, could be regarded as a crime against humanity on the same basis as genocide. But genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide,[8] involved an element of intention, namely the intention to destroy all or part of a national, ethnic, racial or religious group. But it was profit, rather than a motive of that kind, which animated those who engaged in the drug traffic, so that any analogy seemed difficult. He believed that, when individuals committed a crime against a State without the participation of State agents, they committed a crime which came under internal criminal law and not international law. Nevertheless he would be willing to include the drug traffic in the draft code, although it might extend the topic to an infinite degree. The Commission should therefore guard against also including the various preparatory acts mentioned by Mr. Arangio-Ruiz (*ibid.*), such as the take-over of power in Italy by the Fascists and the subsequent suppression of political rights and fundamental freedoms. Did States really expect the code to protect them against seditious persons and extremists of the left or right? Did States, which were always very jealous of their sovereignty, really wish the code to protect them against the internal activities of their own nationals?

10. Genocide was a crime which could be committed by private individuals, though it remained to be seen in what form. First, it should be distinguished from genocide committed by a State within its own frontiers. It might happen, for example, that a racist Government decided to exterminate part of its population, which would engage the responsibility of the State and its agents. When a crime of genocide was committed by individuals, they must come from some State; to that it was often replied that certain States were so weak that they could not control their own subjects. Such views could lead to all sorts of excuses. It must not be forgotten that a State had to assume a minimum of responsibility and could not put all the blame for certain crimes on private individuals as it pleased. Besides, it would be very difficult in such cases to determine whether the State had acted in good faith or as an accomplice. Moreover, although the crime of genocide could be committed by private individuals according to the Convention on the subject, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity reduced the problem to smaller dimensions, since according to that instrument the crime of genocide could be committed by individuals only with the participation of a State. He himself had always considered that offences against the peace and security of mankind were of such magnitude and atrocity that they could be committed only by States or with the participation of States. After the Second World War, the international community had wished to have a code for the prevention of crimes such as those perpetrated by the Nazis. Although other crimes must now be added, care should be taken not to make the list unduly long.

11. Although several members of the Commission were opposed to defining offences against the peace and security of mankind, many others had long been

[7] *Yearbook ... 1983*, vol. II (Part One), pp. 143-144, document A/CN.4/364, para. 38.

[8] See 1885th meeting, footnote 13.

in favour of such a definition. The Commission could, of course, proceed by enumeration, but that method had the disadvantage of being too rigid. The list of offences in the 1954 draft code no longer corresponded to reality. It was because he had thought it necessary to give judges some particulars by which to identify an offence against the peace and security of mankind that he had thought he should take as a starting-point article 19 of part 1 of the draft articles on State responsibility.[9]

12. Several members of the Commission had maintained that that provision related to the responsibility of States, not of individuals, and that the basis of the two responsibilities was not the same, since the former derived from a wrongful act and the latter from a fault. In reality a fault, just as much as a wrongful act, was a breach of an obligation. For just as States assumed obligations of conduct and legal obligations deriving from agreements and conventions, individuals assumed obligations of conduct and legal obligations deriving from contracts. In both cases, a breach could be a source of civil or criminal responsibility. At the international level, when the agents of a State committed a very serious wrongful act, it was an international crime for which they had to answer; but it was the State that was answerable for the injurious consequences. As to the sources of responsibility, the phenomenon was the same internally and internationally: an act could always generate two responsibilities. It was in the régimes of responsibility that the differences appeared, since a State could not be treated as an individual, particularly in regard to penalties. Consequently, he doubted whether it could be maintained that article 19 could not give rise to individual responsibility.

13. Moreover, the two responsibilities constantly overlapped. For instance, an act of aggression engaged the criminal responsibility of the State agents who had committed it and imposed on the State an obligation to make reparation. The same applied to annexation or terrorism organized by a State. Just as the State had to make reparation for injury caused to its nationals, it was responsible for injury caused to foreigners in another State or caused to another State. The notion of professional fault provided another illustration of such overlapping. In administrative law, any fault in the operation of services to users which was not particularly serious engaged only the responsibility of the State: it was a professional fault. But as soon as the fault by the agent attained a certain seriousness, it engaged his personal responsibility as well as the responsibility of the State. The result was that, when an act generated double responsibility, the criminal court had competence to decide both the question of the penalty to be imposed on the author of the act and the question of the civil reparation payable. In such cases the civil court had no jurisdiction. The situation was probably no different at the international level. Indeed, he did not see *a priori* why an international criminal court should not be competent both to punish the author of the crime and to pronounce on the civil reparation payable. It therefore seemed to him incorrect to say that article 19 could not be the source of two responsibilities.

14. It was with those considerations in mind that he had been largely guided by article 19 in preparing the first alternative of draft article 3, on the definition of an offence against the peace and security of mankind. Contrary to what some members had asserted, he had not taken over article 19 as a whole, but had confined his text to the most serious offences—those which affected a number of protected legal interests considered to be the most important. As to the second alternative of article 3, some members had suggested that it should be expanded, which might lead to a tautological definition. Just as it was difficult to define terrorism without referring to terror, it was hard to define the offences to which the draft code related without saying that they attacked the peace and security of mankind. Nevertheless, the text of the second alternative could be improved.

15. With regard to the first of the acts on the list of offences, that of aggression, he recalled, first, that the reason why examination of the 1954 draft code had been suspended was that the international community had been waiting for the concept of aggression to be defined. Now that that had been done, at the cost of long labours, some members maintained that no reference should be made to the definition because it had been drafted for political bodies, whereas the draft code was intended for jurisdictional bodies. He did not think it possible to ignore the definition, though its references to the Security Council should be removed. For it provided, first, that the Security Council could decide that an act considered to be one of aggression did not constitute aggression in the light of the circumstances, and secondly, that the Security Council could characterize as aggression acts other than those enumerated in the definition. It would not be advisable for courts to be closely bound by the decisions of the Security Council, especially as that body, because of its nature, was sometimes unable to establish the existence of an act of aggression. As the Commission seemed to be unanimously in favour of including aggression, he proposed to draw up a list of acts of aggression, specifying perhaps that it was not exhaustive. It was true that in criminal matters the principle *nullum crimen sine lege* had to be respected, but some discretion must nevertheless be left to the court. In short, the whole problem of definitions arose. It would probably be simpler to reproduce the offences listed in the 1954 draft code, without trying to define them, or those which had appeared subsequently. Being convinced of the value of definitions, however, he believed that it was worth while to try to formulate them.

16. Opinion was very divided on the threat of aggression, but most members seemed to believe, as he did, that it should be included in the draft code. It was true that it was not clearly differentiated from the preparation of aggression, but it was important to refer to it, not only because the Charter of the United Nations prohibited that threat, but because it would be inconceivable that by saying nothing the Commission should permit a State, because it was more powerful than another, to threaten that State with impunity.

[9] See 1879th meeting, footnote 9.

17. The majority of members of the Commission had spoken against including the preparation of aggression in the code. That offence was difficult to prove. Evidence of the preparation of aggression might be provided afterwards by secret documents of the aggressor State, but that evidence could only constitute aggravating circumstances for a crime already considered to be the most serious. After all, the saying "He who wants peace prepares for war" was still valid. Any State appearing before an international court could claim that it was preparing for war not in order to commit aggression, but to defend itself. That being so, it would be better to leave that offence aside.

18. It had been said of interference that it was too vague and too political a concept. Yet that concept, which was recognized both in the Pact of Bogotá[10] and in the 1954 draft code, nevertheless had a concrete content. There was interference when civil war was fomented in a State by another State. But was there interference when a State took sides in a conflict within another State between its President and its Prime Minister? And did financial support of an opposition movement constitute interference? He believed so. In spite of the difficulties raised by the definition of interference, he thought it was an offence which should be included in the draft code.

19. The crime of terrorism was much more complicated, for it had several aspects. It could be an act by individuals, but for it to be an offence against the peace and security of mankind there must be participation by a State. Mr. Mahiou (1882nd meeting) had understood that, in limiting terrorism to the acts of a State directed against another State, he (the Special Rapporteur) was leaving aside the problem of individuals. But the acts of terrorism with which he was concerned were those organized by the authorities of a State against another State, including its population, in other words individuals. That was quite clear from the definition of terrorist acts in draft article 4, section D (*a*), according to which they were criminal acts directed by the authorities of a State against another State and calculated to create a state of terror in the minds of public figures, a group of persons, or the general public. Obviously, the consequences of such acts included reparation for injuries caused to States and to private individuals.

20. Terrorism by national liberation movements, to which Mr. Díaz González (1886th meeting) had referred, raised the problem of the relationship between terrorism and guerilla warfare. It was true that the legitimacy of national liberation movements had been recognized, but it was important to distinguish between the legitimacy of a movement and that of the methods it employed. What was forbidden for States could not be permitted for national liberation movements. It had happened that national liberation movements had used terrorism against the State which was their adversary, but they could not use the same means against innocent third parties. Also, certain rules of humanitarian law applied to them in case of armed conflict.

[10] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 30, p. 55).

21. On colonial domination, he did not think there was any difference of opinion. He had proposed a formula and Mr. McCaffrey (1885th meeting) had proposed a variant which the Drafting Committee could examine in due course.

22. In his opinion, breaches of obligations under certain treaties designed to ensure international peace and security were extremely serious. He found it difficult to understand how one could be in favour of including the preparation of aggression in the future code and, at the same time, be opposed to including the violation of obligations under treaties designed to ensure peace: would that not indicate some degree of bad faith? He was quite willing to cite the international instruments in question, as had been proposed. There were two groups of international instruments: those relating to areas and zones to be protected and those relating to armaments. He saw no objection to mentioning in the draft code the obligations stated in those international instruments, the violation of which would be a crime.

23. With regard to mercenarism, he saw no difficulty in drafting, as had been requested, a special provision separate from that appearing in the Definition of Aggression.

24. Subversion raised some problems for him, for it was a general notion, very vague and loose, which covered a great number of separate acts: subversion covered any act whose purpose or result was to overthrow an established régime. In view of the circumstances prevailing in Africa at the time, it was not surprising that the heads of State and Government of OAU, at their second ordinary session held at Accra in 1965, had examined the problem of subversion and identified some aspects of it, to which Mr. Boutros Ghali (1879th meeting) had referred. He hesitated to include subversion as an offence against the peace and security of mankind. At most, it might be possible to mention it in the body of the text among the acts regarded as interference in the affairs of a State.

25. Economic aggression, an expression used mainly by politicians, raised the same problem. No precise definition of that notion had yet been given, and to draft one would be a dangerous undertaking. Although aggression was characterized by the motive —political, ideological or economic—it took place, of course, from the moment when armed force was used. But in that case it was aggression pure and simple, whatever the underlying motive. And if aggression could not be characterized by its motive, by what criteria could it be characterized? There were, in fact, several ways of exerting pressure on Governments without resorting to armed force; for example, through economic measures. But that, in his opinion, was a violation of sovereignty that was not aggression. He found it difficult to present economic aggression as a well-defined concept and to propose it as such to the Commission.

26. He reminded the Commission that he had received several contributions. Mr. Ushakov (1886th meeting) had proposed an interesting text, although his approach was different from his own in that it did not define the acts. It would be for the Commission

and the Drafting Committee, in due course, to see whether that valuable contribution could be used. In any case, it would be advisable to replace the word "persons" in Mr. Ushakov's proposal by the word "individuals", which was not ambiguous, since there were also legal persons and consideration of the problem of the responsibility of legal persons under public law had been deferred. Mr. McCaffrey (1885th meeting) had made a proposal on colonialism and the Chairman, speaking as a member of the Commission (1888th meeting), had made various proposals concerning the definition of an offence against the peace and security of mankind.

27. He was aware that all the draft articles he had submitted could not, of course, be referred to the Drafting Committee. Article 1 could be referred to it, together with the first alternative of article 2 and the second alternative of article 3, the principle of which had won support. On the other hand, it would be impossible to refer to the Drafting Committee the text of article 4, which enumerated the acts constituting an offence against the peace and security of mankind, since it was necessary to reconsider the definitions of aggression, terrorism, etc. He intended to examine the comments made by members of the Commission very carefully, with a view to improving the substance of the texts he had proposed for article 4, it being understood that in his next report he would pursue the study of other acts constituting an offence against the peace and security of mankind. He therefore requested that he be allowed some time for reflection.

28. The CHAIRMAN thanked the Special Rapporteur for his comprehensive statement and his proposals concerning the Commission's future work on the topic under consideration. He noted the Special Rapporteur's conclusion that article 4 was not yet ripe for referral to the Drafting Committee, but that article 1, article 2 (first alternative) and article 3 (second alternative) should be referred to the Committee for consideration in the light of the discussion in the Commission and of the Special Rapporteur's remarks.

29. Mr. USHAKOV said he believed that draft article 4, on acts constituting an offence against the peace and security of mankind, was the most important article, and that the Commission should begin at once to determine some concrete acts which might be regarded as such offences. If the Special Rapporteur agreed, article 4 could also be referred to the Drafting Committee, together with the other articles.

30. Mr. THIAM (Special Rapporteur) said that, if the Commission so desired, he saw no objection to referring the whole of article 4 to the Drafting Committee. He was sure that the improvements he intended to make to that article could equally well be made by the Drafting Committee. The Commission could either leave him time for further reflection on the acts constituting an offence against the peace and security of mankind, or refer article 4 to the Drafting Committee, of which he was a member in any case.

31. Sir Ian SINCLAIR said that, in principle, he had no objection to article 1, article 2 (first alternative) and article 3 (second alternative) being referred to the Drafting Committee, but he was opposed to any proposal to refer article 4 to the Committee. Even with the suggestions made during the debate, the list of offences in article 4 was not ripe for consideration by the Drafting Committee. The long discussion on the various acts in that list and on their relationship with the general principles bore out that conclusion.

32. Mr. USHAKOV said that there was nothing to prevent the Special Rapporteur from engaging in further reflection and submitting concrete proposals to the Drafting Committee. Certain crimes, such as aggression and the crimes against peace tried by the Nürnberg Tribunal, really raised no difficulty as to substance. They attracted some degree of consensus and could well be examined by the Drafting Committee.

33. Mr. CALERO RODRIGUES said that it would be premature to refer article 4 to the Drafting Committee at the present stage. He strongly opposed the idea that proposals for amending the list in article 4 should be left to the Drafting Committee. Any such proposals or suggestions should be made in the plenary Commission, where they could be discussed by all its members, including those who were not members of the Drafting Committee. Lastly, he did not think that the Drafting Committee would be able to do much about articles 1, 2 and 3; he would not oppose their referral to the Committee, though it did not seem really necessary.

34. Mr. THIAM (Special Rapporteur) repeated that he would leave it to the Commission, which could accept Mr. Ushakov's proposal and refer the text of article 4 which it had examined to the Drafting Committee; but he himself intended to submit to the Commission, at its next session, a somewhat modified version of article 4. As to the general principles, he would study them at the time he considered most appropriate.

35. Mr. REUTER observed that the Special Rapporteur was inclining towards a definition *ratione personae* of the offences, which meant that they would always be committed by a person who, even if he was not an official, was an agent of the State, that expression being understood in its widest sense. In other words, if the Commission endorsed that approach, as he did, it would be confining itself to offences in which the State was always the instigator. He noted that the Special Rapporteur was therefore inclined to leave aside certain offences, encouragement of which by the State would be difficult to establish, such as those connected with the illicit traffic in narcotic drugs. The question raised by the Special Rapporteur concerning the adaptation of his work to that of the Special Rapporteur for the topic of State responsibility was most important in that context. For in its work on the draft code the Commission would have to examine offences that were committed by individuals, but behind which there was always a State crime; and a number of members of the Commission had pointed out that all the subject-matter of the draft code to some extent duplicated that of State responsibility. The Special Rapporteur had asked the Commission to settle the question of the relationship between his topic and the

topic of State responsibility. He would therefore ask the Special Rapporteur, and the Commission if it accepted the Special Rapporteur's view, when the question of that relationship would be settled. If the Commission referred article 4 to the Drafting Committee forthwith, it seemed that the question would be settled at once. He would therefore like the Special Rapporteur to explain his position on that point. It was a question of method, which could not be avoided.

36. Mr. THIAM (Special Rapporteur) said that he had not yet finished his study of acts constituting an offence against the peace and security of mankind. In explaining the meaning he attached to the second alternative of draft article 2, he had asked the Commission to accept that approach provisionally, as he would have to go further into the question of the scope *ratione personae* of the draft when he took up crimes against humanity. All the offences listed in draft article 4 so far were offences that could be committed only by State agents, except perhaps terrorism by individuals. For the time being, before the Commission settled the question whether the Special Rapporteur for the topic of State responsibility or he himself should deal with crimes against humanity, he would like to continue his study of those crimes so as to be able to take a definitive position.

37. At the outset, he had considered that offences against the peace and security of mankind could be committed only by State agents or by individuals with the participation of State agents. He was still concerned, however, about the problem of individuals acting alone. If the Commission decided to identify the offences according to their author, the topic would be very wide; but if it decided to identify the offences according to their nature, some of them would be set aside. Drug trafficking, for example, was a crime by individuals, and if it were included in the draft code it would not be permissible to leave aside other crimes that could be committed by individuals. He was still considering that question and waiting to examine crimes against humanity before fixing his position. He would certainly do so in his next report, in which he would take up the question of crimes against humanity.

38. Mr. YANKOV stressed that the list of acts constituting an offence against the peace and security of mankind contained in draft article 4 was still incomplete. He also pointed out that the indivisibility of the notion of the peace and security of mankind, which the Special Rapporteur had emphasized, was valid not only for crimes against peace, but also for two other categories of crime: war crimes and crimes against humanity. He thought the Commission would do better to wait until it had a clearer idea of article 4 before referring it to the Drafting Committee. Moreover, in view of the volume of work with which that Committee was faced, he urged that only articles 1, 2 and 3 should be referred to it.

39. Mr. BARBOZA agreed that draft article 4 should be reserved, because the Special Rapporteur had so recommended and, in the light of the discussion, would be able to submit to the Commission a text of that article on which the Drafting Committee would really be able to work.

40. It seemed to him that the general discussion was not closed and that it was in the context of that discussion that the Commission should decide whether the Special Rapporteur for the draft code of offences against the peace and security of mankind or the Special Rapporteur for State responsibility should deal with the question of criminal responsibility.

41. That being so, it would be preferable to reserve articles 1, 2 and 3 as well as article 4, because in fact the Drafting Committee would have very little work to do on article 1 and on the first alternative of article 2, which did not raise any particular difficulties and were generally accepted, and because the second alternative of article 3 did not seem to have secured unanimity or even a large consensus in the Commission.

42. Mr. LACLETA MUÑOZ noted that the discussion in progress, on a question which was really one of procedure, showed that the Commission's efforts always to secure a consensus sometimes resulted in appreciable loss of time, whereas the question could easily be settled by an indicative vote.

43. He endorsed the comments made by previous speakers, particularly those of Mr. Barboza. He too believed that articles 1 and 2 could be referred to the Drafting Committee; but he had doubts about article 3, on which all opinions had not been taken into account and which might provoke a new discussion. He himself had already said (1888th meeting) that, like other members of the Commission, he did not think it wise to include as a separate article in the body of the draft a definition of an offence against the peace and security of mankind, because of the difficulties of interpretation and the uncertainty it might create, and he had added that such a definition might possibly have a place in the preamble.

44. With regard to article 4, he agreed that it would be premature to refer it to the Drafting Committee, which, moreover, was not short of work.

45. Mr. FRANCIS said that it would be most unfortunate if the Commission did not comply with the Special Rapporteur's recommendations and refer articles 1, 2 and 3 to the Drafting Committee. The Commission must be seen to be making progress on the topic. He agreed that article 4 should not be referred to the Drafting Committee, in particular for the reasons given by Mr. Yankov.

46. Mr. USHAKOV said he was still convinced that the Commission should directly attack the real problem, which was that of the list of concrete acts constituting an offence against the peace and security of mankind; the Special Rapporteur had already drawn up part of that list. It would be curious if the Commission, after considering the subject for three years, could not specify a single concrete crime. Moreover, there was one crime which was universally recognized as such and there were others listed in the Charter of the Nürnberg Tribunal,[11] on which there was also unanimity. If the Commission was to make any progress, it must refer article 4, which was the most

[11] See 1879th meeting, footnote 7.

important and really crucial, to the Drafting Committee.

47. Mr. McCAFFREY said that he thought the Special Rapporteur had been wise to suggest that only those draft articles which he regarded as ripe for consideration should be referred to the Drafting Committee. But if the Commission decided not to refer any of the articles to the Drafting Committee, he would have no objection.

48. The CHAIRMAN said that, in the light of the discussion, he would propose referring article 1, article 2 (first alternative) and article 3 (both alternatives) to the Drafting Committee. As to article 4, he would propose that section A (acts of aggression) be referred to the Drafting Committee for consideration, if time permitted, in the light of the Commission's discussion. Any text which the Drafting Committee might recommend could be examined at the current session and be included in the Special Rapporteur's fourth report.

49. Mr. McCAFFREY asked whether that meant that article 4 was to be treated differently from the other draft articles.

50. The CHAIRMAN said that the Drafting Committee would be requested to examine articles 1, 2 and 3 and to prepare drafts in the light of the discussion, for such action as the Commission deemed appropriate. Any text that the Committee might draft for article 4 would certainly help the Commission in its work, but there would be no question of adopting it at the current session.

51. Mr. REUTER said he understood that the Chairman's proposal was that the Drafting Committee be asked to hold an exchange of views on section A of article 4 to help the Special Rapporteur and the Commission in their work, it being understood that that would not affect the Commission's traditional method of work in any way. If that were so, he supported the proposal; otherwise he must oppose it. It was quite clear that the Special Rapporteur's rights remained intact, that the time he had requested for reflection would be granted to him, that he retained his full freedom and that the Commission did not lose any of its rights either. Those were two important legal points; the Special Rapporteur had rights and the Commission had rights, and those rights must be preserved.

52. Mr. THIAM (Special Rapporteur) said that he hoped the Commission would adopt the Chairman's proposal.

53. Mr. REUTER, invited by the CHAIRMAN to state his preference, said that he always gave way to the views of a Special Rapporteur on questions of procedure.

The Chairman's proposal was adopted.

The meeting rose at 6.15 p.m.

1890th MEETING

Wednesday, 29 May 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc. 3)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3]**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/389).

2. Mr. RIPHAGEN (Special Rapporteur) said that the sixth report consisted of an introduction and two sections. Section I contained commentaries to draft articles 1 to 16, which constituted part 2 of the draft articles, and section II dealt with the possible content of part 3 of the draft.

3. Draft articles 1 to 16, which had been submitted in his fifth report (A/CN.4/380), read as follows:

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

Article 2

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongful act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

Article 3

Without prejudice to the provisions of articles 4 and 12, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

For the purposes of the present articles, "injured State" means:

(*a*) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(*b*) if the internationally wrongful act constitutes a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(*c*) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(*d*) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(i) the obligation was stipulated in its favour; or

(ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or

(iii) the obligation was stipulated for the protection of collective interests of the States parties; or

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(*e*) if the internationally wrongful act constitutes an international crime, all other States.

Article 6

1. The injured State may require the State which has committed an internationally wrongful act to:

(*a*) discontinue the act, release and return the persons and objects held through such act, and prevent continuing effects of such act; and

(*b*) apply such remedies as are provided for in its internal law; and

(*c*) subject to article 7, re-establish the situation as it existed before the act; and

(*d*) provide appropriate guarantees against repetition of the act.

2. To the extent that it is materially impossible to act in conformity with paragraph 1 (*c*), the injured State may require the State which has committed the internationally wrongful act to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Article 7

If the internationally wrongful act is a breach of an international obligation concerning the treatment to be accorded by a State, within its jurisdiction, to aliens, whether natural or juridical persons, and the State which has committed the internationally wrongful act does not re-establish the situation as it existed before the breach, the injured State may require that State to pay to it a sum of money corresponding to the value which a re-establishment of the situation as it existed before the breach would bear.

Article 8

Subject to articles 11 to 13, the injured State is entitled, by way of reciprocity, to suspend the performance of its obligations towards the State which has committed an internationally wrongful act, if such obligations correspond to, or are directly connected with, the obligation breached.

Article 9

1. Subject to articles 10 to 13, the injured State is entitled, by way of reprisal, to suspend the performance of its other obligations towards the State which has committed the internationally wrongful act.

2. The exercise of this right by the injured State shall not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed.

Article 10

1. No measure in application of article 9 may be taken by the injured State until it has exhausted the international procedures for peaceful settlement of the dispute available to it in order to ensure the performance of the obligations mentioned in article 6.

2. Paragraph 1 does not apply to:

(*a*) interim measures of protection taken by the injured State within its jurisdiction, until a competent international court or tribunal, under the applicable international procedure for peaceful settlement of the dispute, has decided on the admissibility of such interim measures of protection;

(*b*) measures taken by the injured State if the State alleged to have committed the internationally wrongful act fails to comply with an interim measure of protection ordered by such international court or tribunal.

Article 11

1. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act to the extent that such obligations are stipulated in a multilateral treaty to which both States are parties and it is established that:

(*a*) the failure to perform such obligations by one State party necessarily affects the exercise of the rights or the performance of obligations of all other States parties to the treaty; or

(*b*) such obligations are stipulated for the protection of collective interests of the States parties to the multilateral treaty; or

(*c*) such obligations are stipulated for the protection of individual persons irrespective of their nationality.

2. The injured State is not entitled to suspend the performance of its obligations towards the State which has committed the internationally wrongful act if the multilateral treaty imposing the obligations provides for a procedure of collective decisions for the purpose of enforcement of the obligations imposed by it, unless and until such collective decision, including the suspension of obligations towards the State which has committed the internationally wrongful act, has been taken; in such case, paragraph 1 (*a*) and (*b*) do not apply to the extent that such decision so determines.

Article 12

Articles 8 and 9 do not apply to the suspension of the performance of the obligations:

(*a*) of the receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff;

(*b*) of any State by virtue of a peremptory norm of general international law.

Article 13

If the internationally wrongful act committed constitutes a manifest violation of obligations arising from a multilateral treaty, which destroys the object and purpose of that treaty as a whole, article 10 and article 11, paragraph 1 (*a*) and (*b*) and paragraph 2, do not apply.

Article 14

1. An international crime entails all the legal consequences of an internationally wrongful act and, in addition, such rights and obligations as are determined by the applicable rules accepted by the international community as a whole.

2. An international crime committed by a State entails an obligation for every other State:

(*a*) not to recognize as legal the situation created by such crime; and

(*b*) not to render aid or assistance to the State which has committed such crime in maintaining the situation created by such crime; and

(*c*) to join other States in affording mutual assistance in carrying out the obligations under subparagraphs (*a*) and (*b*).

3. Unless otherwise provided for by an applicable rule of general international law, the exercise of the rights arising under paragraph 1 of the present article and the performance of the obligations arising under paragraphs 1 and 2 of the present article are subject, *mutatis mutandis*, to the procedures embodied in the United Nations Charter with respect to the maintenance of international peace and security.

4. Subject to Article 103 of the United Nations Charter, in the event of conflict between the obligations of a State under paragraphs 1, 2 and 3 of the present article and its rights and obligations under any other rule of international law, the obligations under the present article shall prevail.

Article 15

An act of aggression entails all the legal consequences of an international crime and, in addition, such rights and obligations as are provided for in or by virtue of the United Nations Charter.

Article 16

The provisions of the present articles shall not prejudge any question that may arise in regard to:

(*a*) the invalidity, termination and suspension of the operation of treaties;

(*b*) the rights of membership of an international organization;

(*c*) belligerent reprisals.

4. At its thirty-fifth session, the Commission had provisionally adopted articles 1, 2, 3 and 5 (article 5 having later become article 4) and the commentaries thereto, but the question whether articles 2 and 3 should contain a reference to *jus cogens* had been left in abeyance.

5. In that connection, he pointed out that, following the basic premise that part 2 of the draft articles would deal with the normal legal consequences of an internationally wrongful act, the phrase "other rules of international law relating specifically to the internationally wrongful act in question" in article 2 stressed the residual nature of the provisions of part 2, in other words the possibility of adding legal consequences to the "normal" ones or removing some of them. Such other rules of international law would normally be conventional rules, particularly those in a treaty which laid down primary rules. For example, when a treaty of that kind contained a provision that, if one State party acted in breach of a primary obligation, another State party would be empowered to occupy its territory in order to ensure performance of the primary obligation breached, such provision would presumably render the treaty void *ab initio* under article 53, and also article 44 (5), of the 1969 Vienna Convention on the Law of Treaties. But did that make a reference to *jus cogens* in article 2 redundant? He was inclined to believe that it did not. Article 73 of the 1969 Vienna Convention stipulated in sweeping fashion: "The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty ... from the international responsibility of a State ...". In point of fact, part 2 of the draft in its entirety was based on the premise that the question of invalidity, termination or suspension of the operation of a treaty as such was situated on quite a different legal plane from that of the legal consequences—in terms of the allowed or prescribed conduct of States—of an internationally wrongful act.

6. There were, of course, common considerations underlying both sets of rules, but that did not remove the legal difference between, on the one hand, rules based on the need to uphold the principle of *pacta sunt servanda* by limiting the cases of invalidity of a treaty as such, and, on the other, rules relating to State responsibility for internationally wrongful acts. That legal difference could in a sense be compared to the difference between the level of determination of the legal consequences of internationally wrongful acts in terms of the conduct of States, and the level of the maintenance of international peace and security, which was dealt with in article 4 of part 2. The Commission had rightly decided to include in article 2 a reference to article 4 and similar considerations would seem to apply to a reference to *jus cogens* in article 2.

7. The value of a reference to *jus cogens* in article 3 was governed by somewhat different considerations. The purpose of article 3 was to recall that there might, under customary international law and, indeed, under other rules of international law, be legal consequences of an internationally wrongful act that were of a different kind from those dealt with in part 2, namely consequences not relating directly to new obligations of the "author" State and new rights and, in certain cases, obligations of another State or States in terms of conduct. In his view, it could be argued in connection with article 3 that the reference to articles 4 and 12 might be superfluous, and he would therefore suggest that the matter should be referred to the Drafting Committee.

8. Draft articles 5 and 6 had been discussed at the previous session and referred to the Drafting Committee on the understanding that members who had not had an opportunity to comment on them could do so at the current session.[4] In the new commentaries, to the articles, he had endeavoured to respond to the various questions raised both in the Sixth Committee of the General Assembly and in the Commission.

[4] See *Yearbook ... 1984*, vol. II (Part Two), p. 104, para. 380.

9. So far as article 5 was concerned, he still deemed it essential to provide some indication at the beginning of part 2 of the State or States that would have the status of "injured State" in the event of an internationally wrongful act being committed by another State. If, as had been decided, an internationally wrongful act entailed new legal relationships between States, it was necessary to know which States were parties to such relationships. It did not make sense to distinguish between primary and secondary rules if no attempt was made to determine the States involved in that new legal relationship, which was governed by secondary rules.

10. On the other hand, determination of the "injured State" was clearly a hazardous exercise, given the wide variety of the content and sources of primary international obligations, and that was particularly true since the Commission had decided not to make "damage" an element of an internationally wrongful act. The fundamental difference between international law and domestic law was of interest in that regard. Domestic law was generally based on the "norms" concept, namely on rules of conduct applicable to all members of an integrated society. For instance, under the Netherlands legal system, which had drawn on the French legal system, even contractual rights and obligations were related to norms and the Civil Code had provided for the principle *pacta sunt servanda* by a legislative pronouncement to the effect that a contract was law so far as the parties to it were concerned. On the other hand, torts, in the sense of wrongful acts, had long been considered to be acts or omissions that were either infringements of another's rights, or violations of obligations, or acts that were not consistent with the principle that due care should be taken in societal relations with respect to the interests of other individuals.

11. Jurisprudence had seen fit to develop the notion of the so-called relativity of torts, consisting of acts or omissions contrary to obligations under domestic law; simultaneously, it had developed the notion that a person not a party to certain types of contract might none the less invoke the terms of such contract against a person in violation of his obligations under the contract. The situation was the complete reverse under international law, which was typically bilateral in that its norms created only bilateral relationships as between the State committing an internationally wrongful act and the State legally affected by such an act. It was surely the progressive development of international law that had brought into being real norms of international law, norms that in principle entailed legal consequences beyond the bilateral legal relationship between the author State and the State directly affected by its acts or omissions.

12. All those points were relevant to article 5 as submitted to the Commission at its previous session. In the final analysis, the interests of the State dictated the formulation of rules of international law and, in particular, the primary rules of the conduct of States in their mutual relations. Whether the underlying interests were legally allocated to particular States in such a way as to give them the status of "injured State" in the event of a breach of an obligation of conduct imposed by the primary rules on another State was a matter which involved the elaboration and, therefore, the interpretation of such rules. Article 5 could do no more than set forth some rebuttable presumptions as to what States, as the creators of the primary rules, intended in that respect.

13. As he had explained at the previous session in his oral introduction to the fifth report (A/CN.4/380),[5] article 6 (reparation), article 8 (reciprocity), article 9, paragraph 1 (reprisals), article 14 (additional legal consequences) and article 15 (additional legal consequences including individual and collective self-defence), were designed as a kind of "sliding scale" of the legal consequences of internationally wrongful acts, while article 7 provided for certain limitations on article 6; articles 11 and 12 for limitations on article 8 and on article 9, paragraph 1; article 9, paragraph 2, and article 10, paragraph 1, for limitations on article 9, paragraph 1; article 10, paragraph 2, for an exception to the limitations in article 10, paragraph 1; and article 13 for an exception to the limitations in article 10 and article 11, paragraph 1 (*a*) and (*b*) and paragraph 2.

14. Some of the provisions of part 2 of the draft overlapped with what could be termed the tertiary rules, namely the procedural provisions governing implementation of the legal consequences of internationally wrongful acts. That overlapping, however, seemed inevitable where more than two States were involved in a situation arising out of an internationally wrongful act, even if a procedure for the settlement of disputes by a third party was available. The question was whether article 10 and article 11, paragraph 2, with the exception provided for in article 13, referred to the procedures required to organize the response in such cases, which transcended the purely bilateral relationship; the same question applied to article 14, paragraph 3, article 15 and, for that matter, article 4. All those provisions were in a sense a prelude to part 3 of the draft.

15. The complexity of the matter was only natural, in view of the interplay between four sets of rules; (1) what he termed pre-primary rules; (2) primary rules of conduct; (3) secondary rules of State responsibility; (4) the tertiary rules governing the implementation of State responsibility. In addition, the topic was meant to cover the whole gamut of the rules of conduct between States and it was also necessary to bear in mind the thin dividing line, particularly in regard to circumstances precluding wrongfulness, that separated it from the topics of international liability for injurious consequences arising out of acts not prohibited by international law and of the draft Code of Offences against the Peace and Security of Mankind. So far as the first of those topics was concerned, he would refer members to the footnote to paragraph 21 of his sixth report (A/CN.4/389). As to the second topic, to the extent that the so-called criminal responsibility of States was legally reflected not in the prosecution and punishment of individuals, but in the imposition of special financial burdens on the so-called criminal State or in special limitations on its sovereignty, there would obviously be room in

[5] *Yearbook ... 1984*, vol. I, pp. 262-263, 1858th meeting, paras. 17 *et seq.*

the draft articles on State responsibility for secondary rules if and when such additional legal consequences were determined by the applicable rules accepted by the international community as a whole. No limitations resulting from what would otherwise be regarded as *jus cogens* would then apply.

16. With reference to section II of the sixth report, the underlying thesis lay in the analogy drawn between the validity of a treaty and the existence of the new legal relationships between States arising out of the commission of an internationally wrongful act. The essence of the proposals put forward was (*a*) that the principle embodied in article 42 of the 1969 Vienna Convention on the Law of Treaties should apply *mutatis mutandis*; (*b*) that the procedures laid down in articles 65 and 67, and also in the annex to the Convention, should apply to the question of the existence and content of the new legal relationships arising out of the internationally wrongful act. So far as the first of those elements was concerned, one initial difference concerned the inseparability of the new obligations of the alleged "author" State under articles 6 and 7 of part 2 of the draft under consideration and its primary obligations. Those two articles dealt with belated or substitute performance of primary obligations and it could be argued that, if the parties to the primary legal relationship had not provided for a means of settling disputes via a third party, it would perhaps be rash to fill the lacuna in a convention on State responsibility. In the case of measures taken either by way of reciprocity or as reprisals, there was a risk of escalation, with the result that the primary rules might ultimately be nullified. To obviate any such likelihood, some procedure for settlement of disputes should be devised to which an alleged author State could, if confronted with countermeasures by an alleged injured State, refer the matter. Naturally, the third party concerned would also have to deal with the breach of the primary obligation, as was the case under the 1969 Vienna Convention.

17. Account must also be taken of the fact that instances had occurred of the application of the principle of reciprocity which had nothing whatsoever to do with countermeasures; the procedure provided for under part 3 of the draft articles should not apply in such cases. There had also been several instances in State practice of States agreeing in principle to settle any disputes regarding the interpretation and application of a primary rule by means of a third-party procedure which itself involved further voluntary co-operation between the parties in dispute, for example in connection with the appointment of arbitrators or conciliators. In such a case, a real countermeasure taken in order to arrive at such co-operation should not be subject to the procedure provided for under part 3 of the draft. More generally, inasmuch as the procedural rules in part 3 formed an integral part of the legal consequences of an internationally wrongful act, the principle of the residual character of the provisions of part 2 should also apply implicitly to the relevant provisions of part 3. Thus, when States created a primary right or obligation between themselves, they could, at some stage before the primary obligation was breached, determine that part 3 should not apply to alleged breaches of the right or obligation. If such a system were adopted, however, it should be understood that reservations excluding the application of part 3 would not be allowed under any future convention on State responsibility. In his view, the precedent set by the 1982 United Nations Convention on the Law of the Sea,[6] which recognized the inseparability of the substantive and the procedural provisions, should be followed in that respect.

18. There was obviously a connection between the idea of an international crime, as defined in article 19 of part 1 of the draft articles and the concept of *jus cogens*. It should be possible, by analogy, to include in the draft a provision corresponding to article 56 of the 1969 Vienna Convention on the Law of Treaties, in which case it would also be necessary to deal with the relationship between that procedure and the special procedures provided for elsewhere, for example in the Charter of the United Nations. Nevertheless, the new obligations of the author State could not be separated from the original primary obligation, nor was it possible to provide for a dispute-settlement procedure that was applicable to all types of obligations under international law. Accordingly, a provision might be included to reserve the application of part 3 of the draft to obligations assumed after the entry into force of the convention.

19. As to the relationship between parts 2 and 3 of the draft, article 13 was designed to provide an exception to article 10. A question had been raised as to who would judge whether there had been a complete breakdown in the relationship: the answer lay with the dispute-settlement procedure, which, under part 3, would be applicable to article 13. Accordingly, if an alleged injured State invoked article 13, and the alleged author State opposed the application of that article, the dispute could be submitted to the procedure provided for under part 3.

20. He would also suggest that part 3 of the draft should follow the precedent set by the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea and provide for a compulsory conciliation procedure in the cases he had mentioned and for a compulsory judicial procedure in the event of an international crime.

21. As to article 15, which concerned acts of aggression, the primary responsibility for dealing with such situations rested, of course, with the Security Council. Whether that body decided to have recourse to the ICJ, in accordance with the terms of the Charter of the United Nations, was a matter for it alone to decide.

22. The CHAIRMAN thanked the Special Rapporteur for his oral presentation and invited comments on the sixth report (A/CN.4/389).

23. Sir Ian SINCLAIR, speaking on a preliminary basis, said that he had two questions regarding draft article 5, the first of which related to subparagraph (*d*) (iii). He endorsed the very useful explanation, at

[6] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

the beginning of paragraph (14) of the commentary to article 5, about a common feature of the majority of multilateral treaties. He also accepted, in theory, that the explanation in the first sentence of paragraph (21) of the commentary was a possible construct of a particular type of multilateral treaty. An immediate example that sprang to mind was that of a multilateral treaty providing for the creation of a customs union or some other form of economic integration. A matter for concern, however, was that, in article 2 of the draft, the legal consequences determined by the "other rules of international law relating specifically to the internationally wrongful act in question" had been preserved. It seemed to him that States which formulated a multilateral treaty for the purpose of promoting and protecting the collective interests of States parties would insist on including in-built mechanisms with a view to securing its purpose. In other words, the collective interests in question would be promoted and protected by institutional mechanisms the effect of which was preserved by article 2. Basically, therefore, his question was what kind of collective multilateral treaties recognizing or creating collective interests did the Special Rapporteur have in mind when such treaties did not contain in-built mechanisms? Also, he was always somewhat chary about making the kind of assumption contained in the penultimate sentence of paragraph (21) of the commentary to article 5, at any rate without having a clearer understanding as to precisely what types of treaty were involved and precisely what the consequences of such an assumption would be. Again, he was not certain about the type of treaty referred to in the last sentence of the same paragraph of the commentary.

24. His second question related to the concept in subparagraph (*e*) of article 5 whereby, if the internationally wrongful act constituted an international crime, all other States were injured States. A number of essential clarifications were made in that connection in paragraphs (8) to (10) of the commentary to draft article 14, all of which he fully endorsed. Yet those clarifications did not emerge from the text of article 5, and specifically of subparagraph (*e*). One possible way of solving the problem might be to retain the definitions of an injured State as laid down in subparagraphs (*a*) to (*d*) of article 5, and then to have a separate paragraph 2 which could read:

> "2. If the internationally wrongful act constitutes an international crime, the expression 'injured State' shall also be deemed to include, in the context of the rights and obligations of States other than a State that has committed the internationally wrongful act, all other States."

That would confine the use of the expression "injured State" to the specific context of article 14, concerning the rights and obligations of States other than the author State.

25. Mr. RIPHAGEN (Special Rapporteur) said that he recognized the wisdom, in drawing up a multilateral treaty for the protection of collective interests, of providing for the effective protection of such interests. It was a known fact, however, that conferences at which multilateral treaties were adopted were always hampered by lack of time. The possibility that a multilateral treaty might not provide for the requisite machinery therefore had to be envisaged. The only answer was that each State, as a member of the collectivity, would clearly become an injured State. As that might perhaps not be a satisfactory way of dealing with the matter, draft article 14, paragraph 3, provided for a residual rule to apply to a particular type of multilateral treaty.

26. The last sentence of paragraph (21) of the commentary to draft article 5 was really more in the nature of a text-book remark. The intention behind that statement was to signify once again that, when drawing up a multilateral treaty, States would be well advised to provide for collective interests by raising the question of the kind of machinery required in such a case.

27. With regard to Sir Ian Sinclair's second question, there was, of course, a link between subparagraph (*e*) of article 5 and paragraphs (8) to (10) of the commentary to article 14. In his view, the matter could be referred to the Drafting Committee, along with Sir Ian's suggested form of wording.

28. Mr. FLITAN asked how the Special Rapporteur intended to resolve the problem of former draft article 4 on the link between the rules of *jus cogens* and the draft as a whole. That article, submitted by the Special Rapporteur in his third report and considered by the Commission at its thirty-fourth session,[7] had been referred to the Drafting Committee,[8] which had not yet made any specific proposal. Admittedly, draft article 11, paragraph 2, and draft article 12, subparagraph (*b*), also concerned *jus cogens*, as the Special Rapporteur had stressed, yet it seemed that the rules set forth in those two provisions were based on former draft article 4. Furthermore, at the previous session, the Special Rapporteur had pointed out the absence of a provision establishing the relationship between the rules of *jus cogens* and the possibility for the parties to derogate from the provisions of the draft articles by agreement.[9]

29. Mr. RIPHAGEN (Special Rapporteur) said that the question of a reference in article 3 to *jus cogens* had been left in abeyance. In the original draft, there had been a separate article on that subject (article 4),[10] but it had now been left out because the matter was dealt with in draft article 12.

30. The question also arose whether any reference to article 4 should be included in articles 1 and 2. Article 2 dealt with the possibility for States to establish additional primary obligations which, when breached, would entail legal consequences over and above those specified in the draft. Clearly, any such provisions must be subject to the rules of *jus cogens*. If one were to imagine a treaty clause whereby a party was empowered to occupy another's territory in the event of a breach, the clause would obviously render the whole treaty null and void.

31. As to article 3, he had some doubts regarding the reference therein to articles 4 and 12, for the legal

---

[7] *Yearbook ... 1982*, vol. II (Part Two), p. 80, para. 86.

[8] *Ibid.*, p. 82, para. 103.

[9] *Yearbook ... 1984*, vol. I, p. 261, 1858th meeting, para. 7.

[10] See footnote 7 above.

consequences envisaged in article 3 were indirect and did not result from the conduct of States. It was true that the inclusion of a reference to article 4 had already been decided on, but the question of the reference to article 12 remained open.

32. The CHAIRMAN said that the scope of draft article 12, subparagraph (*b*) namely of *jus cogens* in relation to former draft article 4 as submitted by the Special Rapporteur at the thirty-fourth session, could be examined when the Commission came to discuss article 12.

33. Mr SUCHARITKUL stressed that the topic of State responsibility had become a very comprehensive one, since it was no longer confined to the narrow field of injury to the person or property of aliens. The first Special Rapporteur on the topic, Mr. García Amador, had started by dealing with State responsibility for injury of that kind and covered such matters as the exhaustion of local remedies and the doctrine of minimum standards of treatment. Under the leadership of the subsequent Special Rapporteur, Mr. Ago, the Commission had completed its first reading of part 1 of the draft, a work that had been likened by Mr. Reuter to a cathedral: it did indeed constitute a splendid roof, but it required a very strong structure to support it. For the past six years, the present Special Rapporteur had been toiling to construct precisely such a structure in the form of parts 2 and 3 of the draft articles.

34. Draft article 5 was in a way a definition, and its purpose was to identify the injured State. It listed the various concrete situations of injured States by classifying internationally wrongful acts according to the origin of the obligation breached. Subparagraph (*d*) went beyond subparagraphs (*a*), (*b*) and (*c*) to deal with the much more complicated situation arising from a breach of multilateral treaty obligations, and subparagraph (*d*) (i) to (iv) set out four possible situations. With regard to subparagraph (*d*) (i), some doubt could arise as to how the obligation had been stipulated in favour of the State concerned. He was satisfied with the Special Rapporteur's explanation in his sixth report (A/CN.4/389) that subparagraph (*d*) (ii) covered a factual situation (commentary to article 5, paras. (18)-(19)), but subparagraph (*d*) (iii) raised the question how the "collective interests" of the States concerned were created. Certain commodity agreements—such as the International Tin Agreement and the International Sugar Agreement—contained provisions on machinery for possible breaches, but they did not cover every eventuality. For example, in the regional area with which he was most familiar, multilateral agreements existed for the creation of food reserves and each member country had to provide a certain quantity of rice, although only one country was a rice exporter. If that country failed in its obligations, all the member countries would be affected by the breach. The international instruments concluded by the member countries certainly did not contain machinery to cope with every situation. The difficulty of the problem of breaches of multilateral treaties was further illustrated by such multilateral instruments as those governing OAS and SEATO, which included provisions on wrongful acts committed by non-member countries. Again, article 5 (*e*), relating to internationally wrongful acts which constituted international crimes, did not include piracy, which was the traditional crime under international law. Another problem was so-called air piracy. If a country allowed an aircraft unlawfully seized in violation of the Tokyo[11] or Hague[12] Conventions to land on its territory, such a breach could be regarded either as an international crime covered by subparagraph (*e*) or as an internationally wrongful act covered by subparagraph (*d*) (iii).

35. Article 6 constituted the core of part 2 of the draft, dealing as it did with reparation in the broadest sense and with the rights and obligations arising from the internationally wrongful act. Paragraph 1 set forth the four remedies to which the injured State was entitled, namely (*a*) discontinuance of the act and return of the persons and objects held through such act; (*b*) application of such remedies as were provided for in the internal law of the author State; (*c*) re-establishment of the pre-existing situation, in other words *restitutio in integrum*; (*d*) the provision of appropriate guarantees against repetition of the act, a situation that was not very common in practice.

36. The essential provision of draft article 6, however, lay in paragraph 2, for it contained a very clear and direct formula about monetary compensation if re-establishment of the pre-existing situation proved impossible. It did, of course, raise the difficult problem of how to assess in practice "the value which a re-establishment of the situation as it existed before the breach would bear". In that regard, he urged the Special Rapporteur to supplement the commentary with suitable references to the relevant State practice. Adequacy of compensation was a crucial matter for the injured State and it called for appropriate elaboration.

37. Draft article 7 related to internationally wrongful acts in connection with the treatment of aliens. On a different legal plane, it should be noted that article 22 of part 1 of the draft articles referred to the rule of the exhaustion of local remedies. The last part of article 7, on the amount of compensation, repeated the formula used at the end of article 6, paragraph 2. Experience in the matter of claims for injuries to aliens was fairly extensive, for there was a considerable body of cases involving private claims of that nature. The traditional heading in the textbooks was that of "protection of citizens abroad". There again, the main problem was that of determining the adequacy of compensation.

38. As its session at Kathmandu, in February 1985, the Asian-African Legal Consultative Committee had discussed the formulation of a model draft treaty on the protection of foreign investments. A State which was sorely in need of foreign investments would, of course, be prepared to accept more stringent provisions in the matter. Naturally, the question of compensation in the event of nationalization or expropriation was crucial. The relevant United Nations

[11] Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963 (United Nations, *Treaty Series*, vol. 704, p. 219).

[12] Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 (*ibid*., vol. 860, p. 105).

resolutions used the expression "appropriate compensation" and, for drafting purposes, it was worth noting that the adjective "appropriate" was translated in French by *adéquate.*

39. As to draft articles 8 and 9, on suspension by the injured State of performance of its obligations by way of reciprocity or by way of reprisal, a qualification in paragraph 2 of article 9 embodied the rule of proportionality. Reciprocity and reprisal, as well as retaliation and retortion, came under the general heading of countermeasures. He suggested that the Special Rapporteur should supplement his commentaries to articles 8 and 9 by including fuller references to State practice in the matter.

40. With reference to draft article 12, he supported the Special Rapporteur's proposal regarding subparagraph (*b*), on *jus cogens*, but he could not altogether agree with the content of subparagraph (*a*), which contained an exception to articles 8 and 9. Under Italian law, for example, the immunities in question were granted only if the foreign State concerned could prove that its own legislation granted such immunities to other States. Another point was that Italian law did not recognize any legal personality for a diplomatic or consular mission; under that system, it was not the mission as such that was entitled to immunities.

41. Still on the question of reciprocity, it was worth noting that article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics, on the diplomatic immunity of foreign States, contained a reciprocity clause specifying:

> Where a foreign State does not accord to the Soviet State, its representatives or its property the same judicial immunity which, in accordance with the present Article, is accorded to foreign States, their representatives or their property in the USSR, the Council of Ministers of the USSR or other authorized organ may impose retaliatory measures in respect of that State, its representatives or that property of that State.[13]

From the examples of Italian law, Soviet legislation and the law of a number of other States, it was plain that the provisions of draft article 12 (*a*) were not supported by State practice.

42. Draft article 14 dealt with the consequences of an international crime, and draft article 15 with those of the particular crime of aggression. In those situations, as stated in paragraph 2 of article 14, States other than the author State had three sets of obligations: (*a*) not to recognize as legal the situation created by the crime; (*b*) not to render any assistance to the author State; (*c*) to join other States in affording mutual assistance in carrying out the obligations under (*a*) and (*b*). In his view, both of those articles required much more elaboration. In addition, he had some doubts about singling out the act of aggression by making it the subject of an article of its own; such crimes as terrorism and genocide also constituted violations of the provisions of the Charter of the United Nations.

43. Draft article 16 was the prelude to part 3 of the draft and, with regard to the three safeguard clauses set out in the article, he was inclined to agree with the formulations proposed by the Special Rapporteur.

44. Lastly, on the question of settlement of disputes, he thought it might be feasible to use the formula adopted in the 1969 Vienna Convention on the Law of Treaties, adapting it *mutatis mutandis* for the purposes of the present topic.

The meeting rose at 1.05 p.m.

[13] See United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), p. 40.

1891st MEETING

Thursday, 30 May 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. REUTER said that he would begin with some general comments on the Special Rapporteur's sixth report (A/CN.4/389), which was characterized by its clarity, precision and density and required careful study. As a good grasp of the topic could be acquired from the report, it should be possible for a certain number of important and welcome draft articles, such as articles 5, 8 and 9, to be examined by the Drafting Committee, in spite of the doubts to

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

which they might still give rise. It was still possible to place between square brackets any terms which had not secured a consensus, particularly if they were connected with provisions which had not yet been drafted. In any case, it was time for the Drafting Committee and the Commission to make progress in elaborating articles on such an important topic as State responsibility.

2. The Special Rapporteur presented the subject in such a way as to make the reader reflect and get to the bottom of things. The topic under consideration was difficult and delicate, since it involved the legislative function and the executive function in international law. The Special Rapporteur sometimes gave the impression that he was pointing out certain dangers in order to provoke a reaction on the part of members of the Commission.

3. The reason why the Special Rapporteur had approached the subject as he had was probably because it could not be approached otherwise. Personally, he would have preferred to proceed from the simplest to the most complicated matters, in other words to examine successively reparation, the "responses" to a breach of international law and, lastly, the offences. But the Commission had already dealt with the problem of international crimes, which was certainly embarrassing for it, since it would not be able to propose a single article without making cross-references or expressing doubts or reservations. That situation led him to ask the Special Rapporteur whether he intended to propose other articles on reparation or on the offences, before passing on to the third and last part of the draft.

4. Although he was quite prepared to adopt the Special Rapporteur's point of view on part 3 of the draft, he wished to emphasize that the question of settlement of disputes inevitably provoked disagreement in the Commission. He was thinking in particular of the draft Code of Offences against the Peace and Security of Mankind. Some members of the Commission indeed believed that it was important to take a position forthwith on the settlement of disputes and recourse to third parties; others, on the other hand, believed that a consensus would not be possible and that it would be better to defer the question. When the Commission had prepared its draft articles on the law of treaties, it had been very cautious and had left it to the plenipotentiary conference to settle that delicate problem. He could understand why the Special Rapporteur wished to know the reactions of members of the Commission at once, since the drafting of the articles would depend on whether they were addressed to an international court, to national courts or to tribunals common to several States, such as the Nürnberg International Military Tribunal.

5. In his oral presentation (1890th meeting), the Special Rapporteur had emphasized the need to take account of article 22, on the exhaustion of local remedies, in part 1 of the draft. He himself had never been very enthusiastic about that article and he now noted that, according to paragraph 1 (*b*) of draft article 6 as submitted by the Special Rapporteur, the injured State could require the State which had committed an internationally wrongful act to "apply such remedies as are provided for in its internal law". That provision assumed that the internationally wrongful act existed; it therefore appeared to contradict article 22 of part 1 of the draft, since according to that article the internationally wrongful act only came into being after the exhaustion of local remedies.

6. The problem of absolute peremptory rules was more serious. From the outset, he had expressed serious reservations about the concept of *jus cogens* and he tended to maintain them. For it was not known how *jus cogens* came into being, or what existing rules were absolutely peremptory. The Special Rapporteur had referred (*ibid.*) to the case in which a treaty provision gave a State the right to occupy or reoccupy an area belonging to another State, and had said that such a provision would be void by virtue of *jus cogens*. Not only did he find it doubtful that any treaty in force could accord such a right, but the relevance of the example seemed questionable in view of paragraph 1 (*d*) of draft article 6, according to which the State which had committed an internationally wrongful act could be required to "provide appropriate guarantees against repetition of the act".

7. The reference, in the footnote to paragraph (5) of the commentary to draft article 8, to a peremptory norm permitting non-performance of the obligation "in the case of a breach of the same obligation by another State" was also perplexing. He was, of course, aware that a peremptory rule was always absolute for others but not always for oneself, but he was troubled by an absolute peremptory rule which was at the same time conditional. It should not be concluded from that that he did not believe in the absolute peremptory rule. Human rights had been and still were subjected to violations which left no doubt about the existence of sacred rights and absolute rules to which there could be no exception. What he was opposed to was the tendency to introduce the absolute everywhere in law, in such a way that it was no longer respected.

8. Passing on to particular points, he explained that he had spoken of "responses" to a breach of international law because that term seemed to have a wider meaning than the term "countermeasures" used by the Special Rapporteur. For since the latter term had been hallowed by lawyers in an arbitration case,[5] it had perhaps acquired a special meaning. The Commission now had to adopt a terminology. With regard to draft articles 8 and 9, each of which dealt with a particular response—in the one case reciprocity, and in the other reprisals—the Special Rapporteur had given an example of the following kind: a State party to a bilateral treaty interpreted the word "ships" as meaning only merchant ships and not warships. The other State party to the treaty believed that both categories were covered by the term "ships", but it agreed to take the term as covering only merchant ships. That situation did not pertain to responsibility—since neither State alleged a breach of the treaty—but to the interpretation of treaties.

[5] *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, arbitral award of 9 December 1978 (see 1892nd meeting, footnote 9).

Conversely, if the second State believed that the term "ships" covered both merchant ships and warships, but decided to apply it only to merchant ships because that was how the first State applied it, there was a breach which generated international responsibility. In his view, there was no question of a "countermeasure" in that case, unless the Special Rapporteur thought that "countermeasures" and "responses" were the same.

9. To distinguish between reciprocity and reprisals, the Special Rapporteur emphasized that there was reciprocity in the case of suspension of performance of certain obligations, provided that those obligations corresponded to or were directly connected with the obligation which had been breached. An example might be the case of a customs agreement between two States, each of which exported wine to the other and had agreed to levy a duty on wine. If one of those States omitted to levy the duty and the other did likewise, there was suspension of performance of a corresponding obligation. But more frequently, when a tariff provision of that kind was not observed, the injured State was not an exporter of the same product and could only suspend performance of an equivalent obligation relating to a different product. That situation also qualified as reciprocity, since the obligations were directly connected. But he wondered whether the Special Rapporteur did not think that the drafting of article 8 could be improved. Did that provision refer to obligations under one and the same treaty, under the same conventional system or relating to the same matter?

10. For reprisals, which had no such limitation, the Special Rapporteur had introduced into the commentary to draft article 9 another idea, which was a variant of the idea of proportionality: the response could be strictly equivalent, as could happen under GATT if there was parallel suspension of tariff obligations. When the response was accompanied by an idea of coercion, it should no doubt be proportional, as the Special Rapporteur affirmed, but it must not be forgotten that, to oblige the author State to fulfil its obligations, it might be necessary to go rather further than it had gone in the non-performance of another obligation. Did passing from strict equivalence to the idea of coercion mean passing from one kind of response to another?

11. It should also be noted that there was never any question in the draft articles of punishing the offending State. But if the offences were considered, it must be with a view to punishment. Did the Special Rapporteur intend to deal with that delicate question in other articles?

12. The question of the offences led him to urge the need to define the exact scope of the topic of State responsibility in relation to that of the draft Code of Offences against the Peace and Security of Mankind. Both the Special Rapporteurs for those two topics and the Commission itself were still working in uncertainty. But it was for third persons to decide the question. Yet the Sixth Committee of the General Assembly often appeared to be composed of third persons who did not fully appreciate the practical difficulties involved. Was there not something abnormal about a situation in which two topics overlapped and the Commission did not know how the problem would be solved? As the Special Rapporteur for the draft code had suggested (1879th meeting), it would probably be better to deal with aggression first and leave the statement of general principles until later, so that the Special Rapporteur for State responsibility could continue in the mean time to explore the consequences of certain international crimes. It was true that the latter had observed, in paragraph (1) of the commentary to draft article 14, that the distinction drawn in article 19 of part 1 of the draft articles between "international delicts" and "international crimes" made sense only if the legal consequences of the latter were different from those of the former. That was why the Special Rapporteur dealt with the legal consequences of international crimes, which were different from those of other internationally wrongful acts. But another question arose, that of the régime of responsibility, which might come under either topic.

13. Just as article 73 of the 1969 Vienna Convention on the Law of Treaties reserved the question of the international responsibility of States, draft article 16 as submitted by the Special Rapporteur reserved the question of the invalidity, termination and suspension of the operation of treaties. It might be asked not only whether it was appropriate to show this courtesy to the 1969 Vienna Convention, but also what was the exact scope or effect of such a precaution. Draft article 13, the substance of which he approved, only increased his doubts. As indicated in paragraph (1) of the commentary to that article, it dealt with "the complete breakdown of the system established by a multilateral treaty". That case was plausible, but was it covered by the 1969 Vienna Convention? If not, the situation would be embarrassing, because the Vienna Convention contained a provision excluding any new cause for the disappearance of a treaty; if so, it would be necessary to establish that a provision such as article 61 of the Vienna Convention, which referred rather to the disappearance of a material object, was applicable. It would be interesting to hear the views of members of the Commission who had made a special study of the Vienna Convention.

14. There remained the very disturbing question of the relationship between the draft articles and the Charter of the United Nations, or rather the United Nations system. That question was raised by several draft articles, in particular article 14, paragraph 4, and article 15. The expression "the international community as a whole", which had been coined to meet the need for a definition of absolute peremptory rules, had since set a trend, although its content was very hard to grasp. He could understand that expression being used in article 53 of the Vienna Convention on the Law of Treaties in connection with the concept of *jus cogens* and in article 19 of part 1 of the draft articles. If such peremptory rules existed, it was not by virtue of a particular treaty, but by virtue of customary law reflecting a deep-seated *opinio juris*. To demonstrate the existence of a rule of customary law it was not, of course, necessary to cite precedents from all States. It should be noted in that connection that a State which had expressly declared that it did not recognize a certain rule as customary law could

not subsequently have that rule invoked against it, at least in a world where there was no international legislator. While he could accept that a general rule emanating from the legislative power, such as the rule prohibiting aggression, was an absolute peremptory rule accepted by the international community as a whole, he was not prepared to make the leap suggested by the Special Rapporteur and accept an individual decision of the executive power. It was certainly difficult to give a general definition of an act violating an obligation that was of essential importance for the international community, but it was an even more serious matter to decide, in a specific case, that a particular State was the aggressor. That was where the question of the relationship between the draft articles and the Charter of the United Nations arose.

15. To understand what the United Nations was, it was necessary to refer to the Charter as interpreted. In the commentaries to the draft articles, the Special Rapporteur referred more than once to decisions taken by the international community as a whole, or by the organized community. Was that process outside the Charter? At the present time, the United Nations and the international community as a whole did not completely coincide. It had happened, perhaps because the United Nations were not unanimous, that conferences intended to represent all States had been held outside the United Nations system. It was certainly desirable that the United Nations should be identified as closely as possible with the international community as a whole, but legally those were still two different concepts. While it was true that there were armed conflicts which the Security Council did not resolve because of political positions, there were others which it found more reasonable not to treat as cases of aggression. The defects of the Charter should be spoken of only with caution. The draft articles should not give the impression that the international community was an entity, in the process of creation which might be subject to other rules in the near future. Hence caution was also needed in regard to drafting. At the present time, some groups of States believed that they could impose sanctions against other States. The Commission must take care that the draft articles did not lead to indirect justifications or condemnations of the purposes it pursued.

16. Mr. RIPHAGEN (Special Rapporteur) said that he would not attempt, at the present stage, anything like a complete answer to Mr. Reuter's numerous and profound remarks, but would merely furnish certain clarifications on a few points. In the first place, he wished to reiterate that the set of draft articles in his sixth report (A/CN.4/389), namely articles 1 to 16 of part 2 of the draft, constituted the complete set of articles in that part; he did not propose to submit any further articles for part 2. That would perhaps allay some of Mr. Reuter's fears.

17. Mr. Reuter had raised the question of the possible relationship between paragraph 1 (*b*) of draft article 6 and article 22 of part 1 of the draft, which he found unsatisfactory. Article 6, paragraph 1 (*b*) did not refer only to the rules of international law mentioned in draft article 7, namely those relating to wrongful acts in the treatment of aliens. That subparagraph also referred to other matters and covered internationally wrongful acts which affected the foreign State itself—not merely those which affected it through its nationals. In such cases, the author State should take appropriate steps on its own initiative. For instance, if an embassy was attacked by foreign students, the receiving State had to take adequate measures, including repressive measures. Mr. Sucharitkul (1890th meeting) had suggested that the foreign State could set the local remedies in motion. But the foreign State was not bound to do so; it was entitled to ask the author State to take appropriate measures, and it had no obligation to appear before the courts of another State. To be required to appear and thereby accept the jurisdiction of the local courts, it would have to waive its immunity, and no State could be compelled to do that.

18. The scope of article 6, paragraph 1 (*b*), was thus much broader than that of article 22 of part 1. Article 22 referred to the need to exhaust local remedies. That rule applied to the injured alien; it did not apply to the foreign State itself. It was thus clear that article 22 did not have the same scope as article 6, paragraph 1 (*b*), and that the two provisions could perfectly well coexist.

19. Referring to rules of *jus cogens*, he had spoken at the previous meeting of the possibility of a treaty containing a clause under which occupation of a territory was one of the legal consequences of non-performance of obligations under the treaty. His own feeling was that such a clause would make the whole treaty null and void under the rules of *jus cogens*, but he realized that some members might have doubts about the absolute character of *jus cogens* in that situation. There was one field, however, namely humanitarian law, in which there should be no doubt at all. As far as the present draft was concerned, however, the Commission had to take into account the concept of *jus cogens* rules, even though there might be some uncertainty about their character or even their exact content.

20. With regard to terminology, the debate had shown the need to agree on the terms used in the draft articles. First, he wished to clarify the meaning of the term "retortion". That term applied to acts which were in themselves legally permissible, unlike "reprisal" and "reciprocity", which referred to acts that were normally not permissible, but could be resorted to in retaliation for an internationally wrongful act by the other party. In that connection, he drew attention to the passage of his sixth report dealing with the interpretation of a treaty (A/CN.4/389, para. 22). If both parties accepted a restrictive interpretation, the countermeasure would constitute a retortion; otherwise, it would be a reprisal. As to the distinction between reciprocity and reprisals, it was admittedly a difficult one. But even though the dividing line was not easy to draw, the distinction still had to be made, because in practice there were a great many cases which clearly involved either reprisals or reciprocity, and the two had to be kept apart.

21. The drafting of article 8, dealing with reciprocity, was certainly susceptible of improvement.

The operation of its provisions should not necessarily be limited to one and the same treaty, although that was the usual situation. Sometimes two States concluded at the same time two treaties having a clear link between them. On the other hand, one and the same treaty could contain different international obligations having no connection between them. There was in fact an infinite variety of situations in practice and it would be difficult to devise language to cover all of them.

22. In connection with reciprocity, Mr. Reuter had mentioned commercial treaties. He himself had been involved in the negotiation and drafting of many such treaties and had noticed a tendency on the part of the competent government bodies to adopt a strict *quid pro quo* approach. In that connection, he drew attention to paragraph (4) of the commentary to article 8 and its conclusion: "Even if in actual fact, at a particular moment, the balance between the performance and non-performance of respective obligations is not completely equal, the measure by way of reciprocity could still be justified as such."

23. It had been pointed out that the punishment of a State was not mentioned in the draft articles. Although there was no explicit reference to it, draft article 14 was relevant. The concept of the punishment of a State depended on what the international community as a whole regarded as a crime, and, hence, as an act for which punishment was in order. One form of punishment might be the imposition of a heavy financial burden upon a State; in practice, that type of measure had always proved ineffectual. There was also the possibility of taking away part of the territory of a State. Clearly, those were matters which the Commission could not codify, but article 14 did provide an opening.

24. On the question of proportionality, he wished to stress that the provisions of draft article 9, paragraph 2, did not require complete proportionality. The purpose of that provision was to avoid manifest disproportionality, which was also necessary in regard to punishment.

25. The question of the relationship between the draft articles on State responsibility and the draft Code of Offences against the Peace and Security of Mankind had also been raised. He himself had a slight preference for dealing with the punishment of a State as part of the topic of State responsibility, but it could equally well be dealt with in the draft code.

26. The question of the relationship between the present draft articles and the law of treaties arose at various levels. In the first place, a clear distinction had to be drawn between the question of the validity of treaties and that of the conduct of a State in response to an internationally wrongful act. Draft article 16, subparagraph (*a*), provided that the provisions of the present articles would not prejudge any question that might arise in regard to the "invalidity, termination and suspension of the operation of treaties". That provision was parallel to article 73 of the 1969 Vienna Convention on the Law of Treaties, which he himself found too sweeping: it was perhaps unwise to say that the Vienna Convention "shall not prejudge any question that may arise in regard to a treaty from ... the international responsibility of a State ...". On that point, he wished to stress that draft article 13 did not refer to the validity or to the suspension of the operation of a treaty; it dealt only with the conduct of a State in the performance of a treaty. Hence it did not come into direct conflict with the 1969 Vienna Convention.

27. The question of the relationship of the draft to the law of treaties also arose at another level, namely that of remedial consequences—a matter connected with the maintenance of international peace and security. Mr. Reuter had said that he could accept only the legislative function of the international community as a whole, although there might be some question as to what constituted that community and how it acted. He himself had, of course, no intention of introducing the concept of executive functions of the international community; there could be no question of any concrete decisions in concrete cases. The intention in the draft was to refer to the action of the international community *in abstracto*, in other words the legislative functions of that community. Perhaps Mr. Reuter feared that the concept of "the international community as a whole" might lead to the recognition of a sort of unofficial United Nations outside the United Nations itself. The fact was, however, that the international community existed, just as the United Nations existed, and that both had to be taken into account. He would revert, at the end of the debate, to the various important issues raised in Mr. Reuter's thought-provoking statement.

The meeting rose at 11.30 a.m.

1892nd MEETING

Monday, 3 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

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

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/ Conf.Room Doc. 7)

[Agenda item 3]

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. McCAFFREY said that the Special Rapporteur's sixth report (A/CN.4/389) on a topic daunting in its complexity was a masterpiece of logic and analysis. It was extremely helpful in that it provided both commentaries to the draft articles submitted at the thirty-sixth session and an outline of part 3 of the draft on the "implementation" of international responsibility. He would, however, encourage the Special Rapporteur to provide stepping-stones by citing cases and authorities in support of the propositions he had adduced.

2. Referring to the draft articles, he noted that the Special Rapporteur had asked whether articles 2 and 3 should include a cross-reference to articles 4 and 12. Concerning article 2, his own view was that a cross-reference to article 12 (*a*) would be particularly useful since the diplomatic privileges and immunities to which the latter provision related did not have the same peremptory force as a norm of *jus cogens*. While there would be no harm in referring also to article 12 (*b*), it was probably not strictly necessary to do so since norms of *jus cogens* had by definition a peremptory force of their own, and a convention on State responsibility, again by definition, could not derogate from them.

3. It would probably be harmless, but, again, not strictly necessary to refer in article 3 to article 4. The reasons were, first, that the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security were so universally accepted that they could be considered to have become norms of customary international law, so that reference to them would be superfluous; and, secondly, that those provisions and procedures were themselves in any event largely of a peremptory character, which made reference to them unnecessary. A reference in article 3 to either article 12 (*b*) or article 12 (*a*) might well also be superfluous since both norms of *jus cogens* and diplomatic immunities could be considered part of the corpus of customary international law.

4. The corner-stone of part 2 of the draft was article 5 and he had four main points to raise in that connection. The first concerned the extent to which the article covered human rights violations against an author State's own citizens where such violations: (i) were not governed by a multilateral treaty under subparagraph (*d*); (ii) did not rise to the level of an international crime under subparagraph (*e*). The question that arose was whether there was a customary international law analogous to subparagraph (*d*) (iv) of article 5. In his view, there was, and provision should be made for it. It could be argued that, if the violations in question were violations of an obligation *erga omnes*, they were covered by subparagraph (*a*) of article 5. In that eventuality, as *inter alia* the dictum of the ICJ in the *Barcelona Traction* case[5] suggested, they would constitute "an infringement of a right appertaining to a State by virtue of a customary rule of international law" (article 5, subparagraph (*a*)) and "the State whose right has been infringed" (*ibid.*) would in fact be all States other than the author State. It could also be argued that such human rights violations were covered by draft article 3, which provided for the residual character of rules of customary international law, of which human rights norms formed a part. In his view, however, it was unnecessarily elliptical to cover such an important area of international law by implication or by an indirect reference. Possibly, therefore, some consideration should be given either to adding a paragraph to article 5 or to recasting subparagraph (*e*) to meet the situation.

5. Furthermore, draft article 5 did not seem to cover either other violations of obligations *erga omnes* that did not rise to the level of international crimes or violations of obligations not imposed by a multilateral treaty. The more he pondered such issues concerning obligations *erga omnes*, the more concerned he became about the uncertain ramifications of the concept of an obligation *erga omnes*. At the very least, it seemed evident that if international law proscribed serious and widespread violations of human rights in respect of a State's own citizens—and he believed it did—the corresponding right must be vested somewhere; and, by definition, the same was true of such other obligations *erga omnes* as might exist.

6. The issue that would have to be faced sooner or later was in favour of whom or of what did such obligations run. They could be viewed as running either in favour of the international community as a whole, which was a collectivity, or in favour of all States, namely towards each State individually. The first approach would imply that, since the obligation ran in favour of the collectivity of States, only the collectivity as a body could respond. The second approach implied that, since the obligation ran in favour of each State individually, it was permissible for each State to respond on its own in an appropriate way. Given the current state of organization of the international community, it was probable that in many cases there would be no response at all if the rights enjoyed by all States could be exercised only collectively. If, however, it was to be permissible for rights enjoyed by all States to be exercised individually, there had to be certain safeguards.

7. Obviously, the use of force was foreclosed by the Charter of the United Nations unless it was under-

---

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

[5] *Barcelona Traction, Light and Power Company, Limited, Second Phase*, Judgment of 5 February 1970, I.C.J. Reports 1970, p. 3.

taken in self-defence, individually or collectively. Also, there would seem to be no essential need for States not directly affected by the breach to be entitled to claim reparation or even to take countermeasures. The right of such States could be vindicated through an entitlement to bring a claim against the author State to comply with the obligation in question and to cease any continuing breach. A more complete catalogue of possible remedies was, of course, provided in paragraph 1 of draft article 6. In some cases of extremely serious breaches, the collective interests of the international community could perhaps be enforced only by allowing States to apply countermeasures with a view to bringing about the cessation of the internationally wrongful act in question and/or to demonstrate displeasure with or objection to the act in question. Such countermeasures could presumably be subject to the extent applicable to the conditions outlined in draft article 10. In other words, they could be applied at least on an interim basis pending the engagement of a procedure for the settlement of international disputes.

8. He therefore considered that some revision of article 5 might be necessary to deal with human rights violations. One possibility would be to recast subparagraph (*e*) to read:

"(*e*) if the internationally wrongful act constitutes a violation of an obligation *erga omnes*:

"(i) the State directly affected, if any; and

"(ii) [Alternative A] the international community as a whole.

[Alternative B] all other States."

That formulation involved a significant change of wording but not of substance, since it was, if anything, more comprehensive and precise than the existing one. The replacement of the term "international crime" by "violation of an obligation *erga omnes*" would mean that the article would cover not only international crimes, but also other violations of obligations *erga omnes*, including human rights violations. His suggested formulation also made separate provision for, on the one hand, the State that was directly affected and, on the other, other States or the collectivity of the international community as a whole; that could facilitate the drafting of subsequent provisions on ways in which injured States or the collectivity could respond to an internationally wrongful act. Obviously, if there was a State that was directly affected by the breach, that State should be entitled to respond in the manner indicated in draft articles 6 to 9, as qualified by subsequent articles. If, however, there was no such State, as, for example, in the case of human rights violations against a State's own citizens, it was really an interest of the collectivity of humanity that was injured. Alternative A of his suggested formulation referred to that collectivity as "the international community as a whole", but some more suitable expression could perhaps be found. As to Alternative B, there seemed to be a very real issue whether, in the case of a violation *erga omnes*, it was only the additional legal consequences entailed by the most serious internationally wrongful acts (denominated international crimes under article 19 of part 1 of the draft) that were to be determined and applied within the framework of the "organized community of States".

9. The second point concerning draft article 5 related to the extent to which that article would allow countermeasures by third States in cases of international delicts, which were not offences *erga omnes*. In a recently published study,[6] Elisabeth Zoller had argued that the right of a third State to take countermeasures should not be limited to cases in which there was a treaty link between the third State and the directly injured State, particularly where the third State had been "specially affected by the breach" as contemplated by article 60, paragraph 2 (*b*), of the 1969 Vienna Convention on the Law of Treaties; Professor Zoller had based that argument on the principles of friendship and neighbourliness. The Special Rapporteur might wish to consider whether the issue merited further examination.

10. The third point concerned the notion of collective interests, referred to in subparagraph (*d*) (iii) of draft article 5 and which the Special Rapporteur had contrasted, in paragraph (21) of the commentary to the article, with interests that were merely common or parallel. Under the provision in subparagraph (*d*) (iii), it would appear that a State party to a multilateral treaty not directly or specially affected by a breach of that treaty could apply countermeasures if the obligation breached was intended to protect the collective interests of States parties to the treaty.

11. In the first place, it would not always be clear from the wording of the treaty that a particular obligation was stipulated for the protection of the collective interests of States parties. That underlined the importance of the procedures in part 3 of the draft and also of draft article 11, paragraph 2, where applicable. Secondly, as to the meaning of subparagraph (*d*) (iii) of article 5 and its interrelationship with article 11, paragraph 1 (*b*), he would refer members to a United States statute entitled *Restriction on importation of fishery or wildlife products from countries which violate international fishery or endangered or threatened species programs*, under which the President could, under certain conditions, direct that the import into the United States of fish or wildlife products from an offending country should be prohibited, where the actions of the latter country "diminish[ed] the effectiveness" of a fishery convention or endangered species programme.[7] Assuming that State A had such a statute and took measures pursuant thereto against State B in response to an alleged breach by State B of a multilateral treaty for the protection of a threatened species, and assuming further that the measures taken by State A would otherwise have violated a bilateral trade agreement between States A and B, then, as he interpreted article 5 (*d*) (iii) and article 11 (1) (*b*), such action would be a permissible response by State A so long as it did not involve the suspension by State A of obligations contained in a multilateral treaty which were "stipulated for the protection of collective interests of the State parties"

[6] *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Dobbs Ferry (N.Y.), Transnational Publishers, 1984), pp. 113 *et seq.*

[7] *United States Code, 1976 Edition, Supplement V*, p. 128, title 22, sect. 1978.

to that treaty. He would like to know whether his understanding of the Special Rapporteur's approach was correct.

12. His fourth point concerning draft article 5 related to the treatment of an international crime under subparagraph (*e*). As he had already had occasion to state, while he recognized that there were international obligations essential for the protection of the fundamental interests of the international community as a whole, he did not accept the proposition that a breach of such an obligation could properly be termed an international crime. He agreed with the statement in paragraph (24) of the commentary to article 5 to the effect that it was for the international community as a whole to determine and apply the additional special legal consequences of such grave breaches. Not even the United Nations, however, was vested with power under its Charter to punish a Member or, for that matter, a non-member State, at least according to the ordinary definition of punitive measures. Thus the sole purpose of the measures and actions that might be taken by the Security Council pursuant to Articles 41 and 42 of the Charter was to maintain or restore international peace and security. If the United Nations lacked the power to punish States and if additional legal consequences had to be decided upon by the international community as a whole, it seemed highly doubtful that individual States could, on their own initiative, properly take truly punitive measures against an author State.

13. A final point regarding draft article 5 concerned the second sentence of paragraph (10) of the commentary. The question whether interim measures of protection indicated by the ICJ, in particular under Article 41 of its Statute, were binding had been much debated. Indeed, the very language of Article 41, paragraph 1, of the Statute strongly suggested that the framers of the Statute intended that such measures should not be binding. He took it that the second sentence of paragraph (10) of the commentary to draft article 5 did not purport to resolve the controversy regarding Article 41 of the Statute of the ICJ, since it referred to "such orders ... as may be binding on the parties to the dispute".

14. Although it seemed to be far more rigid, the same comments applied to paragraph 2 (*b*) of draft article 10. That provision used the term "ordered", which was at variance with the terminology advisedly employed in Article 41 of the Statute of the ICJ. He was, therefore, uncertain how far paragraph 2 (*b*) of article 10 was intended to apply to provisional measures "indicated" by the ICJ under Article 41; to the extent, however, that it purported to resolve the question whether provisional measures under Article 41 were binding, he would be unable to accept it.

15. Draft article 6 used the word "require", which, in his view, had an almost coercive connotation. He would prefer some wording to the effect that the injured State had the right under international law to demand that the author State take the action provided for in paragraph 1 (*a*) to (*d*) of article 6.

16. He would suggest that draft article 7 should also cover injuries to citizens of the author State.

17. With regard to draft article 8, it was true that retortion was not a new right of the injured State because it was, by definition, a measure which, though possibly unfriendly, was not otherwise unlawful and could thus legally have been taken even before the commission of the internationally wrongful act. Nevertheless, like a reprisal, it might have "the purpose of influencing a decision of the author State to perform its ... obligations ...", as the Special Rapporteur stated in paragraph (2) of the commentary to article 8. It would therefore be useful, in his view, to distinguish retortion from reprisal in the commentary to the article.

18. It would also be useful to give some all-embracing definition of a reprisal at some point in the commentary to draft article 9. He was thinking, for example, of the definition given in the *Naulilaa* case,[8] although he was not certain, mainly for reasons of terminology, whether that definition, which had been enunciated before the Charter of the United Nations had been drafted, was still valid. It might, however, serve as a useful basis together with, for example, the arbitral award of 9 December 1978 in the *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*.[9] In that connection he quoted extracts from paragraphs 81, 83 and 90 of the arbitral award. In paragraph 78 of the award, the tribunal had also provided some guidance for the determination of the type of countermeasure involved. Some explanation along those lines in the commentary to article 9 would be helpful, although a more appropriate place might perhaps be in the commentary to article 8.

19. With regard to paragraph 1 of article 9, the word "suspend" might seem too limitative. Could the commission of an act that would otherwise be wrongful always be viewed as a suspension of the performance of obligations? Furthermore, if the expression "other obligations" denoted obligations other than those meant in article 8, it would be useful to make that clear by including a reference to "obligations other than those referred to in article 8".

20. He agreed with the formulation of the rule of proportionality in paragraph 2 of article 9, which had presumably been largely inspired by the *Naulilaa* arbitration award. He was not sure whether, on its facts, that award could still be said to provide a firm basis for such a standard, since the case had been decided at a time when it had not been at all certain that international law required that reprisals should be in approximate proportion to the offence. Perhaps that was mainly why the tribunal had gone no further than to hold that it would be excessive and illegal to take reprisals that were out of all proportion to the acts that motivated them. It would, however, be virtually impossible to apply a rule of strict proportionality. Such a requirement would make it extremely hazardous for the injured State to resort to reprisals and would, in many instances, result in the non-enforcement of international obligations.

---

[8] *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique*, arbitral award of 31 July 1928 (United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 1011).

[9] *Ibid.*, vol. XVIII (Sales No. E/F.80.V.7), p. 417.

21. He considered that article 10, relating to the effect of the availability of dispute-settlement procedures, had a place in the draft and agreed with the intent behind that article, namely that a State that claimed to have been injured should not simply proceed in total disregard of the existence of any mechanism for resolving disputes that was available to the parties. Article 10 went much further than that, however—or seemed to—by providing, in paragraph 1, that an injured State could not have recourse to reprisals until it had exhausted the dispute-settlement procedures available to it. Moreover, although that rule was subject to the exceptions in paragraph 2, it seemed to him that the latter paragraph, rather than stating the exceptions, embodied the rule that countermeasures could be taken by the injured State until such time as a competent international tribunal was seized of the dispute and provided that the tribunal's powers ensured some degree of enforcement of the obligations in question.

22. Those propositions were based, *inter alia*, on the arbitral award in the *Air Service Agreement* case between the United States of America and France. In that case, the arbitral tribunal had first considered whether a duty to negotiate affected the right to resort to countermeasures, concluding on that point that it did not believe it possible,

> ... in the present state of international relations, to lay down a rule prohibiting the use of countermeasures during negotiations, especially where such countermeasures are accompanied by an offer for a procedure affording the possibility of accelerating the solution of the dispute.[10]

The tribunal had next considered the specific question raised by draft article 10; the passage set forth in paragraphs 94 and 95 of its award, which he read out, was particularly relevant. The tribunal had concluded that "under present-day international law States have not renounced their right to take countermeasures" where they have in principle agreed to resort to arbitration or judicial settlement.[11] He would therefore ask the Special Rapporteur to consider recasting article 10 so that it more accurately reflected the principles recognized by that tribunal. His fear was that, as drafted, article 10 would be counter-productive, since it could discourage States from agreeing to submit their disputes to third-party settlement.

23. The first question with regard to draft article 11 was who had the burden of establishing the factors mentioned in paragraph 1: the injured State, before taking countermeasures; the other States parties to the multilateral treaty; or the author State? Was it a *post hoc* establishment that was contemplated? It would be helpful if the commentary could shed some light on the matter.

24. With regard to paragraph 2 of article 11, were all countermeasures, no matter what their purpose, precluded in the circumstances referred to? It would seem that many of the factors referred to in the bilateral context of the *Air Service Agreement* case between the United States and France would also be applicable in the context of a multilateral treaty. For example, it might take some time and some encouragement from other States parties to the treaty before the procedure of collective decisions was engaged, in other words before the tribunal was established and seized of the dispute. It was difficult to accept that contemporary international law precluded States from taking measures designed to restore equality between the parties to a dispute and to encourage the author State to continue negotiations towards an acceptable solution even in the context of a multilateral treaty. It might be that the constraints in paragraph 1 (*a*) and (*b*) of article 11 were, in fact, so narrow as to diminish his concerns considerably. In other words, it might very seldom be the case that the failure to perform obligations necessarily affected the exercise of the rights or the performance of the obligations of all other States parties to the treaty, just as it might very seldom be the case that such obligations were stipulated for the protection of collective interests of the States parties to the multilateral treaty. Even so, the proposition in paragraph (8) of the commentary to article 11 that, even in the absence of a procedure of collective decisions, an injured State party to a multilateral treaty could respond by suspending its obligations under the treaty only if the object and purpose of the treaty as a whole were destroyed seemed somewhat doubtful. He would appreciate some concrete illustrations of how that principle had operated in practice.

25. A question that rose in connection with draft article 14 was whether the requirement in paragraph 3 applied to all the rights referred to in paragraph 1, namely both the normal legal consequences of an internationally wrongful act and the additional legal consequences flowing from what was referred to as an international crime. In other words, did paragraph 3 preclude States not directly affected by the offence in question from taking normal or non-punitive countermeasures? For the reasons stated in connection with draft article 5, he was not sure that States should be so precluded, and he would appreciate the Special Rapporteur's clarification on the point.

26. As to draft article 15, he was not sure whether a separate provision was necessary in regard to aggression. Aggression was, of course, governed by the Charter of the United Nations and that was a point that might be worth recalling. Article 4 of the draft might, however, suffice by itself.

27. Part 3, on implementation of international responsibility, seemed in many respects to be a necessary foundation to the entire draft. While it was possible to ignore the primary rules in the preparation of the articles, States could not do so when applying them. He had no detailed comments to offer at the current stage but could say that, subject to his remarks on the articles in part 2 of the draft, and particularly on article 10, he was in broad agreement with the system envisaged in the outline.

28. Mr. CALERO RODRIGUES complimented the Special Rapporteur on his excellent and comprehensive sixth report (A/CN.4/389). As a first general observation regarding part 2 of the draft, it could be asked whether the articles contained everything necessary to describe the legal consequences of an

[10] Paragraph 91 of the arbitral award, *ibid.*, p. 445.

[11] Paragraph 95 of the arbitral award, *ibid.*

internationally wrongful act. In his view, the issue was one of choice. More articles could be included and more legal consequences defined or preference could be given to the "lean approach" suggested by the Special Rapporteur, whereby only the elements essential for the definition of the legal consequences of State responsibility were presented. The Special Rapporteur's course was perhaps right, since the subject was very difficult, not only from the legal standpoint but also from that of acceptance by States.

29. He was also not sure that the commentaries were full enough. They had presumably been included as a means of condensing the explanations given in earlier reports and would suffice for use at the current stage. Ultimately, however, they should perhaps be expanded.

30. If he understood the general thrust of draft article 5 correctly, the Special Rapporteur regarded the injured State as a State whose primary right had been infringed and had separated international delicts and international crimes, distinguishing in the case of the former between rights under customary rules of international law, rights of a third party to a treaty to which the State was not a party, rights established by a judgment or other binding dispute-settlement procedure, rights under a bilateral treaty, and rights under a multilateral treaty. Those distinctions were clear and the commentary to the article was excellent. That excellence notwithstanding, he was not entirely convinced that the distinction between a common interest of all parties and a collective interest of the parties was necessary.

31. In the case of crimes, the Special Rapporteur suggested that the injured States were all States; that was a clear consequence of article 19 of part 1 of the draft. In the special case of crimes, however, some distinctions should perhaps be drawn as between categories of injured States, a possibility that the Special Rapporteur had apparently recognized in the penultimate sentence of paragraph (23) of the commentary to article 5. Such distinctions would be useful at the current stage if differences were to be established with regard to the legal consequences of international crimes.

32. With regard to draft article 6, he felt, unlike Mr. McCaffrey, that the words "may require" were not strong enough. The first obligation under article 6 was to stop the breach, namely to discontinue the act *ex nunc* and prevent its continuing effects. He wondered, however, whether the phrase "release and return the persons and objects held through such act" was necessary and whether it was not implied in the discontinuance of the act. He also had doubts regarding the need to mention the second obligation, which was to apply the remedies provided for under internal law. The application of existing remedies under internal law was part of the obligation either to stop the breach or to make restitution and, in his view, it was not essential to refer to those remedies in that particular case.

33. The next obligation was *restitutio in integrum stricto sensu*, namely to re-establish the situation as it had existed before the act. If re-establishment was materially impossible, there was a requirement to make compensation. In that connection, he had already had occasion to voice his doubts regarding the expression "pay ... a sum of money" when used in the context of compensation, and he noted that the Special Rapporteur had himself referred, in paragraph (8) of the commentary to article 6, to "pecuniary compensation—the payment of damages—or compensation in kind". Compensation could not be limited to payment of a sum of money, for in certain cases it would be better for both States, and particularly the injured State, to receive compensation in kind. The Commission should recognize that fact unequivocally.

34. The last obligation under article 6, providing for guarantees against repetition of the act, was somewhat briefly stated, since such guarantees could take several forms, and the commentary was not very clear. It might therefore be useful to give examples of the guarantees that could be required from the author State.

35. When draft article 7 had first been presented, he had voiced strong doubts as to the need for such an article because compensation normally fell due when it was materially impossible to re-establish the situation. Under the terms of article 7, it appeared that there could be compensation even if re-establishment was not materially impossible. Why, when the obligation concerned the treatment to be accorded to aliens, was the author State given the option of not fulfilling it even if fulfilment was materially possible? Legal impossibility under domestic law should not, in his view, provide a State with the justification for paying compensation rather than fulfilling an international obligation which it had breached; the initial situation should be re-established if that was at all possible. Furthermore, once an internationally wrongful act had been committed, the ensuing obligation was no different from any other obligation involving other primary rules.

36. Moreover, he considered that there had been no clear explanation of why it was necessary to include article 7 in the draft. Paragraph (2) of the commentary to that article stated that, while neither the decisions of international courts and tribunals nor the practice of States and the teachings of publicists were uniform, there was "a marked tendency" not to require restitution in the cases in question or at least to leave the author State the choice between restitution and compensation. He found it difficult on logical grounds to accept that exception. He also failed to see any link between the reference in paragraph (4) of the commentary to the question of extraterritorial status and the text of article 7.

37. Draft articles 8 and 9 defined the new rights of the injured State and did so well enough to obviate the need for recourse to the legal concepts of reciprocity and reprisal. The articles would still be clear if those concepts were deleted and there would also be one less possible element of confusion.

38. While he had no objections in general to draft articles 10 to 13, he did have some doubts regarding article 11, paragraph 1 (*c*), which referred to obligations stipulated for the protection of individual persons irrespective of their nationality. If obligations

were stipulated for the protection of individuals in general, they should be maintained, but he wondered whether there might not be cases in which certain obligations were stipulated for the protection of individuals and in which suspension with regard to nationals of the author State should not be authorized. He had pondered the question but had not reached any definite conclusion.

39. Draft article 12 provided for two instances in which suspension of the performance of an obligation would not be allowed. In his view, both exceptions were justified.

40. Turning to draft articles 14 and 15, which dealt with the legal consequences of international crimes, he remarked that of the three kinds of legal consequences listed in paragraph (3) of the commentary to article 14 that were additional to the legal consequences of international delicts, only the third kind was dealt with in article 14. The succeeding paragraphs of the commentary said that the first kind was dealt with in draft article 5 (*e*) and that the second kind could only be determined by the international community as a whole if and when it recognized some internationally wrongful acts as constituting international crimes. Moreover, paragraph (5) of the commentary contained a reference to article 2, the commentary to which explained (paragraph (1)) that that article stipulated the residual character of the provisions of part 2 of the draft, and (paragraph (2)) that the predetermined legal consequences established by States when creating primary rights and obligations between themselves "may deviate" from those to be set out in part 2.

41. While following the logic of the Special Rapporteur's reasoning, he was not satisfied with the results. After going into some detail on the subject of the legal consequences of internationally wrongful acts which constituted delicts, the articles would, in fact, have very little to say about the legal consequences of international crimes. That might be a way out of the difficulty which had apparently arisen when international crimes had been mentioned in part 1 of the draft, thereby implying that their legal consequences had to be developed in part 2. But it was by no means sure that the Convention on the Prevention and Punishment of the Crime of Genocide[12] and the International Convention on the Suppression and Punishment of the Crime of *Apartheid*[13] or the future code of offences against the peace and security of mankind contained or would contain a determination by the international community as a whole of the legal consequences of the crimes with which they dealt. To adopt article 14 would be tantamount to accepting that the legal consequences of certain international crimes would be no more than those provided in the articles for international delicts; and that, in turn, would be tantamount to dropping the distinction established in part 1 of the draft between international delicts and international crimes.

42. The problem was, of course, a most difficult one. States were wary of accepting rules which progressive international law recommended but which could only be effective if they were applied by all States. Nevertheless, the Commission should at least attempt to tackle the problem of the legal consequences of international crimes; it should not limit itself to making a general reference to rules which the international community made on an *ad hoc* basis. The matter had to be studied far more carefully before it could be said that the Commission had done its duty with regard to that part of the draft articles.

43. He had no objection to the formulation of draft article 16.

44. With regard to section II of the report, dealing with part 3 of the draft articles, there was no doubt that, in legal logic, in order for the secondary rules of State responsibility to come into operation it had to be determined that a primary rule establishing an obligation had been infringed. Thus, if the States involved disagreed that there had been an infringement, their dispute had to be settled. If a system of settlement—either general or peculiar to the dispute in question—already existed between them, there was no problem. The question was whether the draft articles should provide for a separate system which would come into play if no other system was applicable.

45. In his report (A/CN.4/389, para. 8), the Special Rapporteur said that the establishment of a new dispute-settlement procedure of that kind could be said to amount to the creation of a multilateral compulsory dispute-settlement procedure relating to all (primary) obligations, present and future, under international law of States becoming parties to the convention on State responsibility. A settlement procedure of very wide scope concerning invalidity, termination, withdrawal from or suspension of the operation of a treaty was, of course, provided in articles 65 and 66 of the 1969 Vienna Convention on the Law of Treaties. If a procedure were established in respect of State responsibility, its scope would be even wider, and it was by no means certain that States would be prepared to accept such a procedure. A convention which did not include such a system of settlement would no doubt be incomplete and ineffective; but then the same could be said of all international law. On the other hand, the inclusion of a procedure of that kind might actually prevent the convention from being accepted.

46. The Special Rapporteur was in effect proposing that the Commission should try to follow a median course between those two risks. For his own part, he entirely approved of that approach. Awareness of the difficulties involved should not deter the Commission from preparing part 3 of the draft articles. The system proposed by the Special Rapporteur was highly ingenious in that it placed the author State in the position of having to take the initiative of applying the compulsory conciliation procedure. If the author State failed to react, it would, in effect, be accepting the injured State's contention that a breach of international law had been committed. The suggested procedure had a good parallel in the 1969 Vienna Convention. The Special Rapporteur should proceed on that basis.

---

[12] United Nations, *Treaty Series*, vol. 78, p. 277.

[13] *Ibid.*, vol. 1015, p. 243.

47. Mr. FLITAN said that the commentaries to draft articles 1 to 16 in the Special Rapporteur's excellent sixth report (A/CN.4/389) had the purpose not only of defining the the content of those articles, but also of responding to any objections which might have been made concerning them. In his next report, the Special Rapporteur could amend those articles as required and, if he deemed it necessary, expand part 2 of the draft: several members of the Commission had already wondered whether part 2, which appeared somewhat out of proportion with part 1 as provisionally adopted in first reading, would contain only the 16 articles submitted so far. He himself believed that part 2 as a whole should be re-examined and aligned with part 1.

48. As he had already pointed out (1890th meeting), he believed that the draft articles should contain a special provision on *jus cogens*, as did the 1969 Vienna Convention on the Law of Treaties. While that would not be without difficulties, especially as the content of *jus cogens* was not well known, it remained the case that the provision of draft article 12 (*b*) to the effect that articles 8 and 9 did not apply to the suspension of the performance of the obligations of any State by virtue of a peremptory norm of general international law was insufficient. A provision was needed which would prohibit States parties to the convention which the draft articles might one day become from weakening or strengthening peremptory norms of international law. Article 12 (*b*) was of limited application and did not seem to be directed at possible agreements between two States to modify the provisions of the draft articles.

49. It appeared to be time for the Special Rapporteur to come to an agreement with the Special Rapporteur for the topic of the draft Code of Offences against the Peace and Security of Mankind on the exact scope of each of their topics. For example, part 2 of the draft articles under examination contained an article 15 on the act of aggression, whereas part 1 contained article 19 which concerned not only the act of aggression but also other international crimes. Did the fact that the Special Rapporteur did not deal with the specific consequences of those crimes in part 2 of the draft mean that he was leaving that problem to the Special Rapporteur for the draft code of offences? Since that did not seem to be the case, why was article 15 not more developed? Why did the articles under consideration not apply to the international crimes mentioned in article 19, paragraph 3 (*b*), (*c*) and (*d*), of part 1, such as the establishment or maintenance by force of colonial domination; slavery, genocide and *apartheid*; or massive pollution? Part 2 of the draft should therefore be re-examined in the light of part 1.

50. Among the provisions in part 2, draft article 5 was extremely important since it provided, in a way, a definition of the injured State and was therefore the counterpart to the provisions of part 1 which defined the author State. As the Special Rapporteur had indicated (A/CN.4/389, para. 37), part 2 could be considered an example of operational research or systems analysis. The text of article 5 would benefit greatly from a distinction between the directly injured State and the indirectly injured State, a distinction raised by several members of the Commission. It seemed to be generally accepted that a breach of an international obligation could have different legal consequences for different States and so justify different claims. Account must therefore be taken of the seriousness of the injury which a particular internationally wrongful act caused to each State. For example, when a State was the victim of aggression, the interests of the international community as a whole were injured, but it was obvious that the State against which the aggression was directed was particularly injured and should enjoy more rights.

51. Referring to Mr. McCaffrey's proposal concerning human rights, he said that the purpose of part 2 of the draft was not to define the primary rules and indicate which situations should be added to those covered in article 19 of part 1 or other articles, but merely to define the secondary consequences. The proposal in question concerned part 1 of the draft and could be submitted again when that part was examined in second reading. It might, however, give rise to difficulties in that States might invoke certain prerogatives or pretexts in order to commit a breach of international law.

52. With regard to draft article 5, subparagraph (*a*), he felt that rights appertaining to a State by virtue of a customary rule of international law and rights arising from a treaty provision for a third State could better be mentioned in separate provisions. In paragraph (5) of the commentary to article 5, it was recalled that article 38 of the Vienna Convention on the Law of Treaties envisaged the possibility that a rule set forth in a treaty might become binding upon a third State as a customary rule of international law, recognized as such. Did the Special Rapporteur intend to limit himself to mentioning that question in the commentary or did he wish to see it reflected in article 5? Whatever the case, the eventuality mentioned in paragraph (5) of the commentary did not seem to follow from article 5, subparagraph (*a*). Furthermore, it was hard to tell how far the reference to a right arising from a treaty provision for a "third State" meant one State or a group of States. It would be helpful if the Special Rapporteur could provide some clarification on that point, which had long exercised learned writers. There were also a number of drafting problems which required attention, such as the reference in subparagraph (*a*) to "an infringement of a right" and the reference in subparagraph (*b*) to "the breach of an obligation". With regard to subparagraph (*b*), he found it hard to accept the apparent assertion that judgments or other binding decisions of international courts or tribunals were opposable *erga omnes*.

53. Subparagraph (*d*) (i), (ii) and (iii) seemed to overlap and all to settle the same question. Furthermore, subparagraph (*d*) (iii) concerned a notion—that of "collective interests of the States parties"—which required clarification. The Special Rapporteur was certainly right in saying, in paragraph (21) of the commentary to article 5, that multilateral treaties could recognize or create a collective, as distinct from a merely common or parallel, interest, but that interest must be provided for *expressis verbis*.

54. The situation envisaged in subparagraph (*e*), in which the internationally wrongful act constituted an international crime, should be dealt with in more detail. While the possibilities covered in the preceding subparagraphs of the article were all based on the source of the obligations, it was based on the seriousness of the internationally wrongful act.

55. With regard to draft article 6, he agreed with Mr. Calero Rodrigues that the introduction to paragraph 1 could be more cogently drafted: perhaps it could mention the "rights" available to the injured State. Paragraph 1 (*a*) concerned the very special case of the release of persons and return of objects held and appeared to be based on recent events which, despite their seriousness, should be considered with a certain detachment. Perhaps it was not absolutely necessary. Paragraph 1 (*d*) was unacceptable in its current form, for its effect would be to require guarantees in the event of the slightest offence by one State against another. Perhaps the provision should be limited to crimes or to certain crimes and certain offences.

56. Finally, he was inclined to agree with Mr. Calero Rodrigues that draft article 7 was completely unnecessary. It seemed to have been prompted by the recent events to which he had already alluded and concerned a situation covered by article 6, paragraph 2. While it was normal that the Commission should have in mind, in approaching the topic under consideration, the serious events to which article 7 referred, those events did not warrant the drafting of a special article.

The meeting rose at 6.05 p.m.

1893rd MEETING

Tuesday, 4 June 1985, at 10.25 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

Welcome to the participants in the International Law Seminar

1. The CHAIRMAN welcomed the participants in the twenty-first session of the International Law Seminar and expressed the hope that attendance at the Commission's meetings would prove interesting and useful to them and would enhance their own future contribution to the dissemination and development of international law.

Programme, procedures and working methods of the Commission, and its documentation

[Agenda item 10]

MEMBERSHIP OF THE PLANNING GROUP OF THE ENLARGED BUREAU

2. The CHAIRMAN said that the Enlarged Bureau had met that morning and had recommended that the Planning Group should be composed of the following members: Mr. El Rasheed Mohamed Ahmed (Chairman), Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. Francis, Mr. Huang, Mr. Jacovides, Mr. Koroma, Mr. Malek, Mr. Njenga, Mr. Reuter, Mr. Roukounas, Mr. Thiam, Mr. Tomuschat and Mr. Ushakov. The Group would be open-ended and any member of the Commission interested in some aspect of its work would be welcome to participate. It was particularly hoped that the special rapporteurs would make themselves available when the Group considered matters relating to their topics. The first meeting of the Planning Group would be held in the afternoon of 6 June 1985. If there were no objections, he would take it that the Commission agreed to the Enlarged Bureau's recommendation.

It was so agreed.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

3. Mr. FLITAN, continuing the statement he had begun at the previous meeting, said that the subject-matter of draft articles 8 and 9 relating to the new rights of the injured State lay somewhat outside that of reparation strictly speaking, which was dealt with in draft articles 6 and 7. Unlike those two articles, which were of a "fixed" character, articles 8 and 9 constituted, as it were, an adjustable scale. Each was concerned with a category of measures that could be taken by the injured State against the State which had committed the internationally wrongful act: article 8 with measures by way of reciprocity and article 9 with measures by way of reprisal. In the course of

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

the discussion it had become apparent that there was a need to define what, at the lower end of the scale of measures that one State could take in respect of another, constituted measures by way of reciprocity. In that connection, a distinction was required between measures by way of reciprocity and measures deriving simply from the interpretation of treaties. In his opinion, it was just as important to determine, at the upper end of the scale, the limit beyond which the injured State could not go. That upper limit was in fact recourse to armed reprisals, which should be expressly prohibited in the draft articles.

4. With reference more particularly to article 8, the draft articles in their current form made it quite difficult to draw a precise picture of the concept of a measure of reciprocity. The only statement on that point contained in article 8, namely that obligations whose performance could be suspended by the injured State had to correspond to or be directly connected with the obligation breached, was inadequate. The question whether a measure was one of reciprocity could not be determined in all cases with the help of that definition. As pointed out during the discussion, it was sometimes difficult to establish the dividing line between measures by way of reciprocity and measures by way of reprisal. Indeed, the Special Rapporteur recognized as much in paragraph (3) of the commentary to article 8 by stating that the justification for countermeasures in either category was connected with the effect of the internationally wrongful act, but then going on to say that the ultimate purpose of both types of measures must be a restoration of the "old" primary legal relationship, or, in other words, that elements of proportionality and of interim protection were inherent in measures by way of reciprocity. Perhaps those points made by the Special Rapporteur should be incorporated in the draft in order to shed further light on articles 8 and 9. After all, the draft was not addressed to legal experts alone but was intended to be applied by State authorities.

5. In paragraph (5) of the commentary to article 8, the Special Rapporteur observed that there was no reciprocity in the primary relationship and, therefore, no justification for the suspension of the performance of obligations by way of reciprocity if the latter obligations were obligations by virtue of a peremptory norm of general international law. In that connection, a cross-reference was made to article 12 (*b*), under which articles 8 and 9 did not apply to the suspension of the performance of the obligations of any State by virtue of a peremptory norm of general international law. As he had already had occasion to point out (1892nd meeting), that provision was not enough to replace a separate article in part 2 of the draft articles on the peremptory norms of general international law.

6. Paragraph (7) of the commentary to article 8 made a point in connection with article 12 (*a*), namely that the obligations of a receiving State regarding the immunities to be accorded to diplomatic and consular missions and staff were not a counterpart of the fulfilment of the obligations of the sending State, its missions and their staffs relating to the proper exercise of their functions. It was then explained that, while declarations of *persona non grata* and the severance of diplomatic and/or consular relations were a legitimate response to breaches of those obligations, the immunities themselves had to be respected. That idea should be incorporated in articles 7 and 8 in order to make them easier to apply.

7. Under draft article 9, the injured State was entitled, by way of reprisal, to suspend the performance of "its other obligations" towards the State which had committed the internationally wrongful act. During the discussion it had been deemed necessary to make an express reference to article 8 in order to clarify the nature of those other obligations. Furthermore, it was apparent that the measures envisaged in articles 8 and 9, respectively, must be ranked in some way. It was true, however, that measures by way of reciprocity did not always precede measures by way of reprisal and that, because of their ultimate purpose, measures by way of reprisal had to be resorted to first. Several members had already remarked that the statement in paragraph 2 of article 9 that the exercise of the right of reprisal by the injured State should not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed was far too vague. For his own part, he thought that to introduce the concept of the seriousness of an internationally wrongful act was to bring in a factor that was extremely difficult to measure.

8. A reading of draft article 10 gave the impression that the scales were being tipped in favour of the author State, an impression that was indeed gained from the whole of part 2 of the draft. Under paragraph 1 of article 10, the injured State could not take any measure in application of article 9 until it had exhausted the international procedures for peaceful settlement of the dispute available to it. Paragraph (5) of the commentary to article 10 implied that an agreed dispute-settlement procedure existed in all cases. Moreover, in paragraph (10) of the commentary the Special Rapporteur said that the fact that a compulsory third-party dispute-settlement procedure did not provide for a final and binding decision by the third party did not take away the compulsory character of the procedure itself, something that did not by any means follow from article 10. The question was, in that instance, why the compulsory character of the procedure itself should be maintained.

9. Draft article 11 also gave the impression of tipping the balance in favour of the author State inasmuch as it imposed conditions and restrictions upon the injured State. Did the rights of the injured State have to be so limited that it could not take the smallest measure of non-performance of its obligations when such non-performance would affect the interests of the other States parties to the multilateral treaty concerned? Was there not a hierarchy, or ranking, of the interests involved, and might not the interests invoked by the other States parties be quite minor compared with those of the injured State? As to article 11, paragraph 1 (*b*), he wished to emphasize, as he had done at the previous meeting in connection with draft article 5, that the phrase "collective interests of the States parties to the multilateral

treaty" was very vague and confusing. It should perhaps be specified that they were the "collective interests of the States parties expressly provided for in the multilateral treaty". He had the same reservations which regard to the phrase "procedure of collective decisions" in paragraph 2 of article 11.

10. Draft article 12 (*b*) was inadequate and part 2 of the draft should contain a provision specifically on *jus cogens*. Subparagraph (*a*) should not, perhaps, be confined to the immunities to be accorded to diplomatic and consular missions and staff but should extend to all immunities recognized in all cases covered both by the relevant conventions codifying diplomatic and consular law[5] and by the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

11. In paragraph (4) of the commentary to draft article 13, the Special Rapporteur explained that the complete breakdown of the system established by a multilateral treaty as a consequence of an internationally wrongful act in relation to the obligations imposed by that treaty could not be lightly assumed and that the violation must be at least a "material breach" in the sense of the 1969 Vienna Convention on the Law of Treaties. Accordingly, the words "manifest violation" in the text of article 13 might well be replaced by "material breach".

12. Articles 14 and 15, although subject to improvements and drafting changes, were essential provisions and certainly had their place in the draft. In view of the difficulties of interpretation inherent in the concept of "the international community as a whole", it might be preferable to replace the expression "applicable rules accepted by the international community as a whole" in paragraph 1 of article 14 by the phrase "applicable rules of international law".

13. Under article 14, paragraph 2 (*c*), an international crime committed by a State entailed an obligation for every other State to join other States in affording mutual assistance in carrying out the obligations set out in the two preceding subparagraphs. The current wording of subparagraph (*c*) suggested that the other States must always give each other mutual assistance, but it did not seem that such an obligation existed in every case. In paragraph (9) of the commentary to article 14, the Special Rapporteur introduced the idea of regional action. That concept was ill-defined; it did not seem to be rooted in article 14 and, what was more, the question also arose whether the Commission should really consider cases of regional action. All action should be in conformity with general international law, and there was no call to give special consideration to regional action.

14. Draft article 15 was surprising in that it dealt only with the crime of aggression—undoubtedly the most serious of all international crimes—to the exclusion of the other international crimes referred to in article 19 of part 1 of the draft articles. Furthermore, all the secondary legal consequences of the acts covered by part 1 should be dealt with in part 2. Thus part 2 of the draft should, for example, deal with non-recognition of the acquisition of territory or of a special advantage resulting from an act of aggression.

15. In connection with draft article 16 (*b*), he wondered whether it was really necessary to deal with the rights of membership of an international organization; the draft should perhaps ignore those specific rights. He also wondered whether, if article 16 were maintained, article 3 would not become redundant.

16. With regard to a possible part 3 of the draft on the "implementation" (*mise en œuvre*) of international responsibility and the settlement of disputes, he feared, in the light of the comments made by Mr. Reuter (1891st meeting), that such a part 3 might give rise to new difficulties. The success of the draft articles was of extreme importance to the international community and to mankind as a whole and should not be jeopardized by the introduction of the concept of compulsory settlement of disputes. It would be wiser to display moderation with regard to the implementation of international responsibility.

17. Mr. THIAM said that his initial remarks on the Special Rapporteur's concise, abstract, yet extremely well thought out sixth report (A/CN.4/389) would relate chiefly to the scope of the topic of State responsibility, on the one hand, and of the draft Code of Offences against the Peace and Security of Mankind, for which he was the Special Rapporteur, on the other. He believed it necessary to revert to that question because other members had referred to it on several occasions. Moreover, on reading the sixth report, he had realized that some articles dealt with offences which, by their nature, fell more within the purview of the draft code of offences than State responsibility as viewed by the Special Rapporteur.

18. Particular attention would have to be paid, therefore, if not to finding a solution, at least to outlining solutions for defining the two topics. But when all was said and done, the problem of delimitation arose only because part 1 of the draft articles on State responsibility, instead of being confined to the traditional scope of responsibility—in other words, reparation for injury, a study of responsibility in terms of its material consequences, of its patrimonial content, i.e. a search for a balance between the injured State and the author State—introduced in article 19 the new concept, at least as far as State responsibility was concerned, of an international crime. Accordingly, it was necessary to decide which international crimes came under the draft Code of Offences against the Peace and Security of Mankind and then consider the treatment to be given to other international crimes. The Special Rapporteur for the topic of State responsibility was quite aware of that fact and noted, in paragraph (12) of the commentary to draft article 14, that "the commission of an international crime does not necessarily affect the maintenance of international peace and security". The Special Rapporteur was therefore admitting that one domain, namely offences against the peace and security of mankind, should be separated from international crimes as a whole and be given special treatment if duplication was to be avoided.

19. A problem then arose: the requisite criterion. The Commission had amply discussed the criteria for

[5] See 1904th meeting, footnote 5.

characterizing an offence as one against the peace and security of mankind. It had decided that the criterion of seriousness was not sufficient, and he himself had proposed another more objective one, which was the subject-matter of the obligation breached. Article 19 of part 1 of the draft articles on State responsibility set forth a number of obligations concerning interests whose protection was extremely important to mankind: the obligations to maintain international peace and security, to safeguard the right of self-determination of peoples, to safeguard the human being and to safeguard and preserve the human environment. He had at first taken the view that the crimes resulting from breaches of one of those four basic obligations fell within the purview of the draft Code of Offences against the Peace and Security of Mankind. But what about other international crimes, those which neither the Special Rapporteur for State responsibility nor he himself had considered as falling within his respective topic? They would still have to be dealt with. He would willingly have included them in the framework of the draft code of offences, but did not believe he could do so because of the wording of the topic which he had been assigned. It remained to be seen whether the Special Rapporteur for State responsibility could deal with the matter.

20. In that connection, it was difficult to understand why there was such an imbalance between part 1 and part 2 of the draft articles. Part 1 dealt, in article 19, with international crimes, when it could quite easily have been limited to such aspects of responsibility as reparation—*restitutio in integrum*, indemnification, compensation, and so on—and the draft articles would then have been more consistent. Accordingly, it would have been logical to set out in part 2 all the consequences of those international crimes, at least the international crimes which did not fall within the draft Code of Offences against the Peace and Security of Mankind. Yet it seemed that the Special Rapporteur had been sometimes too timid and sometimes too bold.

21. The consequences specified in draft article 14 were particularly mild. The first part of paragraph 1 was very broad and, at the same time, very vague; the second part was also much too vague and, indeed, difficult to understand: if the rules in question were applicable and accepted by the international community, their source lay not in the articles on State responsibility but in other rules. As to the obligations enumerated in paragraph 2 (*a*), (*b*) and (*c*), they were very little in terms of the international crime which was supposed to have given rise to them. Was it really so much to ask of a State not to recognize as legal the situation created by an international crime? Was it not the least that could be asked of the other members of the international community not to render aid or assistance to the author State in maintaining the situation created by an international crime? What was the point of the mutual assistance referred to in subparagraph (*c*), since the obligation in subparagraph (*a*) not to recognize as legal the situation created by the international crime called for no mutual assistance, and the obligation in subparagraph (*b*) was a negative obligation that did not call for any mutual assistance either? Again, paragraph 3 related to obligations under the Charter of the United Nations and introduced nothing particularly new. In his opinion, an international crime should entail greater and more serious consequences than those of an ordinary wrongful act, consequences which were, moreover, referred to in the commentary to article 19 of part 1 of the draft.[6]

22. On the other hand, some of the consequences went beyond all expectations. Draft article 15 covered aggression, but aggression fell naturally within the scope of the draft Code of Offences against the Peace and Security of Mankind. The fact that article 19 of part 1 cited aggression as an example did not mean that it should be mentioned in part 2; if it was to be mentioned, so should all the other crimes enumerated in article 19, as well as all the offences against the peace and security of mankind. Similarly, draft article 16 was far too bold, since it spoke of belligerent reprisals, which did not form part of the subject-matter.

23. Thus the Special Rapporteur sometimes took one step forwards and sometimes one step backwards, which did not make for an accurate idea of the precise area covered by the topic. He should therefore attempt in part 3 of the draft, which would perhaps embody the special criminal law on the matter, to study a number of international crimes which did not fall within the purview of the draft Code of Offences against the Peace and Security of Mankind, so as to justify the existence of article 19 in part 1.

24. With reference to the settlement of disputes, the Special Rapporteur stressed in his sixth report the fact that the international community should elaborate appropriate procedures for punishing offences against the peace and security of mankind, but did not propose any particular procedure. It was a wise attitude, for at the current stage the Commission did not know whether an international criminal jurisdiction would be created—a possibility that should not be discarded *a priori*—or whether States would be competent to punish international crimes. Yet the Special Rapporteur was proposing that disputes regarding the interpretation or application of article 19 of part 1 of the draft should be referred to the ICJ. Did that not mean that States would be deprived of the power of interpretation—in which case he failed to see, *a priori*, on what basis—and that the international criminal jurisdiction, if it were created, would also be in the same position? If the draft Code of Offences against the Peace and Security of Mankind took the form of a convention, would the terms for the settlement of disputes regarding the convention be subordinated to a provision which established in advance the competence of the ICJ? In his view, that would be going too far.

25. Sooner or later the Commission would have to decide whether the matter of international crimes as a whole came under the draft Code of Offences against the Peace and Security of Mankind, in which case the draft code would have to be expanded, or under the topic of State responsibility. But it would be unthinkable at the present time to leave aside a number of

[6] *Yearbook ... 1976*, vol. II (Part Two), pp. 96 *et seq.*

international crimes which were not offences against the peace and security of mankind but which were none the less extremely serious.

26. Draft articles 8 and 9 were very important and he endorsed the remarks made about the distinction between reciprocity and reprisals, one that was difficult to establish precisely. Generally speaking, reciprocity entailed two obligations which had some correlation, in other words when they were synallagmatic in character, and reprisals occurred when other obligations intervened which were not directly linked to the obligation breached. Yet in terms of the goal sought, reciprocity sought in theory to ensure a balance, whereas reprisals sought to bring pressure—constraint—to bear on another State which had not fulfilled its obligations. But were there not some measures in the nature of reciprocity which, in fact, had more in common with constraint? For example, under a convention between two States for the supply of gas against the supply of capital goods, the State which was to supply the gas, in the light of short-term and continuous needs, might suspend its supply because it had not received the capital goods, and it was then plain that, even in the case of a synallagmatic convention, the pressure brought to bear by one of the two States was none the less much greater than the pressure exerted by the other. Hence it seemed preferable to indicate, in one single article, that the injured State could take a particular measure, without speaking of measures of reciprocity or measures of reprisal, or simply to delete the words "by way of reciprocity" from article 8 and the words "by way of reprisal" from article 9.

27. He unreservedly endorsed the comments made by Mr Calero Rodrigues (1892nd meeting) regarding the exhaustion of internal remedies. In principle, aliens had access, in the context of the economic and social activities that they normally conducted in a country, to the courts of that country in the event of injury suffered, and it was therefore logical in such cases to require prior exhaustion of internal remedies. Furthermore, he wondered whether the rule on remedies was a substantive or a procedural rule. In part 1 of the draft, it was posited as a substantive rule, because exhaustion of internal remedies in itself was regarded as creating a breach of the obligation. That might be true, but for his part he believed it to be a procedural rule, a question that should be discussed again on second reading of part 1.

28. Article 7 should in his opinion be deleted, for it made no great contribution to the draft. He would await further clarification before commenting on the other articles.

29. Mr. HUANG congratulated the Special Rapporteur on the remarkable progress achieved on the topic of State responsibility, one of the most important and difficult questions in international law. It had long been a virtually uncharted area but, during the previous 20 years, the new concepts of *jus cogens* and of an international crime by a State had emerged and had contributed to the slow but steady process of codification.

30. Part 2 of the draft, which served as a link between part 1 and part 3, dealt with the legal consequences of State responsibility, a little-explored area where codification was particularly difficult. In his six reports to date, the Special Rapporteur had demonstrated the importance he attached to new developments in international law and the stage had now been reached when it was possible to visualize what the edifice of responsibility under construction would ultimately be like. The Commission's fruitful discussions of recent years had further strengthened the basis on which that edifice was to stand. The desirability of early completion of the draft had been emphasized and the views expressed in the Sixth Committee of the General Assembly had revealed how much importance the international community attached to the topic. Given the current favourable climate, the pace of work on it could be expected to quicken.

31. It was important, however, not to lose sight of the difficulties. How, for instance, would a proper balance be struck in the draft between the weight to be given, on the one hand, to the protection of the injured State and the prevention of the commission of an internationally wrongful act, and, on the other, to the need to avoid over-reaction against the author State and escalation of international tension? How would the complex relationship between the present topic, the draft Code of Offences against the Peace and Security of Mankind, the 1982 United Nations Convention on the Law of the Sea,[7] the 1969 Vienna Convention on the Law of Treaties and the United Nations system be handled appropriately? How would the régimes governing international crimes and international delicts be differentiated and established in terms of their legal consequences? There seemed to be no easy solutions to those and other questions. Nevertheless, he trusted that the Commission would be able to complete the first reading of part 2 of the draft articles before the end of members' current term of office.

32. He had to leave Geneva shortly and had not had time to study all the voluminous materials on the topic, so his comments would be of a preliminary nature.

33. It had rightly been said that draft article 5 was a key article. Its purpose was to identify or define "injured States", which could be likened to actors without whom the drama could not be staged. Just as, under part 1 of the draft, the status of "author States" was determined by reference to the international obligation breached, the identity of "injured States" was based on the rights infringed, for, as the Special Rapporteur explained in paragraph (3) of the commentary to article 5, in many cases the obligation of one State was merely the mirror image of the right of another State.

34. With regard to the formulation of article 5 he had just one query: was the list of five situations in which a State could be regarded as an injured State exhaustive? In paragraph (7) of the commentary, the Special Rapporteur had linked the right of a State, the infringement of which made the State in question an injured State, to the primary rules or "sources" of such rights. According to Article 38 of the Statute of

[7] See 1890th meeting, footnote 6.

the ICJ, there were two main sources, treaties and international custom, and both were covered in draft article 5. There might, however, be other sources which, though controversial, could engender rights and obligations. He therefore wondered whether it would be possible to establish a criterion for injured States that was wide and flexible enough to cover all the situations likely to produce injured States, in addition to the specific situations referred to in article 5. The Drafting Committee might, for instance, wish to consider inserting, before subparagraph (*a*), some wording such as: "... a State whose rights have been infringed or affected by a breach of an international obligation, including, *inter alia*:".

35. The definition of the injured State in the case of an international crime in subparagraph (*e*) was a logical development of article 19 of part 1 of the draft and correctly embodied the *erga omnes* nature of such a crime. But the problem was rather one of the consequences that might flow from the definition. The definition did not, for instance, answer the question of what difference, if any, existed between the rights and obligations of various injured States. If need be, that question could be dealt with in draft article 14.

36. The basic idea underlying draft article 6 was well conceived and the elements of the new obligations of the author State towards the injured State or States corresponded, broadly speaking, with international practice. There might, however, be certain other elements which should be included in the content of those new obligations. He had some misgivings about the formulation of article 6, which, although it related to the new obligations of the author State, was couched in terms of the rights of the injured State. It did not stipulate whether the author State had an obligation to comply with a request made by the injured State under paragraph 1 of the article. In his view, it would be advisable to refer expressly to the new obligations of the author State. That might be done by specifying that the injured State could require the State which had committed an internationally wrongful act to take the steps listed in paragraph 1 (*a*), (*b*), (*c*) and (*d*) and that the latter State "shall" do so, which would be more in line with the purpose of the article.

37. It had been suggested that there was no justification for draft article 7, since a breach of an obligation regarding the treatment of aliens was a particular type of internationally wrongful act whose consequences were fully covered in article 6. His own attitude was flexible and if the Commission as a whole felt that article 7 should be retained, he could agree.

38. Draft articles 8 and 9 concerned the right of the injured State to take countermeasures by way of reciprocity and by way of reprisal: the Special Rapporteur's very useful analysis had done much to clarify the meaning of those two distinct but closely related concepts. In their current form, both articles were acceptable in principle, though some improvements might be needed.

39. Draft article 10 raised certain doubts. Paragraph 1 provided that the injured State could not take countermeasures by way of reprisal until it had exhausted the international procedures for peaceful settlement of the dispute available to it. The problem lay mainly in the terms "exhausted" and "available". In the case of a treaty régime such as that provided for under the Vienna Convention on the Law of Treaties, or of a bilateral treaty which included a dispute-settlement procedure, the terms of article 10 could perhaps be applied with little difficulty because the availability or otherwise of such procedures could easily be ascertained. In other cases, however, it might not be easy to determine whether such procedures were available or not. It would, of course, always be possible to refer to Article 33 of the Charter of the United Nations and to hold that the procedures for dispute settlement provided for therein were always available. Even so, there remained the problem of the word "exhausted". Did the injured State have to approach the author State and suggest that it apply all the procedures? What if the author State refused to negotiate in good faith? What if one party, but not the other, had accepted the jurisdiction of the ICJ. For that matter, did the injured State have to accept the jurisdiction of the ICJ in order to comply with the requirement of exhaustion of procedures? All those questions required clarification, but, even without them, the provisions of article 10 could still operate as an undue restraint on the injured State. Instances might well occur in which it would be too late for the injured State, after it had followed all the procedures required, to exercise its right of reprisal in any meaningful way, so that it might find itself in an irreversible situation. Article 10 therefore required reconsideration, although he appreciated that, later on, part 3 of the draft might well dispel his doubts.

40. He was in no way opposed to the role to be played by dispute-settlement procedures in the draft articles. Indeed, peaceful settlement of international disputes was a fundamental principle of modern international law and could well prove indispensable in a future convention on State responsibility. The concern with preventing over-reaction against the author State and escalation of tension should not, however, unduly restrict the proper exercise of legal rights by the injured State.

The meeting rose at 1 p.m.

1894th MEETING

Wednesday, 5 June 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) **(A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf. Room Doc.7)**

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. HUANG, continuing the statement he had begun at the previous meeting, said that the purpose of draft article 12 was to place limitations on the application of articles 8 and 9. With regard to subparagraph (*a*) of article 12, his response to the Special Rapporteur's proposition in the second sentence of paragraph (7) of the commentary to draft article 8 would be that declarations of *persona non grata* and the severance of diplomatic relations were not appropriate remedies. The former often prompted similar reactions on the part of the author State, while the latter affected both States equally, so that the injured State remained in a less advantageous position. As a diplomat, he sympathized with those who might be the victims of violations, but it was necessary to be realistic and to be satisfied with what had been accorded.

2. Article 14 was the most difficult and important article in part 2 of the draft. He accepted the basic idea embodied in it and agreed that it was a logical corollary of the recognition of the concept of an international crime. As the Special Rapporteur had pointed out in paragraph (1) of the commentary, the distinction drawn in article 19 of part 1 of the draft articles between "international delicts" and "international crimes" made sense only if the legal consequences of the latter differed from those of the former. The Special Rapporteur had accordingly identified three kinds of additional legal consequences (paragraphs (3) to (6) of the commentary), which he himself accepted.

3. There was, however, room for improvement in the formulation of article 14. As he had already pointed out, the definition in subparagraph (*e*) of article 5 could cause a problem: for the status of an "injured State", which that definition conferred on all States other than the author State, would entitle them to invoke the rights provided for in draft articles 6 to 9. Common sense dictated that that could not be right. Although such States might all be termed "injured States", the degree of injury and the extent to which their rights and interests were affected could well differ, as had been recognized by the Special Rapporteur in paragraph (8) of the commentary to article 14. The footnote to paragraph (2) of the commentary also seemed to distinguish between two types of injured State in terms of the right to request compensation. A distinction between injured States was implicit in the formulation of article 14 inasmuch as paragraph 1 referred to States that were direct victims of an international crime and paragraph 2 to States that were not. It would be preferable, in his view, to make the distinction and provide expressly for the rights and obligations of the two types of injured State. Paragraph 1 should apply only to States that had suffered direct damage from, or were most affected by, an international crime, and the rights resulting from an international crime should be accorded to other injured States or third States only to the extent consistent with the damage they had suffered or the degree to which they had been affected. The unity of the definition in article 5, subparagraph (*e*) would thus be preserved and the desired result concerning the rights of injured States achieved. Difficulties might, of course, arise because it was not always easy to determine which were the most affected, or directly affected, States; but in many cases those States would be readily identifiable.

4. While paragraph 2 of draft article 14 was acceptable to him in general, consideration should be given to the possibility of adding some further obligations of a positive nature, particularly in view of the comments made in the Sixth Committee of the General Assembly (A/CN.4/L.382, para. 551) to the effect that the obligations not to act, provided for in paragraph 2 (*a*) and (*b*), should be supplemented by an obligation to act. The utmost caution was, however, required; a hastily drafted provision, divorced from reality, would be of no practical use.

5. As to draft article 15, he agreed entirely that there should be a separate provision on the legal consequences of aggression; he also agreed in general with the substance of the existing formulation, for the reasons stated in the commentary. It had been suggested that provision should be made for the non-recognition of any advantages accruing to an aggressor as a result of aggression and for certain specific rights of the injured State, such as self-defence and collective sanctions. There would be no harm in such additions if the sole purpose was to emphasize the importance and relevance of those principles. On the whole, the provisions of articles 14 and 15 were inadequate and some further expansion might be necessary.

6. Draft article 16 was a safeguard clause; he was not certain whether the enumeration was exhaustive and would suggest that the words "*inter alia*" be added after the words "in regard to" in the opening phrase.

7. He agreed that part 3 of the draft articles should deal with the implementation of international responsibility and the settlement of disputes. The three parts of the future convention should constitute a whole, each part being closely related to the others. Violations of the primary rules in part 1 would trigger off

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

the implementation of the legal consequences provided for in part 2, while any disputes arising out of the implementation process would bring into play the procedure to be elaborated in part 3.

8. He also agreed that the central purpose of part 3 of the draft should be the elaboration of an appropriate international régime for the peaceful settlement of disputes concerning the interpretation and application of the future convention on State responsibility. The aim of the dispute-settlement régime should be to make use of existing codification instruments such as the 1982 United Nations Convention on the Law of the Sea[5] and the 1969 Vienna Convention on the Law of Treaties. While due account should be taken of special merits, no particular model should be adopted to the exclusion of others. It was necessary to bear constantly in mind that the future régime, unlike that under other conventions, was likely to be of a rather general nature. As the Special Rapporteur had pointed out in his sixth report (A/CN.4/389, para. 8), it could involve the creation of a multilateral compulsory dispute-settlement procedure, whereas the régimes under other conventions were usually confined to the specific areas they covered. Such factors should influence the elaboration of part 3 of the draft. One essential element of the future dispute-settlement régime should be a well-structured equilibrium. For it was necessary, on the one hand, to prevent nullification or diminution of the purpose and effectiveness of the future convention through lack of effective procedures for dispute settlement, and, on the other hand, to avoid reducing the acceptability of the future convention by making the dispute-settlement régime too rigid.

9. With the presentation of the articles in part 2 of the draft and the submission of an outline of part 3, some light had appeared through the uncertainty to which Mr. Reuter had alluded (1891st meeting). Despite the difficulties that lay ahead, he was optimistic about the future prospects.

10. Mr. FRANCIS joined previous speakers in thanking the Special Rapporteur for his sixth report (A/CN.4/389), the excellent quality of which was due to his undoubted expertise and to the fact that he had followed the Commission's guidelines. Part 2 of the draft derived its raison d'être from part 1, so that its content naturally reflected the codification element of that part. All members of the Commission would therefore be familiar with the basic concepts of reprisals, countermeasures and proportionality introduced in part 2. It was the task of the Commission to organize those concepts to meet the requirements of an acceptable draft convention, and the Special Rapporteur's sixth report provided a sound basis on which to proceed.

11. Expressing his support for the main thrust of the draft articles, he first noted that, with regard to article 5, subparagraph (*b*), and paragraph (10) of the commentary to that article, Mr. McCaffrey (1892nd meeting) had raised a question concerning the binding nature of Article 41 of the Statute of the ICJ relating to provisional measures of protection. Without going into the substance of Mr. McCaffrey's point, he wished to express a reservation on his apparent position in the matter, bearing in mind the impact of Article 59 of the Statute of the ICJ and the fact that provisional measures were also dealt with by the Security Council.

12. He also wished to echo Mr. Huang's query (1893rd meeting) concerning the general scope of draft article 5, which had reminded him of the judgment of the ICJ of 21 December 1962 in *South West Africa Cases, Preliminary Objections*,[6] a judgment that had been severely criticized and was, in his humble submission, wrong. Specifically, he would ask whether subparagraph (*b*) of article 5, as drafted, would cover the situation that had obtained in those cases. Leaving aside any question of *apartheid* or self-defence, which would in any event be covered by subparagraph (*e*) of article 5, would any former State party to the Covenant of the League of Nations, of which the Mandate for South-West Africa formed an integral part, be able to initiate proceedings, on the basis of article 5, and to submit either that the arming of the indigenous inhabitants of Namibia constituted a breach of the Covenant and of the Mandate, or that there had been failure to maintain the minimum standard of treatment which any nation was required to guarantee its citizens? His own view was that it would not be able to do so. He therefore agreed on the need to consider carefully whether all categories of injured States would be covered. The Drafting Committee might wish to consider some formulation whereby, if the obligation breached would defeat any of the objects of the treaty, the State party affected would be an injured State.

13. Mr. Flitan, who had raised a point on *erga omnes* obligations (1892nd meeting), would no doubt agree that there were other multilateral situations covered by a treaty, besides *erga omnes* situations, in which the directly affected State was in quite a different position from the other States parties to the treaty. The Special Rapporteur had recognized that point in his fourth report[7] and presumably, therefore, intended to deal with the question of the rights of the directly affected party *vis-à-vis* the other parties to the treaty at an appropriate point in the commentary.

14. In regard to draft article 6, he fully supported the suggestion that the opening clause should be more positive about the rights of the injured State. He would also suggest that a fact implicit in the content of the article, namely that the author State had obligations concerning the elements enumerated in the article, should be re-emphasized. He also agreed that paragraph 1 (*a*) of article 6 should be couched in general terms.

15. As to paragraph 1 (*b*), he recognized that there was room for it in the draft because, as the Special Rapporteur had pointed out, it was much wider in scope than article 22 of part 1, on the exhaustion of local remedies. In his view, however, it was too rigid in its reference to internal law, since there might not

[5] See 1890th meeting, footnote 6.

[6] *ICJ Reports 1962*, p. 319.

[7] *Yearbook ... 1983*, vol. II (Part One), p. 11, document A/CN.4/366 and Add.1, para. 56.

in fact be any specific provisions in internal law. In some countries, certain treaties were ratified before legislation was promulgated, even where internal legislation was required to implement them. In any event, even if the treaty had been ratified, the State concerned might sometimes have to use means other than its own legislative provisions to comply with its international obligations. Consequently, while he supported paragraph 1 (*b*), he considered that it, too, should be couched in more flexible terms, with a view to ensuring that the remedies could be applied *proprio motu*, whether they were available under internal law or otherwise. Indeed, the Special Rapporteur had recognized that need by his reference to administrative "remedies" in paragraph (4) of the commentary to article 6. The Drafting Committee might therefore wish to examine article 6, paragraph 1 (*b*), with a view to introducing an element of flexibility.

16. Since the author State might be unwilling to give guarantees, he wondered whether paragraph 1 (*d*) of article 6 should perhaps be redrafted to provide that the injured State had a right to call for the establishment of safeguards or for measures to prevent a recurrence of an internationally wrongful act.

17. Unlike some members, he considered that article 7 did have a place in the draft, because article 22 of part 1 made it quite clear that, for the international responsibility of the author State to be engaged, local remedies must have been exhausted. Unless there were good reasons for omitting the article, therefore, he would prefer to include it.

18. He supported draft article 8 and also draft article 9, which was of a more serious nature so far as countermeasures were concerned. Regarding the interplay of draft articles 9 and 10, it had been asked whether countermeasures would be appropriate in certain circumstances where the case was *sub judice*. The Special Rapporteur had referred, in his fourth report, to the possibility of excluding the maintenance of reprisals from the moment a dispute was *sub judice*,[8] and he would presumably be mentioning that point in the commentary in due course.

19. The expression "belligerent reprisals", used in draft article 16, was a term of art and must not be confused with the wording of article 9. The Drafting Committee might wish to consider including some explanation in the commentary or elsewhere.

20. As to the difficult draft articles 14 and 15, Mr. Reuter (1891st meeting) had rightly said that matters on which consensus could more easily be reached should be dealt with first. It was necessary to be selective at the current stage and not to hinder progress by spending too much time on the most difficult areas. Mr. Thiam (1893rd meeting) had suggested that the draft should go further than it did in regard to the legal consequences of the breach of an obligation *erga omnes*. He was right in principle, but not entirely so. Had there been no draft Code of Offences against the Peace and Security of Mankind, but only article 19 of part 1 of the draft on State responsibility, the Special Rapporteur would certainly have had to provide for the full range of consequences flowing from the article. But as there was a direct overlap with the draft code, and as the General Assembly had agreed that the question of the attribution of criminal responsibility to States under the draft code should be postponed for the time being, it was not possible to go much further than the Special Rapporteur had done. In any event, there was enough material in articles 14 and 15 to provide the Commission with plenty of work on the delimitation of the boundaries between State responsibility and the draft code. Furthermore, he noted that the Special Rapporteur had referred to the international community's readiness to acknowledge that there were crimes and delicts so far as State responsibility was concerned and had rightly stated in his sixth report that such recognition entailed "certain deviations from the general rules concerning the legal consequences of internationally wrongful acts" (A/CN.4/389, para. 30). The Special Rapporteur had also indicated that the international community was cautious about taking a further step in regard to legal consequences. It would therefore be difficult for the Commission to proceed further until the question of the application of the draft code to State entities had been settled.

21. Another question to be decided if States were to be covered by the draft code, and bearing in mind that crimes of aggression were dealt with by the Security Council, was whether all offences other than aggression would be dealt with under the code. Again, he considered that it would not be possible at the current stage to do more than consider some aspects of *erga omnes* obligations pending a decision on the draft code. The rate at which the Special Rapporteur was progressing and the link between the two topics made it imperative for the Commission to expedite the elaboration of the draft Code of Offences against the Peace and Security of Mankind.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

22. Mr. BALANDA associated himself with the members of the Commission who had praised the sixth report of the Special Rapporteur (A/CN.4/389), which was extremely dense and offered much food for thought. He only regretted that the Special Rapporteur had not illustrated his remarks with specific examples. They were not lacking, either in doctrine or in case-law, and would undoubtedly have made it easier to follow his reasoning and to understand a text which was somewhat hermetic and might perhaps have been improved by clearer presentation.

23. The subject was highly important, for it affected the very life and functioning of States, which, like individuals, were always in contact with each other. Unfortunately, however, those contacts were not always peaceful and sometimes brought about clashes which engaged the responsibility of those involved. The Commission was fully aware of that, and should do everything possible to make its draft articles realistic and provide a set of rules acceptable to all States, whatever their political, economic and social systems.

[8] *Ibid.*, p. 20, para. 106.

24. Commenting on the draft articles submitted, he suggested that, in article 1, the words "committed by that State" should be replaced by the words "attributable to that State" in order to stress the fact that a State had international responsibility when an internationally wrongful act was attributable to it. Referring to the expression "legal consequences", he pointed out that the consequences referred to in the article were, of course, to be understood as consequences produced in the sphere of law. He therefore doubted whether it was appropriate to retain the adjective "legal", since the consequences of an internationally wrongful act did not constitute a legal act as such, in the technical sense of the term, but were sometimes purely material acts. Such was the case, for example, when the authorities of a State decided, as a countermeasure, to expel a diplomatic agent of another State: that was a material act, not a legal act as such. It was also the case when States were invited to collaborate in the measures taken to prevent consolidation of the effects of an international crime. That comment was valid for all of the draft articles and commentaries.

25. With regard to the commentary to article 1, he wished to make another remark, following that made by Mr. Flitan (1893rd meeting). Paragraph (2) of the commentary referred to "new *obligations*" and "new *rights*"; but he doubted that it was permissible to speak of "new obligations" and "new rights" in all cases in which the international responsibility of a State was engaged. In fact the obligation to make reparation, referred to in paragraph (2), was not a new obligation: once responsibility was established, the consequence of the internationally wrongful act must lead to reparation. The same was true of reciprocity, referred to in draft article 8. He was not sure that the implementation of a measure of reciprocity was a new obligation, since the Special Rapporteur himself explained (paragraph (2) of the commentary to article 8) that there was reciprocity when the measure taken by way of reciprocity sought to restore a balance—in other words, when the injured party abstained from performing the obligation binding it: that was the *exceptio non adimpleti contractus*. Reprisals, on the other hand, did involve "new obligations" and "new rights", for they were precisely measures which the injured State could be led to take, but which went beyond mere re-establishment of the existing relationship between it and the author State. Those comments dealt perhaps more with theory than with substance, but the Commission should not neglect the theoretical aspect of its work.

26. According to paragraph (3) of the commentary to article 1, certain internationally wrongful acts could have the legal consequence that every State, other than the author State, was "under an *obligation* to respond to the act". But according to draft article 6, which specified what the injured State could require of the State which had committed an internationally wrongful act, that was not an obligation, but merely a faculty: the injured State might not respond to the act.

27. In paragraph (4) of the commentary to article 1, the Special Rapporteur stated that an internationally wrongful act could produce legal consequences in the relations between States and "*other* 'subjects' of international law"—an expression probably intended to refer to international organizations. The advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*[9] showed that an international organization could be a passive subject of international law. Given the principle of specialization which governed the activities of international organizations, was it conceivable that, in certain cases, the international responsibility of an organization could be engaged, as the general terms used by the Special Rapporteur implied?

28. Draft article 2 qualified the consequences as "legal", which, as he had already pointed out, could suggest that legal acts were involved, whereas they might be only material acts. In addition, the words "and to the extent that" were unnecessary and could be deleted. The principle laid down in article 2 would allow States to envisage, in their respective relations, other consequences of an internationally wrongful act than those provided for in the draft. Given the residual nature of the draft, the same internationally wrongful acts could be subject to different régimes as to their legal consequences. Was that really desirable, or would it not be better for a single treatment to be applicable?

29. Referring to paragraph (2) of the commentary to article 2, he stressed that it was difficult to determine whether a norm of general international law had acquired a peremptory character and which authorities were empowered to establish the existence of such a norm. Would it not unduly restrict the scope of article 2 to reserve the peaceful settlement of all disputes, especially those affecting international peace and security, to the competent organs of the United Nations? It should be pointed out that Article 52 of the Charter of the United Nations attached great importance, in the context of international cooperation, to regional arrangements and agencies for dealing with matters relating to the maintenance of international peace and security. In his opinion, a local conflict could more easily be settled in a regional framework than in the existing United Nations system. Hence it would be desirable to state, if not in article 2, at least in the commentary to that article, the idea expressed by the Special Rapporteur in paragraph (11) of the commentary to draft article 5, namely that, in addition to the ICJ, other international institutions dealing with disputes or situations might be empowered to pronounce decisions. Article 2, paragraph 7, of the Charter of the United Nations, which excluded from the competence of United Nations organs all matters which were within the domestic jurisdiction of a State, confirmed his doubts. He feared that two States in conflict would characterize their dispute as local, in which case it was difficult to see how it could be referred to the competent organs of the United Nations.

30. In draft article 3, a concept established in article 2, that of the residual nature of the draft, should be introduced, for example by adding the words "or the law of the régime applicable to the legal consequences" after the words "the rules of customary law".

[9] *ICJ Reports 1949*, p. 174.

31. Draft article 4 called for the same comments as article 2 regarding the exclusive competence of United Nations organs for the settlement of disputes when responsibility was engaged. It did not seem that the Special Rapporteur intended to adopt such a restrictive approach.

32. Draft article 5, which was intended to define the concept of an injured State, was the counterpart of the provisions of part 1 of the draft defining the author State. It provided a means of determining the State to which reparation was due and the State entitled to take countermeasures. Subparagraph (*a*) covered two possibilities: that of a right appertaining to a State by virtue of a customary rule of international law and that of a right arising from a treaty provision for a third State. It did not seem necessary to refer specifically to the case of a third State; it would be sufficient to refer to the right of a State in general, since a State could hold its right either from general customary law, or from general international law, that was to say treaty law. The second part of subparagraph (*a*) could therefore be redrafted to read: "by virtue of a customary rule of international law or of a treaty provision, the State whose right has been infringed;".

33. In subparagraph (*b*) of article 5, the word "imposed" could be replaced by "established", for it was rather too strong to qualify an obligation arising from a judgment. Furthermore, it might be doubted whether it was advisable to try to define an injured State by reference to a State whose right derived from a judicial decision; for the effect of any judicial decision was necessarily relative: it bound only the parties to the dispute. The Special Rapporteur seemed to have had in mind the judgments of the European Court of Justice which, of course, bound only the parties to a dispute, but which could have a mandatory effect for all the members of the European Communities in regard to the interpretation of treaty rules. In his opinion, to refer to States enjoying rights deriving from judicial decisions might make for misunderstanding concerning the essentially relative nature of such decisions.

34. In both subparagraphs (*c*) and (*d*) of article 5, the expression "obligation imposed" should be replaced by the words "obligation established", for the reason already mentioned. With regard to the "collective interests of the States parties" to a multilateral treaty, referred to in subparagraph (*d*) (iii), he doubted that the interests of a legal entity such as an international organization could always be easily distinguished from those of its member States. Taking the case of an integrated international organization such as the Economic Community of Central African States, he stressed that both the organization as such and each of its members had an interest in the rules laid down being respected by all the member States. In principle, if one of them broke a rule relating to the common customs tariff, that breach caused harm both to the other member States and to the organization as a legal entity. That being so, it did not seem appropriate to attempt to define an injured State by contrasting obligations under a bilateral treaty with the much more complex obligations deriving from a multilateral treaty. Moreover, in analysing the legal relationships between States parties to a multilateral treaty, the Special Rapporteur stated that they remained bilateral relationships as between each pair of States parties (paragraph (14) of the commentary to article 5).

35. Subparagraph (*d*) (iv) of article 5 referred to an obligation stipulated for the protection of "individual persons"—a term which could be applied to both natural and legal persons. While he saw no objection to the term being applied to natural persons in that context, subject to some reservations, he doubted whether it could be extended to legal persons. Must it be considered that the international community as a whole was injured by the violation of an obligation stipulated in a multilateral treaty for the protection of a multinational company? Would it not be advisable for the Commission to confine itself to human rights—an area which already raised many difficulties? Under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms,[10] any State could request the jurisdictional organ to verify a violation of that instrument with respect to an individual. But it did not seem possible to apply the reasoning which had led to that solution, in particular for fear of abuses. Furthermore, even in the area of human rights, principles such as those of the sovereign equality of States and non-interference could raise difficulties. In his opinion, it would be going too far to maintain that any State member of the international community could claim to be an injured State as soon as there was a violation of a right intended to protect individuals. In that respect it seemed difficult to pass from the sphere of human rights to that of the international responsibility of States. As to the concept of "the international community as a whole", it was doubtful that it coincided with the United Nations and that the United Nations really represented the melting-pot of universal conscience.

36. Because of the way it was presented, draft article 6 could give the impression that the cases referred to in paragraph 1, subparagraphs (*a*) to (*d*), were cumulative, whereas that was not the case. It might therefore be preferable to confine the article to the essential cases. The case referred to in paragraph 1 (*b*), in which the State that had committed the internationally wrongful act was required to "apply such remedies as are provided for in its internal law", could be deleted; that wording suggested legal remedies, whereas it referred to all measures calculated to put a stop to the internationally wrongful act. The case referred to in paragraph 1 (*d*), in which appropriate guarantees were required against repetition of the act, could also be deleted, in view of the difficulties of application which were sure to arise. Besides the question of the form in which those guarantees were to be given, there was the problem of their effectiveness.

37. Paragraph 2 of article 6 should not go into too much detail, in order not to limit States' freedom of action. That provision, which concerned the payment of a sum of money corresponding to the cost of re-establishing the situation as it had existed before

[10] United Nations, *Treaty Series*, vol. 213, p. 221.

the breach, seemed to exclude reparation in kind. But such reparation was not inconceivable. A case in point would be the rebuilding by a receiving State of an embassy plundered in riots which had engaged its international responsibility. Moreover, paragraph 2, by its use of the word "corresponding", established a strict equivalence between the damage suffered and the sum of money paid, which amounted to ignoring some modes of reparation recognized in international law, such as apology or symbolic reparation. It would therefore be preferable to lay down the principle of reparation, which was essential, without going into detail.

38. Like other members of the Commission, he thought that draft article 7 could be deleted, since its underlying principle was already expressed in article 6. Perhaps article 7 merely reflected some nostalgia for the capitulations régime. In fact those were private-law relationships, and, in case of difficulties, there were appropriate mechanisms by which the author State could repair the injury without the problem being moved into the area of international responsibility.

39. Article 8 certainly belonged in the draft articles, but it would be advisable to avoid the interpretation problems that might be raised by the use of the term "reciprocity", the meaning of which had gradually been more precisely defined for the Commission by the Special Rapporteur, but was not yet established in doctrine. It would therefore be better to delete the words "by way of reciprocity", which would not change the substance of article 8 in any way. Article 8 also raised the question whether a State could take measures of reciprocity and measures of reprisal simultaneously, or whether it could resort to reprisals only after having awaited the result of a prior measure of reciprocity for a period which remained to be determined. But when what was judged to be a higher interest of a State was involved, it acted without waiting, for then it was the result that counted.

40. Draft article 9 presented hardly any difficulties, but in the commentary the Special Rapporteur should distinguish the concepts of reprisals and countermeasures very clearly from that of reciprocity, which was at the level of *exceptio non adimpleti contractus*. Furthermore, with regard to paragraph 2, several members of the Commission had stressed that it would not be easy in practice to determine whether the exercise of the right of reprisal was not "manifestly disproportional" in its effects to the seriousness of the internationally wrongful act. The concept of proportionality had a quantitative and a qualitative aspect, and an outside authority capable of determining whether or not there was proportionality would have to intervene in each particular case.

41. Draft article 10 was similar to Article 33 of the Charter of the United Nations, which imposed on States the obligation to settle their disputes by peaceful means—a provision which remained a dead letter in many cases. The Special Rapporteur was, in a way, inviting States to show such wisdom, but it was doubtful whether they were wise enough to begin by exhausting procedures for peaceful settlement before resorting to countermeasures. Moreover, the implementation of paragraph 1 of article 10 could be particularly difficult when the application of a peaceful means of settlement required the co-operation of the States concerned, since any kind of co-operation between the States parties to a dispute was necessarily difficult.

42. According to paragraph 2 (*a*) of article 10, the injured State could take interim measures of protection, the admissibility of which would then be decided on by a competent international court or tribunal. He thought it would be more logical either to authorize the injured State to take such measures, which in any case served to prevent aggravation of the injury, or to make the taking of such measures subject to prior judicial determination, which would be a more realistic solution than that provided by article 10. After a reading of paragraph 2 (*b*) of article 10, which assumed that measures of protection had been judicially authorized, it might be asked, in the light of subparagraph (*a*), whether there were, on the one hand, measures of protection that could be taken without any judicial authorization and, on the other, measures of protection requiring such authorization in advance.

43. In its French version at least, the introductory sentence of draft article 11, paragraph 1, could be improved, in particular so as to avoid giving the impression that it set out two cumulative conditions. For the rest, in view of the symmetry between articles 10 and 11, he would refer the Commission to the comments he had made about the collective interests of States parties to a multilateral treaty and of individuals.

44. In draft article 12, subparagraph (*a*) should be retained because it recalled the protection to be given to a certain class of persons, but that protection could be extended to other persons, in particular those referred to in the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. Subparagraph (*b*) raised difficulties by its use of the expression "peremptory norm of general international law".

45. To determine whether a violation was "manifest", within the meaning of draft article 13, a competent body would have to intervene. But it was doubtful that, even in the system to be proposed by the Special Rapporteur, a judicial body would always be able to make such a determination. He therefore proposed that the word "manifest" should be deleted, which could be done without harming the substance of the text. He also suggested that, for the sake of precision, the words "the commission of fine" should be inserted before the words "a violation".

46. Draft article 14, which was on the borderline between two topics, raised the question whether the Commission should elaborate the consequences of international crimes in the draft articles under consideration, which seemed desirable, or merely refer to the consequences to be enumerated in the draft Code of Offences against the Peace and Security of Mankind. In any case, the two sets of draft articles would have to be harmonized.

47. In the French text of article 14, paragraph 1, the words "ressortant des règles applicables" should be replaced by the words "ressortissant aux règles appli-

cables". In paragraph 2 (*a*), the word "legal", qualifying a situation at the international level, was not justified, since there were no international "laws". The words "as legal" could very well be deleted.

48. While admitting the need to deal with international crimes in a set of draft articles dealing with the "civil responsibility" of States, he feared that paragraph 2 (*a*), (*b*) and (*c*) of article 14 would raise serious application problems. It might well be asked, for example, whether the rule of solidarity, which required States to reject the internationally wrongful act and not to consolidate the situation it had created, might not in practice lead to defections by some States. Moreover, should the international community as a whole resort to a certain category of means only, or could each member State resort to individual means, according to its possibilities?

49. According to paragraph 4 of article 14, the obligations under that article would prevail in the event of conflict between them and rights and obligations under any other rule of international law, subject to Article 103 of the Charter of the United Nations. He endorsed that provision, but was not sure how it could be reconciled with the provisions affirming the residual nature of the draft articles. Again, he wondered whether the beneficiary of reparation, in the case of an international crime, was the international community as a whole or a directly injured State. It appeared utopian to consider that the entire international community was injured, without seeking to determine whether one or more States were not directly injured *in concreto*. True, in paragraph (9) of the commentary to article 14, the Special Rapporteur had recognized that "there may be an injured State or injured States under article 5, subparagraphs (*a*) to (*d*)"; but, in his own opinion, that was not merely an eventuality.

50. Referring to draft article 15, some members of the Commission had questioned whether aggression should be dealt with specifically, since it was in the category of international crimes treated in the draft Code of Offences against the Peace and Security of Mankind. In his opinion, aggression did belong in the draft articles on State responsibility, for it was the crime of States *par excellence*. Was it not precisely because aggression had been committed by States against other States that the League of Nations and the United Nations had come into being?

51. He expressed doubts about the relevance of draft article 16, subparagraph (*b*), concerning the rights of membership of an international organization. He saw no reason to give special attention to that question. As to belligerent reprisals, referred to in subparagraph (*c*), they were indissolubly linked with self-defence, which should be taken into consideration by the Special Rapporteur in his further work.

52. Finally, in regard to the implementation of international responsibility, he believed that the general outline should be set out in the draft, otherwise the building would have no roof. But great caution should be exercised in proposing any mechanism. States were more and more mistrustful of compulsory jurisdiction as such, so that rather than suggest too binding a mechanism, it would be better to suggest a flexible system that would encourage the States parties to a dispute to come together in order to seek a solution. Even at the regional level, States were sometimes reluctant to resort to binding jurisdiction, as illustrated by the fact that the Commission of Arbitration and the Arbitral Tribunal set up for the settlement of disputes within OAU had never functioned.

The meeting rose at 1.05 p.m.

1895th MEETING

Thursday, 6 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Huang, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf. Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Sir Ian SINCLAIR said that he wished to raise two points on draft article 5, in addition to those he had already mentioned (1890th meeting). The first, already raised by Mr. McCaffrey (1892nd meeting) and Mr. Francis (1894th meeting) related to para-

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

graph (10) of the commentary to that article, which stated that subparagraph (*b*) was "meant to cover not only the final award or judgment, but also such orders as the indication of interim measures of protection as may be binding on the parties to the dispute". That passage seemed to imply that an order of the ICJ or another international tribunal indicating provisional measures was binding upon the parties to the dispute. That, however, was highly debatable, particularly where orders of the ICJ were concerned. Indeed, the prevalent view among writers on the subject was that orders of that kind were, strictly speaking, not binding on the parties. The reference to interim measures of protection might perhaps be deleted.

2. His other comment on article 5 related to the case mentioned in subparagraph (*d*) (iv). In paragraph (22) of the commentary to article 5, the Special Rapporteur indicated that, in the case of a multilateral treaty for the protection of fundamental human rights, the interest was not allocated to an individual State party, so that any State party to the treaty had to be considered an injured State in the event of a breach of the treaty. In one sense, that was, of course, obviously right. However, the case in article 5, subparagraph (*d*) (iv), had also to be considered in relation to that in article 7, which, as currently drafted, appeared to accord lesser rights to a State seeking to exercise diplomatic protection of its nationals in the event of their suffering damage or injury as a result of an internationally wrongful act of another State than to a State claiming to be an injured State only because the obligation breached had been stipulated for the protection of individual persons, irrespective of their nationality. That surely could not be right. He appreciated that the Special Rapporteur had proposed article 7 in an endeavour to qualify the obligation of the author State to provide *restitutio in integrum stricto sensu* in the case of injury to aliens. But presumably article 7 would not be applicable to the case covered by article 5, subparagraph (*d*) (iv), otherwise an absurd situation could arise in which the breach of an obligation stipulated for the protection of individual persons, irrespective of their nationality, gave rise to a greater panoply of rights for any State party to the treaty concerned than would be the case where the obligation breached concerned the treatment to be accorded to aliens and the injured State was the State whose nationals had suffered injury. He therefore had considerable doubt about the definition of an "injured State" contained in article 5, subparagraph (*d*) (iv). If that definition were retained, article 7 might have to be deleted because of the peculiar results which flowed from the combination of the two provisions. Any further explanation the Special Rapporteur could provide on that point would be welcome.

3. As to draft article 6, he accepted the explanation given by the Special Rapporteur (1891st meeting) concerning the relationship between paragraph 1 (*b*) of that article and article 22 of part 1 of the draft. Nevertheless, the relevance of article 22 of part 1 to article 6 would have to be considered if and when part 1 came before the Commission for second reading. Referring to article 6, paragraph 1 (*d*), he noted the statement in paragraph (11) of the commentary that what was "appropriate" depended on the circumstances of the case, as well as the mention, in the footnote to that paragraph of the commentary, of the notion of "satisfaction" resulting from a declaration by an international tribunal that an internationally wrongful act had occurred. Against that background, the phrase "appropriate guarantees against repetition of the act" might be rather too strong, and the Drafting Committee might consider replacing it with an expression such as: "(*d*) provide other forms of satisfaction to prevent repetition of the act."

4. As to paragraph 2 of article 6, he noted that the Special Rapporteur had disclaimed any intention of proposing detailed rules regarding the quantum of damages. While agreeing with that principle, he nevertheless thought that the Drafting Committee should be asked to look carefully at the wording of the paragraph. It would also be helpful if the sources upon which the Special Rapporteur had drawn in proposing the rule were indicated in the commentary. The materials cited might disclose that a slight element of flexibility should be written into the rule in order to provide for exceptional cases in which the amount of compensation to be paid did not exactly coincide with the sum which would result from a rigid application of the rule.

5. He had no comment to make on draft article 7 other than to draw attention once again to its link with article 22 of part 1 and to remark that a final decision on whether article 7 should be retained and, if so, what its content should be, would depend on the decision taken concerning article 22 of part 1 on second reading.

6. Article 8 was the first of the draft articles that required consideration of the relationship between the draft and the 1969 Vienna Convention on the Law of Treaties, more particularly its articles 27, 60 and 73. It could, of course, be argued that the Vienna Convention was concerned only with the treaty-law consequences of material breaches. But the obligations whose performance the injured State was entitled to suspend under draft article 8 could derive from treaty law as well as from customary law. Without overlooking the provisions of draft article 11, or the fact that article 60 of the Vienna Convention was concerned only with material breaches, he thought that the minimum required in order to ensure consistency between the draft articles on State responsibility and article 60 of the Vienna Convention would be a provision stating that articles 8, 11 and, possibly, 13 of the draft were without prejudice to the terms of article 60 of the Vienna Convention. Article 16 of the draft under consideration was, in his view, insufficient for the purpose and should be supplemented by a specific reference to article 60 of the Vienna Convention; if subparagraph (*c*) of article 16 were deleted, the need for such a reference would become still more apparent.

7. The statement in paragraph (7) of the commentary to article 8 that, in the case of diplomatic and consular immunities, the obligations of a receiving State were not a counterpart of the obligations of the sending State was too absolute and seemed to ignore the effects of article 47 of the 1961 Vienna Convention on Diplomatic Relations and article 72 of the

1963 Vienna Convention on Consular Relations, which clearly incorporated the principle of reciprocity into the field of diplomatic law. That principle might not be applicable in regard to the fundamental principle of inviolability of the premises of a diplomatic mission, but it was certainly applicable in other contexts. For example, if a receiving State imposed extremely severe restrictions on the freedom of movement of members of a diplomatic mission, and if those restrictions could not be justified by national security considerations, the sending State would clearly be justified in imposing corresponding restrictions on members of the receiving State's diplomatic mission, whether by way of reciprocity or by way of reprisal. True, the example related more to the privileges than to the immunities of members of a diplomatic mission or consular post; but the Special Rapporteur appeared to underestimate the impact and influence of reciprocity in the field of diplomatic law generally. Paragraph (7) of the commentary to article 8 should be reviewed and, for the same reasons, subparagraph (*a*) of article 12 should be deleted or, at the very least, severely attenuated so as to allow for the proper application of the concepts of reciprocity and reprisal in diplomatic law.

8. In referring to draft articles 8 and 9, several speakers had pointed out the difficulty of drawing a clear-cut distinction between countermeasures taken by way of reciprocity and those taken by way of reprisal. Mr. Calero Rodrigues (1892nd meeting) had even suggested that the references to reciprocity and reprisal could be deleted from those articles. While agreeing that a difficulty might arise in special circumstances, he generally supported the broad substantive distinction made by the Special Rapporteur and reflected in articles 8 and 9. Terminological problems arising in that connection could be considered by the Drafting Committee.

9. Draft article 10, on the other hand, did give rise to some doubts, particularly as to the relative importance of the rule set out in paragraph 1 and the exception provided for in paragraph 2 (*a*). The formulation of the article as a whole appeared to be based on the 1978 arbitral award in the *Air Service Agreement* case between the United States of America and France,[5] which, however, seemed to provide authority for the rule stated in paragraph 2 (*a*) rather than for that in paragraph 1. He wondered, therefore, whether the provision in paragraph 2 (*a*) should not be formulated as an integral part of a combined rule and, furthermore, whether the reference to interim measures of protection was appropriate in the context. Those points, too, could no doubt be considered by the Drafting Committee.

10. Draft article 11 raised serious problems other than those he had already mentioned. In the present disorganized state of international society, he had the gravest doubts about the wisdom or viability of paragraph 2, which imposed particularly severe limitations upon the rights of an injured State to take countermeasures by way of reciprocity or reprisal. Some multilateral treaties might well embody a procedure for collective decisions which was ineffective or illusory, either because a unanimous vote of the decision-making body was required or because the State which had committed the internationally wrongful act was able to command a sufficient blocking vote in that body to prevent any effective action being taken. To subject the injured State's right to take countermeasures to the requirement of a collective decision would, in such circumstances, place a very heavy fetter on its response to an internationally wrongful act. The interests or legally protected rights of other States parties to the multilateral treaty had, of course, to be borne in mind; some special provision might be necessary to cover the case in which countermeasures by the injured State would necessarily affect the exercise of the rights or the performance of the obligations of all other States parties to the treaty. That special case apart, he greatly doubted the need for anything corresponding to paragraph 2 of article 11, especially in view of the provisions of article 2 of the draft, which should have the effect of preserving particular treaty régimes already in operation. Although paragraph 2 of article 11, as drafted, appeared to be quite general in its scope and effect, he assumed that it was intended to be limited to the cases mentioned in paragraph 1—an impression which seemed to be confirmed by the concluding phrase. The Special Rapporteur could perhaps elucidate that point.

11. Subparagraph (*b*) of draft article 12 posed the familiar question whether any reference to *jus cogens* should be made in part 2 of the draft. In his opinion there was no hard evidence for the existence of *jus cogens* as a real factor in the functioning of present-day international law. In the context of treaty law, it had a specific role to play in limiting the otherwise absolute freedom of States to determine the content of the treaties they might wish to conclude; but its role, if any, in the law of State responsibility was not clear. The test of "manifest disproportionality" in article 9, paragraph 2, would sufficiently ensure that no State could violate a norm of *jus cogens* by way of reprisal; and if it was the author State which had violated the norm of *jus cogens,* then, in the vast majority of cases, it would have committed an international crime whose legal consequences would be determined by articles 14 or 15. There was no need, as a matter of law, to include a specific reference to *jus cogens* in part 2 of the draft. Such a reference would only add further elements of confusion to an already difficult text. To the extent that norms of *jus cogens* existed and had an impact beyond the law of treaties—both elements of that proposition remaining highly controversial—they would control the operation of all the articles in part 2, not only that of articles 8 and 9. In contrast with the views expressed by Mr. Flitan (1893rd meeting), he therefore urged that subparagraph (*b*) of article 12 should be deleted; and since, for reasons already stated, he considered that subparagraph (*a*) was otiose, he suggested deleting the whole of article 12.

12. With regard to the point raised by Mr. Reuter (1891st meeting) concerning draft article 13, he thought the concept of a manifest violation of obligations arising from a multilateral treaty which destroyed the object and purpose of that treaty as a whole was clearly not recognized in the Vienna Con-

[5] See 1892nd meeting, footnote 9.

vention on the Law of Treaties. He agreed with the Special Rapporteur, however, that article 13 was not concerned with the treaty-law consequences of the situation it purported to deal with, but only with the legal consequences of the internationally wrongful act which had brought that situation about. Accordingly, subject to the reservations he had already expressed on the reference to "collective interests" of the States parties in article 5, subparagraph (*d*) (iii), and article 11, paragraph 1 (*b*), and on the content of article 11, paragraph 2, he had no objection to article 13.

13. He had already commented favourably (1890th meeting) on paragraphs (8) to (10) of the commentary to draft article 14. The Special Rapporteur had been reproached for not having laid down specific legal consequences, for both the author State and the injured State, of a so-called international crime. An aggravated degree of State responsibility did, of course, attach to the violation of obligations of the kind illustrated in article 19 of part 1 of the draft, but that aggravated degree of responsibility was not yet capable of being translated into concrete rules which could be applied indiscriminately to the wide variety of situations referred to in that article. To leave it to "the international community as a whole" to determine what additional legal consequences should flow from the commission of a so-called international crime might be unsatisfactory, but no more so than leaving it to the international community as a whole to determine what constituted a so-called international crime in the first place. Elaboration of the additional legal consequences involved might bring down what was already a very flimsy edifice. The Commission was exploring unknown territory and could only rely upon a compass to indicate the general direction, leaving it to succeeding generations to plot the detailed landmarks along the way.

14. As to the relationship between the work on State responsibility and that on the draft Code of Offences against the Peace and Security of Mankind, the former was, in his view, concerned with the material legal consequences of all internationally wrongful acts—a matter to which the Commission's mandate for the draft code did not extend. But, given the confusion that had arisen, he wondered whether the time had not come to begin the second reading of part 1 of the draft articles on State responsibility. Some of the difficulties arising in connection with part 2 stemmed inevitably from the content of part 1, and it might not be possible to resolve them without reconsidering some of the decisions adopted provisionally in respect of part 1. Accordingly, he invited the Special Rapporteur to consider whether it might not be desirable, as the next step, to undertake the difficult but vitally important task of reviewing part 1.

15. In conclusion, referring to section II of the Special Rapporteur's sixth report (A/CN.4/389), he observed that to draw up rules on the "origin of international responsibility" and on the "content, forms and degrees of international responsibility" without proposing mechanisms and procedures for the effective implementation of those rules would be to render a fundamental disservice to the international community and to the process of codification and progressive development of international law. The potentiality of dispute at every stage was in the very nature of the topic and should not be blithely ignored. The absence of suitable implementation machinery would make the draft as a whole unacceptable to many Governments, and the fact that compulsory dispute-settlement machinery applicable to the interpretation and application of the draft articles in parts 1 and 2 would inevitably cover a very wide area should not deter the Commission from attempting to devise such machinery. In his view, the Special Rapporteur had displayed great subtlety and ingenuity in proposing the system outlined in his report (*ibid*., para. 14). The approach was judicious, since it would enable the third-party instance to determine the basic issues of fact and law as to whether an internationally wrongful act had in fact been committed. He also approved of the dispute-settlement procedure proposed by the Special Rapporteur (*ibid*., para. 32). The details would, of course, have to be worked out and it would almost certainly be necessary to add some kind of temporal limitation to exclude disputes relating to acts or facts which might have occurred prior to the proposed convention's entry into force. Subject to that reservation, the Special Rapporteur was to be warmly congratulated for having formulated proposals which, although they might encounter objections on political grounds, nevertheless offered some guarantees to States that the substantive provisions in parts 1 and 2 could be effectively applied. He hoped that the outline would soon be presented in the form of draft articles for inclusion in part 3 of the draft.

16. Mr. USHAKOV said that part 3 of the draft articles, which was broadly outlined by the Special Rapporteur in his remarkable sixth report (A/CN.4/389) and which was to deal with the settlement of disputes, had practically no connection with part 2. According to paragraph 1 of draft article 10, the injured State could not take any measure by way of reprisal in application of article 9 until it had "exhausted the international procedures for peaceful settlement of the dispute". From that provision it would be deduced that any dispute relating to the existence of an internationally wrongful act should have been settled before measures could be taken by way of reprisal. But the author State might deny having committed an internationally wrongful act, in which case the whole of part 2 of the draft articles would be inapplicable because the responsibility of that State had not been engaged. Part 2 was based on the assumption of the existence of an internationally wrongful act established in accordance with part 1. Any dispute relating to the existence of an internationally wrongful act came under part 1, which dealt with the conditions that had to be satisfied for the existence of an internationally wrongful act to be established. Whether the author State claimed that certain conduct could not be attributed to it under international law, or that it had not failed to fulfil one of its international obligations, there was, in either case, a dispute as to the existence of an internationally wrongful act.

17. There was perhaps only one case in which a dispute related to international responsibility proper

and therefore came under part 2 of the draft, namely the case of a dispute concerning the amount of reparation required of a State which had committed an international delict. In that connection, it should be noted that a dispute concerning the existence of an international crime committed by a State was not conceivable. The existence of crimes in that category, especially those constituting a threat to peace, a breach of the peace or an act of aggression, was determined by the organized international community of States or, more precisely, by the Security Council; and a dispute between the Security Council and a State which had committed an international crime was unthinkable. Hence it followed that part 3 of the draft articles would deal mainly with the settlement of disputes relating to the establishment of internationally wrongful acts and, possibly, disputes concerning the amount of reparation.

18. Before reviewing the draft articles under consideration, he wished to make two general comments. Referring to the peremptory norms of general international law mentioned, in particular, in draft article 12, subparagraph (*b*), he questioned whether such norms existed in regard to State responsibility. Some peremptory primary rules did, of course, exist, but they were not involved in part 2 of the draft articles, which dealt with secondary rules. An example of a peremptory secondary rule was the prohibition of the threat or use of force contained in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[6] Recourse to armed reprisals in response to an internationally wrongful act was prohibited. While such a peremptory secondary norm clearly fell within the scope of part 2 of the draft, the same was not true of primary peremptory rules, such as that which prohibited recourse to the threat or use of force, be it military, political or economic. According to the Charter of the United Nations, however, the Security Council could, when there was an act of aggression, take coercive measures involving the use of armed force. In that case there was no breach of a primary rule, since the issue was one of international responsibility to which secondary rules applied. Similarly, a State could, in accordance with part 1 of the draft, take legitimate countermeasures involving the use of political or economic force against another State. Hence only secondary peremptory rules relating to international responsibility should be referred to in part 2 of the draft.

19. His second general comment concerned what happened to a treaty if its provisions were violated by a State. In his view, that question, which seemed to cause concern to the Special Rapporteur and some members of the Commission, was irrelevant, since it came under the law of treaties, in particular under article 60 of the 1969 Vienna Convention on the Law of Treaties, and had no bearing on State responsibility. In the latter field, what counted was that the treaty should be in force at the time when an obligation deriving from it was breached; that was clear, in particular, from article 18, paragraph 1, of part 1 of the draft articles on State responsibility.

20. Turning to the draft articles before the Commission, he said that he had many doubts about the wording and indeed the appropriateness of articles 5, which was devoted not to stating rules, but to defining the concept of the "injured State". That concept was self-evident. Just as the author State was the State which had committed an internationally wrongful act—whether a delict or a crime—the injured State was the State with respect to which the act had been committed. Nevertheless, it was impossible to determine in any concrete fashion which was the author State and which the injured State: everything depended on the actual circumstances in which the internationally wrongful act occurred. Article 5 contributed nothing. Moreover, inasmuch as it dealt with the origin of a subjective right and a subjective obligation of the State, it was in flagrant contradiction with article 17 of part 1 of the draft articles, which proclaimed a self-evident principle of international law, namely the irrelevance of the origin of the international obligation breached to the international responsibility of the author State. But perhaps it should be provided that, when the internationally wrongful act had been committed in violation of a peremptory norm of general international law, it was the international community of States and the States composing it that were directly or indirectly injured.

21. Since draft articles 14 and 15 expressly dealt with international crimes, draft articles 6 to 13 obviously concerned international delicts, although that was not expressly stated. Such a statement should, however, be included, because what was applicable to an international delict could be applicable to an international crime, though the converse was not true. The structure of the set of articles was rather complex: article 6 concerned what the injured State could require of the author State; articles 8 and 9, corresponding to article 30 of part 1 of the draft, on countermeasures, dealt with reciprocity and reprisal, respectively; and articles 10, 11 and 12 listed exceptions to article 9, while article 13 stated an exception to articles 10 and 11. As to draft article 7, it was, as other members of the Commission had already pointed out, superfluous.

22. It was important to specify expressly all the measures which the injured State was entitled to require of the author State, and in that respect article 6 as submitted by the Special Rapporteur was definitely inadequate. The measure provided for in paragraph 1 (*a*) was acceptable; that in paragraph 1 (*b*) was perhaps superfluous and, in any case, should be further explained. The measure provided for in paragraph 1 (*c*) should be more precisely defined: while it was possible to re-establish the legal situation as it had existed before the act, it was not possible to re-establish the previous material situation. The guarantees referred to in paragraph 1 (*d*) seemed inconceivable. Other measures might reasonably be contemplated: at the Commission's thirty-fifth session, in 1983, he had proposed that the international responsibility of the State should consist, *inter alia,* in that the State should: make reparation for the

[6] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

damage caused and, if necessary, restore the previous legal situation and the rights and interests that had been infringed; take the measures and action prescribed by international law, including the applicable international arrangements in force; provide the requisite satisfaction to the injured State or States; and institute criminal proceedings against persons accused of having committed the offences which had given rise to the international responsibility of the State.[7]

23. Draft articles 8 and 9 concerning reciprocity and reprisal—between which he made no distinction—should be consistent with article 30 of part 1, entitled "Countermeasures in respect of an internationally wrongful act". As they stood, those articles implied that the injured State could suspend the performance of all its obligations towards the author State. That was inconceivable if the internationally wrongful act was only an international delict. True, exceptions were provided for in draft articles 10, 11 and 12: but article 10 referred to the settlement of disputes and was not applicable, because the disputes in question could relate only to the existence of an internationally wrongful act; and article 11 dealt with obligations arising from multilateral treaties, but was not sufficiently explicit. He would not revert to the exceptions provided for in article 12, which he had already discussed in connection with the breach of a peremptory norm of general international law.

24. On the basis of article 30 of part 1 of the draft, he proposed that the provisions of articles 7 to 13 should be replaced by the following text:

"1. The injured State shall be entitled to take measures legitimate under international law against a State which has committed an international delict. Such measures shall include (but not be limited to):

"(*a*) the restriction or temporary suspension of the rights and interests of the State which has committed a delict within the sphere of jurisdiction of the injured State;

"(*b*) the temporary suspension of the injured State's economic obligations towards the State which has committed a delict;

"(*c*) the temporary suspension of technological, scientific and cultural relations between the injured State and the State which has committed a delict;

"(*d*) the suspension or severance of diplomatic relations between the injured State and the State which has committed a delict.

"2. The measures referred to in paragraph 1 shall be taken by the injured State in the light of the circumstances of the delict in question and of its seriousness and shall be lifted as soon as the State which has committed the delict has fulfilled its obligations under article 6."

It was to be understood that those measures, the list of which was not exhaustive, applied only to international delicts and not to international crimes.

[7] *Yearbook ... 1983*, vol. I, p. 296, 1806th meeting, para. 30.

25. Draft articles 14 and 15 referred to international crimes. No specific legal consequence was stated in paragraph 1 of article 14. But the consequences should be specified, especially if the international crime constituted a threat to peace, a breach of the peace, an act of aggression or a war of aggression. Moreover, the "internationally wrongful act" mentioned in the paragraph should, of course, be taken to cover an international delict as well as an international crime. In the French text, the words *tous droits et obligations* should be replaced by the words *tels droits et obligations*. In paragraph 2, he did not see why the obligation specified in subparagraph (*a*) should result only from an international crime. Did that mean that States were free to recognize an unlawful situation created by an international delict? That was impossible, since every State was required not to recognize as legal the unlawful situation created by an internationally wrongful act, whether it was a delict or a crime. The meaning of the obligation referred to in subparagraph (*b*) was not clear; that text appeared to be a revision of article 27 of part 1 of the draft, which provided that aid or assistance rendered by a State to another State for the commission of an internationally wrongful act itself constituted an internationally wrongful act. He also wondered what "other States" were meant in subparagraph (*c*). What was to be done if there were no other States to join? Besides, the obligation presupposed agreement between States to face together the situations created by an international crime. He simply did not understand paragraph 2 of article 14.

26. Article 15, which dealt with acts of aggression, should certainly be retained in principle, but needed to be more appropriately drafted.

27. Besides drafting problems, some points of substance remained to be settled. It was the Special Rapporteur's arduous task to formulate general rules concerning international delicts, which were manifold, and international crimes, which were no less so. He was convinced that the Special Rapporteur would do his best to perform that task and that the Commission would assist him in it.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

28. Mr. OGISO joined previous speakers in congratulating the Special Rapporteur on another masterly report (A/CN.4/389) on the complex topic of State responsibility. The quality of his work would greatly assist the Commission in its understanding of such a wide-ranging topic.

29. It seemed to him that the basic presumption on which the Special Rapporteur had constructed part 2 of the draft articles was that, once an internationally wrongful act had been committed by a State, there arose, as an inevitable consequence of that act, a new legal relationship between the author State, the injured State and third States. In that connection, he noted the Special Rapporteur's statement in his report that:

There seems to be general agreement that an internationally wrongful act of a State entails: (*a*) new obligations of the "author" State (A); (*b*) new rights of other States, in particular of the

"injured" State(s) (B); (*c*) in some cases, new obligations of "third" States (C) *vis-à-vis* the (other) "injured" State or States. (*Ibid.*, para. 3.)

In other words, according to the Special Rapporteur, all those new legal consequences or new legal relationships between States resulted from the commission of an internationally wrongful act by a State.

30. Because of that presumption, the definition of an injured State in draft article 5 was very important, as had been noted in the commentary to the article. The existence of an internationally wrongful act or of an injury might be disputed by the alleged author State. That was a very real possibility in practice, as the Special Rapporteur himself had pointed out (*ibid.*, para. 5). Presumably, therefore, the articles in part 3 of the draft might deal, *inter alia*, with the settlement of that kind of dispute. At the point at which the dispute related to the existence of the injury itself, the parties concerned were neither an author State nor an injured State, but rather an alleged author State and an alleged injured State. The new legal relationship to which he had referred had not yet been created, since, from a strictly legal standpoint, the rights and obligations provided for in draft article 6 and subsequent articles came into being only when the existence of an author State and an injured State had been legally established, which was either on the admission by the author State that an internationally wrongful act had been committed, or by a decision taken in accordance with an international procedure, or, again, by the application of the procedure for the settlement of disputes to be laid down in part 3 of the draft.

31. In practice, however, the sequence of stages in that process was not necessarily so clear-cut. It was usually when the alleged injured State had made the request provided for in article 6 and the alleged author State had admitted that an internationally wrongful act had been committed, by responding to the request in one way or another, that a new legal relationship between the newly identified author State and injured State was established. In other words, agreement on remedies such as *restitutio in integrum stricto sensu* or on payment of reparation should usually be concluded simultaneously with the establishment of the new legal relationship. Thus, although, as a theoretical abstraction, a decision on the status of author State and injured State came first and the new legal relationship came next, a decision as to status could in practice often be made at the time when the solution of the major problems arising from a particular internationally wrongful act had been agreed between the parties concerned. It was in no way his intention to criticize the Special Rapporteur's report, but he had wished to make a general comment to assist members in their understanding of the points he hoped to raise on specific draft articles at the next meeting.

The meeting rose at 1 p.m.

1896th MEETING

Friday, 7 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. OGISO said that, as he had explained at the previous meeting, he could accept in general the Special Rapporteur's theoretical presumption that, as a result of an internationally wrongful act, a new legal relationship would be established between the author State, the injured State and a third State. In practice, however, the establishment of that new legal relationship would not necessarily follow the same sequence; often, it was established at the same time as the solution of major problems arising out of the internationally wrongful act, since the objection by the author State might make it difficult to establish the status of the injured State and the author State. As a result, the latter might not accept the new legal relationship until a final solution had been reached regarding the result of such wrongful act.

2. Referring to the draft articles, he said that he would like to have some clarification of the wording of subparagraph (*a*) and (*d*) of article 5 and of the commentary to the latter subparagraph. Whereas subparagraph (*a*) referred to an "infringement of a right" and to "the State whose right has been infringed", subparagraph (*d*) and the commentary to

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

it were concerned with how an internationally wrongful act could affect the exercise of a right of a State or the interests of a State. He wondered whether that difference in the wording of the two subparagraphs was meant to indicate that, in the case of a bilateral relationship, injury could be caused only by infringement of a right of the injured State, whereas, in the case of a multilateral treaty, a State party could be an injured State if a situation arose whereby its right was affected by an internationally wrongful act. He also wondered whether the "breach of the obligation" by one party, as referred to in paragraph (*d*) (ii)—or what might be termed the first breach that triggered off the author State's and the injured State's new relationship under the multilateral treaty—was a breach that infringed the right of a given party or a breach affecting the right or interest of the other party without actually infringing a right. He was inclined to think that the internationally wrongful act which triggered off the new legal relationship should be the infringement of the right of the other State, irrespective of whether it related to a bilateral or a multilateral régime. The only difference between those two régimes concerned the status of the other parties to a multilateral treaty régime, whose rights had not been infringed but might be affected.

3. The concept of collective interests, referred to in article 5, subparagraph (*d*) (iii), was more political than legal and the dividing line between collective interests, on the one hand, and common or parallel interests, on the other, was extremely difficult to draw. As he interpreted the concept, however, it applied solely to cases in which the treaty itself made express reference to the collective interests of the parties, as was the case, for example, with the reference to collective self-defence under Article 51 of the Charter of the United Nations. In the absence of such a reference, it was difficult to see how the existence of collective interests could be established within the meaning of subparagraph (*d*) (iii) of article 5. For instance, if a multilateral treaty did not specify whether its terms covered collective or common interests, a dispute as to the legal nature of the protected interests was very likely to arise. Who, in such a case, determined the existence of collective interests? Although the Special Rapporteur seemed to suggest that a procedure under part 3 of the draft might apply, normally the basic character of a treaty should be decided by the parties to it. He was not sure whether a third party could properly make a decision as to the character of the interests protected by a given treaty and it therefore seemed preferable that the protection of collective interests should apply only where expressly provided for in the treaty in question.

4. With regard to subparagraph (*e*) and the second and last sentences of paragraph (23) of the commentary to article 5, the real difficulty was to determine by whom and by what procedure the existence of an international crime was to be decided. Reference could, of course, be made to the international community as a whole, and each act could be assessed and held to be an international crime under one of the categories provided for in article 19, paragraph 3, of part 1 of the draft. The international community as a whole, however, was an abstract legal concept. Even if it did exist, on the basis of what procedure did it make a decision on international crimes? Admittedly, the Charter of the United Nations laid down the procedure for determining the existence of an act of aggression, but what about the cases, other than aggression, enumerated in article 19 of part 1? Could the international community as a whole, for example, arrive at a finding of fact that there had been a serious breach of an international obligation relating to environmental protection without having further criteria or a proper international mechanism upon which to rely? Aggression, therefore, was perhaps the only case in which an international procedure for determining the existence of such an act had been clearly established.

5. He did not think it was the Special Rapporteur's view that the General Assembly could take such a decision on behalf of the international community as a whole without a further multilateral decision that would invest the Assembly with such a right. Subparagraph (*e*) stipulated that, in the case of an international crime, "all other States" became injured States, a conclusion that could perhaps be drawn from the *erga omnes* nature of an international crime. Even in the case of such crimes, however, there could be two categories of injured State: the State whose right had been infringed as a result of an act amounting to an international crime; and the State or States whose rights might be, or were, affected by the same act. Those two categories appeared to have been given equal status as injured States under subparagraph (*e*) of article 5.

6. The Special Rapporteur seemed to be contemplating the establishment of two different legal systems, one to govern the legal relationship arising out of the internationally wrongful act in general, and the other to govern the legal relationship arising out of an international crime. The latter would, in his own view, give rise to difficulties when the Commission came to consider part 3 of the draft, since, in the absence of criteria and a proper international mechanism for establishing that there had been a serious breach of an international obligation, as provided for under article 19, paragraph 3, of part 1, it was doubtful whether the ICJ would be able to pass judgment.

7. On reading draft article 6, he had been a little puzzled by the fact that both paragraphs were formulated in terms of what the injured State "may require" of the author State, rather than in terms of the right of the injured State to take certain steps and the obligation of the author State to do likewise. That was, however, only a drafting point.

8. In article 9, paragraph 1, after the words "an internationally wrongful act to", the words "*inter alia*" could perhaps be added to denote that the points enumerated in subparagraphs (*a*) to (*d*) were not exhaustive. Also, a new paragraph 3 might be added, worded along the following lines:

> "3. Paragraphs 1 and 2 shall be without prejudice to any other form of settlement which the injured State may accept."

In practice there were many cases of *ex gratia* settlements without any legal payment of compensation

that corresponded to "the value which a re-establishment of the situation as it existed before the breach would bear". It would therefore be advisable, for practical purposes, to leave room for such settlements, which might also meet the concern expressed regarding compensation in kind.

9. He was a little uncertain about the application of article 6 in the case of an international crime. Assuming that the State directly injured by the international crime had taken steps pursuant to article 6, and that its request had been completely satisfied by the response of the author State, would States other than the directly injured State, within the meaning of article 5, subparagraph (*e*), still apply the sanctions provided for under draft article 14, paragraph 2?

10. As he had already pointed out (1895th meeting), in practice the legal relationship between an author State and an injured State was established simultaneously with the virtual solution of the main problems regarding the responsibility of the author State. Article 6 could be interpreted to mean that the alleged injured State might not be able to invoke the provisions of paragraph 1 (*a*) to (*d*) because, so long as the alleged author State objected to the existence of an internationally wrongful act, it did not acquire the status of an injured State. A saving clause should perhaps be included at an appropriate point to provide, in mandatory terms, that for the purposes of articles 6 and 8 the term "injured State" should be interpreted to cover States alleged to have suffered injury.

11. As to draft article 7, he was not convinced of the need for a separate provision concerning the treatment of aliens. It would be helpful if the Special Rapporteur could provide some specific examples of the "marked tendency" not to require *restitutio in integrum stricto sensu* referred to in paragraph (2) of the commentary to that article. He would also suggest that the words "without prejudice to article 22 of part 1" should be added, to reflect the content of paragraph (3) of the commentary.

12. His only problem with draft article 9 related to the criterion whereby the exercise of the injured State's right to take certain measures by way of reprisal must not be "manifestly disproportional" to the seriousness of the internationally wrongful act in question. That criterion was too loose, and could lead to an escalation of the situation. A more restrictive criterion, such as "essentially proportional" would be preferable, in the interests of maintaining legal stability. Such a change would also shift the initial burden of proof from the State which was the target of the reprisal to the State which triggered off the reprisal. He agreed that a phrase should be added to provide for the prohibition of armed reprisal in response to an internationally wrongful act not accompanied by the use of force. The actual wording could be left to the Drafting Committee.

13. Reference had been made to the binding nature of the interim measures of protection provided for under paragraph 2 (*b*) of draft article 10. In his view, provisional measures taken by the ICJ were binding upon the parties to the dispute pending the final decision of the Court in the matter.

14. In regard to draft article 12, he agreed with those members who had referred to the vagueness of the content of *jus cogens* and therefore supported the deletion of subparagraph (*b*). He considered, however, that the content of *jus cogens* should be determined by means of an international procedure, such as a written application made by the parties in the case to the ICJ. If the Commission decided to retain subparagraph (*b*), the point regarding a determination as to the content of *jus cogens* should be clarified in part 3 of the draft.

15. He was not entirely convinced of the need for paragraph 2 (*c*) of draft article 14. If it was meant to refer to the kind of collective self-defence measures referred to in paragraph (9) of the commentary to that article, that should be stated clearly.

16. Draft article 15 might be unnecessary, since its content was already covered by articles 4 and 14. However, he had no strong views on the matter.

17. With regard to draft article 16, he wondered how the exception provided for in subparagraph (*b*) would apply in the case of an international crime. With regard to subparagraph (*c*), he wondered whether it would not be better to use the term "belligerent relationship", in view of the Special Rapporteur's explanation in paragraph (5) of the commentary to article 16.

18. Lastly, concerning part 3 of the draft, he said that, while he recognized that the general direction advocated in the sixth report was perhaps the best one for the Commission to follow, the actual application of part 3 could give rise to many practical difficulties. With regard to the Special Rapporteur's proposed dispute-settlement procedure (A/CN.4/389, para. 32), providing for the submission of a dispute concerning an international crime to the ICJ, he was doubtful whether, in the absence of international agreement on an appropriate mechanism, the Court could properly take a decision on behalf of the international community as a whole regarding the existence of a serious breach of an international obligation.

19. Mr. Njenga paid tribute to the Special Rapporteur for his concise and well-thought out sixth report (A/CN.4/389) and for providing the Commission with a very sound basis for its debate.

20. He agreed that article 5 was central to part 2 of the draft. He also agreed with the categories of injured State specified in subparagraphs (*a*), (*b*) and (*c*), of the article, since the parties concerned were clearly identifiable. However, the situation was far more complex in the case of multilateral treaties, where identical, though parallel, bilateral rights and obligations could be created as between individual contracting parties, but where they could also be created, simultaneously, with regard to certain specific matters affecting all the contracting parties. The first two sentences of paragraph (21) of the commentary to article 5 contained an admirable statement of the position. In the case of the 1982 United Nations Convention on the Law of the Sea,[5] for example, the principles governing the "Area"

[5] See 1890th meeting, footnote 6.

embodied in Part XI—particularly article 136, which provided that the Area and its resources were the common heritage of mankind, and article 137 on the legal status of the Area and its resources—reflected the collective interests of all States, and any breach of those principles had to be seen in that light. The extent to which a State or group of States could, by remaining outside the Convention, evade their legal responsibility for the breach of what many regarded as a part of customary international law was highly dubious and, in his view, legally unwarranted. The term "collective interests", in subparagraph (*d*) (iii) of article 5, might, however, require further refinement, in order to draw a clear distinction between such interests and common interests.

21. He did not share the doubts expressed with regard to the formulation of article 5 (*e*) relating to international crimes, which, by their very nature, were to be considered as wrongful acts against all members of the international community. Indeed, international crimes such as genocide, *apartheid*, colonialism and the massive abuse of human rights could be considered as crimes not only against the international community, but against humanity itself, particularly since they were committed within States and thus did not, strictly speaking, fall within the arena of inter-State relations.

22. While draft article 6 was acceptable to him, he doubted whether the enumeration of measures which the injured State could require of the author State was exhaustive. The fact that *restitutio in integrum* was not possible did not mean that the only satisfaction could be in monetary terms. Where, for instance, a State was in breach of an obligation to afford a right of access to and from the sea to a land-locked country, provision of an alternative access route might be more appropriate than monetary compensation. The Drafting Committee might therefore wish to consider the addition of the words *"inter alia"* at the end of the opening clause of article 6, paragraph 1, to indicate that the enumeration was not exhaustive.

23. He did not share the doubts voiced regarding draft article 7. In the case of an alien, the State had an absolute right to exercise its sovereignty and the alien could avail himself of the local remedies. An alien should not be able to acquire rights greater than those of a national. In the case of nationalization, for example, nationals could not require their State to repeal its laws and restore their property to them, and aliens should not have such a right either. At most, the alien's right would be to monetary compensation, the right of his State to intervene on his behalf arising only after the alien had exhausted the available local remedies and there had been an abuse of process. Likewise, if a State decided unilaterally to rescind a contract with an alien, it was exercising its sovereign right and there could be no question of *restitutio in integrum*. In his view, therefore, the Special Rapporteur had captured both the spirit and the letter of the law in article 7.

24. While he did not wish to be a prophet of doom, he feared that draft articles 8 and 9, unless qualified, might have far-reaching and very detrimental repercussions, in particular for small and weak States. Those articles could operate to induce a régime of self-help which the strong could use as a pretext to impose their views, on the basis of their own interpretation of their rights arising out of a real or assumed breach of an international obligation. He did not think that was the Special Rapporteur's intention; indeed, in paragraph (2) of the commentary to article 8, the Special Rapporteur had himself stated: "Obviously this right to take countermeasures is not unlimited." In the absence of machinery for the compulsory settlement of third-party disputes, however, who but the State in question would determine where the limit should be set? For States, the ultimate purpose of both reciprocity and reprisal was undoubtedly in effect to restore the old primary legal relations, but he doubted whether that was realistic in the context of modern-day power relationships. More likely, such a "right" would be used to take coercive measures against the weaker members of the international community.

25. Paragraph 1 of article 9, and in particular the reference to "its other obligations", was very broadly phrased and should be amended. Mr. Ushakov had made a useful proposal in that connection (1895th meeting, para. 24). Furthermore, the proportionality requirement in paragraph 2 of article 9, according to which acts of reprisal should not be "manifestly disproportional" to the internationally wrongful act committed, could have a legally meaningful content only within the framework of binding, compulsory dispute-settlement procedures, which, if past experience was any indication, would be difficult to establish.

26. That weakness had been recognized and provided for in paragraph 1 of draft article 10. Unfortunately, however, in the context of the sovereign immunity of States, effective remedies were very rare. Even where machinery for the compulsory and peaceful settlement of disputes did exist, there was no guarantee that it would be acceptable to the superior Power, as had been seen in a very recent case before the ICJ. It was therefore a very difficult area in which the possibility of unilateral interpretation by a State of its rights could easily be abused.

27. He agreed with the wording of draft article 11, except for the expression "collective decisions" in paragraph 2, which he did not altogether understand.

28. In regard to draft article 12, while he was in agreement with subparagraph (*b*), he had serious doubts about the blanket exception to articles 8 and 9 provided for in subparagraph (*a*). What gave diplomatic law, and particularly diplomatic privileges, such wide acceptance was the fact of reciprocity. Possibly reprisals could be excluded, but the exclusion of reciprocity would undermine the very foundation upon which respect for diplomatic privileges and immunities was based. In contemporary State practice, if a State violated its obligations in respect of the granting of diplomatic or consular privileges, the injured State could do likewise: that was why there were so few abuses. Subparagraph (*a*) therefore had no place in the draft convention.

29. Draft article 13 was manifestly justified. Referring to draft article 14, he said that the Special Rapporteurs for the topics of State responsibility and the draft Code of Offences against the Peace and Security of Mankind should proceed to provide the Commission with substantive provisions. Whatever individual members' views might be, the Commission had firmly embraced the distinction between international crimes and international delicts. Unfortunately, however, while both the Special Rapporteurs and the members of the Commission agreed that international crimes constituted the gravest offence under State responsibility, one Special Rapporteur persistently maintained, despite a strong body of opinion to the contrary, that the draft code should be confined to individuals. There were, of course, some who shared that view, and all members were aware of the difficulties entailed in making States accountable for international crimes. However, that was not a convincing reason for dismissing the possibility of a State's responsibility for international crimes. Despite the statement in paragraph (1) of the commentary to article 14, the Special Rapporteur had not actually provided for any fundamental difference in the consequences for a State of committing an international crime as opposed to an international delict. Moreover, article 14, paragraph 1, contained no indication of what "all the legal consequences" or the additional obligations to be determined by the applicable rules might be. Reference was simply made to a chapter that was actually non-existent, since the Special Rapporteur for the draft code of offences had decided to exclude the application of the code to States.

30. Article 19 of part 1 of the draft might be an unwanted child, but it was very much alive, and many States considered it crucial to a future convention on State responsibility. Whittling down the concept until it was no more than an empty slogan would be quite unacceptable. The Commission therefore had to decide whether to deal with it under the topic of State responsibility or in the draft code; no progress would be made on either topic until the issue had been resolved. He agreed entirely with Mr. Francis (1894th meeting) in that respect.

31. While he could accept the provisions of draft articles 15 and 16, he considered, in the case of the former, that singling out aggression could give the impression that other crimes, such as colonialism, *apartheid* or massive pollution of the environment, were of considerably less importance to the international community.

32. He wholeheartedly endorsed the need for a part 3 of the draft, but underlined that difficulties were likely to arise in securing the acceptance of States for the inclusion of machinery for compulsory third-party settlement of disputes in a set of draft articles on State responsibility. The Special Rapporteur might, however, gain inspiration from the procedures adopted in the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. Mr Balanda (*ibid.*) had already referred to the difficulties in the OAU, whose member States preferred to resolve their disputes by *ad hoc* arrangements rather than refer them to the Commission of Mediation, Conciliation and Arbitration, which was virtually moribund.

33. Mr. TOMUSCHAT said that draft article 5 should perhaps state more clearly that the injured State was the State in whose favour certain specific entitlements arose once an international obligation had been breached. The crucial question was whether a right of a State had been violated; that was stated in article 5 (*a*), but it should also be made the focal point elsewhere. The existence of a right was easy enough to determine in a bilateral relationship, but extremely difficult in a multilateral framework, where practice and precedent had to be relied upon to provide the most dependable criteria. He agreed with previous speakers that no selection should be made as between sources of law; Article 38 of the Statute of the ICJ should not be ignored and the *Nuclear Tests* cases[6] brought before the Court should also be borne in mind. The Special Rapporteur went some way towards making that point in paragraph (8) of the commentary to article 5, but the idea should also be reflected in the text of the provision, which might then read roughly as follows:

> "For the purposes of the present articles, 'injured State' means a State whose rights under international law have been violated. The following are to be considered injured States, *inter alia:*
>
> "(*a*) if the internationally wrongful act constitutes a breach of an obligation existing in a bilateral relationship with another State, that other State;
>
> "(*b*) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty or by another rule of international law which is generally applicable, a State party to that treaty or subject to that rule if the obligation exists specifically in its favour or if it is specially affected by the breach."

34. Article 5, subparagraph (*d*), as submitted by the Special Rapporteur, should not cover only obligations imposed by a treaty, but should be expanded to include other sources of international law. A particular difficulty arose in connection with subparagraph (*d*) (iv), dealing with the protection of human rights, in that minor violations of human rights occurred in every country, but so long as they were more or less accidental they could not give rise to countermeasures by other States. He would revert to that issue in connection with articles 8 and 9 of the draft. Lastly, there would appear to be some overlapping between subparagraph (*d*) (iv) and subparagraph (*e*), since in some instances violations of human rights constituted international crimes.

35. Turning to draft article 6, he said that the text should make it perfectly clear that a breach of an international obligation did not destroy the original primary obligation. The point was made indirectly in paragraph 1 (*d*), but it should be spelt out at the very beginning of the article. That criticism apart, he welcomed paragraph 1 as being less abstract than many other parts of the draft. With regard to paragraph 1 (*b*), he agreed with Mr. Balanda (1894th meeting)

[6] See 1898th meeting, footnote 12.

that the term "remedies" in English was broader in scope than *recours* in French, which meant formal legal proceedings only. To require the defaulting State to take such formal steps as were provided for in its internal law might introduce an element of delay and interfere with the main object of the article, which was to provide swift redress to the injured party. Other acts of redress which the injured State might require of the author State and which should accordingly be mentioned in the text were apologies and the bringing to justice of the individual perpetrator of a crime. If the primary obligation breached was only the obligation to consult other States parties to a treaty before taking an important decision, it was difficult to see what the appropriate redress might be. In the case of very serious breaches of international law, such as wars of aggression, the aggressor State was hardly ever required to make reparation for the full damage caused, simply because the burden upon the people of the State concerned would then be too great. Lastly, he agreed with previous speakers who had expressed doubts about the use of the words "appropriate guarantees" in paragraph 1 (*d*).

36. He had no strong views on draft article 7, which no doubt provided a useful clarification.

37. Draft article 8, however, did give rise to a major question. If the obligations to which it referred were based on treaties, then, as Sir Ian Sinclair (1895th meeting) had rightly pointed out, the article covered much the same ground as article 60 of the 1969 Vienna Convention on the Law of Treaties. So far as obligations deriving from customary law were concerned, the distinction between reciprocity and reprisal was surely unusual, and possibly inappropriate. He would revert to that point in connection with article 10.

38. Draft article 9 was basically acceptable, but the concept of suspending the performance of obligations implied an essentially passive reaction and might perhaps be replaced by language which made it clear that the injured State was entitled to take positive action. A more substantial point arising from article 9 was the question of establishing a distinction between the right of the directly affected State and that of other injured States to take countermeasures by way of reprisal. For example, the complaints procedure provided for in article 41 of the International Covenant on Civil and Political Rights,[7] under which any State party could charge another with having violated its treaty obligations, was not subject to any limitation *ratione magnitudinis* of the alleged violation. On the other hand, in current United Nations practice, the community of nations could manifest its concern only in the presence of a consistent pattern of gross and reliably attested violations of human rights. Some similar requirement should be established as a pre-condition for the right of a State not directly affected by an internationally wrongful act to take measures by way of reprisal. Generally speaking, the concept of countermeasures should be explained more clearly, and the right of other States to inquire into alleged violations should be mentioned as a peaceful and therefore desirable alternative to the taking of countermeasures by way of reprisal. Lastly, he agreed with Mr. Ogiso that the temporary nature of the right referred to in paragraph 1 of article 9 should be made clear in paragraph 2.

39. The restrictions in draft article 10 upon the measures which an injured State could take in application of article 9 were too broad. The injured State could not, in the face of conduct which was clearly in breach of existing commitments, be expected to wait for negotiations to yield positive results. To impose such an obligation on the injured State would be to encourage the law-breaker. Too far-reaching an attempt to limit reprisals might seriously weaken the international legal order, which did not in any event have many sanctions at its disposal. Although the rule suggested by the Special Rapporteur fitted perfectly well into the framework of a regional system such as that of the European Communities, he doubted whether it could operate successfully on a world scale.

40. Draft article 11 covered more or less the same ground as article 60 of the Vienna Convention on the Law of Treaties, but diverged significantly from the rules set forth therein. Those divergences should be examined very carefully.

41. Turning to draft article 12, he agreed with Mr. Sucharitkul (1890th meeting) that the meaning of the words "do not apply" was not clear. Moreover, the reference to "a peremptory norm of general international law" did not solve the problem of the limitation of rights under articles 8 and 9. So far as subparagraph (*a*) of article 12 was concerned, he agreed with Sir Ian Sinclair (1895th meeting) that only a hard core of the immunities of diplomatic and consular missions and staff should be protected. The article should recognize that other immunities might be legitimately restricted by way of reciprocity or reprisal.

42. Draft article 13 was, of course, closely linked with article 11, and the question of the relevance of article 60 of the Vienna Convention on the Law of Treaties arose once more.

43. With regard to draft article 14, paragraph 1, he agreed with Mr. Reuter (1891st meeting) that the reference to "the applicable rules accepted by the international community as a whole" was unsatisfactory. The mere fact of acceptance or recognition did not suffice: an element of consistent practice was required, and should be mentioned in the text. Unlike Mr. Ushakov (1895th meeting) and Mr. Njenga, he did not consider that a general obligation existed for every State not to recognize as legal the situation created by an international crime (paragraph 2 (*a*)): recognition of the *de facto* consequences of, say, unlawful seizure of foreign property or of a massive expulsion of populations was hardly an international delict. The use of the words *"mutatis mutandis"* in paragraph 3 of the article was, in his opinion, superfluous. Generally speaking, the decisive provisions concerning international crimes were to be found not in article 14, but in article 9 and article 5 (*e*).

44. Referring to draft article 15, he expressed doubt as to the need to include a specific provision on

[7] United Nations, *Treaty Series*, vol. 999, p. 171.

aggression. If the intention was to draw attention to the relevant procedures under the Charter of the United Nations, the article was too narrow.

45. With regard to draft article 16, he questioned the distinction which the Special Rapporteur wished to draw between the termination or suspension of the operation of treaties and the suspension of the performance of treaty obligations. The arguments advanced in the footnotes to paragraph (21) of the commentary to article 5 and to paragraph (3) of the commentary to article 11 had failed to convince him, and he continued to feel that a renewed effort should be made to identify the relationship between the draft articles on State responsibility and the Vienna Convention on the Law of Treaties. Lastly, the reference to the rights of membership of an international organization in subparagraph (*b*) of article 16 was too broad and therefore misleading.

46. Before concluding, he sought the Chairman's leave to address himself to some of the issues arising in connection with articles 2 and 3.

47. The CHAIRMAN said that, since articles 1 to 4 had already been considered and provisionally adopted by the Commission, the appropriate time to comment on articles 2 and 3 would be on the occasion of the second reading of part 2 of the draft.

48. Replying to a point of order raised by Mr. McCaffrey, he said that comments on the minor changes introduced by the Special Rapporteur in articles 2 and 3 since their adoption on first reading were in order and would, in fact, be welcomed by the Drafting Committee. Substantive points, however, should be deferred until the second reading.

49. Mr. TOMUSCHAT said that he would transmit his comments to the Drafting Committee in writing. Reverting to articles 5 to 16, he said that he fully endorsed the Special Rapporteur's proposition that countermeasures taken by States other than the directly affected State should be exercised within the framework of the organized international community. Accordingly, he would wish to see reflected in the draft articles a system which began with the rights of the directly injured State, went on to consider the rights of other States acting collectively, and only in the last resort accorded certain rights to States not directly injured, acting more or less as guardians of the international legal order.

The meeting rose at 1 p.m.

1897th MEETING

Monday, 10 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf. Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. MAHIOU said that the draft articles submitted by the Special Rapporteur in his sixth report (A/CN.4/389) formed a well-constructed whole; each part fitted closely into the next and there were numerous explicit or implicit cross-references. However, the cross-referencing technique required considerable attention on the part of the reader, whom it might cause to see subtleties where there were only drafting errors, or leave wondering whether certain problems of comprehension originated in form or substance. What, for example, was to be made of the cross-reference in paragraph (6) of the commentary to article 11 to "paragraph 1 (i) and (ii)"? It was not only that paragraph 1 of the article contained no subparagraphs (i) and (ii); the reference did not seem to be to the subparagraphs (*a*) and (*b*) which it did have.

2. The commentaries to the articles were unquestionably of high quality, but they were sometimes too concise and elliptical. As some members of the Commission had said, they would be more convincing for the inclusion of more frequent references to State practice, judicial and arbitral decisions, and doctrine. The general structure of the draft was satisfactory and entirely logical.

3. In draft article 5, the Special Rapporteur sought to identify the State injured in each of the cases contemplated in subparagraphs (*a*) to (*e*) by referring to the source of the obligation breached. While his criterion was not the only one that could be employed, it had the advantage of giving the reader a clear view of the various possible situations.

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

4. It had been said of subparagraph (*a*) that it concerned two situations—the infringement of a right appertaining to a State by virtue of a customary rule of international law and the infringement of a right arising from a treaty provision for a third State—which, while closely related, were distinct and could be dealt with in separate provisions. The reference to article 38 of the 1969 Vienna Convention on the Law of Treaties in paragraph (5) of the commentary in fact served to highlight the existence of two different situations, depending on whether the right of the third State arose from a treaty provision that had become a customary rule of international law or from a treaty provision that had remained as such.

5. Subparagraph (*e*) had occasioned a number of drafting comments and suggestions worthy of close attention. The subparagraph served as a reminder of the principle that all States were considered to be injured by an international crime. As the Special Rapporteur said in paragraph (26) of the commentary to article 5, that principle did not necessarily entail the same new rights for each of the injured States. The problem was, above all, to determine whether the States were not injured differently. Obviously, certain international crimes, such as the crime of aggression, caused more serious injury to the State that was their direct victim than to the other States. While it was difficult to draw, that distinction between States directly or indirectly injured deserved to be taken into account and warranted at least an explanation in the commentary. There was unquestionably a hierarchy of injurious consequences of internationally wrongful acts. Perhaps that hierarchy could be given legal expression by reference to the distinction between rights and interests that had been established by the ICJ in the *Barcelona Traction* case.[5] The State that was the victim of aggression suffered injury to its vital and essential interests, whereas the other States suffered injury to their legal interests in the broad sense of the term, as members of the international community.

6. It had been suggested that article 5 should be less restrictively worded so as not to exclude situations which it did not mention. It should be noted in that respect that, as paragraph (8) of the commentary to the article showed, it was the Special Rapporteur's deliberate intention to refrain from taking a stand on certain cases, such as those of general principles of law and resolutions of United Nations organs as independent sources of primary rules. Although he approved of the Special Rapporteur's prudence and sagacity, more could be said in the commentary concerning those questions. In that respect, he drew attention to the advisory opinion of the ICJ of 21 June 1971 concerning the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*.[6] In that case, the Court had held that the termination of South Africa's Mandate and the declaration of the illegality of that country's presence in Namibia were opposable to all States in the sense of barring *erga omnes* the legality of a situation which was maintained in violation of international law. Another reason for wording article 5 less restrictively was that unilateral acts could create obligations for their authors and that it was open to question whether a State which was the victim of a breach of such an obligation was not an "injured State" within the meaning of the draft articles.

7. In the case of draft article 6, the substance was satisfactory, but the text could be improved. Paragraph 1 (*b*), which it was not certain was useless, could be drafted in more flexible terms so as not to concern merely the remedies provided for in internal law. A State which committed an internationally wrongful act must, of course, apply the remedies provided for in its internal law, but there might be other remedies as well. For example, the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States,[7] adopted under the auspices of the World Bank, provided for remedies that did not derive from internal law. The deletion of paragraph 1 (*b*) would limit the scope of article 6.

8. Since the injured State might, in certain cases, require of the State which had committed the internationally wrongful act less substantial compensation, article 6 might usefully be supplemented by a subparagraph (*e*) providing for the presentation of apologies. Finally, the possible range of solutions might, as Mr. Ogiso (1896th meeting, para. 8) had suggested, be enlarged by the addition of a paragraph 3 providing that the preceding paragraphs would apply without prejudice to any other form of settlement that the injured State might accept.

9. A number of members had said, with regard to paragraph 2 of article 6, that the requirement to pay a "sum of money" was too restrictive. In his view, the term "compensation" would be more acceptable, because it was wider in scope.

10. Since the matter to which draft article 7 referred was already covered in article 5 (*d*) (iv) and in article 6, it might be sufficient, in order to be able to delete article 7, to include in article 6 the additional provision that article 7 contained.

11. He wondered whether it was really useful to make express mention of measures by way of reciprocity and by way of reprisal in draft articles 8 and 9, respectively. On the other hand, while it was true that those expressions might give rise to difficulties, their deletion might occasion problems of interpretation and calculation. Perhaps article 8 could be made less self-evident by going into more detail. It would, however, be a very daunting task to try to enumerate in the article all measures by way of reciprocity. One way of strengthening the article and of indicating better the scope of the countermeasures it concerned would be to emphasize the scalar nature of such measures: they could be taken for a specified period of time, be provisional and depend for their duration on the conduct of the author State, or be irreversible.

12. Articles 8 and 9 alike raised the question of the distinction between measures by way of reciprocity

[5] See 1892nd meeting, footnote 5.

[6] *ICJ Reports 1971*, p. 16.

[7] United Nations, *Treaty Series*, vol. 575, p. 159.

and measures by way of reprisal and the question of proportionality. On the first point, he felt that, while the distinction was well outlined in paragraph (3) of the commentary to article 8, it would be better comprehended if the paragraph contained further information concerning it. Proportionality was important for article 8, but essential for article 9. As such, it should be viewed in parallel with the problem of dispute-settlement procedures. It seemed indispensable, in order to avoid the escalation of countermeasures and to prevent powerful States interpreting the notion of proportionality as authorizing them to coerce weaker States, to provide for third-party settlement of disputes. The notion of proportionality should therefore be carried over into part 3 of the draft.

13. While he approved of the general idea expressed in draft article 10, he wondered whether the obligation upon the injured State to exhaust the international procedures for peaceful settlement before resorting to reprisal might not result in delays beneficial to the author State. It was unfair that the injured State should be unable to threaten reprisals against the author State in order to shorten the period during which the international procedures for peaceful settlement were being exhausted. While it was true that paragraph 2 (*a*) of the article reserved interim measures of protection, it was important to distinguish, in the case of unarmed measures by way of reprisal, between those which expedited the settlement of disputes and those which did not.

14. The same problem arose with regard to paragraph 2 of draft article 11, which provided that the injured State was not entitled to suspend the performance of its obligations towards the author State if the multilateral treaty imposing the obligations provided for collective decision-making. Once again, there would be a waiting period during which damage to the injured State might grow. Other considerations notwithstanding, a means must be found of enabling the injured State to exert pressure on the author State in such a case.

15. Some members of the Commission believed that the reference in draft article 12, subparagraph (*b*), to peremptory norms of general international law was neither justified nor convincing. He could accept that the content of *jus cogens* or the manner in which it arose were open to question, but he considered it beyond dispute that there were imperative rules of international law and that the question whether it was permissible for States to conduct themselves, in response to an internationally wrongful act, in a manner contrary to *jus cogens* must be examined.

16. The problem raised by draft article 13—that of the relations between the draft articles and the Vienna Convention on the Law of Treaties—could be resolved by a drafting change: article 13 should speak not of a "manifest violation of obligations arising from" a multilateral treaty, but, in the terms of article 60, paragraph 3, of the Vienna Convention, of a "material breach of ... a provision essential to the accomplishment of the object or purpose" of a multilateral treaty.

17. Draft article 14, which drew the consequences deriving from article 19 of part 1 of the draft, had its place in part 2. In view of its importance, it should be more precisely worded. It had, in particular, been asked whether the consequences set out in paragraph 2 applied to crimes alone or to all internationally wrongful acts. It would seem reasonable for them to apply to all serious internationally wrongful acts, such as crimes, for an international crime injured all States either directly or indirectly, while an international delict did not. In addition, it was somewhat paradoxical that paragraph 1 of article 14, concerning the obligations of the author State, should have been couched in very general terms, whereas paragraph 2, concerning the obligations of other States, was extremely detailed. The reverse might have been expected.

18. In paragraph 2 of article 14, the list of obligations for States other than the author State might be supplemented by a subparagraph (*d*) concerning the obligation to prosecute the authors of the international crime. Whatever the relationship between the draft code and the topic of State responsibility, the principle, at least, of that obligation should be incorporated in the draft code. According to paragraph (1) of the commentary to article 14, the distinction drawn in article 19 of part 1 of the draft between "international delicts" and "international crimes" made sense only if the legal consequences of the crimes were different from those of the delicts. That statement would be in contradiction to article 14 if the article confirmed both crimes and delicts. After all, if the consequences mentioned in paragraph 2 of the article were considered as applying to delicts, all distinction between crimes and delicts would be removed as far as consequences were concerned.

19. Finally, article 14 should be examined in the light of the work on the draft Code of Offences against the Peace and Security of Mankind. As article 2 of part 2 of the draft under study made clear that that part contained only residual rules, it followed that any specific rules which the draft code might contain on the consequences of international crimes would prevail over the provisions of the draft articles on State responsibility. In any event, there was bound to be a problem of the relationship between the two topics, whether it was a matter of the apportionment of provisions between them or of the consequences attributed by the draft code to international crimes committed by States.

20. Draft article 15, concerning aggression, went at once too far, inasmuch as the question was already the subject of articles 4 and 14, and not far enough, in view of the importance of the crime of aggression. It was justified to the extent that it sought to make clear the legal consequences of aggression, but it must not elude the problems associated with self-defence. The relations between the provisions of the Charter of the United Nations and the draft articles should be examined every time an Article of the Charter was concerned, but self-defence had hardly been mentioned, except in paragraph (24) of the commentary to article 5.

21. He approved of the Special Rapporteur's approach and suggestions concerning part 3 of the draft

articles. It was, however, obvious that, because of States' marked sensitivity, great caution would be required in regard to compulsory procedures for the settlement of disputes. On the other hand, certain problems, such as that of proportionality, could be resolved only through compulsory dispute-settlement machinery. In the absence of such machinery, other provisions of the draft that provided for measures and countermeasures would lead to escalation and the aggravation of the situation. The Special Rapporteur should therefore take steps to submit concrete suggestions to the Commission.

22. Mr. BARBOZA said that the Special Rapporteur was to be congratulated on the richness and logic of his sixth report (A/CN.4/389), although certain passages were so succinct that it was not always easy to understand them.

23. Article 5 sought to define the protagonist in part 2 of the draft, namely the injured State. For that the Special Rapporteur had adopted a case-by-case approach, the result of which was a somewhat restrictive text. Perhaps the words "*inter alia*" should be added at the end of the introductory clause. The various sections of the article concerned the primary rules that could give rise to a right or an obligation. The Special Rapporteur made no mention, however, of the general principles of law, the resolutions of United Nations organs or unilateral declarations as independent sources of primary rules; paragraph (8) of the commentary to article 5 merely stated that the article took no position on their validity as sources of such rules. His own view was that it might be advisable to recognize the validity of those sources.

24. Subparagraph (*d*) of article 5 enlarged the circle of injured States to include the States parties to multilateral treaties. The provisions of the subparagraph that related to the protection of collective interests of States parties and of fundamental human rights were of special importance in that regard. Subparagraph (*e*) was more important still because it set forth the principle that an international crime injured all the States comprising the international community.

25. Draft article 6 raised the problem of the relationships between the four subparagraphs of paragraph 1. The relationship between subparagraph (*a*), which provided that the injured State could require the author State to release and return the persons and objects held, and subparagraph (*c*), which provided that it could require the re-establishment of the previous situation, was one of part to whole. The Special Rapporteur spoke with regard to subparagraph (*a*) of *restitutio in integrum lato sensu* and with regard to subparagraph (*c*) of *restitutio in integrum stricto sensu*. In fact, the application of subparagraph (*c*) overlapped that of subparagraph (*a*), so that there was no real choice between those provisions. It would therefore be sufficient to mention the case referred to in subparagraph (*c*) for an injured State to be able to require, in particular, the release and return of persons and objects held. In addition, he wondered whether an injured State which called for *restitutio in integrum stricto sensu* under subparagraph (*c*) could at the same time require, pursuant to subparagraph (*b*), the application by the author State of the remedies provided for in the latter's internal law. Subparagraph (*b*) seemed at variance with the logic of the article, for remedies were, in the type of case in question, a means of obtaining reparation; it would not be right for an author State to be able to invoke the absence of adequate remedies in its internal law to evade its new obligation. Indeed, article 27 of the 1969 Vienna Convention on the Law of Treaties would prevent it from doing so.

26. The situation was not the same in the case of article 22 of part 1 of the draft, where the exhaustion of local remedies was a condition for the existence of a breach of an international obligation. While article 22 provided for a progression from internal law to international law, draft article 6 provided for the reverse; such a progression would be very complicated. An author State might have to exhaust all the remedies in its internal law in order to discharge an international obligation. That was, indeed, what happened for all international obligations, inasmuch as a State which undertook, for example, to sell a quantity of wheat to another State first entered into relations of internal law with private persons or national co-operatives. Such problems of internal law were not, however, the Commission's concern. In the footnote to paragraph (10) of the commentary to article 6, the Special Rapporteur went so far as to state that "the obligation of *restitutio in integrum stricto sensu* would go beyond the limits of legal relationships between States".

27. The need for draft article 7 was not clear, for it seemed to concern no more than a particular instance of a case covered by article 6. Whatever difference there might be between the case referred to in article 7 and that referred to in article 6, paragraph 1 (*b*) and paragraph 2, the injured State could in each case require the payment of a sum of money corresponding to the value of the re-establishment of the previous situation.

28. The Special Rapporteur stated in paragraph (1) of the commentary to draft article 8 that, while articles 6 and 7 dealt with the new obligations of the author State, articles 8 and 9 concerned the "new rights" of the injured State. In his own view, the latter provisions concerned not so much rights—since there were no corresponding obligations—as actions which an injured State could take in order to obtain reparation. If that was so, it should be noted that, even if it included the performance of the old obligation, reparation *in integrum* did not cover the damage to which failure to discharge the obligation might give rise with time as a result of, for example, the non-possession of an object or a loss of business.

29. The notion of reciprocity, which was the subject of article 8, must be examined in conjunction with the subject of article 9, reprisals. There did not seem to be any fundamental difference between measures by way of reciprocity and measures by way of reprisal. The Special Rapporteur placed two conditions on reciprocity. According to article 8, a measure by way of reciprocity could not consist in more than the suspension of the performance of obligations corresponding to or directly connected with the obligation breached. According to paragraph (2) of the com-

mentary to article 8, the purpose of reciprocity was to restore the balance in the positions of the author State and the injured State, while the purpose of reprisals was to influence the author State to perform its new obligations. The balance that was the aim of reciprocity was not purely aesthetic. A measure by way of reciprocity was for an injured State a means of freeing itself from an obligation whose performance would go unrequited or of influencing the author State to discharge its obligations. As the Special Rapporteur indicated in paragraph (3) of the commentary to article 8, the goal in both cases was to restore the old primary legal relationship. While the Special Rapporteur spoke of balance with regard to reciprocity, he spoke of proportionality with regard to reprisals and did so in the negative, saying, in paragraph 2 of article 9, that the exercise of the right to take reprisals must "not, in its effects, be manifestly disproportional to the seriousness of the internationally wrongful act committed". In the final analysis, the notions of balance and proportionality were closely related. Not only did balance and proportionality have the same aim, but both measures by way of reciprocity and measures by way of reprisal would be wrongful unless taken in response to an internationally wrongful act. They were, in short, two forms of the same type of countermeasure and paragraph 2 of article 9 should therefore be recast in the positive.

30. The Special Rapporteur had described the problem of reprisals very well in his fourth report,[8] where he had said that, within the framework of qualitative proportionality, the admissibility of measures of self-help was obviously the most dubious, since such measures necessarily involved an infringement of rights of the author State, and that reprisals were therefore generally considered as allowed only in limited forms and in limited cases. In that regard, the nature of the internationally wrongful act and the nature of the rights of the author State infringed by the reprisals were of the greatest importance. If the strongest States were not to impose their own interpretation of the existence of a breach of an international obligation, the taking of reprisals must be subject to all sorts of safeguards. The Special Rapporteur recognized three sorts of restriction, the first of which related to armed reprisals. According to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[9] States must refrain from armed reprisals. In the draft articles, the ban on armed reprisals derived from article 12 (*b*), pursuant to which articles 8 and 9 concerning measures by way of reciprocity or reprisal were inapplicable to the suspension of the performance of obligations resulting from a peremptory norm of general international law. The Special Rapporteur might specify whether that ban extended to reprisals consequent upon an isolated case of the use of force, such as a violation of airspace accompanied by bombing. Some writers considered reprisals to be unlawful in such cases. The other restrictions concerned diplomatic immunities (article 12 (*a*)) and the obligations stipulated in multilateral treaties (article 11), particularly those concerning human rights (article 11, paragraph 1 (*c*)).

31. Finally, the Special Rapporteur stated in his report (A/CN.4/389, para. 26) that the future convention on State responsibility should not allow reservations excluding the application of part 3 of the draft. He did so after specifying (*ibid.*, para. 24) that the procedural rules in part 3 formed an integral part of the legal consequences of an internationally wrongful act. It followed that the injured State would always be able to invoke the machinery provided for in part 3.

32. He subscribed to the idea behind paragraph 1 of draft article 10: reprisals should not be taken until the international procedures for peaceful settlement of disputes had been exhausted. An injured State would always have available to it an international procedure for such settlement, first because such procedures would be set forth in part 3 of the draft, and, secondly, because it might be able to invoke specific procedures provided for in a treaty. If, as the Special Rapporteur proposed (*ibid.*, para. 14), the State which considered itself to be injured and wished to invoke article 8 ("reciprocity") or article 9 ("reprisal") as a justification for suspending the performance of its obligations was obliged to notify the author State of its reasons for doing so, and if the author State was obliged to declare and explain any objection it might have to the injured State, mutual notification would be essential and would at least have the effect of revealing the extent of the dispute. On the other hand, the triggering and exhaustion of the settlement procedures would depend on the co-operation of the author State: the possibility of taking preventive reprisals would apparently always remain open as a means of overcoming reluctance on the part of the author State to act.

33. Paragraph 2 of article 10 exempted certain measures from the rule of the obligatory exhaustion of international procedures for peaceful settlement of a dispute. In his view, paragraph 2 (*a*) concerned interim measures of protection taken by the injured State prior to the initiation of the international procedure for peaceful settlement and paragraph 2 (*b*) concerned the measures that the injured State could take when such a procedure was in progress. He believed that, in either case, the court or tribunal dealing with the affair would have to examine the measure taken by the injured State for legality and say, for example, whether it was disproportional.

34. Draft article 14 concerned a matter that, from the point of view of both State responsibility and the draft Code of Offences against the Peace and Security of Mankind, was more controversial. The Special Rapporteur seemed to consider that there were two main types of consequence of internationally wrongful acts. The first kind was the "civil" consequences, meaning those that did not go beyond the expunging of the effects of the breach of the obligation, or all the consequences common to an internationally wrongful act, including, it seemed, the new collective right referred to in article 5 (*e*). He himself accepted

[8] *Yearbook ... 1983*, vol. II (Part One), p. 15, document A/CN.4/366 and Add.1, para. 80.

[9] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

those consequences, which the Special Rapporteur considered as a minimum. In his view, the consequences referred to in article 14, paragraph 2 (*a*), (*b*) and (*c*), were applicable only to international crimes, since it was such crimes that involved the element of international public order which imposed obligations on all the States in the international community. As to the second kind of consequence, the penalties applicable in the event of an internationally wrongful act, the Special Rapporteur relied on the decisions of the international community as a whole. He himself was not opposed to that position, which seemed attributable to a resolve on the part of the Special Rapporteur not to deal in the draft with the criminal liability of States. The Special Rapporteur might be right in that, because to take a stand at the current stage in the draft articles on State responsibility with regard to the criminal liability of States would be tantamount to opening the major debate which the Commission had decided to postpone until it studied the draft Code of Offences against the Peace and Security of Mankind. Moreover, it would perhaps be unwise to take up the question of the criminal liability of States in the context of the draft articles on State responsibility, which, as the Special Rapporteur wished and the Commission had agreed, were intended to be general and, indeed, residual.

35. He had great difficulty in understanding paragraph 3 of article 14. He could not agree that even the discharge of the minimal obligations set forth in paragraph 2 (*a*), (*b*) and (*c*) of the article should be subject to collective procedures of the type laid down in the Charter of the United Nations for the maintenance of international peace and security. Naturally, if the United Nations had competence, the performance of the obligations would be subject to the procedures provided for in the Charter. But if it did not—and it was not competent in all aspects of international affairs—nothing would prevent the enforcement of the obligations without waiting for a decision of the United Nations. The Special Rapporteur had said that paragraph 7 of Article 2 of the Charter did not apply or, in other words, that intervention in the internal affairs of States was not forbidden. But United Nations competence was only precluded or established by international agreement. When, and only when, it had been established, the rights and obligations in question would be subject, within the framework of the Organization, to a collective procedure laid down in the agreement itself.

36. There was also a need clearly to define the role of the ICJ in relation to that of the United Nations. That was so because, if the Court and the United Nations were each given a role, there would be two different procedures with regard to the consequences of an international crime: a political procedure falling within the competence of the United Nations and a legal procedure falling within that of the Court.

37. Draft article 15 concerned the extremely important question of aggression. The Special Rapporteur had been reluctant to include aggression and self-defence in the draft articles on State responsibility. That was apparent from his summing-up of the Commission's discussion on the topic at its thirty-fifth session, when he had said that

> ... He personally continued to believe that aggression and self-defence were at the extreme frontiers of the topic of State responsibility, if not outside it altogether. Aggression was much more than a mere breach of an international obligation, and self-defence was much more than a mere legal consequence of such a breach.[10]

But, obviously in order to satisfy a strong current of opinion within the Commission, he had decided to include the question of aggression and, indirectly, that of self-defence in the draft articles in the form of a mere reference, without indicating either in article 15 or in the commentary thereto what were the "rights and obligations... provided for in or by virtue of the United Nations Charter" that arose from an act of aggression. The expression clearly meant self-defence and the procedures triggered by aggression, as well as the obligations and rights deriving from those procedures.

38. In his own view, the question of aggression could not be left out of the draft articles, for aggression entailed consequences entirely different from those of other international crimes and it was with the consequences of internationally wrongful acts that the draft was supposed to deal. Furthermore, self-defence was the sole case in which an act contrary to a peremptory norm of international law was opposed to an act that also breached that norm; without the antecedent, the recourse to force by the injured State would constitute an international crime. The Commission must consider whether it should look into the matter of self-defence and mention it *expressis verbis*. It had made room in the draft for another extremely difficult question, that of reprisals, although those reprisals had been made subject to limitations such as that of proportionality. It must, therefore, ask itself whether it should not do the same in the case of self-defence and provide, for example, that such defence must be proportional to the attack and not go beyond what was strictly necessary. There was, admittedly, no shortage of political and legal difficulties in that respect. The Charter of the United Nations did not define self-defence, but mentioned it. Perhaps, too, it would be advisable for the Commission to codify customary law so as to forestall both the introduction of new grounds for self-defence and the crumbling of the principle of the non-use of force that was embodied in the Charter.

39. He had nothing to add to what had already been said concerning draft article 16.

40. As section II of the report showed (A/CN.4/389, paras. 8 and 12), part 3 of the draft articles lay at the very heart of international law. He approved of the approach suggested by the Special Rapporteur with regard to the implementation of international responsibility and the settlement of disputes.

41. Mr. DÍAZ GONZÁLEZ said that he wished first of all to pay tribute to the Special Rapporteur, whose sixth report (A/CN.4/389) constituted a concentrated and profound summary of legal knowledge on a subject at the heart of international law.

42. Article 5 was the keystone of part 2 of the draft, since it defined the concept of the "injured State". He

[10] *Yearbook ... 1983*, vol. I, p. 149, 1780th meeting, para. 26.

did not have much to add to what had already been said concerning the article and wished merely to support Mr. Balanda's proposal (1894th meeting) that the words "for a third State" should be deleted from subparagraph (*a*). He wondered, with regard to the "collective interests of the States parties" mentioned in subparagraph (*d*) (iii), how it would be possible to distinguish between the interests of one of the States parties to a multilateral treaty such as the Charter of the United Nations and the interests of the community or collectivity of States as a whole. Perhaps the Special Rapporteur could clarify the matter in his summing-up.

43. He could accept the provision made in draft article 6 for the payment of a sum of money corresponding to the value of the re-establishment of the situation previous to the breach, but observed that reparation could, in some cases, take another form. The objective was to expunge the effects of the wrongful act and could be achieved by various means, including, of course, pecuniary compensation, but also, in the case of a diplomatic act, the mere granting of satisfaction or the dispatch of a diplomatic note.

44. Draft article 7 reminded him of the régime of capitulations. To what "treatment" for aliens did the article refer. In traditional international law, treatment for aliens was defined subjectively in relation to the "minimum of civilized treatment". But the assertion that States had a "general duty of diligence" was equally subjective, as could be seen from the definition of it given in 1928 by Max Huber, the arbitrator in the *Island of Palmas (or Miangas)* case. According to that definition:

> Territorial sovereignty ... involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.[11]

Of course, to determine when such a vague rule had been breached was a delicate matter, especially as the "duty of diligence" had to be assessed in the light of the circumstances. That duty was in practice open to abuse by certain States which invoked it. In traditional international law, the Calvo clause, which lay at the origin of article 7, was denied all validity. At most, writers recognized that it was generally equivalent to the confirmation, in relation to a person accepting it, of the principle of the prior exhaustion of local remedies.

45. The question thus arose what was the purpose of article 7 as currently worded. If it was to confirm the principle of the exhaustion of local remedies, he could agree to that, for, in point of fact, the chief internationally unlawful jurisdictional act was the denegation of justice. Provision had, however, already been made for that act in other international instruments. Following the reasoning of Mr. Reuter (1891st meeting), who had linked the article to article 22 of part 1 of the draft, he considered that article 7 did not have a place in the draft. In fact, the article sought to protect investments; that was normal enough, but contemporary international law provided other, more effective means of achieving that aim, without permitting the creditor State or its nationals to resort to reprisals, to retortion and force. For its part, the denegation of justice brought about the application of the remedies recognized by international law, such as the diplomatic protection of the nationals of a State.

46. He approved of draft article 8. His only suggestion concerning it was that the words "by way of reciprocity" should be deleted in order to avoid all problems of interpretation and all risk of confusion between reciprocity, reprisals and retortion.

47. Draft articles 9 and 10 appeared contradictory. According to paragraph 1 of article 9—from which the words "by way of reprisal" should in any event be deleted—the injured State was "entitled" to suspend the performance of its other obligations towards the State which had committed the internationally wrongful act; but according to paragraph 1 of article 10, the injured State could take no measure—not even, therefore, those provided for in article 9—until it had exhausted the international procedures for peaceful settlement of disputes. Clearly, one of the articles was superfluous. In paragraph 1 of article 10, the words "available to it" should be deleted because, of the international procedures for the peaceful settlement of disputes set forth in the Charter of the United Nations or in other treaties or conventions, there would always be one or other that was appropriate. Paragraph 2 (*a*) spoke only of a court or tribunal and made no mention of the Security Council, which was the organ competent to act and to determine whether recourse to reprisals was warranted, whether there had been aggression and whether a measure had been taken in exercise of the right of self-defence.

48. The aim of draft article 11 was to protect the collective interests of the States parties to a multilateral treaty. Who, however, was to determine when those collective interests had been injured? What was meant by the injured collectivity and a "procedure of collective decisions"? There was a United Nations organ, namely the Security Council, which decided what collective measures should be taken and the Charter made it quite clear that States could not, either individually or collectively, take any other than the collective measures decided upon by the Security Council, measures which were, furthermore, subject to the procedures of the Charter, which provided for the application of regional arrangements.

49. The two subparagraphs of draft article 12 seemed to have already been included, and could at all events usefully be included, in article 8. Of the two types of obligation concerned, the obligations of a receiving State with regard to the immunities to be accorded to diplomatic and consular missions and their staff derived from other conventions and could not, in any event, be suspended, while the obligations falling to a State by virtue of a peremptory norm of general international law could not be suspended either.

---

[11] United Nations, *Reports of International Arbitral Awards*, vol. II, (Sales No. 1949.V.1), p. 839.

50. He found it hard to understand the wording of draft article 13. Perhaps, in the Spanish text, the word *que* should be replaced by the words *la cual* in order to make it perfectly clear that it was the manifest violation of obligations arising from a multilateral treaty that destroyed the object and purpose of that treaty as a whole.

The meeting rose at 6 p.m.

1898th MEETING

Tuesday, 11 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf. Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. DÍAZ GONZÁLEZ, continuing the statement he had begun at the previous meeting, said that draft articles 14, 15 and 16 dealt with internationally wrongful acts constituting international crimes. They corresponded to article 19 of part 1 of the draft, which the Commission had provisionally adopted after a lengthy and difficult debate and which drew a distinction between "international delicts" and "international crimes". However, those articles did not seem to distinguish between internationally wrongful acts on the basis of the subject-matter of the international obligation breached and, more particularly, of the importance attached by the international community as a whole to the fulfilment of certain obligations. They thus made no distinction between "international delicts" and "international crimes", as the Commission did in adopting article 19. In that regard, it was relevant to refer not only to the text of article 19, but also to the commentary thereto approved by the Commission at its twenty-eighth session,[5] particularly paragraphs (6) and (59) thereof.

2. Article 14, paragraph 1, rightly referred to the concept of *jus cogens*, which had not been specifically and precisely defined, but had been explained in article 53 of the 1969 Vienna Convention on the Law of Treaties. Paragraph 2 (*a*) concerned the obligation not to recognize "as legal" the situation created by an international crime, but, as Mr. Balanda had pointed out (1894th meeting), it should, rather, concern the obligation "not to recognize the situation created by such a crime". A breach resulting from an internationally wrongful act produced legal effects, but it was not legal.

3. He saw no reason why the draft articles should not contain a provision relating to aggression, which was, according to article 19 of part 1 of the draft, an international crime. In order to maintain the link with article 19, however, the text of draft article 15 would have to be amended to include a reference to the four international obligations listed in article 19, paragraph 3 (*a*), (*b*), (*c*) and (*d*), which were of essential importance for the maintenance of international peace and security; safeguarding the right of self-determination of peoples; safeguarding the human being; and safeguarding and preserving the human environment. In that way, the Commission would not give the impression that it was placing the crime of aggression at the top of the list of international crimes. He personally would not make any distinction, in terms of degree, between international crimes.

4. He would reserve his position on part 3 of the draft articles until the Special Rapporteur had submitted some specific proposals.

5. He expressed the hope that, when the Special Rapporteur summed up the debate, he would try to dispel doubts and answer the many questions that had been raised, so that members of the Commission might have a clearer idea of the substance of the draft articles before a decision was taken to refer them to the Drafting Committee.

6. Mr. RAZAFINDRALAMBO commended the Special Rapporteur on having successfully completed the difficult task of submitting a set of clear, precise and coherent draft articles that fit in perfectly with those of part 1 of the draft.

7. Since part 1 of the draft had defined the concept of a State which had committed an internationally wrongful act or, to use the Commission's terminology, the concept of an "author" State, part 2 had to contain provisions identifying the State or States

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

[5] *Yearbook ... 1976*, vol. II (Part Two), pp. 96 *et seq.*

which had been "injured" by such an act and which were therefore entitled to new rights. Draft article 5 identified the "injured State" and was apparently intended as a "catalogue" listing the different types of injured State according to the customary, legal or conventional origin of the obligation breached. Although the definitions contained in that article were generally acceptable, some of them would have to be further clarified.

8. Article 5, subparagraph (*d*), raised a problem relating to the interpretation of multilateral treaties. Should competence for such interpretation be attributed only to the injured State which was a party to the treaty in question or to all the parties, which would take a collective decision in that regard? Who would, for example, establish that the obligation had been stipulated in favour of the State party concerned, as provided for in subparagraph (*d*) (i)? Subparagraph (*d*) (ii), which stated that "the breach ... necessarily affects the exercise of the rights or the performance of the obligations of all other States parties", involved a problem of proof, whereas subparagraph (*d*) (iii), which related to an obligation stipulated for the protection of collective interests, raised a problem of law to which there was no obvious solution, as the Commission's debates had shown.

9. It was, however, subparagraph (*d*) (iv) that was most in need of further clarification. In paragraph (22) of the commentary to article 5, the Special Rapporteur had explained that that provision referred to obligations to respect fundamental human rights as such. It thus appeared to apply only to individuals, not to private legal persons; but it also covered the case of a State party to a multilateral treaty, such as some of the international labour conventions or the International Covenant on Civil and Political Rights.[6] Would a State party to such instruments be entitled to an additional right not provided for in the ILO Constitution or in the Covenant and the Optional Protocol thereto? The answer to that question was clear in the case of an internationally wrongful act resulting from the breach by another State party of an obligation so essential for the protection of fundamental interests of the international community that its breach was recognized as a crime by that community as a whole, or, in other words, in the case of an international crime resulting from a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples (article 19, paragraph 3 (*b*), of part 1 of the draft), or for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid* (article 19, paragraph 3 (*c*)). Those crimes were also provided for in the International Covenant on Civil and Political Rights: article 1 referred to the right of peoples to self-determination; article 8 to slavery; article 6 to genocide; and article 26 to non-discrimination. It was under subparagraph (*e*) of draft article 5, which referred to an internationally wrongful act constituting an international crime, that the other States parties to such a multilateral treaty would be entitled to the new rights provided for in part 2 of the draft.

[6] See 1896th meeting, footnote 7.

10. As far as international delicts were concerned, the question of the rights of another State party had still not been answered. Which criteria would be used to identify a State party to a multilateral treaty which considered that it had been injured by the breach of an obligation stipulated for the protection of an individual person, irrespective of his nationality? For example, would State B be entitled to the rights provided for in draft article 6 or even in draft articles 8 and 9, including the right to claim monetary compensation, if State A breached an obligation stipulated in favour of a national of State A? The provision contained in article 5, subparagraph (*d*) (iv), appeared to go further than the provisions of the international human rights conventions in force, or at least further than those of a universal character. The Special Rapporteur would probably be able to provide further clarification on that point and explain the exact meaning of that provision.

11. It had rightly been pointed out that, in article 5, subparagraph (*e*), the words "all other States" did not take account of all the interests, or of the particular situation, of the State directly injured, for example by an act of aggression. In his own view, the use of those words in no way affected the respective rights and obligations of the States parties to a multilateral convention.

12. Since article 6 was the first provision that dealt with the new obligations of the State which had committed an internationally wrongful act, it would have been more logical to stress that point and to draft the article in such a way as to draw attention to the obligations of the author State. Article 6, paragraph 1, might, for example, read: "The State which has committed an internationally wrongful act shall, *inter alia*: (*a*) discontinue the act ...; (*b*) apply such remedies ...; (*c*) re-establish the situation ...; and (*d*) provide appropriate guarantees ...". He had no particular difficulties with the four elements listed in paragraph 1, (*a*) to (*d*), which were based on international practice, arbitral awards and legal decisions. He nevertheless thought that article 6 placed too much emphasis on material injury and that it did not take proper account of cases in which the injury sustained was only of a moral nature and for which international practice merely required reparation in the form of satisfaction or apologies.

13. Many members of the Commission had expressed the view that draft article 7 duplicated article 6 and that article 6, paragraph 2, already covered the case of the treatment to be accorded by a State to aliens. In his own view, however, there was a difference between the two provisions, since article 6, paragraph 2, applied only in cases where it was materially impossible for the author State to act in conformity with paragraph 1 (*c*) and to effect *restitutio in integrum stricto sensu*, which was a retroactive measure (*ex tunc*), whereas article 7 provided that the re-establishment of the situation as it had existed before the breach had to be the result of a deliberate decision by the author State.

14. That was probably what the Special Rapporteur had had in mind when he had drawn attention, in paragraph (2) of the commentary to article 7, to

... a marked tendency not to require such *restitutio in integrum stricto sensu* in the case of an internationally wrongful act consisting in the infringement—within the jurisdiction of the author State—of a right (or, more generally, a legal situation) of a natural or juridical person "belonging" to the injured State, or at least to leave to the author State the choice between such *restitutio in integrum stricto sensu* and the substitute performance of compensation and satisfaction (i.e. reparation).

He thus agreed with the statement by the Special Rapporteur in paragraph (3) of the commentary that "on a quite different legal plane, article 22 of part 1 of the draft articles does give legal relevance to the domestic legal system of the author State", and noted that article 22 dealt only with obligations of result, not with obligations of means, which were provided for in article 23. He considered that the proposed article 7 applied to the two situations referred to in articles 22 and 23. Article 7 was thus fully justified and did not duplicate article 6, paragraph 2.

15. In that connection, he said he did not think that the example of nationalization which had been cited to show that, in the case referred to in article 7, the author State did not have to effect *restitutio in integrum* was really relevant, because nationalization was not an internationally wrongful act. It was governed by the principle of permanent sovereignty over natural wealth and resources, which was the corollary of the principle of State sovereignty and one of the rights provided for in the Declaration on the Establishment of a New International Economic Order[7] and in the Charter of Economic Rights and Duties of States.[8] There were specific rules governing compensation in the event of nationalization: it must, in particular, be just and equitable. If the Commission wished to avoid having a separate article, the case covered by article 7 might, if necessary, form the subject of a new paragraph of article 6.

16. Draft articles 8 and 9 dealt with the new rights of the injured State and, specifically, with the countermeasures which the injured State could take in response to a breach of obligations by the author State. The injured State's response was designed to re-establish the balance between the positions of the two States by means of reciprocity, thus implying that their reciprocal obligations corresponded to or were connected with one another. Since a countermeasure by way of reciprocity was justified by the synallagmatic relationship between the author State and the injured State, its application should not give rise to any difficulties, subject to the restrictions provided for in draft articles 11 and 13 in the case of a multilateral treaty, and in draft article 12 in the case of obligations of a receiving State regarding diplomatic and consular immunities and of obligations existing by virtue of a peremptory norm of general international law. As to other possible restrictions, it could, for example, be asked why reciprocity as a legitimate countermeasure should not also be subject to an international procedure for the peaceful settlement of the dispute, on the same basis as reprisals. A countermeasure by way of reciprocity was, of course, quite "moderate" in comparison with a countermeasure by way of reprisal, as referred to in article 9. Its maintenance for an indefinite period, without any prospect of peaceful settlement, might, however, lead to a situation that would be prejudicial to peaceful relations between the States concerned.

17. The control mechanism for the legitimacy of a countermeasure by way of reprisal, as provided for in article 9, was fully justified. Reprisals had, of course, always been regarded as measures of coercion which were contrary to the ordinary rules of international law and they were all the more dangerous in that they had no obvious connection with the internationally wrongful act committed by the author State. In principle, therefore, he agreed with the Special Rapporteur's position that there should be a separate provision relating to countermeasures by way of reprisal, but he did not think that the restrictions which had been proposed in draft article 10, and which were definitely needed, went far enough. It had to be made clear that, in addition to the belligerent reprisals referred to in draft article 16, subparagraph (*c*), reprisals of a violent nature were prohibited in all cases. Article 9, paragraph 2, did, of course, embody a major restriction in that it brought the principle of proportionality into play. It might also be argued that, under article 4, all the provisions of part 2 of the draft were subject to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. The prohibition of the use of force was, however, far too important simply to be referred to in passing and to be watered down by such an abstract principle as that of proportionality. At present, measures of reprisal took various forms that were primarily of an economic nature and they were the weapon that powerful States preferred to use against weaker States, particularly developing States. Article 10, paragraph 2 (*a*), which provided that the injured State could take interim measures of protection within its jurisdiction, therefore gave rise to serious reservations inasmuch as such measures, which could be taken independently of a procedure for peaceful settlement of the dispute, would be difficult to reconcile with the principle of the jurisdictional immunity of States and their property. The Special Rapporteur might try to dispel doubts in that regard.

18. It was also open to question whether, as Mr. Ushakov (1895th meeting) had proposed, the injured State should be entitled to take a measure by way of reprisal only in cases where the internationally wrongful act was very serious, and whether such a measure should not be discontinued in certain circumstances, namely when an international procedure for the peaceful settlement of the dispute had been instituted and the dispute was thus *sub judice*.

19. Article 10, paragraph 1, embodied a safeguard provision that was absolutely necessary. It was thus appropriate to say that the injured State must have exhausted the international procedures for peaceful settlement of the dispute that were "available to it", because the injured State could then be required to avail itself of procedures before it engaged in reprisals.

20. The comments he had made with regard to article 5, subparagraph (*d*) (iv) and subparagraph (*e*),

[7] General Assembly resolution 3201 (S-VI) of 1 May 1974.

[8] General Assembly resolution 3281 (XXIX) of 12 December 1974.

concerning obligations stipulated for the protection of individual persons also applied to draft article 11, paragraph 1 (*c*).

21. The content of draft article 12 was entirely acceptable. Subparagraph (*b*) rightly referred to *jus cogens*, a concept that continued to give rise to controversy and strong reactions. As the Commission often said in connection with article 19 of part 1 of the draft, the existence and content of peremptory norms of general international law were open to discussion, but the fact was that articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties did exist and, unlike article 19, were in force, since the Convention had entered into force in 1980 and had so far been ratified by 46 States. Article 12 might, however, be placed immediately after article 9 or after article 10.

22. Draft article 13 had not given rise to much discussion. Draft article 14, however, was an essential provision because it was the corollary of recognition of the concept of an international crime. Paragraph 1 referred implicitly to the provisions of the preceding articles and, in addition, to such rights and obligations as were determined by the applicable rules accepted by the international community as a whole. It was closely linked to article 19 of part 1 of the draft and, in particular, to article 19, paragraph 2, on whose wording it was based. That would, of necessity, preclude rules which might be invoked by certain States, such as the concept of "vital interests" or the principles governing a national system of defence. The obligations set forth in article 14, paragraph 2, were mainly of a negative character. Like Mr. Thiam (1893rd meeting), he therefore had doubts about the practical effect of paragraph 2 (*c*), which required States to join other States in affording mutual assistance in carrying out the obligations provided for in paragraph 2 (*a*) and (*b*). The list contained in paragraph 2 was, in any event, only of an indicative nature, and that was what the Special Rapporteur had probably meant to emphasize in paragraph 3, which should, however, probably also be more explicit. It might, for example, be necessary to refer to the exercise of the right to self-defence in bringing about, by what would usually be violent means, the discontinuance of an act or a set of particularly serious wrongful acts committed by another State. Paragraph (9) of the commentary to article 14 referred only to collective self-defence, but in view of its particular importance and in order to establish a link with article 34 of part 1 of the draft, the right to self-defence should be specifically mentioned in article 14. Like other members of the Commission, he was of the opinion that the reference to the rights and obligations provided for in the Charter of the United Nations was not explicit enough and that it applied only to aggression.

23. As to draft article 15, he would, in principle, have no objection if a separate provision was devoted to aggression, which was not an ordinary international crime within the meaning of article 14, but, rather, a serious breach of an international obligation of essential importance for the maintenance of international peace and security or, in other words, an offence against the peace and security of mankind. Aggression was, however, not the only internationally wrongful act which had those characteristics. Article 19 of part 1 of the draft referred to three other categories of offences against the peace and security of mankind whose legal consequences were dealt with in the draft Code of Offences against the Peace and Security of Mankind. If reference was made only to aggression and other crimes were left out, there might be an imbalance between article 19 of part 1, on the one hand, and part 2, on the other. He therefore tended to agree with article 8 of Graefrath and Steiniger's draft convention on State responsibility, which assimilated the "forceful maintenance of a racist régime (such as *apartheid*) or of a colonial régime" to "aggression" and to which reference had been made in the Special Rapporteur's fourth report.[9] Like aggression, those crimes should be dealt with in separate provisions of the draft articles.

24. He fully supported the Special Rapporteur's proposals concerning draft article 16. The three cases which were covered by that article and to which the provisions of part 2 did not apply were fully justified. Even if that list was not exhaustive, it was not absolutely necessary to say so in the text.

25. There was an obvious link between part 3 and parts 1 and 2 of the draft articles. Many of the provisions of part 2, such as article 10, and of part 1 would, moreover, require a procedure for the peaceful settlement of disputes. Article 11, paragraph 1, *in fine*, stated, for example, that it was necessary to "establish" the elements listed in subparagraphs (*a*) to (*c*) before any measure could be taken to suspend the performance of obligations. The Special Rapporteur had been right, as indicated in his sixth report (A/CN.4/389, para.9), to draw on the obvious analogy between the Vienna Convention on the Law of Treaties and a possible convention on State responsibility and to state that he was in favour of the addition to the rules on State responsibility of provisions corresponding to articles 65 and 66 of the Vienna Convention. The notification procedure referred to in the report (*ibid.*, para. 14) in connection with the application of articles 8 and 9 was entirely appropriate. On the whole, the possibilities suggested (*ibid.*, paras. 16 *et seq.*) did not appear to be very controversial. The proposal (*ibid.*, para. 32) that a dispute concerning the interpretation or application of article 19 of part 1 should be submitted to the ICJ according to a procedure similar to that provided for in article 66, subparagraph (*a*), of the Vienna Convention on the Law of Treaties would have the effect of broadening the jurisdiction of the Court. In view of the traditional position taken by many third world States with regard to that high Court, that proposal might raise a problem of political options which would give rise to serious objections.

26. In conclusion, he thanked the Special Rapporteur for the valuable work he had done, for it would enable the Commission to make considerable progress in the elaboration of a set of draft articles on State responsibility.

---

[9] *Yearbook ... 1983*, vol. II (Part One), pp. 10-11, document A/CN.4/366 and Add.1, para. 57.

27. Chief AKINJIDE joined previous speakers in warmly congratulating the Special Rapporteur on his excellent sixth report (A/CN.4/389), which was a reflection of his industry and scholarship.

28. Part 2 of the draft articles on State responsibility was crucial, for, without it, parts 1 and 3 could not stand. It seemed, however, to be based on two erroneous assumptions: first, that the aggressor would always be defeated, and secondly, that the modern world was a normal one. So far as acceptance of part 2 was concerned, it should be borne in mind that a State which signed the future convention would be limiting its sovereignty; accepting international obligations that could give rise to criminal liability; and agreeing to be bound by international judgments and to accept the punishments imposed in such judgments. As lawyers, the members of the Commission tended to view the matter essentially from the legal angle, but Governments, which would be called upon to approve the future convention, would look at it essentially from the political angle. Like the draft Code of Offences against the Peace and Security of Mankind, therefore, it was an issue that was partially legal and partially political and the question was how to combine those two elements in a convention that would be broadly acceptable to the international community. That was by no means an easy task.

29. Account also had to be taken of the consequences that could ensue from the balance of power between two competing ideologies, as well as between the North and the South—the "haves" and the "have nots". Another question concerned the extent to which the nations of the world would be prepared to surrender a sizeable portion of their sovereignty, in compliance with the type of obligation set forth in part 2 of the draft. The trend since the First World War showed that, in any conflict between national and international interests, the preference had always been to protect the former rather than the latter. Had it been otherwise, peace would have reigned in many troubled areas of the world.

30. Again, many wars were waged by proxy and it was sometimes difficult to discern the principles at issue. It seemed to him that the draft articles of part 2 were a development, or elaboration, of various provisions of the Charter of the United Nations and the different resolutions adopted by the Security Council and the General Assembly. There was, however, no certainty that, if the provisions of part 2 were agreed upon and put into effect, they would not be ignored, just as those other provisions and resolutions had been ignored over the years. The relative strength of the parties, in military, economic and political terms, was likewise relevant to part 2 of the draft. That was a matter which concerned not only the great Powers, but also the developing countries, particularly in Africa, where many States had been the victims of intervention or aggression in one form or another. His comments were not to be interpreted as an indication of opposition to part 2 of the draft. He merely wished to indicate the dangers that lay ahead and the difficulties of securing acceptance by States of the provisions of part 2.

31. The draft articles dealt, *inter alia*, with reciprocity, reprisals, countermeasures and response. Although he had listened to the comments made in that connection and had carefully read the commentaries, he had to confess that he was none the wiser. Unless such notions were defined, they were bound to give rise to many different interpretations by the various competing interests, particularly where criminal or civil liability was involved. He therefore suggested that the draft should include a section on definitions in which those four notions would be defined as precisely as possible, bearing in mind that certainty was an essential element in criminal liability.

32. Part 2 of the draft appeared to provide for two régimes, criminal and civil. It should be made clear which acts amounted to crimes and which acts to torts—to use the English law term for delicts. He fully appreciated that, while every crime could be a wrongful act, not every tort would amount to a crime, and that the consequences of one might differ from, or be more serious than, those of the other.

33. As he had already noted, the aggressor was not always defeated; and if the aggressor in the Second World War had been the victor, and part 2 of the draft had been in force at the time, the history of the world might have been very different. In the atmosphere that prevailed immediately following a war, human beings were not always at their most rational and there was a wish for revenge. The victor could do as he wished with the vanquished. In that connection, he pointed out that, according to archives held at the Record Office in London, General Jodl, on signing the document of unconditional surrender to the Allied Forces in 1945, had expressed the hope that the victors would treat the German people with generosity. Hermann Goering had, moreover, said that, although his trial was a cut and dried political affair, he was prepared for the consequences. It had likewise been interesting to note that the War Cabinet in London, having decided on 12 April 1945 that a full trial by judicial process was out of the question for the principal Nazi leaders, had wanted Parliament to pass a bill of attainder; but United States support had not been forthcoming, since such a bill was illegal under article 1, section 9.3, of the United States Constitution. He mentioned that to show that, if the aggressor won, the consequences could go far beyond the provisions of part 2 of the draft. In his view, therefore, that part should be re-examined, for otherwise it might prove to be a dead letter in the event of a war of aggression which the aggressor won. It was often assumed that the provisions in question were directed at the great Powers in order to ensure that they did not use their stockpile of arms. He knew of no era in history, however, when there had been a stockpile of weapons which had not ultimately been used.

34. With regard to draft article 5, subparagraph (*a*), he agreed with Mr. Balanda (1894th meeting) that the reference to a third State was unnecessary and should be deleted. The definition of the "injured State" as a State whose right arising from a treaty provision had been infringed was acceptable, but he had serious doubts about the part of the definition

referring to a "customary rule of international law". Article 53 of the 1969 Vienna Convention on the Law of Treaties notwithstanding, such a definition could, in an atmosphere of tension, offer fertile ground for dispute. The same held true of the provision contained in article 5, subparagraph (*b*), because of prevailing uncertainty as to the status of judgments of the ICJ. The provisions of subparagraph (*c*) and subparagraph (*d*) (i) were acceptable, but he disagreed with the Special Rapporteur (paragraphs (17) to (19) of the commentary to article 5) that subparagraph (*d*) (ii) and (iii) reflected situations of fact; he was, rather, of the opinion that the statement in subparagraph (*d*) (ii) represented a combination of fact and law and that the statement in subparagraph (*d*) (iii) was entirely a matter of law. As for subparagraph (*d*) (iv), it should be borne in mind that not all countries were democracies where the rights of individual persons were protected. As several other speakers had pointed out, moreover, not every breach of individual rights was necessarily an internationally wrongful act. With regard to article 5, subparagraph (*e*), he recalled that many speakers at both the previous session and the current session of the Commission had argued that the position of "all other States" could not be assimilated to that of the State directly affected by an international crime and had expressed the hope that the Special Rapporteur would take account of that view.

35. The provisions of draft article 6 were no doubt correct in theory, but they would not be easy to apply in practice. In that connection, he cited two examples from his country's experience with a neighbouring State, one involving a border incident in which six of his countrymen had been killed, and the other in which the neighbouring State had overrun several islands belonging to his country in a lake held in common by the two States. In both cases, his Government, which was an elected Government and therefore had to take account of public opinion, had taken prompt action under Article 51 of the Charter of the United Nations, preventing further bloodshed in the former case and re-establishing the situation as it had existed before the act in the latter. It was difficult to see how article 6 could have been observed in such situations. Merely to "require" the author State to discontinue its internationally wrongful act (paragraph 1 (*a*)) might well prove inadequate; as for requiring it to apply such remedies as were provided for in its internal law (paragraph 1 (*b*)), the internal machinery in question might be far too slow or non-existent. He agreed with other members of the Commission that, for the sake of logic, paragraph 1 (*c*) and paragraph 2 should be combined and he endorsed the views on paragraph 2 expressed by Mr. Barboza (1897th meeting) and Mr. Reuter (1891st meeting).

36. Draft article 7, which dealt with the question of the nationalization of assets of aliens, including multinational corporations, did not appear to be entirely consistent with article 1, paragraph 3, and article 25 of the International Covenant on Economic, Social and Cultural Rights[10] and should, in his view, be deleted. Nothing in the draft articles should lend itself to being construed as legalizing intervention by powerful States in the internal affairs of weaker States.

37. Article 8, if maintained, would have to be drafted with greater precision. The meaning of the concepts of reciprocity, countermeasures and reprisals, as well as of the words "directly connected with", should be carefully defined. The same applied to the words "manifestly disproportional" and "seriousness" in draft article 9, paragraph 2.

38. The examples he had cited in connection with article 6 were also relevant to draft article 10. Cases in which parties to a dispute refused to co-operate or ignored Security Council resolutions were not unknown. As for draft article 11 and, in particular, its paragraph 1, he had to confess that he failed to understand its purport. Perhaps the Special Rapporteur or the Drafting Committee might be requested to make the text a little less puzzling.

39. Previous speakers had already made all the points he might have wished to raise with regard to draft article 12. He agreed that, in draft article 13, it might be more appropriate to refer to "material violation" than to "manifest violation" and, in general, felt that the article should be drafted more explicitly.

40. Draft article 14 gave rise to more serious objections in that it appeared to be subject to a political decision by the Security Council. It was by no means clear whether the rights and obligations referred to in paragraph 1 were to be determined before or after the commission of an international crime. He shared the misgivings expressed by previous speakers in connection with the *erga omnes* provision contained in paragraph 2, and wondered whether the rather complicated wording of paragraph 3 was not a way of indirectly saying that the right of veto would be used. As for the provision in paragraph 4 to the effect that obligations under the future convention on State responsibility would prevail over all other rules of international law except the United Nations Charter, he wondered whether States which had already acceded to other conventions containing a similar provision might not, for that reason, be discouraged from accepting the future convention.

41. With regard to draft article 15, he agreed with previous speakers that care should be taken to avoid any discrepancy between the work being done on State responsibility and that on the draft Code of Offences against the Peace and Security of Mankind. In any event, article 15 seemed to him to state the obvious and it could be omitted without harm to the draft as a whole. As to draft article 16, he noted that many States committed acts of aggression under the guise of reprisals.

42. Referring to part 3 of the draft, on the implementation of international responsibility and the settlement of disputes, he recalled that Mr. Ushakov (1895th meeting) had questioned whether it was necessary to have a part 3 at all. If Mr. Ushakov had meant that, at the current stage, it was questionable whether the future part 3 was relevant to part 2, his point had perhaps been well taken. More generally, however, a part 3 on implementation would un-

[10] United Nations, *Treaty Series*, vol. 993, p. 3.

doubtedly be a logical sequel to parts 1 and 2, and the Special Rapporteur deserved thanks for letting the Commission share his thoughts on the subject. The issue of implementation was of the greatest importance, as the history of the Nürnberg and Tokyo trials had shown, and it could materially affect the Commission's thinking on part 2. He therefore welcomed the Special Rapporteur's attempt to grapple with the problem, but he would reserve his position on the substance of part 3 until the appropriate draft articles had been submitted for consideration.

43. Mr. ROUKOUNAS, commenting, in the light of part 1 of the draft, on part 2, as contained in the Special Rapporteur's excellent sixth report (A/CN.4/389), said that the mechanism of responsibility provided for in part 2 lacked a core of rules relating to the injury caused. To go on from the primary to the secondary rules, the question of injury would have to be included somewhere in the secondary rules relating to reparation. When the Commission had considered the primary rules, it had not dealt in isolation with the element of injury, but had, probably quite rightly, taken the view that injury was implicitly included in the definition of an internationally wrongful act. Injury, namely material or moral damage, was, however, also of concern to those who had to assess reparation, not the wrongful act.

44. Some international legal decisions, such as that handed down by the ICJ in the *Corfu Channel* case,[11] had, of course, moved on directly from the internationally wrongful act to reparation, but others had dwelt at length on the problem of injury with a view to assessing reparation. Such cases had, moreover, not related only to individuals and the Commission appeared to regard them as implying that injury formed part of the wrongful act. The ICJ had, for example, often dealt with injury in the *Nuclear Tests* cases,[12] even in identifying the injured States. It would also be recalled that, in the *Aegean Sea Continental Shelf* case[13] (request for the indication of interim measures of protection), the Court had linked reparation to the existence of possible injury. In the *Mavrommatis* case,[14] the PCIJ had recognized that a particular act had been wrongful, but had found that it did not give rise to reparation because there had been no injury. It should also be pointed out that injury often had to be taken into account in determining the nature and scope of reparation. In dumping cases, for example, injury was taken into account in determining both wrongfulness and reparation. He therefore proposed that a place should be set aside for the question of injury in draft article 6, unless the Commission decided that it should be dealt with in a separate article.

[11] *Corfu Channel, Merits*, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4; *Corfu Channel, Assessment of Amount of Compensation*, Judgment of 15 December 1949, *ibid.*, p. 244.

[12] *Nuclear Tests (Australia* v. *France)*, Judgment of 20 December 1974, *I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand* v. *France)*, Judgment of 20 December 1974, *ibid.*, p. 457.

[13] *Aegean Sea Continental Shelf, Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3

[14] *Mavrommatis Jerusalem Concessions*, Judgment No. 5 of 26 March 1925, *P.C.I.J., Series A, No. 5*.

45. Draft article 5 was, of course, intended to define the term "injured State", but that provision did not appear to cover the problem of injury in relation to reparation, particularly since the injured State was defined as "the State whose right has been infringed"; that wording would have to be further clarified. Part 1 of the draft articles, on the origin of wrongfulness, was based on two ideas, that of the "internationally wrongful act" and that of the "author State". It was therefore difficult to see how part 2 could be based only on the concept of the "injured State".

46. Referring to the extent to which part 2 of the draft could be expected to fit in with part 1, he noted that, in part 1, the Commission had drawn a distinction between obligations of conduct and obligations of result. The consequences of that distinction were, however, difficult to assess and that might well be the cause of the difficulties to which part 2 gave rise.

47. In part 1 of the draft, the Commission had also drawn a distinction between international delicts and international crimes; but, in his view, such a distinction, which had its origin in the internal law of certain States, could be embodied in an international instrument only if it satisfied imperative and specific requirements. In internal law, that distinction determined which court was competent and how harsh the penalty would be, but the same was not true in international law. The Commission had made that distinction in order to emphasize the extremely serious nature of international crimes and to be able to draw consequences therefrom. The most outstanding action was the mobilization of the "international community as a whole" to bring to an end and punish a crime. In part 2 of the draft, an international crime was linked to the concept of the international community as a whole—a concept which had been identified by the ICJ in the *Barcelona Traction* case[15] and which had become institutionalized since the Second World War.

The meeting rose at 1 p.m.

[15] See 1892nd meeting, footnote 5.

1899th MEETING

Tuesday, 11 June 1985, at 3 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/ Conf.Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. ROUKOUNAS, continuing the statement he had begun at the previous meeting, pointed out Mr. Koroma that the word *préjudice* should be taken to mean *dommage matériel ou moral* or, in English, "injury". He had little to add to the proposals already made with regard to draft article 5 and would simply note that, in order to cover all possible origins of the obligation breached, mention might be made of the customary, conventional or "other" origin of the obligation. Furthermore, he too would favour a provision which covered the situation of a third State by specifying that the rights concerned must be rights accepted by third parties. In that regard, the situation of the "third" State might be somewhat different, depending on whether a conventional text or custom as expressed in a conventional text was involved.

2. Subject to his comments, which were not categorical, on "appropriate guarantees", he thought that draft article 6 should introduce the idea of injury and that paragraph 1 should be strengthened. It would be preferable to say that "The injured State *has the right* to require". The article seemed essentially to cover injury to private persons, something that was not justified. It should be broader in scope and should refer to "reparations", a generic term, and then to the satisfaction to be given to the injured State, which could be an apology, compensation or restitution, measures which would not necessarily be cumulative. Paragraph 2 was concerned with compensation. In actual fact, everything depended on the wrongful act, the nature of the injury and the evaluation of it. The judgment of the PCIJ in the case concerning the *Factory at Chorzów (Merits)*[5] which was sometimes cited no longer seemed to satisfy all present-day needs. However, it had been seen that satisfaction could be obtained through a decision of an international organ (the ICJ itself in the *Corfu Channel* case[6]). With regard to compensation, jurisprudence had adopted a restrictive approach concerning remote consequences; it rightly recognized, first and foremost, the "normal immediate consequences of the act". Furthermore, in addition to the situation of the directly injured State and that of the indirectly injured State, it was essential to take the direct and the indirect injury into consideration.

3. If article 6 was restructured and made broader in scope, draft article 7 would lose its usefulness. In any event, the Special Rapporteur seemed to have no major objection to the idea of deleting from paragraph (4) of the commentary to article 7 the reference to the unclear concept of "extraterritoriality". It would be preferable to speak of the competence of a State that was recognized by international law and was sometimes exercised outside its territory.

4. Draft article 8 lacked uniformity in the terms employed. It dealt with one of the aspects of the reaction by the injured State within the framework of interrelated obligations; it was not a question of retortion, in other words a response to a lawful act by another lawful act. In the case in point, if the act which provoked a reaction was lawful, was an article required in the draft? In practice, it was unfortunately very difficult to evaluate *prima facie* the lawful or wrongful nature of the reaction, hence the need for a provision that would cover all possibilities. The idea of reciprocity was a much wider institution and related not only to crises, but also to harmonious relations between States. Some constitutions, including the Greek Constitution, called for reciprocity in the performance of international commitments and in trade and co-operation relations. Therefore it would be better to speak of "countermeasures", a term used in part 1 of the draft and endorsed by the ICJ, and which had not encountered any major difficulty in legal theory.

5. The Special Rapporteur, who had set draft article 9 in a framework of "interobligations", proposed, as a measure of reprisal, suspension of the performance of the obligations of the injured State towards the State which had committed the internationally wrongful act. The use of the term "reprisal" indicated the extent of the action: the measure by way of reprisal would mean a wrongful measure taken in response to a wrongful act and designed to bring it to an end. Various recent instruments contained more or less distinct provisions in that regard. Thus the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,[7] in the first principle, sixth paragraph, proclaimed the duty of States to refrain from acts of reprisal involving the use of force. Similarly, Additional Protocol I of 1977[8] to the Geneva Conventions of 12 August 1949[9] prohibited, in article 20, reprisals against certain categories of persons and objects. Reprisals should therefore be

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

[5] Judgment No. 13 of 13 September 1928, *P.C.I.J., Series A, No. 17.*

[6] See 1898th meeting, footnote 11.

[7] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

[8] Protocol relating to the protection of victims of international armed conflicts, United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), p. 95.

[9] United Nations, *Treaty Series*, vol. 75.

confined to the field of armed conflict and it would be better for the Special Rapporteur to revert to the idea of countermeasures.

6. In considering articles 8 and 9, account should be taken of the principle of proportionality, the corollary to the use of countermeasures in international relations. The Special Rapporteur envisaged two types of proportionality: one was the subject of paragraph (3) of the commentary to article 8, and the other was explained in the commentary to article 9. The best course would be to merge the two articles in order to deal with countermeasures and to include a formulation on proportionality that precluded any possibility of difficulties of interpretation. For example, what would happen if an injured State took manifestly disproportional measures? Would it be barred from requesting reparation for the wrongful act?

7. He agreed with those members who had called for stronger provisions in draft article 14. With reference more specifically to paragraph 2, he thought that the obligation not to recognize the situation created by an international crime was the least that could be asked of States in exchange for their participation in the international community. International law, in the course of its development, had moved towards a law of co-operation to become finally a law of co-ordination, even solidarity. Never had there been any right to remain indifferent. A State called upon to express its position regarding the lawful nature of an act from the standpoint of international law was always duty-bound to take a decision and it could not equivocate. It was certainly not a question of distinguishing between recognition and "recognition as legal". States must recognize or not recognize an act: if the act was unlawful, there must be no recognition. Accordingly, he shared the views of Mr. Balanda (1894th meeting) and Mr. Díaz González (1898th meeting) and requested the deletion of the words "as legal" in paragraph 2 (*a*).

8. With regard to draft article 15, the crime of aggression needed clarification also in relation to the legal dimensions of self-defence.

9. Draft article 16 (*c*) was of some concern, since it referred to "belligerent reprisals". Belligerence was a situation of war within the classic meaning of the term, which was too narrow. Would it not be better to speak of "armed conflicts"? Again, in the absence of co-ordination between the work of the Special Rapporteur for State responsibility and of the Special Rapporteur for the draft Code of Offences against the Peace and Security of Mankind, it was difficult to determine whether the word "reprisals" should be used. Without going so far as to make a formal proposal, he suggested that the subparagraph should speak of the rules of humanitarian law relating to armed conflicts. Paragraph (5) of the commentary to article 16 could also refer, *inter alia*, to ICRC and to the 1949 Geneva Conventions and Additional Protocol I of 1977, which was in force even though the number of ratifications was not large.

10. Mr. AL-QAYSI said that the sixth report of the Special Rapporteur (A/CN.4/389) marked a major turning-point in the Commission's work on the topic. The basic substance of the draft articles was acceptable as a whole and presumably the brief commentaries would be expanded.

11. Some members continued to hold the view that the Commission should restrict itself to the traditional fields of State responsibility and refrain from introducing novel concepts which would weaken the law on State responsibility. It should be borne in mind that political considerations lay at the root of that viewpoint, more particularly in the light of what the Commission had provisionally adopted in article 19 of part 1 of the draft, concerning the distinction between international crimes and international delicts and its implications for the criminal responsibility of States. The result of adopting such an approach would make the Commission's work unacceptably inconsistent. Since part 1 admitted the possibility that the breach of an international obligation by a State could be towards another State or States, or towards the international community as a whole, in other words *erga omnes*, determination of the legal consequences of the breach could not be restricted by excluding a certain kind of injured party. It was one thing to argue in favour of the idea of being restrictive in determining the legal consequences of an internationally wrongful act; it was quite another, however, to require certain legal and judicial safeguards against abuse. In the matter of State responsibility, conflicting political interests abounded.

12. The strengthening of the law of State responsibility would surely help to strengthen the international legal order. Such an objective could not be fully achieved by confining part 2 of the draft to the legal consequences of international delicts, so as to save States as subjects of law from the implications of international criminal responsibility. With appropriate legal and judicial safeguards as envisaged in the sixth report, the consistency of part 2 of the draft with part 1 was not an invitation to chaos.

13. On that basis, he had no difficulty in accepting the substance of draft article 5, subparagraph (*e*), and draft articles 14 and 15 as they stood in the overall context of part 2. The relevant commentaries, moreover, should serve to dispel any doubts regarding the exact parameters of their substantive operation. With regard to article 15, he considered that the inclusion in the draft of a separate article on the crime of aggression was necessary because of the concept of self-defence, which did not come into play in the case of other international crimes.

14. Article 5, subparagraphs (*a*) (*b*) and (*c*), did not seem to raise any special problems, particularly since the Special Rapporteur clearly observed in paragraph (7) of the commentary that the text "cannot prejudge the 'sources' of primary rules nor their content". Subparagraph (*d*) (i) and (ii) were acceptable in substance; but the concept of the "collective interests of the State parties" in subparagraph (*d*) (iii) seemed to have been the cause of misgivings for some members. Admittedly, the drafting could be improved. If the point raised in the first two sentences of paragraph (21) of the commentary was that rights were concomitant aspects of obligations and that they were legally protected interests, the underlying substance of the concept embodied in subparagraph (*d*)

(iii) became clearer, for the collective, in contradistinction to a merely common or parallel, obligation which the States parties entered into for the protection or promotion of their collective interests entitled them to a collective right to remedies in the event of a breach. On the other hand, he did not understand why subparagraph (*d*) (iv) mentioned "the protection of individual persons", while paragraph (22) of the commentary spoke of respect for "fundamental human rights as such", and he would welcome some clarification in that regard.

15. Draft articles 6 and 7 established the new obligations of the author State towards the injured State. One purpose was to undo the internationally wrongful act of the State, and when that was materially impossible, a substitute performance was envisaged. In that connection, it might be preferable to replace the word "before", in article 6, paragraph 2, and in article 7, by the words "at the time of". Although the situation governed by article 7 was already covered by article 6, he wished to reserve his position on whether a separate article was needed on the question of the treatment of aliens. It might also be appropriate to settle, by suitable drafting, the apparent relationship between article 6, paragraph 1 (*b*), and article 22 of part 1 of the draft. However, the Special Rapporteur seemed to imply in paragraph (5) of the commentary to article 6 that there was no connection whatsoever between the two provisions, stating that the exhaustion of local remedies was construed in article 22 as "a condition for the existence of a breach of an international obligation", whereas the application of internal law remedies under article 6, paragraph 1 (*b*), was carried out by the author State after the breach. As the Special Rapporteur had said at the previous session,[10] it might be better to alter the wording of that provision so as to speak of the application of "measures" rather than "remedies".

16. Generally speaking, draft articles 8 and 9 seemed to be appropriate, but any doubts concerning the distinction between reciprocity and reprisal should be dispelled by the commentaries. The negative criterion for measuring the exercise of the right of reprisals, in article 9, paragraph 2, should not be changed to a positive one, as had been suggested by some speakers, because the criterion of manifest disproportionality was tied in with the effects of the exercise of the right of reprisals against the author State. It was reasonable to expect that the injured State should not be burdened by having to judge what was essentially proportional, in addition to the injury it had suffered as a result of the commission by the author State of the unlawful act. The burden of proof should be on the author State, and that could only be achieved through a negative criterion.

17. Noting that article 8 was made subject to the limitations set out in articles 11 to 13, he drew attention to the statement in paragraph (3) of the commentary to article 8 that "while article 9, paragraph 2, and article 10 contain special conditions for the taking of reprisals only, the object and purpose of those conditions is also relevant for the qualification of the measures taken as measures by way of reciprocity". If that was so, he would like to know why draft article 10 was specifically related to article 9 alone.

18. The provisions of draft article 12 seemed essential. Subparagraph (*a*), however, seemed to be intended to cover "hard-core" immunities, and the wording could perhaps be improved by the Drafting Committee. As to subparagraph (*b*), he agreed with the Special Rapporteur that it was simply not possible to disregard peremptory norms of general international law. The Special Rapporteur had also rightly pointed out that draft article 16 must be exhaustive; otherwise, the remaining articles would make no sense.

19. In his opinion, part 3 of the draft was essential, since it would make for certainty in the law, eliminate abuse and strengthen the international legal order.

20. Lastly, within the context of articles 5 (*e*), 14 and 15, as well as the provisions of article 4, the legal consequences of internationally wrongful acts were subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security. While it was impossible to reject those rules, the question remained what the legal consequences were for States within the framework of part 2 of the draft when the machinery for the maintenance of international peace and security under the Charter became impotent as a result of its outright rejection by a State party engaged in armed conflict.

21. If States A and B were locked in an armed conflict under consideration in the Security Council, what were the legal consequences under part 2 of the draft for those two States, for States Members of the United Nations generally and for States members of the Security Council specifically, (*a*) if State A accepted the unanimous resolutions of the Security Council on a cease-fire and peaceful settlement, including judicial settlement; (*b*) if State B rejected the authority of the Security Council, rejected peaceful settlement, and rejected unanimously adopted cease-fire resolutions? What legal consequences applied to other Member States, in particular members of the Security Council and specifically the permanent members, if some of them continued to conduct business as usual with State B and enabled it to prolong the armed conflict? The lawlessness epitomized by the conduct of State B in the situation in question, which was real, made the Commission's exercise seem somewhat academic unless those aspects were squarely faced. Such situations might be accepted on the basis that the underlying problem was political. However, was it not time for the Commission to lead the way in drawing up legal rules to govern political conduct?

22. Mr. LACLETA MUÑOZ said that his first comments on the Spanish version of the Special Rapporteur's sixth report (A/CN.4/389) related not only to drafting matters, but also to conceptual matters. In Spanish, the meaning of *crimen* and *responsabilidad criminal* was different in the draft from their meaning under internal law. International law could adopt its own definitions—for example, in article 19 of part 1 of the draft *delito*, meant a wrongful act

[10] *Yearbook ... 1984*, vol. I, p. 318, 1867th meeting, para. 31.

that was not of any particular gravity, whereas *crimen* signified a particularly serious wrongful act. He requested the Secretariat to correct those mistakes, which were a source of confusion in the commentaries and even more annoying in the draft articles.

23. Draft article 5, setting forth the legal consequences of an internationally wrongful act, posed no great difficulty, but it might well be preferable to separate the two cases covered by subparagraph (*a*). Again, subparagraph (*d*) was not very clear, at least in Spanish: did "a State party" mean "any (*cualquier*) State party"? Would it not be better to say in subparagraph (*d*) (ii) and (iii) that all the other parties were injured, and if not, specify that it was any other party?

24. He appreciated the Special Rapporteur's concern, apparent from paragraph (14) of the commentary to article 5, to distinguish multilateral treaties involving bilateral legal relationships as between each pair of States parties from other multilateral treaties founded upon an interest common to a larger number of States. Yet the text of articles did not seem to meet that concern satisfactorily, nor was it in keeping with the explanations given in paragraphs (19) to (21) of the commentary. Like other members, he did not think that all the other States had the same rights as the State directly injured by an international crime. One way or another, the article should reflect what was stated in paragraph (26) of the commentary, namely that the difference in degree of injury naturally affected the countermeasures applicable.

25. Draft article 6 was clearly conceived from the standpoint of options, for the injured State could choose from among the possibilities enumerated in paragraph 1. No reference was made to apologies—a measure of reparation that was customary in the absence of material injury. There was in link between paragraph 1 (*a*) and paragraph 1 (*c*): the latter set forth a new and essential obligation upon the author State, whereas the former established the initial and minimum obligation that the author State could not evade in some clearly determined cases. In his opinion, paragraph 1 (*c*) should take first place, so as to demonstrate clearly the obligation of *restitutio in integrum*, as qualified later by paragraph 2. On the other hand, the *renvoi* to article 7 that was now contained in paragraph 1 (*c*) was pointless, since article 7 dealt only with the case in which the wrongful act breached obligations concerning the treatment to be accorded to aliens, whether natural or juridical persons. The *renvoi* duplicated the provisions of article 6, paragraph 2. He also had some doubts about paragraph 1 (*b*).

26. Generally speaking, draft articles 8 and 9 were sound and both related to countermeasures, a term to which he was not opposed. He had no objection to the distinction drawn between reciprocity, in article 8, and reprisals, in article 9. Surprisingly, however, no mention was made of retortion, which could probably be explained by the lawfulness of retortion, although it came within the context of countermeasures. Apart from conventional reciprocity, reciprocity was nothing less than a kind of reprisal. It was *lex talionis*, unless the wrongfulness of a State's conduct was justified because the conduct in question merely reproduced that of the author State. Did the slight difference between reciprocity and reprisals warrant two separate articles? Again, if reprisals, as provided for in article 9, could consist of non-performance of obligations towards the author State, it was necessary to specify the limitations on the exercise of that right. For the purpose of indicating that the obligations in question were not directly bound up with those which had been breached, article 9 should speak of suspension of the "performance of other obligations". The formulation used, at least in the Spanish text, conveyed the idea that the injured State could suspend the performance of all its other obligations, including those not covered by reciprocity under article 8. In actual fact, a State which decided on measures of reprisals could choose, from among a wide range, the rights of the author State that it would breach; the idea was not to urge it to breach all of them, which would be excessive.

27. Draft article 10, which put a brake on reprisals, seemed acceptable, and he endorsed the idea that recourse to reprisals should be subject to a prior requirement, namely exhaustion of the international procedures for peaceful settlement of the dispute. However, acceptance of such a restriction naturally depended on the machinery for the peaceful settlement of disputes, which would be covered by part 3 of the draft and should consist of genuine means of settlement rather than mere negotiations that could well prolong matters indefinitely.

28. As to draft article 12, he did not share the view that diplomatic privileges and immunities were based essentially on the notion of reciprocity. Like the Special Rapporteur, he thought that those matters should be excluded from the scope of articles 8 and 9. It was enough to see that article 47 of the 1961 Vienna Convention on Diplomatic Relations expressly prohibited discrimination, and consequently reciprocity.

29. Draft articles 14 and 15, like article 5 (*e*), set out the legal consequences of the distinction drawn in article 19 of part 1 of the draft between an international crime and an international delict; but was article 14 sufficient? He too considered that wrongful acts which constituted delicts also entailed obligations—the degree alone was different. Surely one of the consequences of an international crime was precisely to trigger the individual responsibility of natural persons who had guided the conduct of the author State. The reference in article 14, paragraph 1, to the rights and obligations determined by the applicable rules accepted by the international community covered that possibility, but the Special Rapporteur could well express that idea more clearly. Again, the expression *"mutatis mutandis"*, in paragraph 3, raised some doubts: perhaps it would be better to say "where appropriate" (*en su caso*), for the case envisaged related not to all international crimes, but only to those which were an offence against the peace and security of mankind.

30. With reference to article 15, he agreed with those members who had called for an express reference to the legal consequences of an act of aggres-

sion, in other words exercise of the injured State's right of self-defence.

31. Lastly, he was convinced of the need for a part 3 of the draft. More particularly, he endorsed the Special Rapporteur's description in his report (A/CN.4/389, paras. 4-5) of the way things really happened and of the situations that inevitably arose in practice. Plainly, the author State could deny the facts, deny it was the author of the act, and deny that the act was wrongful. Dispute lay at the core of responsibility, as in internal law. Moreover, in view of the broad scope of the draft, which was to cover all the secondary rules relating to all the violations of the primary rules, the consequence drawn by the Special Rapporteur (*ibid.*, para. 8), although ambitious, seemed well founded. The Commission would doubtless encounter practical difficulties, but such an approach was desirable and he hoped that it would succeed. Harmonization of the dispute-settlement machinery with the Charter of the United Nations and particularly with the powers of the Security Council in the case of offences against the peace and security of mankind posed some special problems, but the Special Rapporteur's competence and his knowledge of the subject would undoubtedly enable him to complete the task.

32. Mr. YANKOV congratulated the Special Rapporteur on his sixth report (A/CN.4/389), which contained a well-structured and coherent set of draft articles on the content, forms and degrees of international responsibility.

33. The concise manner in which the commentaries to the draft articles had been presented was, of course, commendable, but they should, in his view, also contain more detailed references to State practice, as evidenced by precedents, treaties, judicial decisions and assessments by writers on law. Since, as the Special Rapporteur had rightly pointed out in his fourth report,[11] there was "an abundance of primary rules of conduct but a relative scarcity of secondary rules and a virtual absence of tertiary rules", it would be easier to formulate appropriate legal provisions if emphasis were placed on the relevant background material, which would be particularly helpful to Governments and their legal offices. The Special Rapporteur might therefore consider the possibility of bringing the content and format of the commentaries to the articles into line with those of the more detailed commentaries to the articles of part 1 of the draft.

34. He seriously doubted whether the three core elements of part 2 of the draft, namely the content, forms and degrees of international responsibility, had been adequately reflected in the draft articles submitted in the sixth report. Articles 2, 5 and 11 made it clear that the "content of international responsibility" meant that an internationally wrongful act created new relationships between the author State and the injured State, but articles 6 to 10 would require further scrutiny and elaboration because, although they referred to the principle of proportionality, they did not include all the other criteria that would be instrumental in determining "the forms and degrees of international responsibility". In that connection, Mr. Ushakov (1895th meeting, para. 24) had proposed a new draft article which would supplement article 6 and refer to action that the injured State would be entitled to take against a State which had committed an international delict. The Commission might draw on that proposal in its attempts to explore the possibility of ensuring more adequate coverage of the three main elements of part 2.

35. Since there might be a dichotomy between the treatment of crimes and the treatment of delicts, he suggested that the Commission should decide as soon as possible whether it would deal in part 2 of the draft with the responsibility of States both for crimes and for delicts and, in the draft Code of Offences against the Peace and Security of Mankind, with the criminal responsibility only of individuals for offences against the peace and security of mankind.

36. Article 5 was of crucial importance because it was intended to define the main actor in part 2 of the draft, namely the "injured State". The article should therefore begin with an introductory clause identifying the "injured State" as "a State whose right under international law has been infringed by an internationally wrongful act committed by another State", thus indicating the main elements of the legal relationship between the injured State and the author State and covering the sources of international law. As it now stood, for example, article 5 (*a*) focused not on a general rule of treaty law, but on a right arising from a treaty provision "for a third State". That subparagraph thus needed further elaboration, as did subparagraph (*b*), relating to a judgment or other binding dispute-settlement decision of an international court or tribunal. The Special Rapporteur had been right to base subparagraph (*d*) on article 60 of the 1969 Vienna Convention on the Law of Treaties, yet the distinction between subparagraph (*d*) (ii) and (iii), and even, to some extent, subparagraph (*d*) (iv), was not at all clear. Perhaps subparagraph (*d*) (ii) and (iii) could be combined and an explanation of the cases they covered be included in the commentary to article 5. Singling out the "protection of individual persons" in subparagraph (*d*) (iv) was not at all justified in terms of the general structure of the draft articles, for there might be other "subjects" that also required special protection. With regard to subparagraph (*e*), he agreed with other members who had emphasized that it could apply to an enormous variety of situations and that it did not express the degrees of State responsibility in clear legal terms.

37. He experienced some difficulty with regard to the content and scope of the reparations that could be required by the injured State under draft article 6. The list contained in paragraph 1 (*a*) to (*d*) was not at all exhaustive, since it did not mention such possibilities as "satisfaction" or "apologies". The substance must therefore be elaborated further and the relationship between article 6, paragraph 2, and article 7 had to be explained more clearly. The words "may require" in paragraph 1 were, moreover, too weak and there was no need to refer specifically to "persons and objects" in paragraph 1 (*a*).

[11] *Yearbook ... 1983*, vol. II (Part One), p. 8, document A/CN.4/366 and Add.1, para. 35.

38. With reference to draft article 7, he realized that the treatment of aliens and State responsibility in respect of aliens had traditionally had a prominent place in international law, but it was questionable whether special importance should be attached to a particular type of internationally wrongful act in a set of articles on the content, forms and degrees of international responsibility. The substance of article 7 could well be incorporated in article 6.

39. As to draft articles 8 and 9, he agreed with Mr. Roukounas that it might be more appropriate to refer to countermeasures, as dealt with in article 30 of part 1 of the draft, than to reciprocity and reprisals. In his opinion, further consideration should be given to the criteria and parameters for countermeasures, including their temporary nature and proportionality, and to the possibility of the peaceful settlement of disputes. It should not be impossible to find a way of referring very comprehensively to "countermeasures" and of combining articles 8 and 9. In addition, it might be dangerous to refer in article 9, paragraph 1, to "its other obligations towards the State which has committed the internationally wrongful act", for obligations under a specific treaty were quite different from other obligations deriving from customary rules. The door would be open to reprisals if the injured State had an unlimited choice of obligations whose performance it could suspend.

40. With regard to draft article 11, the Special Rapporteur had rightly emphasized the importance of interim measures in connection with the organization of the response to a breach of an obligation under a multilateral treaty.

41. In draft article 12, the Special Rapporteur rightly referred to "immunities" alone, rather than to "privileges and immunities". Immunities could be regarded as being within the realm of *jus cogens*, hence they demanded guaranteed protection. The commentary to article 12 should, none the less, explain why reference was being made only to "diplomatic and consular missions and staff" and not to other types of missions, such as permanent missions, which also enjoyed protection. He shared the doubts expressed by other members in connection with the reference in article 12 (*b*) to "a peremptory norm of general international law".

42. Draft article 13, as the Special Rapporteur had indicated in paragraph (1) of the commentary, dealt with the case of a complete breakdown, as a consequence of an internationally wrongful act, of the system established by a multilateral treaty. Such an article should nevertheless have a place in the draft as a safeguard provision.

43. He agreed with Mr. Ushakov (1895th meeting) that draft article 14 should cover both international crimes and international delicts. Paragraph 3 referred to the procedures embodied in the Charter of the United Nations with respect to the maintenance of international peace and security. In that connection, draft article 15 should be considered in relation to article 14 and article 4. It was obvious why aggression was expressly mentioned in article 15, but he failed to see why other crimes covered by part 1 of the draft were omitted.

44. Referring to part 3 of the draft, on the implementation of international responsibility and the settlement of disputes, he recalled that, at its twenty-seventh session, in 1975, the Commission had decided to divide the draft articles on State responsibility into three parts. It would, however, not be sufficient if part 3 was regarded as being limited to the secondary rules contained in part 2 or if, as the Special Rapporteur had stated in his fourth report, "such limited dispute settlement" referred only "to the interpretation of such rules as part 2 might contain relating to quantitative and qualitative proportionality".[12] The Special Rapporteur had therefore been right to suggest[13] that the dispute-settlement procedure might be extended to the interpretation of chapters II, III, IV and V of part 1 of the draft. Although he himself could agree with other members of the Commission that a cautious approach had to be adopted in dealing with the complex problems involved in part 3, he did not think that a system of State responsibility could be established without provisions on the implementation of international responsibility and the settlement of disputes. Consequently, the Commission should encourage the Special Rapporteur to draft such provisions.

The meeting rose at 6.05 p.m.

[12] *Ibid.*, p. 9, document A/CN.4/366 and Add.1, para. 40.

[13] *Ibid.*, paras. 40-41.

1900th MEETING

Wednesday, 12 June 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

Content, forms and degrees of international responsibility (part 2 of the draft articles) and "Implementation" (mise en œuvre) of international responsibility and the settlement of disputes (part 3 of the draft articles)[3] (continued)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. MALEK recalled that the importance of the topic of State responsibility and the need to complete the study of it as soon as possible had been emphasized in the Sixth Committee at the thirty-ninth session of the General Assembly. Moreover, the Commission itself had referred, in its report on the work of its thirty-sixth session, to the desirability of completing the first reading of part 2, and possibly of part 3, of the draft articles before the expiration of the current term of office of its members.[5] Accordingly, the Commission should now make some preparations for the second reading of the draft. Invaluable doctrinal comments had already been made with regard to part 1 of the draft. A systematic compilation of the views expressed by writers and by members of the Commission at its various sessions would be very useful. Moreover, most draft articles had given rise to substantive proposals which called for careful consideration and, in some cases, substantial research on the part of the Special Rapporteur before he could decide which were suitable for referral to the Drafting Committee.

2. While he welcomed draft article 5 (*e*) and the general principle stated in draft article 14, he experienced some difficulty with article 14, paragraph 3, and with draft article 15. Moreover, the commentaries to the 16 draft articles, while of great scientific value, would have been still more helpful if they had been made more detailed, so as to compensate for a number of inevitable deficiencies in the wording of certain provisions and clarify some obscure points in the texts.

3. A number of specific proposals worthy of consideration had been made in respect of article 5 (*e*). He would not oppose any wording which, like the existing text, made it quite clear that, following an internationally wrongful act considered to be an international crime, all States other than the author State were injured States, even though they did not all have the same rights and obligations, particularly as far as the State or States directly injured were concerned.

4. The obligations arising out of an international crime for any State other than the author State were enumerated in article 4, which set out in a fairly reasonable and detailed manner the reaction of solidarity to an international crime of a particular scale or gravity. Nevertheless, such solidarity could not be established as long as it remained subject to the restrictions provided for in paragraphs 1 and 3, as clarified in the commentary to article 14. For example, according to paragraph 1 of the article, the rights and obligations arising out of an international crime must derive, not from the applicable rules of international law, but from the applicable rules accepted by an as yet ill-defined subject of international law, namely the "international community as a whole". The commentary to article 14 followed the same lines, since it was stated therein (paragraphs (5)-(6)) that the obligations of the State which was the author of the international crime could be determined only by the international community as a whole. The obligations of States other than the author State would involve all such States practising "a measure of solidarity as between them when confronted with the commission of an international crime" (paragraph (6) of the commentary). There again, it was stipulated that the substance of the solidarity and the international procedures for the organization of that solidarity might well be determined by the international community as a whole, and that, in any event, an international crime gave rise to minimum obligations of solidarity, as enumerated in article 14, paragraph 2 (*c*). Could that last assertion be construed as meaning that the obligations set forth in paragraph 2 (*c*) were not limitative? At the thirty-fourth session, during the consideration of article 6 as originally proposed by the Special Rapporteur, the provisions of which were now contained in article 14, he had asked why mutual assistance between States in response to an international crime should be limited to the performance of the obligations now enumerated in paragraph 2 (*a*) and (*b*) and had expressed the hope that subparagraph (*c*) would be worded so as to cover the obligations not listed in subparagraphs (*a*) and (*b*).[6]

5. At the previous session, he had also wondered whether the provision now contained in article 14, paragraph 3, did not duplicate article 4, and could therefore be deleted.[7] In paragraph (12) of the commentary to article 14, the Special Rapporteur stressed that the commission of an international crime did not necessarily involve the maintenance of international peace and security and that the function of paragraph 3 of article 14 was therefore quite different from that of article 4. That assertion would appear to call for some clarification. Paragraph (11) of the commentary to article 14 and paragraph 35 of the sixth report (A/CN.4/389) were concerned with determining the nature and scope of the primary rule stated in article 14, paragraph 3. It emerged from those paragraphs that the sole purpose of that rule, which was of a residual nature, was to state a condition for the exercise of rights and the performance of obligations of all States in the case of the commission of an international crime, that condition being the application *mutatis mutandis* of the procedures embodied in the Charter of the United Nations with respect to the maintenance of international peace and security. The organization of the reaction of solidarity provided for in article 14, paragraph 2, in the event of the commission of an international crime

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

[5] *Yearbook ... 1984*, vol. II (Part Two), p. 105, para. 387.

[6] *Yearbook ... 1982*, vol. I, p. 207, 1732nd meeting, para. 9.

[7] *Yearbook ... 1984*, vol. I, p. 311, 1866th meeting, para. 16.

was thus accompanied by a condition which made it very difficult to see how it could be applied. It was highly doubtful whether the procedures provided for in the Charter for the maintenance of international peace and security would enable a decision to be taken in application of article 14, paragraphs 1 and 2, even in response to the most heinous international crimes. Indeed, it would seem that, under those procedures, the more serious the international crime, the more likely it was to escape any effective legal control. He could not recall any recent case of an international crime in which the Security Council had succeeded in taking an effective decision to bring the author State to reason and alleviate the situation of the victim State.

6. The "international crime" other than aggression whose legal consequences were stipulated in article 14 was perhaps the same as the international crime defined in article 19 of part 1 of the draft. In that regard, it should first be noted that neither of the commentaries to articles 14 and 15 contained an explanation as to why the legal consequences of aggression were dealt with in a separate article. Article 19 of part 1 included the crime of aggression in the general concept of international crimes, without according it any special status. He had already expressed his views on that point at the previous session.[8] Moreover, the scope of article 14 was considerably reduced by the fact that article 19 of part 1 gave a highly restrictive definition of the term "international crime". The Special Rapporteur might include in the commentary to article 14 the necessary clarifications on the concept of international crime dealt with in that article. As it stood, article 19 of part 1 could be interpreted as excluding international crimes of such extreme gravity as crimes against humanity, which were grave by their very nature, war crimes and, in particular, serious violations of the 1949 Geneva Conventions for the protection of war victims,[9] as well as other crimes covered by the draft Code of Offences against the Peace and Security of Mankind. It would be shocking for such crimes to be ranked with "international delicts" as defined in article 19, paragraph 4. Moreover, such crimes were the principal subject of contemporary repressive international law and must therefore be referred to expressly in any definition of grave international crimes.

7. Draft article 15, which had attracted considerable comment at the previous session, was now proposed without any amendment. If the Commission decided to adopt that article, together with its commentary, both of which were very straightforward, he would not object. However, he wished to stress that article 15, the importance of which derived from its scope, as well as the functions which it was intended to perform, was devoid of any effect in its current form. The rule set forth in the first part of the article whereby "an act of aggression entails all the legal consequences of an international crime" was already covered in article 14 on the legal consequences of an international crime, which, since it did not exclude aggression, must therefore include it. The rule set forth in the second part of article 15 whereby an act of aggression entailed "such rights and obligations as are provided for in or by virtue of the United Nations Charter" would appear even less necessary. The absence of such a rule from an international instrument on State responsibility would in no way signify that that instrument could allow a derogation from the rule, which derived from the principle of the prevalence of the obligations provided for by the Charter of the United Nations. In that regard, article 15 appeared to draw a distinction between two categories of rights and obligations—the rights and obligations "provided for in" the Charter, and the rights and obligations provided for "by virtue of" the Charter—on the basis of their immediate source. In drafting the article, the Special Rapporteur had surely had in mind specific examples of rights and obligations within the second category which would be worth mentioning in the commentary. In that connection, the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States and of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization could prove informative.

8. If the Commission wished to confer special status on the crime of aggression and devote article 15 specifically to it, that article could not be left in its current form. Moreover, a State wishing to destroy another State might resort, not to an act of aggression, but rather to other international crimes which were no less grave, but whose perpetrator would be more difficult to identify. A provision devoted to the crime of aggression would be meaningful only if its wording, or at least the commentary thereto, stated clearly the fundamental consequence of that crime, namely the right to resort to self-defence. Admittedly, several members of the Commission had advanced very valid scientific and political arguments against that idea, but only out of caution and in the general interest of the established international order. The same might be said of the validity and purpose of the arguments invoked in the past against efforts to define the concept of aggression. Nevertheless, those efforts had finally borne fruit. Despite the earlier criticisms of it, the Definition of Aggression[10] was becoming increasingly indispensable to the international community as a whole, as embodying peremptory rules of general international law.

9. The efforts to define the concept of self-defence at the same time as the concept of aggression had failed, and the Definition of Aggression adopted by the General Assembly confined itself to a very general allusion to the exception of self-defence laid down by the Charter of the United Nations. Indeed, article 6 of that Definition, stating that "nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful", was quite superfluous. First, the provisions of the Charter did not require any protection of that kind, since they were explicitly

[8] *Ibid.*, paras. 21-22.

[9] See 1899th meeting, footnote 8.

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

protected by its Article 103, whereby the obligations of Members of the United Nations under the Charter prevailed over their obligations under any other international agreement. Secondly, self-defence was a right inherent in the sovereignty of every State and did not need to be formally proclaimed; it was implicit in every international agreement. The unlawful exercice or abuse of that right would not necessarily be prevented by a definition of the right to self-defence. It was not sufficient to reiterate or refer to the relevant provisions of the Charter; the limits of the concept of self-defence and the conditions governing its exercice should be spelt out, if only in the commentary to an article. It was important to define that right clearly, particularly in part 2 of the draft articles.

10. Another term which several members of the Commission had felt it imperative to clarify was that of "reprisal", used in draft article 9, paragraph 1. He noted that, in the commentary to that article, the Special Rapporteur made a number of very useful observations on the principle of proportionality referred to in paragraph 2 of the article. In general, where the wording of a rule required, the Commission did not hesitate to resort to the use of a detailed text. For example, article 33 of part 1 of the draft concerning a state of necessity was intended to set out precisely the conditions under which a state of necessity could not be invoked. Finally, he pointed out that the traditional objection to any attempt to define a concept or principle laid down in the Charter of the United Nations, namely that any such definition would be inadvisable, if not dangerous, could no longer be seriously defended.

11. With regard to a future part 3 of the draft articles, he said that he did not intend to make any observations before having studied the draft articles concerned, which it would be desirable for the Special Rapporteur to submit to the Commission as soon as possible.

12. Mr. ARANGIO-RUIZ expressed unconditional admiration for the work done by the Special Rapporteur, the difficulty of whose task was compounded by the obligation to take account of his predecessors' efforts. As other speakers had already pointed out, some of the difficulties arising in connection with part 2 of the draft articles were undoubtedly the result of previous decisions with regard to part 1. He associated himself with the suggestion that part 2 might be subdivided into chapters or sections in the same way as part 1 and that not only those sections, but also the individual draft articles, should be given titles. He also associated himself with the doubts expressed by other speakers, and particularly by Mr. Balanda (1894th meeting) as to the appropriateness of the expression "new obligations", which was frequently to be found in the commentaries and in section II of the sixth report (A/CN.4/389). Since the primary rule violated by an internationally wrongful act did not disappear as a result of that act, to speak of "new" obligations in that context was technically incorrect. The obligations in question were perhaps altered or extended, but hardly new.

13. With regard to draft article 5, he agreed with Mr. Yankov (1899th meeting) that too much stress was placed on the source of the rule from which the violated obligation derived. When all was said and done, international law remained essentially a horizontal system in which every obligation of a State had its counterpart in a corresponding right of another State. To identify the injured State, in accordance with Mr. Yankov's suggestion, as the State whose right had been infringed by an internationally wrongful act would be useful because it would pin-point all the affected States, subject to subsequent determination of their respective entitlements to reparation. In that connection, he welcomed the concept of material or moral injury (*préjudice*) introduced by Mr. Roukounas (*ibid.*) as a factor which must certainly affect the kind of reparation or the severity of the countermeasures to which each injured State would be entitled to have recourse. The broad interpretation of the concept of the injured State was supported by the fact that, inasmuch as all States Members of the United Nations were bound by the provisions of the Charter, including the prohibition of the threat or use of force in Article 2 (4), they were also injured by a violation of that rule.

14. Article 17 of the Charter, which provided that the expenses of the United Nations were to be borne by the Members as apportioned by the General Assembly, was another case in point. Every Member State was entitled to insist that other Member States should pay their fair share of the Organization's expenses. The rule was even more obvious in the fields of self-determination and human rights, where every State was patently entitled to insist on respect by all other States for the international rules in force in those fields. As for the distinctions that would subsequently have to be drawn between injured States on the basis of the respective damage suffered and the consequences thereof, he did not entirely accept the distinction between "subjective rights" and "legitimate interests" suggested by Mr. Mahiou (1897th meeting), since in his opinion all injured States, even those indirectly affected, possessed rights amounting to more than a legitimate interest.

15. Like several previous speakers, he thought that the reference to "collective interests" in subparagraph (*d*) (iii) of article 5 was unclear and that the provision in subparagraph (*a*) was too comprehensive and should be further subdivided.

16. Turning to draft article 6, he agreed that the words "*inter alia*" or "in particular" should be inserted in the opening clause of paragraph 1, that mention should be made of reparation in kind and *ex gratia* settlement, etc., and that the reference to internal law in paragraph 1 (*b*) should be deleted.

17. With regard to draft article 7, he had little to add except to say that he did not agree that it should be merged with article 6, paragraph 2.

18. Draft articles 8 and 9, on the other hand, might well be combined, since the idea of acceptable countermeasures was not necessarily reflected in the distinction between reciprocity and reprisal.

19. He had serious misgivings about the provision in draft article 10, paragraph 1. The international procedures for peaceful settlement of disputes normally available to the average member of the inter-

national community were basically those referred to in Article 33 of the Charter of the United Nations. The Manila Declaration on the Peaceful Settlement of International Disputes,[11] referred to by one member of the Commission, was unfortunately not a very forceful document. The jurisdiction of the ICJ was in decline. Considerable caution should be exercised before subjecting the measures envisaged in article 9 to the exhaustion of international procedures such as those. A greater degree of specification was indispensable, in his view, in order to take account of the "natural" tendency of the author State to escape the consequences of its wrongful act by unduly protracting negotiations and putting obstacles in the way of arbitration or judicial settlement. This was particularly so when the possibility of unilateral recourse to "third-party" settlement had not been envisaged in advance.

20. The doubts he had already expressed in connection with article 5, subparagraph (*d*) (iii), concerning the expression "collective interests" also applied to article 11, paragraph 1 (*b*). He also deprecated the reference to "collective decisions" in article 11, paragraph 2. Such restriction of the injured State's right to take countermeasures might be advisable only if the decision-making facility were automatically available to all States, in other words if a permanent body were established, mobilizable at the request of any State and empowered to make independent majority decisions which could not be vetoed or otherwise reversed. Moreover, the decisions of the permanent body in question would have to be capable of effective implementation. With regard to paragraph 1 (*c*) of article 11, he agreed with Mr. Calero Rodrigues (1892nd meeting) that advantages for nationals of the author State, with the exception of those of a strictly humanitarian character, might well be excluded from the scope of the provision.

21. With regard to draft article 12 (*a*), he said that only the personal safety of diplomats needed to be safeguarded; other facilities available to them might well be suspended by way of countermeasures. The possibility of subjecting diplomats to civil jurisdiction should also be open to the injured State, if the author State took similar action. As to the reference to peremptory norms of general international law in article 12 (*b*), he thought that some mention of *jus cogens* in part 2 of the draft was unavoidable, if only because of the frequency with which it was alluded to in part 1. The degree to which part 3 succeeded in developing the concept would, of course, be of crucial importance.

22. He agreed with those previous speakers who had recommended a prompt delimitation of the respective areas covered by the topics of State responsibility and the draft Code of Offences against the Peace and Security of Mankind. The question whether crimes other than acts of aggression should be mentioned in article 5 should be left open pending such delimitation and the second reading of article 19 of part 1.

23. Lastly, he expressed doubt concerning the usefulness of paragraph 2 (*c*) of article 14.

24. Turning to section II of the sixth report, he said that, although it was essential to strengthen dispute-settlement procedures in the field of international responsibility, it would be difficult to secure acceptance by States of a system of implementation as rigid as that rightly advocated by the Special Rapporteur in a field as broad as State responsibility. Conversely, some States would be reluctant to accept any codification or progressive development of the law in such a sensitive area without an adequate system of implementation and peaceful settlement. Consequently the Special Rapporteur should draft articles based on the content of section II of the report for submission to the Commission at its thirty-eighth session.

25. While he concurred in general with the views expressed, it seemed to him that there was a normative gap between the point at which there was partial or total non-compliance with a primary rule and the point at which the secondary rules embodied in articles 6 *et seq.* came into operation, a gap which he felt should be filled more effectively than it currently was under article 6. It should be possible, in the context of normal friendly relations between States, to envisage some kind of "intermediate phase" other than, and clearly preceding, the adoption of countermeasures by the injured State or States (and *a fortiori* any third-party settlement procedure). During that phase, the injured State should be able to approach the author State in a friendly manner with a request to consider, likewise in a friendly manner, the situation arising out of the allegedly wrongful act. Only after friendly representations, and following an unsatisfactory or inadequate reply, should a relatively strong protest be delivered and the request as spelt out in article 6 be made. The door to further measures should be opened only if such a request remained unsatisfied.

26. The Special Rapporteur was himself aware of the problems involved, since some of the language used in article 6 apparently contemplated certain preliminary steps by the injured State. In that connection, he noted that the Special Rapporteur had acknowledged in the report (A/CN.4/389, para. 24) that the rules contained in part 3 of the draft formed an integral part of the legal consequences of an internationally wrongful act. Irrespective of the Special Rapporteur's intention in the matter, however, the Commission might wish to give some thought to an "intermediate" or preparatory phase of the kind he had mentioned, on the understanding that the wrongful act in question and the attitude of the wrongdoer were not such as to preclude anything other than a swift and energetic response. Consideration might also be given to the possibility of providing, also in part 2 of the draft, for some measure to be taken before the wrongful act reached the "decisive" moment, for example when the act of a subordinate or of a peripheral administrative officer was confirmed at a higher level, or when all local remedies had been exhausted. It should also be made as clear as possible that any preliminary steps designed to call a State's attention to the danger of an international

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

obligation being violated should not be regarded as a less than friendly act, or even as interference in the internal affairs ot the Government concerned, provided that the appropriate channels and forms were followed. The Special Rapporteur had possibly had something of the kind in mind when he had included paragraph 1 (*b*) in article 6.

27. Provision for such preliminary steps should be included in part 2 of the draft forthwith and not await the submission of the draft articles of part 3, thereby meeting the justified concern of Mr. Ogiso (1895th meeting) that, until a settlement had been agreed by the parties, it was not entirely correct to assume that there was much more than an alleged author State, an alleged wrongful act and an alleged injured State. It might also meet the concern of those who felt variously that the term "may require", in the opening clause of article 6, paragraph 1, was either too mild or too strong. In his view, however, the Commission would be failing to take account of the exigencies of the progressive development of a delicate area of international law if it did not, first, indicate that the preliminary steps he had referred to were neither unlawful nor even unfriendly, and, secondly, qualify as unlawful any unjustified and hasty recourse to countermeasures before friendly diplomatic representations had been made or after the alleged author State had manifested evident signs of regret and a willingness to meet any secondary or primary obligations. In so doing, the Commission could draw inspiration from the 1969 Vienna Convention on the Law of Treaties—specifically from articles 60, 61, 62 and 65—and also from Article 33 of the Charter of the United Nations. He was not advocating the immediate inclusion in part 2 of the draft of third-party or any other dispute-settlement procedures, but was merely suggesting that some of the elements now set out in part 3—although not those concerning dispute-settlement procedures —should be incorporated in part 2. In other words, the Commission should make an unambiguous statement to the effect that, before any peremptory demands were made or recourse was had to countermeasures, the alleged injured State should make approaches to the alleged author State.

28. Mr. Yankov (1899th meeting) had stressed that the Commission should not confine itself to codification at the expense of the progressive development of international law. Moreover, the rules drafted by the Commission received very wide circulation long before a draft became a convention and became part of the legal materials used by States in their international relations. To omit from part 2 the "intermediate phase" provisions that he had advocated might not be in the best interests of a minimum "rule of law" in international relations. His suggestion was made without prejudice to the addition, at the appropriate time, of adequate draft articles of part 3 covering dispute-settlement procedures (and also to the purposes of article 9 already referred to).

29. Mr. EL RASHEED MOHAMED AHMED complimented the Special Rapporteur on his masterly sixth report (A/CN.4/389) on a difficult topic.

30. Article 5 provided the necessary link between parts 1 and 2 of the draft and, despite the criticism that had been voiced, was important, in his view, since, in order to describe the legal consequences of an internationally wrongful act, it was necessary, as stated in paragraph (1) of the commentary to the article, "at the outset, to define the 'author' State and the 'injured' State or States". But, as the definition laid down in the article was perforce not exhaustive, it could perhaps be improved either by the addition at the end of the opening clause of the words *inter alia*, or by widening the ambit of injured States to embrace the international community as a whole, though he shared some of the doubts expressed on the latter score. He was confident, none the less, that a review of the article in the light of the discussion would suffice to meet most of the points raised. It had been said that Sir Gerald Fitzmaurice had favoured a code for the law of treaties rather than an international agreement, because a code had the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in a way that would not be possible if it were necessary to limit the instrument in question to a strict statement of obligation. The Special Rapporteur had done his best to meet that requirement.

31. A question that had rightly been raised concerning article 5 was who would determine the injured State. As the Special Rapporteur noted in his report (*ibid.*, para. 4), there would be a claimant State, with a double claim, and a defendant State, which might either refute the alleged facts altogether or deny liability or responsibility. Article 5 (*d*) restricted the ambit of the term "injured State". Although, according to the commentary, it could possibly be taken to have a wider meaning, it could also be argued that States parties to multilateral treaties which were not directly affected would not be covered by the definition of an injured State, because, if the *ejusdem generis* rule applied, the proximity of the injured States would be an operative factor. That might not apply in all cases, however. In the *South West Africa, Second Phase* cases in 1966,[12] the ICJ had rejected the claims submitted by Ethiopia and Liberia and had declined to pass judgment on the merits, thereby attracting the criticism of the third world and casting doubt on the role of the Court. Again, if the *erga omnes* notion advanced by the Special Rapporteur was accepted, the problem was that the international community was not ascertainable; indeed, during the Namibia proceedings,[13] it had been conspicuous by its absence. Admittedly, the determination of the injured State could not be divorced from the origin and content of the obligation violated, but that approach might not always help to solve the problems that arose.

32. In draft article 6, it would be preferable to retain the expression "may require", since "may demand", the suggested alternative, would not improve matters and might well antagonize the author

[12] *I.C.J. Reports 1966*, p. 6.

[13] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, *I.C.J. Reports 1971*, p. 16.

State. He did not share the doubts expressed as to the relevance and utility of paragraph 1 (*b*). Indeed, in a recent case,[14] the International Chamber of Commerce Court of Arbitration had held that the principle of just compensation for expropriation was not incompatible with Egyptian law. Also, in another recently decided case concerning the non-performance of contractual obligations, the tribunal had held that *restitutio in integrum* was justified under both domestic and international law. In regard to paragraph 1 (*d*), he suggested that the word "guarantees" should be replaced by "assurances".

33. He was not opposed to the inclusion of draft article 7, for he saw the logic of the argument that it did not overlap with article 6, paragraph 2, since the latter provision applied only where *restitutio in integrum* was materially impossible. There were other considerations, however. For instance, article 7 might be interpreted to cover not aliens *per se*, but foreign investors. In the arbitration case against Egypt to which he had referred earlier, the court had ruled that development contracts between a State and a private party could be removed from the domestic jurisdiction and made subject to international law, thereby conferring upon the private party a quasi-statal status. The inclusion of the article could therefore give rise to the suspicion in the third world that it was designed for the protection of investors and so could stir up delicate political issues.

34. Although he appreciated the distinction between draft articles 8 and 9, several members considered that the demarcation line between reciprocity and reprisals was not clear. In the circumstances, Mr. Calero Rodrigues's suggestion (1892nd meeting) that both terms should be deleted might be appropriate, since the meaning of the articles would not be seriously impaired. Furthermore, although the notion of proportionality might give rise to different interpretations in practice, he did not think that a better solution was readily available.

35. Draft article 10, paragraph 2 (*a*), could, in his view, pave the way for an interim measure that was detrimental to the author State, such as the freezing of its deposits in the injured State, as had happened when the United Kingdom had frozen Egypt's deposits at the time of the Suez crisis and when the United States of America, more recently, had frozen Iranian deposits. Given its political overtones, the provision in question might be viewed with suspicion by third world countries and he therefore agreed that a court should perhaps be appointed to ensure that the necessary safeguards were taken to guard against oppressive interim measures.

36. It had been suggested that the reference to *jus cogens* in draft article 12 (*b*) would only add to the confusion. Possibly, therefore, it would be advisable to adopt a definition along the lines of that laid down in article 53 of the 1969 Vienna Convention on the Law of Treaties.

37. The language of article 60 of the 1969 Vienna Convention should also be followed in draft article 13, with the word "manifest" being replaced by "material".

38. Draft article 14 had been described as a controversial provision that covered unknown terrain. That was perhaps because, as Ian Brownlie had noted in a recent publication,[15] State responsibility was defined essentially as a form of civil responsibility and there was therefore, in his view, no equivalence between the incidence of State responsibility and illegal or invalid conduct. On the other hand, it was not impossible for State responsibility to give rise to a crime or offence, and article 19 of part 1 of the draft did not provide for any such equivalence, merely stipulating what constituted an internationally wrongful act. Against that background, he was able to accept the argument that article 14 was concerned with the material consequences of an internationally wrongful act, irrespective of whether it was a delict or a crime, whereas the draft Code of Offences against the Peace and Security of Mankind did not cover the material consequences of crimes. He agreed, however, that the two texts should be harmonized to avoid confusion.

39. He fully supported the inclusion of a part 3 of the draft: the whole exercise would be pointless if no machinery for implementation was envisaged. As Ernest Landy had stated,[16] the adoption of international legislation and its formal acceptance by a growing number of countries could not of itself add to the stability of inter-State relations unless there also existed some degree of assurance that the contracting parties really complied with their obligations. The study on the draft articles had already had an impact on such learned writers as Rousseau, McDougall, Reisman and Brownlie; it would also serve to clarify, and build up a uniform glossary of, legal terms pertaining to State responsibility.

40. Mr. KOROMA thanked the Special Rapporteur for a very useful sixth report (A/CN.4/389). He agreed that the commentaries should be amplified somewhat to afford a better understanding of the articles. That would also help to secure the adoption of the draft by Member States and to promote a wider understanding of international law.

41. The definition of an injured State as laid down in draft article 5 could be simplified by amending the opening clause to provide that an injured State was a State whose right had been infringed by the commission of an internationally wrongful act by virtue of customary international law, or by the breach of an obligation imposed either in a judgment or in a multilateral treaty. That would cover all the sources proposed by the Special Rapporteur and, at the same time, serve to harmonize the provisions of the article.

42. In paragraph (1) of the commentary to article 5, it was stated that "an internationally wrongful act entails new legal relationships between States in-

[14] *S.P.P. (Middle East) Limited, Southern Pacific Properties Limited and Arab Republic of Egypt, Egyptian General Company for Tourism and Hotels* (1983) (*International Legal Materials* (Washington, D.C.), vol. XXII, No. 4 (July 1983), p. 752, at p. 770).

[15] *System of the Law of Nations. State Responsibility* (Oxford, Clarendon Press, 1983), part I.

[16] *The Effectiveness of International Supervision. Thirty Years of ILO Experience* (London, Stevens, 1966).

dependent of their consent thereto". Although he understood "relationships" to refer to the position of one State by virtue of its contacts with another, he was a little uncomfortable with the term. It seemed to him that a breach of the kind involved would give rise to a breakdown or termination of legal relationships, in which case it was a new legal situation, not a relationship, that would arise. That being so, it would be preferable to replace the word "relationships" by either "situation" or "obligation".

43. He also noted the statement, in paragraph (7) of the commentary, to the effect that article 5 could not "prejudge the 'sources' of primary rules nor their content". In his view, that statement made for considerable uncertainty as to the law in the matter, since it was tantamount to suggesting that what was involved was a rebuttable presumption, whereas in fact there was an abundance of very clear primary rules. For instance, aggression was patently illegal and any State in violation of such a primary rule would also be in breach of an international obligation. He could accept the idea of a rebuttable presumption to the extent that every charge had to be proved, but he certainly could not agree that the law itself was uncertain in all cases where State responsibility was concerned. Recognition of at least a minimum set of primary rules was essential in order to determine whether or not a State had legal responsibility.

44. Article 5 (*e*), which was extremely important, should be viewed in the context of the most serious international crimes, i.e. those against international peace and the security of mankind. Perhaps the further codification of the primary rules involved would encourage the international community to assume its responsibility whenever such grave offences were committed.

45. With regard to draft article 8, while he agreed that reciprocity had positive connotations inasmuch as it involved, for instance, the granding of diplomatic immunities and privileges, what was actually at issue was retortion, namely the imposition of similar or identical treatment or the taking of a similar measure by an injured State against an alleged author State, with a view to the cessation of the internationally wrongful act. He suggested, therefore, that the word "reciprocity" should be replaced by "retortion". As the Special Rapporteur had rightly pointed out, however, in paragraph (5) of the commentary to article 8, there could be no reciprocity, retortion, reprisal or countermeasures if the obligation violated was one that arose by virtue of a peremptory norm of general international law, such as the obligation to settle international disputes by peaceful means or to refrain from the use of force in international relations under Article 2, paragraphs 3 and 4, of the Charter of the United Nations. None of those measures should be allowed to endanger international peace and security.

46. He would like further clarification of draft article 9, an important but controversial provision. The use of reprisals was governed by certain parameters—there had to be an internationally wrongful act; the author State must have been requested to give satisfaction for the wrongful act and have failed to do so—and was conditioned by such international instruments as the Charter of the United Nations, specifically Article 2, paragraphs 3 and 4, and Article 33, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States,[17] which expressly stated that States had a duty to refrain from acts of reprisal involving the use of force.

47. It was regrettable that the minimum degree of solidarity required to enforce the terms of draft article 14 was increasingly lacking, so that it was, in effect, a provision without teeth. However, rather than simply stating that certain wrongful acts were not to be recognized as legal, the Commission might wish to consider whether the Security Council should not be reminded of its responsibility under the Charter.

48. He welcomed the inclusion in the draft of article 15 on aggression, one of the gravest of international offences, and considered that it was appropriate to spell out the legal consequences of aggression to ensure that the provisions of the draft were comprehensive.

49. The Special Rapporteur was to be commended for including an outline of part 3 of the draft at the current stage of the work. It was a bold and imaginative move that would confirm the Commission's determination to bring the topic to fruition. Given the nature of the topic, he could only support the Special Rapporteur's proposal (A/CN.4/389, para. 13) that the Commission should draw upon the experience of the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea. The inclusion in part 3 of a provision for the submission to the ICJ of disputes concerning the interpretation of article 19 of part 1 and article 14 of part 2 of the draft was also to be welcomed.

The meeting rose at 1.10 p.m.

[17] General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

1901st MEETING

Thursday, 13 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

***Content, forms and degrees of international responsibility (part 2 of the draft articles)* and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (continued)**

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*continued*)

1. Mr. BARBOZA explained that, when he had raised the question of reprisals and, in particular, reprisals of a "preventive" nature in his earlier statement (1897th meeting), he had been referring to reprisals in the legal framework of the draft articles under consideration and from the point of view of legal rules which would govern countermeasures and provide for the existence of a court that would rule on their legality according to an established procedure. His comments had in no way applied to reprisals taken in the existing legal framework, in which there were no limits to arbitrary action and in which more powerful States could take it upon themselves to punish weaker States.

2. The CHAIRMAN, speaking as a member of the Commission, paid a special tribute to the Special Rapporteur for his sixth report (A/CN.4/389), which was marked by scholarship and a sense of realism.

3. Part 2 of the draft contained a complete set of 16 articles on the legal consequences of State responsibility, articles 1 to 4 of which served as the pedestal on which the framework of part 2 rested, while articles 5 to 16 embodied the substantive provisions. The Special Rapporteur had, as he had explained, adopted a pyramid-like structure in developing part 2, dealing first with what he had termed "normal" cases—variously referred to as torts, delicts or contraventions—and then with the graver cases known as crimes. The consequences of the "normal" cases were dealt with in draft articles 6, 8 and 9 and the broad framework established by the Special Rapporteur in that connection was sound. The additional consequences arising as a result of a crime and also as a result of aggression were then covered in draft articles 14 and 15. Those two articles dealt with a highly sensitive issue and the Sixth Committee of the General Assembly would undoubtedly look to the Commission for guidance in the matter. It was therefore incumbent upon the Commission to endeavour to clarify the legal consequences of the internationally wrongful acts that constituted international crimes with a view to harmonizing the provisions of articles 14 and 15 with article 19 of part 1 of the draft and with the draft Code of Offences against the Peace and Security of Mankind.

4. With regard to the definition of the term "injured State" contained in draft article 5, he noted that, whereas it had taken almost 35 articles to define the term "author State" in part 1 of the draft, the definition of an injured State had been attempted in a single article. The question was whether that term should be defined in general terms, to provide simply that an injured State was a State which had suffered injury because of the breach of an international obligation, or whether it was necessary to elaborate the sources of the primary obligation the breach of which constituted injury. In a word, should the definition be exhaustive? He had initially been very attracted by the definition, since he had assumed that the Special Rapporteur would proceed, as might have seemed logical, to indicate the legal consequences of a wrongful act by reference to the various sources; the Special Rapporteur had, however, apparently preferred to deal with the legal consequences by reference to the degree of gravity of the case. While that too was acceptable, the Drafting Committee might wish to examine the definition in the light of the comments made, with a view to achieving greater clarity.

5. He endorsed the suggestion that article 5, subparagraph (*a*), should be subdivided into two clauses dealing, respectively, with customary law and a third-party beneficiary under a treaty. He also agreed that there were different categories of injured States, and considered that article 5, subparagraph (*e*), should be re-examined with a view to bringing out the distinction between the directly affected injured State and all other States. Once that distinction had been made, the consequences would have to be spelt out in all provisions referring to an obligation *erga omnes*.

6. He was in broad agreement with the suggestion that the words "a sum of money" in draft article 6, paragraph 2, should be replaced by the word "compensation", it being left to the parties concerned to decide on the quantum and modalities of compensation.

7. His impression with regard to draft article 7 was that the Special Rapporteur had included it in part 2 mainly because of the inclusion in part 1 of article 22 on the exhaustion of local remedies. While he had no objection to the retention of article 7, he considered that its wording should be brought into line with that of article 6, paragraph 2. If, however, it were deleted, its substance would in any event be covered by article 6, paragraphs 1 (*c*) and 2. It had been asked whether article 7 would cover the nationalization of, for example, natural resources or commercial enterprises. That should, in his view, not be taken as a criterion for the retention or deletion of the article, since, again, such consequences would in any event be covered by article 6, paragraphs 1 (*c*) and 2.

8. Draft articles 8 and 9 conferred upon the injured State the right to take certain measures to restore the *status quo ante* by way either of reciprocity or of reprisal. Reciprocity was more in the nature of what

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

he would term "tit for tat", whereas reprisals were a sanction designed to bring pressure to bear with a view to restoring the balance and also as a warning that the injured State might resort to self-help. It seemed to him that a similar right was contemplated in article 30 of part 1, which provided that, in the event of legitimate countermeasures being taken, the wrongfulness of such acts would be precluded. He would therefore urge that any wording that might give rise to unnecessary difficulties of interpretation should be avoided. Reprisals had a sinister connotation even if armed and belligerent reprisals were excluded. The Drafting Committee might therefore wish to consider the possibility of following article 30 of part 1 and referring to countermeasures or legitimate countermeasures rather than to reciprocity and reprisal.

9. He fully agreed with the basic distinction between articles 8 and 9, but noted that, although the commentaries stated that both articles were subject to the principle of proportionality, that principle was expressly referred to only in article 9, presumably because of the wider scope of the latter article. It might none the less be useful to include a similar reference in article 8 as well.

10. As to draft article 10, he considered that paragraph 1 might refer not only to the availability of peaceful settlement procedures, but also to their effectiveness.

11. Draft article 11 provided that measures taken by an injured State by way of reprisal could not extend to what he would term a "self-contained" treaty. While the underlying idea was sound, the question was what right the injured State would have in such a situation. Assuming that collective measures were delayed or ineffective, the injured State would be prohibited by the terms of article 11 from taking any interim measures of protection under article 10, paragraph 2, pending more effective collective action. He therefore considered that article 11, paragraph 2, should be modified, along with article 5, subparagraph (*b*), with a view to classifying injured States into directly affected States and other injured States, and that the consequences of wrongful acts should be elaborated on that basis. A directly injured State would thus be protected in the event of a graver offence.

12. It would also be necessary to decide whether draft article 13, which was a proviso to article 11, should be based on the wording of article 60 of the 1969 Vienna Convention on the Law of Treaties. He nevertheless agreed with the substance of article 13.

13. Draft article 12, subparagraph (*a*), provided that article 9 relating to reprisals would not apply in the case of diplomatic and consular immunities. As he interpreted that provision, it would apply in cases where, if certain members of the diplomatic mission of a sending State had been declared *persona non grata* by the receiving State, the former State retaliated by taking similar action against members of the diplomatic or consular mission of the receiving State on its territory. It could also apply where diplomatic relations were mutually severed. It would, however, not apply where an ambassador was held incommunicado for days or even months until agreement had been reached on his release. On the basis of that interpretation, he considered that article 12, subparagraph (*a*), should be retained.

14. While he agreed on the need for article 12, subparagraph (*b*), he was not certain as to its scope. If, as he believed, the question of *jus cogens* should not be confined to the application of articles 8 and 9, but should be broader in scope, it should be referred to in a separate article, failing which draft article 14, paragraph 4, could be interpreted as applying in that case as well.

15. With regard to article 14, he noted that the consequences of an internationally wrongful act, as defined in article 19 of part 1 of the draft, were not spelt out. Moreover, paragraph 1 of article 14 was far too vague and did not answer the questions raised either by article 19 of part 1 or by the draft Code of Offences against the Peace and Security of Mankind. With a view to bringing the provisions of article 14 into line with article 19 of part 1 and also with the draft code, he therefore suggested that article 14, paragraph 1, should be redrafted to read:

> "1. An international crime committed by a State entails all the legal consequences of an internationally wrongful act and, in addition, entails the international responsibility of that State, as well as the individual criminal responsibility of its agents or of individuals whose conduct is attributable to that State under international law. The additional obligations of the State committing an international crime and the rights and obligations of the injured State and other States will be such as are determined by the applicable rules accepted by the international community as a whole."

16. Since paragraph 2 (*c*) of article 14 merely repeated the terms of subparagraphs (*a*) and (*b*) and did not really assist the injured State, he suggested that it should be redrafted in more positive terms to read:

> "(*c*) to join other States in affording mutual assistance to the injured State in exercising its rights in relation to the situation created by such crime."

A reference to *jus cogens* should also be included in article 14, paragraph 4.

17. In draft article 15, he suggested that the words "by virtue of" should be replaced either by the words "pursuant to" or by the words "in conformity with". It would also be desirable to include a specific reference to the right of self-defence. That could be done by adding the following phrase at the end of the article: "including a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

18. There were two matters relating to part 1 of the draft with which the Commission had undertaken to deal in discussing part 2 and which it should not overlook. The first concerned article 30, in which connection the Commission had said that a distinction should be drawn between countermeasures adopted by an injured State independently, and those

adopted pursuant to a collective decision.[5] As stated in paragraph (23) of the commentary to that article, "the Commission reserves the right to undertake the study of these questions in the context of part 2 of the draft articles, dealing with the content, forms and degrees of international responsibility".[6] The second matter arose in connection with the Commission's consideration of chapter V of part 1 of the draft, relating to circumstances precluding wrongfulness. As stated in paragraph (11) of the commentary to that chapter, "the Commission ... intends to take up the questions raised by attenuating or aggravating circumstances when it comes to study the extent of responsibility, i.e. in the context of part 2 of the draft articles".[7]

19. With regard to part 3 of the draft, he agreed entirely with the framework proposed by the Special Rapporteur, who had relied on the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea and had rightly stressed the residual character of that part. He considered, however, that it was absolutely essential to provide for or at least refer to the establishment of an international criminal jurisdiction. It would be pointless to provide the ICJ with jurisdiction to determine whether an international crime had been committed, but not to determine what the legal consequences of such a crime would be.

20. Mr. RIPHAGEN (Special Rapporteur), summing up the debate, said that many of the points raised in criticism of his sixth report (A/CN.4/389) had already been in his mind during the preparation of his fifth report (A/CN.4/380). Keenly aware as he was of the hazardous nature of his task, he had considered it his duty as Special Rapporteur to make proposals rather than to express doubts. The greatest difficulty, as he saw it, in preparing parts 2 and 3 of the draft articles was to strike a proper balance, not between the interests of the author State and the injured State—a relatively easy matter—but, rather, between the respective interests of States alleged to be the author State and the injured State. The balance was inevitably a delicate one and efforts had to be made to avoid tipping it in either direction. At the same time, a balance also had to be struck between the credibility of international law and the process of permanent negotiation between States, or, in other words, between a rigid and a flexible approach.

21. In reply to the general criticisms levelled at the sixth report, he stressed that the commentaries to the draft articles were intended only to facilitate discussion and would certainly not be reproduced as they stood in the final commentary to the draft as a whole. Many of the references to literature and jurisprudence that had appeared in his earlier reports would, for example, be included in the final text.

22. Another recurring theme had been the relationship between the topic of State responsibility and the law of treaties. The essential point which had to be borne in mind in that connection was that an internationally wrongful act did not do away with the primary right or obligation violated, whereas a treaty whose operation had been suspended or terminated could no longer be invoked. The draft articles on State responsibility and the 1969 Vienna Convention on the Law of Treaties thus did not cover the same ground.

23. Many speakers had criticized his failure to spell out the legal consequences of an international crime in draft article 14, but very few had suggested what those consequences might actually be. The question of the criminal responsibility of States was an extremely difficult one. In the first place, the idea of collective punishment was generally unpopular, if only because it raised the problem of penalizing innocent people, including future generations not born when the international crime had been committed. Indeed, even the generation that was already living could not always be held responsible, because decisions leading to an international crime were almost never the result of a democratic process, but, at most, only of the semblance of one. Another fundamental problem was that of the nature of the punishment to be imposed. To draw an analogy with domestic penal law would be hazardous, especially at a time when the value of the penal system as a whole was increasingly coming under criticism in many countries. Penalties equivalent to the death sentence, corporal punishment or deprivation of liberty were, for many reasons, hardly able to be applied to States. As for economic penalties equivalent to the imposition of heavy fines, the method had been tried, in particular after the First World War, but with a notable lack of success. In his view, the Commission could not, at the current stage in history, venture to specify the legal consequences of an international crime, but could only, as it were, pave the way in article 14 for the future development of international solidarity.

24. One of the general comments made by Chief Akinjide (1898th meeting) had taken the form of a plea for realism. Although he did, of course, agree that it was always desirable to be realistic, a degree of utopian vision was also necessary if any progress was to be made in international law. The legislator could, moreover, not take account of the fact that lawbreakers often escaped with impunity.

25. Referring to draft article 5, he said that he would endeavour to reply in order to the comments made by members of the Commission. With regard to article 5, subparagraph (*b*), Sir Ian Sinclair (1895th meeting), Mr. Ogiso (1896th meeting) and others had asked whether an interim order of the ICJ was or was not binding and, in that connection, he drew attention to paragraph (10) of the commentary to article 5, which referred to "such orders ... as may be binding on the parties to the dispute". He agreed with Sir Ian Sinclair that a connection existed between article 5, subparagraph (*d*) (iv), and article 7, and that it might be appropriate to include a reference to fundamental human rights in the former article in order to avoid any misunderstanding about the scope of the latter. As to Sir Ian's criticism of article 5, subparagraph (*e*) (1890th meeting), he noted that, while the victim of an act of aggression was easy enough to identify, that was not always so in the case of other international

[5] *Yearbook ... 1979*, vol. II (Part Two), p. 121, commentary to article 30, para. (21).

[6] *Ibid.*

[7] *Ibid.*, p. 109.

crimes. Article 5, subparagraph (*e*), was intended to cover the collective interests jeopardized by an international crime. He had some sympathy with Sir Ian's suggestion that paragraphs (8) to (10) of the commentary to article 14 should be taken into account in article 5, subparagraph (*e*), and suggested that the matter should be considered by the Drafting Committee.

26. With regard to the general point made by Mr. Balanda (1894th meeting), Mr. Arangio-Ruiz (1900th meeting) and others that it was not always correct to speak of "new legal relationships" arising from an internationally wrongful act, he recalled that the Commission had been using that term since the outset of its work on the topic and, in that connection, referred to the Commission's report on the work of its thirty-second session.[8] He also noted that the reference to new legal relationships did not imply the disappearance of all previous legal relationships. That was made clear in draft article 1 of part 2 as submitted in his second report;[9] paragraph 53 of the second report was also relevant in that regard. New legal relationships were, moreover, not completely separable from old ones. Draft article 6, for example, prescribed a related or substitute performance of a primary obligation; and arguments in favour or a new, and possibly separate, third-party dispute-settlement procedure were rejected in his sixth report (A/CN.4/389, para. 8) because of the close links between the new obligations of the author State under article 6 and its old primary obligations.

27. Another general point he wished to make concerning article 5 was that, by its very nature, the article was not exhaustive and that more than one of its provisions might be applicable in a given situation. In the case of aggression, for example, article 5, subparagraphs (*a*) and (*b*), would both apply. The Drafting Committee might be requested to consider ways of making that point completely clear.

28. As for the objections raised by Sir Ian Sinclair (1890th meeting) and other speakers to the concept of "collective interests", as referred to in article 5, subparagraph (*d*) (iii), he had to confess that he was somewhat surprised. As everyone knew, collective interests, whether national or international, had no natural existence, but were always created by law. Examples of the creation of collective interests by multilateral treaty included EEC, ECSC and EURATOM. He failed to see how account could not be taken of the existence of collective interests, which should, of course, always be connected with the recognition of fundamental human rights.

29. Mr. Sucharitkul (*ibid.*) had noted that, even if collective interests existed, there was no procedure for dealing with them. That was, of course, true, but an attempt to provide a solution was made in draft article 11, paragraph 2. Referring to article 5, subparagraph (*e*), Mr. Sucharitkul had cited the example of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft[10] and had raised the question whether that Convention could be said to have been stipulated for the protection of collective interests. The answer was no doubt in the affirmative because of the action taken by ICAO to change its Convention in the light of the Hague Convention, but, since the hijacking of aircraft was not currently considered to be an international crime, the point was hardly a material one.

30. Replying to Mr. McCaffrey (1892nd meeting), who had raised the question of human rights violations not covered by a multilateral instrument, he drew attention to paragraph (9) of the commentary to article 5, which emphasized that subparagraph (*d*) did not imply that obligations could not arise from a source other than a multilateral treaty. As he had already pointed out, moreover, article 5 was not intended to be exhaustive. The same point should be borne in mind in connection with Mr. McCaffrey's comment concerning obligations *erga omnes* not related to international crimes within the meaning of article 19 of part 1 of the draft. While he did not disagree with the suggestion that a reference to the breach of obligations *erga omnes* should be added to article 5, subparagraph (*e*), he wondered whether the resulting text might not be somewhat tautological. The whole concept of obligations *erga omnes* had been criticized during the debate on the grounds that it did away with the distinction between directly and indirectly affected States. Yet, in cases involving the right of self-determination of peoples or the fundamental human rights of the author State's own nationals, it was difficult to specify what other State was directly involved; in such cases, all other States were injured States.

31. Mr. Calero Rodrigues, too (*ibid.*), had questioned the term "collective interests", which he would prefer to see replaced by the term "common interests". The matter could most appropriately be discussed in the Drafting Committee, of which Mr. Calero Rodrigues was the Chairman. As for the objection that article 5, subparagraph (*e*), did not sufficiently distinguish between directly and indirectly affected States, he had already explained why, in his view, all States had to be recognized to have been injured by an international crime, although, of course, not all States could be placed on the same footing as far as the consequences of the crime were concerned.

32. Replying to Mr. Flitan's suggestion (*ibid.*) that a separate article of part 2 should be devoted to the question of *jus cogens* and that article 5, subparagraph (*a*), should be further subdivided, he said that those matters could be referred to the Drafting Committee. He was somewhat at a loss to understand Mr. Flitan's suggestion that article 5 should take account of groups of States. If international organizations were what Mr. Flitan had had in mind, it should be recalled that the Commission had long ago decided to restrict the topic of State responsibility to relations between States. Lastly, he noted that the overlapping between the subparagraphs of article 5 to which Mr. Flitan had referred was the result of the non-exhaustive nature of the article; a State could thus be an injured State under more than one subparagraph.

---

[8] *Yearbook ... 1980*, vol. II (Part Two), p. 28, para. 25

[9] *Yearbook ... 1981*, vol. II (Part One), p. 100, document A/CN.4/344, para. 164.

[10] See 1890th meeting, footnote 12.

33. Replying to Mr. Huang, who had pointed out (1893rd meeting) that not all sources of rights and obligations were covered in article 5, he said that other sources could be mentioned if the Drafting Committee thought it necessary, but drew attention to the difficulty of referring to such sources as a unilateral declaration. The suggestion by Mr. Francis (1894th meeting) concerning a reference to the object and purpose of multilateral treaties could be considered by the Drafting Committee. Mr. Balanda (*ibid.*) had, in addition to questioning the reference to new legal relationships and making suggestions concerning the French text of subparagraphs (*b*) and (*c*), asked whether the "individual persons" referred to in subparagraph (*d*) (iv) could be considered to include legal persons such as multilateral corporations. Without going into the primary rule involved, he wished to assure the Commission that, in drafting subparagraph (*d*) (iv), he had intended to refer only to natural persons. In reply to Mr. Balanda's point that subparagraph (*d*) (iv) went too far and that, in the case of the infringement of individual rights, not all the States parties to the treaty concerned were injured States, he noted that, under the European Convention on Human Rights,[11] every State party was entitled to bring a claim against any other State party.

The meeting rose at 1.05 p.m.

[11] See 1894th meeting, footnote 10.

1902nd MEETING

Thursday, 13 June 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

State responsibility (*continued*) A/CN.4/380,[1] A/CN.4/389,[2] A/CN.4/L.382, sect. G, ILC (XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

Content, forms and degrees of international responsibility (part 2 of the draft articles) (continued) and *"Implementation"* (mise en œuvre) *of international responsibility and the settlement of disputes (part 3 of the draft articles)*[3] (concluded)

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*concluded*)

SIXTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4] (*concluded*)

1. Mr. RIPHAGEN (Special Rapporteur), continuing his summing-up of the discussion, noted that Mr. Ushakov (1895th meeting) had expressed some doubts about the value of draft article 5. Most speakers had considered that article essential, however, and he was sure that any drafting problems could be dealt with in the Drafting Committee. He would revert to article 5 later, but would like first to make a general remark concerning draft article 6.

2. Many members had found article 6 too detailed, especially in its first paragraph. The reason for including the details was connected with what Mr. Arangio-Ruiz (1900th meeting) had called the "preliminaries", the intermediate phase of a situation arising from an alleged wrongful act. Article 6 tried to set out what the injured State could require the author State to do. It had been held that the article was not strong enough and that it should be based on the obligation of the alleged author State, an approach he had adopted in his earlier drafts. But as Mr. Ushakov had rightly remarked, there was no obligation unless the injured State demanded that something should be done. Hence he believed that the drafting of article 6 was, in principle, correct.

3. The second reason for including the details in paragraph 1 of article 6 was connected with draft article 7. Article 6 dealt with *restitutio in integrum stricto sensu*—what Mr. Reuter had once called the perfect undoing of the internationally wrongful act, the belated performance of the primary obligation. But since that concept might give rise to difficulty in a situation involving the private right of a private individual, he had thought it useful to separate it from the other obligations of the author State. Of course, if one did not accept article 7, that reason was eliminated. In that connection, he noted that some international lawyers seemed to regard international law as being completely separate from internal law—an attitude with which he most emphatically disagreed. Of course, the state of internal law could not excuse non-performance of an obligation, although when looking at article 33 of part 1 of the draft, on a state of necessity, one could have doubts. In any event, the author State should at least apply the possibilities it had *proprio motu* to redress the wrongful act. The main reasons for including the details in article 6, then, were to underscore the preliminary stage, which occurred before the more dramatic stage of reciprocity or reprisals.

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the texts, see 1890th meeting, para. 3.

4. Article 7 dealt only with *restitutio in integrum stricto sensu*—the method dealt with in article 6, paragraph 1 (*c*)—which meant the re-establishment of private rights affected by an internationally wrongful act. Though there was no absolute uniformity in the opinions and decisions of arbitrators, in modern international law *restitutio in integrum stricto sensu* was not required, but a substitute performance was required as compensation. The rule in article 7, which concerned the treatment of aliens, could be compared with a rule existing in many internal legal systems concerning the legal position of servants of the State, or with the rules applicable to United Nations officials. If it was established that an official had been dismissed in contravention of the applicable rules, the public authority, or the Secretary-General of the United Nations, had a choice between reinstatement of the official, which was *restitutio in integrum stricto sensu,* or a pecuniary indemnity. Article 7 could not prejudge the existence of primary rules. Perhaps there were no rules of customary law, but a situation might arise in which there had been an internationally wrongful act in breach of an obligation concerning the treatment of aliens, whether conventional or customary.

5. Replying in order to the comments made by members of the Commission, he noted that Mr. Sucharitkul (1890th meeting) had expressed the view that the provision in article 6, paragraph 2, would not be easy to apply. He was well aware of that fact; the quantum of damages was a difficult point in any arbitral decision. The Chairman, speaking as a member of the Commission, had said that developing that point would mean opening a very long and difficult debate.

6. Mr. Sucharitkul and several other speakers had referred to the dividing line between so-called reciprocity and so-called reprisals. He thought the discussion on that point had been somewhat confused, since the word retortion had also been used. To the best of his knowledge, that word was most commonly applied to measures not contrary to international obligations, and he therefore believed that retortion was outside the scope of the Commission's discussion.

7. With regard to draft article 12, subparagraph (*a*), relating to diplomatic immunity, references had been made to the ICJ in connection with the case concerning *United States Diplomatic and Consular Staff in Tehran.*[5] He believed there was some misunderstanding as to the link between that case and article 12, subparagraph (*a*). The ICJ had not been dealing with reciprocity or reprisals; it had simply said that violation of diplomatic immunity could not be a response to alleged intervention of the embassy in internal affairs. That was a rather different context, since the Court had not been dealing with reciprocity in the diplomatic field. In paragraph (7) of the commentary to article 8, it was simply stated that a breach of diplomatic immunity could not be a permissible response to an unlawful act; cases of so-called reciprocal application of a rule between two States were not dealt with. He therefore believed that, apart from drafting questions, article 12, subparagraph (*a*), belonged in the draft, although it should perhaps appear as a separate article. The reason why article 12 referred only to immunities and not to privileges was that privileges were subject to a restrictive interpretation on both sides, as the Chairman (1901st meeting) had pointed out.

8. In regard to draft articles 14 and 15, he had already dealt, in his general introduction (1890th meeting), with the desirability of setting out the additional legal consequences of international crimes, as mentioned by Mr. Sucharitkul and others, as well as with the proposal by the Chairman (1901st meeting, paras. 15-16), which could be referred to the Drafting Committee. The Chairman's proposal did not set out the legal consequences either; perhaps a reference could be added to the criminal responsibility of individuals as such, which might be considered as falling outside the scope of the Commission's draft, but which could nevertheless be useful. As far as the criminal responsibility of States was concerned, the Chairman's proposal also referred to what the international community as a whole might decide on that matter.

9. Mr. Sucharitkul (1890th meeting) and others had questioned whether article 15 was really useful. He himself believed that it differed from article 4, which dealt with situations in which, under the normal rules of State responsibility, a State could take measures under articles 8 or 9. But those measures would have the effect of endangering international peace and security. Article 4 was rather negative, whereas article 15 was positive in that it referred to particular rights and obligations arising from aggression and to the Charter of the United Nations, Article 51 of which dealt with self-defence. Whether self-defence should be mentioned in the article or in the commentary was a matter for the Drafting Committee. He agreed with several other speakers that article 15 was a useful and necessary reminder of instruments other than the articles on State responsibility.

10. Mr. Sucharitkul and, indeed, nearly all speakers except Mr. Ushakov (1895th meeting) had agreed that part 3 of the draft was necessary and that work should be continued on preparing articles in that part. References had been made to the ICJ and to a possible international criminal court within the framework of the draft Code of Offences against the Peace and Security of Mankind, all of which he would take into account when drafting the articles. Some speakers, while agreeing that part 3 would be useful, had doubted its acceptability to States. That was a realistic point, but in any event the Commission's responsibility was to make proposals. Some States would consider parts 1 and 2 unacceptable without part 3.

11. Mr. Reuter (1891st meeting) had expressed reservations on draft article 6, particularly in connection with article 22 of part 1. While he understood those reservations, he thought that, for the time being, the Commission should deal with part 2 within the framework of the articles already adopted as part 1. As to Mr. Reuter's reservations concerning *jus cogens,* everyone knew that that concept raised many difficulties and had been the subject of discussion in

[5] Judgment of 24 May 1980, *I.C.J. Reports 1980,* p. 3.

many other bodies and at the United Nations Conference on the Law of Treaties in 1968 and 1969. Like Mr. Arangio-Ruiz (1900th meeting) however, he was inclined to believe that *jus cogens* could not be ignored.

12. He had already replied to Mr. Reuter's comments on articles 8 and 9, which had been referred to the Drafting Committee for a clear distinction to be made between reciprocity and reprisals. He himself did not agree that, in the case of an unequal treaty, the performance of one party was less important than that of the other; that was also a matter to be clarified by the Drafting Committee.

13. Mr. Reuter had also referred to the absence from the draft of any reference to the punishment of a State. Punishment had not been specifically mentioned, but a reference had been made in article 14 to the source of the rules—the international community as a whole—and he had given reasons why he believed it was difficult to be more specific at the present time. Another question raised by Mr. Reuter concerned the relationship between the 1969 Vienna Convention on the Law of Treaties and part 2 of the draft, and whether draft article 13, which in Mr. Reuter's view changed the rules of the Vienna Convention, was acceptable. He believed that different levels were involved: validity in the larger sense of the law of treaties, on the one hand, and measures taken by States, on the other. Wherever he had departed from the terms of the Vienna Convention, he had done so deliberately. Article 13 had to have a narrower scope than any material breach: for not every material breach destroyed the purpose of a treaty. In his opinion, therefore, it was not necessary for article 13 to use the same terminology as the Vienna Convention, and it was not a modification of that Convention.

14. Mr. Reuter's observations concerning the phrase "the international community as a whole", which had first been used in article 19 of part 1 of the draft, left many questions open. Perhaps the Commission could improve on that phrase, which was an essential one; but in any case it was justified in using the same expression in part 2 as it had in part 1.

15. Some of the points made by Mr. McCaffrey (1892nd meeting) were clearly matters for the Drafting Committee. As to the use of the word "suspend" in draft article 9, paragraph 1, he did not think that term was too weak. Perhaps Mr. McCaffrey had been referring to the distinction between suspension and termination. Other speakers had suggested that the word "suspension" in article 11, paragraph 2, should be qualified by the word "temporary". That was a matter for the Drafting Committee, but to his mind suspension was always temporary; if it was not temporary, it became termination. Another question that might arise was how long the suspension should last.

16. Mr. McCaffrey had also raised a point concerning draft article 10. That article referred to third-party settlement procedures, not to negotiations, which were available only if the other party wished to negotiate in good faith. If a third-party settlement procedure did result in a binding decision, there was always the possibility that the injured State would not enforce the decision, but a new legal relationship between the parties to the dispute did in fact arise.

17. As to who would judge the applicability of draft article 11 regarding the limitation of countermeasures, the answer would be given in part 3 of the draft: if the decision was not accepted, no procedure was provided for and it would be necessary to rely on the good faith of the States involved. The same applied to the question whether article 11, paragraph 2, went too far in its reference to a "procedure of collective decisions".

18. As to the question whether article 14, paragraph 2, was also applicable to international delicts, Mr. Tomuschat (1896th meeting) had answered that question when he had said that, in the event of a breach of a bilateral treaty, a third State normally had nothing to do with that situation.

19. Referring to the comments made by Mr. Calero Rodrigues (1892nd meeting), he cautioned against using the term "*inter alia*" in article 6. If an exhaustive list of what the injured State might require from the author State was not to be provided, it would be better to say nothing at all. Perhaps that was a matter of drafting, or it could be explained in the commentary. Reparation in kind was possible and was mentioned in the commentary. Perhaps the word "compensation", suggested by, among others, the Chairman (1901st meeting), could be adopted. The doubts expressed by Mr. Calero Rodrigues concerning article 11, paragraph 1 (*c*), could perhaps be dispelled in the Drafting Committee.

20. Many of the points raised by Mr. Flitan (1892nd and 1893rd meetings) could be referred to the Drafting Committee, such as the distinction between reciprocity and reprisal and the possibility of dividing article 12 to make a separate article on *jus cogens*. He did not think that article 10 was unbalanced in favour of the alleged author State, as Mr. Flitan had suggested.

21. Most of the remarks made by Mr. Thiam (1893rd meeting) had concerned the relationship between the draft Code of Offences against the Peace and Security of Mankind, with which Mr. Thiam was dealing, and the topic under consideration. In drafting the articles, he had assumed that Mr. Thiam's topic would cover personal criminal responsibility only. The need to include the criminal responsibility of States in the draft code had arisen subsequently, during the discussion.

22. He believed he had already replied to most of the comments made by Mr. Huang (1893rd and 1894th meetings), with the exception of a few points which could be referred to the Drafting Committee.

23. Mr. Francis (1894th meeting) had been very strongly in favour of retaining article 7 as it stood and, in his own opinion, had correctly interpreted the meaning of that article.

24. Referring to Mr. Balanda's comments (*ibid.*) concerning "new legal obligations", he pointed out that that approach had been followed by the Commission since long before he had become a member,

and that was why he had followed it. Mr. Balanda had been against retaining article 7 and had spoken of capitulation régimes, which, in his own opinion, were in no way comparable with article 7. The remarks made by Mr. Francis, Mr. Njenga (1896th meeting) and the Chairman (1901st meeting) might be helpful in clarifying that point.

25. He believed he had already replied to most of the comments made (1895th meeting) by Sir Ian Sinclair, who believed that it was not possible at present to add specific legal consequences within the framework of article 14. As to the wish expressed by Sir Ian and Mr. Malek (1900th meeting) to see articles in part 3 drafted as soon as possible, he hoped to have completed that part in his next report to the Commission.

26. Mr. Ushakov had read out (1895th meeting, para. 24) and later submitted to him a draft of an article, which would probably be article 8, and which enumerated some, but not all, of the possible countermeasures. Such an incomplete list, like the use of the expression "*inter alia*", was inappropriate: the Commission's task was to indicate which countermeasures were possible and which were not. Mr. Ushakov had been right in saying that countermeasures ceased immediately if the new obligations of the author State were fulfilled; whether it was necessary to say so in the draft articles was a matter for the Drafting Committee to decide.

27. He appreciated Mr. Ogiso's observation (1895th meeting) that the Commission was trying to determine the position of alleged author States and alleged injured States. As to the view that article 9, paragraph 2, on proportionality, was perhaps rather weak, he could not see the point of reprisals if absolutely strict proportionality was to be invoked. The observation that the draft did not take full account of *jus cogens* outside the area of crimes was quite true; that would be corrected in the drafting of part 3. Mr. Ogiso had also agreed with Mr. Ushakov that articles 8 and 9 gave the impression that the injured State could suspend the performance of any or all of its obligations; but the limitations in articles 10, 11 and 12 could not, of course, be provided beforehand. Moreover, article 9 did not propose that the injured State should stop performing all its obligations at once, but that it should do so selectively. A real distinction could only be made, however, in the case of armed reprisals, which was a separate point. In earlier reports, he had pointed out that the principle of *jus cogens* was involved, and that limitation of reprisals under article 12, subparagraph (*b*) was relevant.

28. Most of the comments made by Mr. Njenga (1896th meeting) had already been discussed in other contexts. He noted that Mr. Njenga was in favour of article 7 and that his explanation, like that of Mr. Francis, was exactly what he himself had had in mind in drafting the article.

29. Mr. Tomuschat (*ibid.*) had stressed the need to refer to sources in article 5. He himself had already explained why the references in that article were not exhaustive; he believed that the source, whether a treaty or customary law, did make a difference in the determination of the injured State. A new question raised by Mr. Tomuschat concerned the result of a breach of the obligation to consult, which in his own opinion must be answered within the framework of the particular consultation provision. Agreements in the field of a related topic, that of international liability for injurious consequences arising out of acts not prohibited by international law, stipulated the obligation to consult, but non-fulfilment did not in itself create a responsibility. In any case, that matter concerned primary rules, and he doubted that the Commission's articles could clarify primary rules in that respect. Mr. Tomuschat had also observed that article 9 seemed to refer only to the passive conduct of the injured State; but in his own opinion both the passive and the active aspects of the situation were covered.

30. Mr. Mahiou's comment (1897th meeting) on draft article 16, subparagraph (*c*), suggested that the reference to belligerent reprisals had caused some misunderstanding. The reprisals referred to were those taken in response to a breach of an obligation of *jus in bello*—a difficult problem which had been dealt with at many ICRC conferences. That limited field of belligerent reprisals should not be developed in the draft, but left to organizations which had much more experience of it.

31. Replying to Mr. Barboza's remarks (*ibid.*) on the non-exhaustiveness of article 5, he pointed out that, if reference were made to a unilateral declaration, it would still not be known whether that declaration had been addressed to one State, a group of States, or all States. As to the question, relating to article 6, paragraph 1 (*b*), whether an author State could invoke the non-existence of remedies under its internal law, the point was that, if the author State did have such remedies available, it should apply them. He agreed with Mr. Barboza that it was difficult at the current stage to be precise about the additional legal consequences of crimes.

32. In regard to Mr. Díaz González's criticism (1897th meeting) of the use of the terms "reciprocity" and "reprisals", he himself would have no objection to deleting those terms; the measures in question could then be referred to as "measures under article 8" or "measures under article 9". But that was purely a drafting matter.

33. Mr. Razafindralambo (1898th meeting) had questioned whether the expression "interim measures of protection", in article 10, paragraph (2) (*a*), was correct; that could be left to the Drafting Committee. On the question of State immunity, he believed that article 10 was without prejudice to the applicable rules; but he doubted whether State immunity was so sacrosanct that it fell outside the scope of countermeasures. That, however, was a matter of primary, not secondary rules.

34. He agreed with Chief Akinjide (*ibid.*) that realism was desirable, but he also believed that, as international lawyers, the members of the Commission should aim for Utopia. On the question whether the international community as a whole, referred to in article 14, paragraph 1, was developing rules on international crimes *in abstracto* or *in concreto*, he

observed that he himself, when drafting the rules, had had a legislative function in mind.

35. Mr. Roukounas (*ibid.*) had commented on the lack of elements of injury in article 5, but, as Special Rapporteur, he himself had felt bound by part 1 of the draft articles, which completely disregarded that question. Material damage could easily be determined, but he believed that to raise the idea of moral damage would amount to begging the question. Perhaps that point could be clarified in the Drafting Committee.

36. He was glad to note that Mr. Al-Qaysi (1899th meeting) approved, in general, of most of the draft articles and also considered part 3 of the draft to be essential. He was unable to answer the question what would happen if the system established under the Charter of the United Nations failed to function. Draft article 13 dealt with the case of the complete breakdown of systems other than the United Nations system. In his opinion, the Commission should leave it to the Organization itself to see how it could improve the United Nations system.

37. Mr. Lacleta Muñoz (*ibid.*) had made a number of useful suggestions which could be discussed in the Drafting Committee. He had also drawn attention to some difficulties that might arise in specifying the additional legal consequences of an international crime. He was pleased to note that Mr. Lacleta Muñoz, too, was in favour of part 3 of the draft and approved of the outline suggested in the sixth report (A/CN.4/389, section II).

38. Mr. Yankov (1899th meeting) had rightly said that not everything that had been, as it were, promised by the Commission in its earlier reports had been fulfilled. He had made some points which could be dealt with in the Drafting Committee. It should be noted that part 3 would not relate to part 2 only. It would provide a special system, which would come into effect when measures were taken under part 2, but it must necessarily be based on part 1 as well. He was glad to see that Mr. Yankov also thought that the articles of part 3 should be prepared, and he would do so as soon as possible. He had noted Mr. Yankov's statement that, in drafting those articles, account should be taken of certain difficulties relating to third-party dispute settlement.

39. Mr. Arangio-Ruiz (1900th meeting) had suggested that an injured State should be defined as one whose rights had been infringed and had referred to the concept of injury mentioned by Mr. Roukounas (1899th meeting). That definition would be acceptable if part 1 of the draft was changed accordingly. But some obligations were really the mirror image of rights. Most of the rules in customary international law were based on the sovereign equality of States, and certain obligations flowed from that principle. In his opinion, it was not easy simply to say that an injured State was one whose right had been infringed and to use the concept of injury, particularly since Mr. Arangio-Ruiz rejected the distinction between subjective law and legitimate interests. He himself agreed that the distinction was particularly relevant in internal legal systems, but did not think that it could be transposed to the field of international law. In any event, that was a matter for discussion in the Drafting Committee.

40. With regard to the doubts expressed by Mr. Arangio-Ruiz concerning articles 6 and 7, he had already explained that article 7 referred only to the particular form of reparation called *restitutio in integrum stricto sensu.* There was a difference between a material impossibility, dealt with in article 6, paragraph 2, and the difficulty of re-establishing the right of an individual which had been taken away.

41. The idea of mutual assistance, mentioned in draft article 14, paragraph 2 (*c*), had been taken from the Charter of the United Nations. It was an expression of solidarity, which was to be welcomed. No one had referred to the position of neutral States, such as Switzerland; he agreed that, in regard to international crimes, there should be no neutrality in the strict sense. Hence article 14, paragraph 2, provided a minimum obligation for any State not to recognize as legal the situation created by an international crime and not to render aid to a State which had committed such a crime. An example of mutual assistance would be if a State broke off economic relations with a State which had committed an international crime, and a third State then established economic relations with the former State. He was glad to note that Mr. Arangio-Ruiz accepted the idea of part 3 in principle.

42. Mr. El Rasheed Mohamed Ahmed (1900th meeting) had supported article 7, although he had feared that it might implicitly favour the tendency of some writers and specialists to withdraw concessions from the application of internal law and place them under international law. That, however, was a question of primary rules and depended on the particular situation. Mr. El Rasheed Mohamed Ahmed had also referred to the psychological elements involved, particularly in connection with article 10, paragraph 2; but several other speakers had maintained that article 10 was not too much of a limitation for the injured State. A balance would have to be struck between the views expressed. Mr. El Rasheed Mohamed Ahmed had also said that he was in favour of part 3, which he considered to be an integral part of the structure of the draft.

43. Mr. Koroma (*ibid.*) considered that part 3 was essential and approved of the role assigned to the ICJ.

44. The remarks made by the Chairman, speaking as a member of the Commission (1901st meeting), had been mostly favourable, at least in regard to articles 6 to 13. The Chairman had even proposed a text for article 14, paragraph 1 (*ibid.*, para. 15), which was a useful suggestion and could be taken up in the Drafting Committee. He was glad to note that the Chairman was in agreement with the outline of part 3.

45. With regard to future action, he suggested that the Commission should refer articles 7 to 16 to the Drafting Committee, which would produce revised texts as a basis for discussion at the following session. The Drafting Committee would bear in mind all the points made during the debate.

46. Mr. FRANCIS said that, in principle, he had no objection to referring articles 14 and 15 to the Drafting Committee, on the understanding that the Committee would take no action on them for the time being. He was convinced that, if the situation had not been as it was, the Special Rapporteur would have gone further in articles 14 and 15. The Special Rapporteur had said that, although the international community had recognized the concept of international crime, there was no general consensus on the consequences of such crimes. He had been right not to go further in articles 14 and 15, because article 19 of part 1 of the draft already attributed criminal responsibility to States and the General Assembly had been asked to determine whether a State could be a subject of law under the draft Code of Offences against the Peace and Security of Mankind. If the Commission went further, it might prejudge the decision to be taken by the General Assembly. The Drafting Committee should therefore be requested to refrain from taking up articles 14 and 15.

47. Mr. USHAKOV supported the Special Rapporteur's suggestion that articles 7 to 16 should be referred to the Drafting Committee.

48. The CHAIRMAN said that the Commission had had a comprehensive discussion on State responsibility. Some concrete suggestions had been made and there had been broad agreement on draft articles 1 to 13. He agreed with the Special Rapporteur that, since articles 5 and 6 had already been referred to the Drafting Committee, articles 7 to 16 should also be referred to it. A wide exchange of views had been held on articles 14 and 15 and the Drafting Committee would have ample material for reflection. He thought that the Committee could be requested to consider articles 14 and 15 in the light of the comments made in the Commission. If it made concrete proposals on those articles, they would be useful to the Commission and the Sixth Committee of the General Assembly, and could be used by the Special Rapporteur in preparing his next report. He therefore suggested that the Commission should refer articles 7 to 16 to the Drafting Committee, on the understanding that the results of its work on articles 14 and 15 would be used by the Special Rapporteur, who might submit appropriate formulations in his next report.

49. Mr. RIPHAGEN (Special Rapporteur) said that the Chairman's suggestion was a workable one. It did not seem likely that the Drafting Committee would be able to discuss articles 14 and 15 during the current session. It should be informed that those articles involved special difficulties, but that it would be useful if it could make concrete proposals. He therefore supported the Chairman's suggestion.

50. The CHAIRMAN said that the mere fact of referring the articles to the Drafting Committee implied that they would not be discussed by the Commission at its next session until the Committee had made its recommendations. Members would then be free to discuss the articles and express their views on them. Articles 14 and 15 would be considered by the Drafting Committee if it had time. The Special Rapporteur would participate in the work of the Committee and take account of its discussions in his next report. The Commission should not still be in doubt about the need to harmonize its work on State responsibility with that on the draft Code of Offences against the Peace and Security of Mankind. It was with an awareness of that need that articles 14 and 15 were being referred to the Drafting Committee.

51. If there was no objection, he would take it that the Commission agreed to refer articles 7 to 16 to the Drafting Committee.

It was so agreed.

The meeting rose at 5.55 p.m.

1903rd MEETING

Friday, 14 June 1985, at 10.35 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

Draft articles submitted by the Special Rapporteur[3]

Sixth report of the Special Rapporteur

Articles 23* and 36 to 43**

---

* Resumed from the 1864th meeting (*Yearbook ... 1984*, vol. I, pp. 298-300, paras. 1-22).

** Concerning articles 36 to 42, resumed from the 1847th meeting (*ibid.*, pp. 191 *et seq.*).

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two) pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

1. The CHAIRMAN invited the Special Rapporteur to introduce his sixth report on the topic (A/CN.4/390), which contained the annotated and, in some cases, revised texts of draft articles 23 and 36 to 43. The draft articles read as follows:

Article 23. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. Any immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

Article 36. Inviolability of the diplomatic bag

1. The diplomatic bag shall be inviolable at all times and whenever it may be in the territory of the receiving State or the transit State; unless otherwise agreed by the States concerned, it shall not be opened or detained and shall be exempt from any kind of examination directly or through electronic or other mechanical devices.

2. Nevertheless, if the competent authorities of the receiving State or the transit State have serious reason to believe that the bag contains something other than official correspondence, documents or articles intended for official use, referred to in article 32, they may request that the bag be returned to its place of origin.

Article 37. Exemption from customs inspection, customs duties and all dues and taxes

The receiving State or the transit State shall, in accordance with such laws and regulations as it may adopt, permit the entry, transit or exit of the diplomatic bag and shall exempt it from customs and other inspections, customs duties and all national, regional or municipal dues and taxes and related charges, other than charges for storage, cartage and other specific services rendered.

Article 39. Protective measures in circumstances preventing the delivery of the diplomatic bag

The receiving State or the transit State shall take the appropriate measures to ensure the integrity and safety of the diplomatic bag, and shall immediately notify the sending State in the event of termination of the functions of the diplomatic courier, which prevents him from delivering the diplomatic bag to its destination, or in circumstances preventing the captain of a commercial aircraft or the master of a merchant ship from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State.

Article 40. Obligations of the transit State in case of force majeure *or fortuitous event**

If, as a consequence of *force majeure* or fortuitous event, the diplomatic courier or the diplomatic bag is compelled to deviate from his or its normal itinerary and remain for some time in the territory of a State which was not initially foreseen as a transit State, that State shall accord the inviolability and protection that the receiving State is bound to accord and shall extend to the diplomatic courier or the diplomatic bag the necessary facilities to continue his or its journey to his or its destination or to return to the sending State.

*Article 41. Non-recognition of States or Governments or absence of diplomatic or consular relations**

1. The facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag under these articles shall not be affected either by the non-recognition of the sending State or of its Government by the receiving State, the host State or the transit State or by the non-existence or severance of diplomatic or consular relations between them.

2. The granting of facilities, privileges and immunities to the diplomatic courier and the diplomatic bag, under these articles, by the receiving State, the host State or the transit State shall not by itself imply recognition by the sending State of the receiving State, the host State or the transit State, or of its Government, nor shall it imply recognition by the receiving State, the host State or the transit State of the sending State or of its Government.

Article 42. Relation of the present articles to other conventions and international agreements

1. The provisions of the present articles are without prejudice to the relevant provisions in other conventions or those in international agreements in force as between States parties thereto.

2. Nothing in the present articles shall preclude States from concluding international agreements relating to the status of the diplomatic courier and the diplomatic bag confirming or supplementing or extending or amplifying the provisions thereof.

Article 43. Declaration of optional exceptions to applicability in regard to designated types of couriers and bags

1. A State may, without prejudice to the obligations arising under the provisions of the present articles, when signing, ratifying or acceding to these articles, designate by written declaration those types of couriers and bags to which it wishes the provisions to apply.

2. A State which has made a declaration under paragraph 1 of this article may at any time withdraw it.

3. A State which has made a declaration under paragraph 1 of this article shall not be entitled to invoke the provisions relating to any of the excepted types of couriers and bags as against another State Party which has accepted the applicability of those provisions.

2. Mr. YANKOV (Special Rapporteur) said that the main objective of his sixth report (A/CN.4/390)

* Text unchanged.

was to submit to the Commission certain proposals for resumption of the consideration of draft articles 23 and 36 to 42 and for consideration of the new draft article 43, entitled "Declaration of optional exceptions to applicability in regard to designated types of couriers and bags". With the exception of draft article 43, all the other texts had been under consideration by the Commission since its thirty-fifth session and, in preparing his sixth report, he had concentrated not so much on the draft articles themselves as on the attitudes of Governments, as expressed in the debates in the Sixth Committee at the thirty-ninth session of the General Assembly (A/CN.4/L.382, sect. C). In the light of those discussions, he had reconsidered the texts of some of the draft articles and was now submitting them in revised form.

3. At the Commission's thirty-sixth session, the Drafting Committee had proposed the following text for draft article 23:

Article 23 [18]. Immunity from jurisdiction

[1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or the transit State.]

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

[4. The diplomatic courier is not obliged to give evidence as a witness.]

5. Any immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not not exempt him from the jurisdiction of the sending State.

4. The extensive debate on draft article 23 in the Sixth Committee (*ibid.*, paras. 141-159) had centred mainly on the question of immunity from criminal jurisdiction (paragraph 1) and to some extent on exemption from the obligation to give evidence as a witness (paragraph 4). No new substantive arguments had been advanced in support of either of the opposing views on paragraph 1, which were described in some detail in the sixth report (A/CN.4/390, paras. 16-17). The possible options regarding paragraph 1 were: (*a*) to maintain the text of the paragraph as proposed by the Drafting Committee; (*b*) to delete paragraph 1, and possibly the whole of the article; or (*c*) to alter paragraph 1 by adding the words "except for serious offences" or "in respect of all acts performed in the exercise of his functions". He was recommending adoption of the paragraph in its present form, in the light of prevailing State practice and also of the fact that, whereas there were many instances of involvement of permanent diplomatic personnel in acts constituting breaches of the criminal law of a receiving or transit State, no such instances could readily be found in the case of diplomatic couriers.

5. It was common practice to accord diplomatic couriers the same immunities as those extended to the administrative and technical staff of diplomatic and consular missions and members of their families and households. The time factor, in other words the brevity of the diplomatic courier's stay in the receiving State or transit State, was not *per se* a legal or material reason for failing to accord the courier such immunities. He shared the view expressed by some representatives in the Sixth Committee that paragraph 1 of draft article 23 should be in line with the provisions of article 16, on the diplomatic courier's personal inviolability, already adopted by the Commission on first reading. It was, of course, for the Commission to decide both on the substance and the drafting of paragraph 1, but as one who had been deeply involved in the study of the problem over the past few years he felt obliged to advocate the utmost caution in introducing at the present stage any changes which might have far-reaching implications for values established in accordance with long-standing practice.

6. Paragraphs 2, 3 and 5 of draft article 23 appeared to enjoy general support and he accordingly proposed their adoption without change. However, his proposed revised text of paragraph 4 departed from the original draft to a significant extent: on the one hand, the diplomatic courier's immunity from the obligation to give evidence as a witness was limited to cases involving the exercise of his functions, and on the other, an important exception was that, when the diplomatic courier was required to give evidence in other cases, that should not interfere unreasonably with the normal exercise of his official functions.

7. Draft article 36, too, had been the subject of much discussion, both in the Commission and in the Sixth Committee. The inviolability of the diplomatic bag was, of course, a most important issue and could be said to represent the foundation of the whole edifice being constructed in the draft articles. The advocates of absolute inviolability of the bag referred to article 24 and article 27, paragraphs 2 and 3, of the 1961 Vienna Convention on Diplomatic Relations, whereas the advocates of conditional inviolability invoked article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations.

8. Another problem area was the use of electronic and other devices for screening the diplomatic bag's contents, and there again opinion was divided as to the advantages and disadvantages of the procedure. One Government which had set up a special parliamentary commission to look into the matter had drawn attention to the risk to the security of confidential correspondence that would result from possible reciprocal action. In the light of the differing views and of State practice in the matter, as well as of the fact that a number of States provided in bilateral consular conventions for the absolute inviolability of the consular bag, he had come to the conclusion that, on balance, it would be wisest to abide by the well-

established rule of absolute inviolability, while possibly providing for some flexibility in its application.

9. Accordingly, he was proposing a revised text for article 36 to which the following additional changes should be made in paragraph 1: the word "whenever" should be replaced by "wherever", and the words "in the territory of the receiving State or the transit State" should be deleted. The deletion of the reference to the territory of the receiving State or of the transit State avoided giving the impression that the same degree of inviolability should not be accorded to the diplomatic bag on the high seas or in airspace above the high seas. Paragraph 2 of article 36 was formulated on the basis of a significant body of practice which suggested that a provision specifying the return of the bag to its place of origin in the event of serious suspicion as to its contents was preferable to one requiring the bag to be opened.

Co-operation with other bodies

[Agenda item 11]

Statement by the Observer for the Asian-African Legal Consultative Committee

11. The CHAIRMAN, on behalf of all members, extended a very warm welcome to Mr. Sen, Secretary-General of the Asian-African Legal Consultative Committee, and invited him to address the Commission.

12. Mr. SEN (Observer for the Asian-African Legal Consultative Committee) conveyed the greetings of the Asian-African Legal Consultative Committee (AALCC) to the Commission and expressed the hope that the Chairman of the Commission, who as India's representative had contributed to the development of AALCC, would be able to honour AALCC by his presence at its next session. He also expressed appreciation to Mr. Sucharitkul, who had represented the Commission at the AALCC session at Kathmandu in February 1985.

13. In a year that marked the thirtieth anniversary of the Bandung Conference and the fortieth anniversary of the creation of the United Nations, it was fitting to depart from the customary annual review of AALCC work and attempt to give a broad overview of its activities, which spanned three decades.

14. AALCC had been established in 1956, following the Afro-Asian Conference in Bandung, and had held its first session in 1957. Initially, there had been seven member countries, but that number had since risen to 40, with two permanent observers.

15. The development of AALCC could be traced back through three stages. The first stage covered the years from 1957 to 1967, when AALCC activities had been confined to matters of a strictly legal consultative nature. It was a period when Governments, after independence, had needed advice on the formulation of policies, and among the subjects referred to AALCC had been diplomatic relations, sovereign immunity as relating to trade transactions, extradition, the status of aliens, dual nationality, enforcement of foreign judgments, refugees, international rivers and even State responsibility. AALCC had also been required under its statutes to consider matters that were before the Commission, and hence an official relationship with the Commission had been established early on. In the first stage of its existence, AALCC meetings had followed the broad pattern of the Commission's meetings, using a skeleton secretariat with functions that had been confined to the preparation of background papers. AALCC had, however, already started to participate in a number of plenipotentiary conferences.

16. During the second stage, from 1968 to 1979, the emphasis had shifted to preparing countries for participation in United Nations conferences. The Committee's main contribution had been in connection with the law of the sea, for which it had prepared background material. It had also served as a forum for consultation and, ultimately, for interregional co-operation. By that time its meetings had been based on the pattern not of those of the Commission, but of those of plenipotentiary conferences. AALCC sessions had been shortened and supplemented by a large number of group and sub-committee meetings, and its membership had increased from 12 to 38. It had opened its doors to observers from all over the world. Following the United Nations Conference on the Human Environment (Stockholm, 1972), it had become involved in environmental matters. The secretariat had started to provide member Governments with advice on their problems, initiated training programmes for government officials and instituted the practice of holding meetings of legal advisers, two of which had been presided over by the present Chairman of the Commission, in 1978 and 1979.

17. The third stage had begun with the twenty-first session of AALCC, in 1980. Many important policy decisions had been taken at that time and two areas had become the main focus of activity: economic co-operation and broader co-operation with the United Nations. In the area of economic co-operation, the Committee had prepared standard commodity contracts, made contributions to liner conferences in the context of its relations with UNCTAD and established relations with UNCITRAL that had led to the establishment of regional arbitration centres in 1978 and 1979. Two ministerial meetings held in 1980 and 1981 had resulted in closer practical co-operation in several areas: one area concerned technical support for global negotiations; another related to investment protection and hence wider co-operation with the World Bank, in which connection model drafts for investment protection agreements had been finalized; and a third area involved the pattern of co-operation in the field of industrialization, which had brought AALCC into direct contact with UNIDO. AALCC was also involved in promotional meetings between investors and prospective countries of investment. A first meeting on the subject had been held in New York in 1984 and three more were scheduled for 1985. Furthermore, it had been felt

necessary to foster some form of judicial co-operation, particularly in regard to Western Asia, where many people were interested in entering into contracts or taking up employment. An inter-sessional meeting, in which a number of interested organs and countries would be participating, was to be held shortly at The Hague to discuss the matter.

18. As to broader co-operation with the United Nations, AALCC had been accorded permanent observer status in 1980 and, in 1981, the General Assembly had adopted a resolution[4] calling for strengthened co-operation between the United Nations and AALCC, as a result of which the Committee had become involved in refugee and environmental protection matters. Of special interest was the fact that AALCC was in the process of preparing notes and comments on issues before the Sixth Committee of the General Assembly, with a view to assisting representatives in participating more effectively in the debates. It was likewise preparing a study on the strengthening of the United Nations through the rationalization of its methods of procedure.

19. With the establishment of the Commission in 1947, the work on the progressive development and codification of international law had been placed on a systematic footing. It was the combination of the Commission's legal endeavour, on the one hand, and the political component in the views expressed in the Sixth Committee, on the other, that had led to considerable success in the codification process, as illustrated by the adoption of instruments such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1969 Vienna Convention on the Law of Treaties. AALCC therefore placed special emphasis on the discussion in the Sixth Committee of the subjects before the Commission. To that end, it had written a paper urging the Sixth Committee to devote more time to the Commission's reports and it arranged for brief meetings on Commission matters to be held during General Assembly sessions, believing as it did that full participation in the debates on the Commission's work was facilitated by such a process of consultation.

20. All the topics under consideration by the Commission were of importance to AALCC, but its member Governments were growing a little restive about the progress on two of them: the law of the non-navigational uses of international watercourses and jurisdictional immunities of States and their property. In the latter case, the wide range of legislation that had been introduced in member States was causing practical problems. AALCC had deferred further consideration of the matter pending the finalization of the Commission's work on the topic, but he trusted that guidance would be forthcoming from the Commission in the not too distant future.

21. The Committee had suspended its work on international watercourses in 1976, when it had handed over all its papers on the matter to the Commission's Special Rapporteur for the topic at that time. In response to urgent requests, the item had been included on its agenda again, but purely to monitor the progress made in the Commission. Member Governments were concerned because Mr. Evensen was no longer a member of the Commission and therefore could not continue his duties as Special Rapporteur for the topic, but they had been assured that the work would be taken up at the point at which he had left off.

22. The CHAIRMAN, thanking Mr. Sen for his statement, said that it was the Commission's policy to promote co-operation with regional bodies involved in the field of international law and that it was particularly interesting to receive reports of activities of special concern to the regions concerned. It was equally interesting to learn of areas of activity in which AALCC was working in harmony with the Commission, thereby facilitating its work and providing it with views and comments from Asia and Africa.

23. Mr. AL-QAYSI, speaking on behalf of the Asian members of the Commission, said it was abundantly clear from Mr. Sen's statement that AALCC had not only responded to regional interests in the matter of the progressive development and codification of international law, but also made a sustained effort to promote international law within the region. It had done so by forging a consensus among the States concerned on matters pertaining to international law, and in a particularly pragmatic way, which could be ascribed to the seriousness with which it performed its task. For example, the increase in its membership from 7 to 40 States was no mean achievement. It had engaged in work on public and private international law, on international trade law and on economic, environmental and refugee issues, but its most interesting initiative, perhaps, related to the strengthening of the United Nations through the rationalization of its methods of procedure. All those achievements would not, however, have been possible without the Secretary-General of the Committee, to whom he wished every success.

24. Mr. FRANCIS said that, when he had had the privilege of representing the Commission at the AALCC session in Qatar in 1978, he had been struck by the efficiency achieved with such a limited number of staff. The fact that the Committee had not confined itself to law but had extended its activities into other areas was a reflection of its awareness of the direct relationship between law and economic and financial realities. As to the two topics about which the Committee felt some concern, he could assure Mr. Sen that the Commission was only too anxious to meet that concern and to move ahead with them.

25. Mr. FLITAN thanked Mr. Sen for his statement and, on behalf of the Eastern European members of the Commission, conveyed best wishes to AALCC for success in the future. He had been struck by the wide range of topics dealt with by the Committee, the achievements in its work and its ambitious programme of future work. It had from the outset paid heed to the realities and demands of international life and was seeking to lend its strength in the service of the United Nations. It was also an

[4] Resolution 36/38 of 18 November 1981.

example to all those who worked in the same areas and provided proof of the fruitful co-operation possible between widely differing legal systems. The Commission plainly benefited, directly and indirectly, from the work of AALCC, and he therefore hoped that the links between the two bodies would grow even stronger.

26. Mr. BARBOZA, speaking on behalf of the Latin American members of the Commission, said that Mr. Sen's outline of AALCC activities had afforded the Commission a welcome opportunity to grasp the full breadth of the Committee's task, to realize that the links with the Committee already dated back quite a number of years and to appreciate the affinity between the Committee's work and that of the Commission. Mr. Sen had also given a good insight into the variety of ways and means of action available to bodies engaged in the progressive development of international law, as advisers to Governments in a particular region and to delegations participating in United Nations conferences, as forums for consultation on matters at regional and inter-regional levels and as authors of studies on topics such as economic co-operation and the law of the sea, while at the same time co-operating with the Sixth Committee of the General Assembly in the examination of drafts submitted by the Commission. The latter aspect of the Committee's endeavours also enabled the Commission to move ahead with greater assurance in the elaboration of drafts ultimately intended for acceptance and ratification by States.

27. Mr. THIAM said that the statements by Mr. Sen were always very interesting and fostered a kind of dialogue between AALCC and the Commission. Every year, the Secretary-General of AALCC contributed new thoughts that encouraged the Commission to ponder further on the progressive development of international law and, in return, took away new considerations regarding universal codification. In that way, the relations between the Committee and the Commission were strengthened. It was to be hoped that the Chairman would be able to represent the Commission at the next session of AALCC.

28. Mr. RIPHAGEN, speaking on behalf of the Western European members of the Commission, thanked Mr. Sen for his report on the activities of AALCC. He had always listened to Mr. Sen's statements with great pleasure and appreciated the high intellectual quality and usefulness of the various AALCC publications. He expressed all good wishes for the Committee's continued success in its work.

The meeting rose at 1.10 p.m.

1904th MEETING

Monday, 17 June 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

1. The CHAIRMAN invited the Special Rapporteur to continue his introduction of the draft articles contained in his sixth report (A/CN.4/390), and specifically of draft articles 37 to 43.

2. Mr. YANKOV (Special Rapporteur) said that the revised text he was proposing for article 37 was an amalgamation of draft article 37 (Exemption from customs and other inspections) and draft article 38 (Exemption from customs duties and all dues and taxes) as originally submitted. The first part of the

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

article, namely the exemption of the diplomatic bag from customs and other inspections, was not provided for in any of the four conventions codifying diplomatic and consular law,[5] but had long been recognized as a rule of customary international law. It was not only to be inferred from the general principle of the inviolability of the diplomatic bag, but was also supported by State practice, by the *travaux préparatoires* relating to article 27 of the 1961 Vienna Convention on Diplomatic Relations and by a number of bilateral instruments. The rule encompassed both exemption from customs inspection and exemption from inspection by public health, veterinary and plant authorities, and it therefore deserved to be recognized for its practical significance.

3. It had been suggested that, in view of the provisions on the inviolability of diplomatic couriers and bags, the whole of article 37 was redundant. It should none the less be borne in mind that customs and other border authorities acted not on a logical basis, but solely in accordance with specific regulations, which were usually founded on international rules. Hence the provision in question was necessary and should be retained in the article. It might also furnish the justification for national laws and regulations, since practice had shown that, following the adoption of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, a number of countries had enacted legislation along those lines. As to the scope of inspection, he considered that, in the light of State practice, the exemption should not be confined to customs inspections *stricto sensu* but should extend to other forms of inspection carried out upon the arrival or departure of the diplomatic bag. In that connection, it would be noted that, under regulations introduced by the Government of Argentina, customs authorities were required to give clearance to closed and sealed packages containing diplomatic correspondence brought in by a diplomatic courier. Similar procedures had been adopted by many other countries, including Austria, Finland, Mexico, Norway and the United Kingdom.

4. The second provision of draft article 37, the exemption of the diplomatic bag from customs duties and/or other dues and taxes, was based on the sovereign equality of States and the immunities accorded to official State agents. The point had been made that there was no need for an express rule, since by definition the diplomatic bag should not contain articles that were subject to dues or taxes. There again, he considered that such a rule would provide the legal foundation for national rules and regulations and for bilateral agreements. The only exception, as stated in the provision itself, related to "charges for storage, cartage and other specific services rendered", which in general had to be paid.

5. The main purpose of draft article 39 was to protect the diplomatic bag when, in exceptional circumstances, it was no longer in the custody or control of a person authorized by the sending State. The article, which stipulated that in such instances the receiving State or transit State was required to take protective measures, was designed to cover the possibility of the functions of the diplomatic courier being terminated before the diplomatic bag had been delivered to its final destination, as a result, for example, of the incapacitation, illness or death of the courier. The same provision would apply to a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship. The article was not intended to cover cases of *force majeure* or fortuitous event, although situations very similar to them could well arise. Rather, the obligation on the receiving State or transit State under article 39 was to be regarded as falling within the régime of international co-operation and solidarity of States in the matter of diplomatic communications. Two main categories of measures could be envisaged: first, protective measures to ensure the safety and integrity of the bag, and secondly, notification either of the mission of the sending State on the territory of the receiving State or transit State or, if there was no such mission, of the diplomatic mission of the State that represented the interests of the sending State. There was no change in the substance of draft article 39, and it had been revised simply to take account of comments made in the Commission and in the Sixth Committee of the General Assembly.

6. Draft article 40 was largely modelled on article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, article 54 of the 1963 Vienna Convention on Consular Relations, article 42 of the 1969 Convention on Special Missions and article 81 of the 1975 Vienna Convention on the Representation of States. Those instruments did not refer specifically to a transit State, as defined in article 3, paragraph 1 (5), of the draft articles under consideration, but to the notion of a third State, which was in effect equated with a transit State. That meaning of the term did not, however, accord the meaning of "third State" under article 2, paragraph 1 (*h*), of the 1969 Vienna Convention on the Law of Treaties. Accordingly, to avoid any misunderstanding it would be preferable to use the term "transit State", which would also be more relevant in view of the itinerant nature of the diplomatic courier's duties.

7. The main obligations under draft article 40 were based on the rule *jus transitus innoxii*, which had received general recognition only with the adoption of article 40 of the 1961 Vienna Convention. The provisions of the draft article had found general support in the Sixth Committee and he had therefore reintroduced it in his sixth report (A/CN.4/390), with one slight amendment consisting of the addition of the words "to the diplomatic courier or the diplomatic bag" between the words "shall accord" and "the inviolability". The obligation of a transit State in the event of *force majeure* or fortuitous event was to assure the protection and inviolability of the courier and the bag, something for which the receiving State was normally responsible, and to make available the necessary facilities for the continuation of the journey.

---

[5] 1961 Vienna Convention on Diplomatic Relations, 1963 Vienna Convention on Consular Relations, 1969 Convention on Special Missions and 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character (hereinafter referred to as "1975 Vienna Convention on the Representation of States").

8. The purpose of draft article 41 was to ensure the necessary facilities, privileges and immunities for the diplomatic courier and diplomatic bag even in the absence of diplomatic relations between the sending State and the receiving or transit State or in the absence of formal recognition of a Government or State. At a time when international conferences were often held in countries with which not all the participating States had diplomatic or official relations, it was important for the diplomatic courier and diplomatic bag to enjoy the requisite legal protection and facilities. Paragraph 1 was based on State practice and was supported by certain bilateral arrangements, but such a provision had first been formulated in express terms in the 1975 Vienna Convention on the Representation of States. The Commission would remember that, during the preparation of the draft articles on special missions, it had affirmed that the rights and obligations of the host and sending States were not dependent on recognition or the existence of diplomatic or consular relations at the bilateral level.[6] A number of Governments placed special importance on the provision in article 41 because they did not always have diplomatic relations with the host country of an international organization. The article proposed in the sixth report therefore reproduced the text submitted originally. As was clear from paragraph 2, the article was limited to the protection and facilities to be accorded to the diplomatic bag and had no other legal implications, particularly with regard to the recognition of a State or Government.

9. The general reaction to draft article 42, both in the Commission and in the Sixth Committee, had been that a provision was required on the relationship between the draft articles and other conventions and international agreements. The article was modelled on article 4 of the 1975 Vienna Convention on the Representation of States, but it would in fact encompass all aspects of matters pertaining to diplomatic couriers and diplomatic bags covered in the four codification conventions, and hence it was perhaps both more necessary and more justified. In its present form, however, it had a very modest function and could be said to state the obvious. The Commission might therefore wish to consider whether a new paragraph should be added to define in more explicit terms the position of the draft *vis-à-vis* other conventions so far as the status of the diplomatic bag and the diplomatic courier was concerned.

10. Draft article 43 was new and was being submitted in the light of earlier suggestions. The four codification conventions contemplated different régimes so far as the inviolability of the diplomatic courier and diplomatic bag was concerned and only two of those conventions were in force. The other two might eventually enter into force, but that would simply add to the plurality of régimes. He had therefore drafted a provision intended to achieve a measure of flexibility. In so doing, he had drawn on articles 19, 22 and 23 of the Vienna Convention on the Law of Treaties and had also found some support in article 298 of the 1982 United Nations Convention on the Law of the Sea,[7] concerning optional exceptions to the applicability of compulsory procedures entailing binding decisions. That article was in turn perhaps influenced to some extent by article 22 of the Vienna Convention on the Law of Treaties.

11. Against that background, he had sought to reflect three main ideas: (*a*) the right to make a declaration of optional exceptions to applicability in regard to designated types of couriers and bags, together with the legal consequences of such a declaration; (*b*) the right to formulate the declaration and the right to withdraw it; (*c*) the procedural matter of making such a declaration in writing. In that connection, while it was implicit in paragraph 2 that withdrawal of a declaration should be in writing, it would perhaps be better to say so expressly and also to stipulate that the declaration should be communicated to the other contracting parties. The article proposed might call for improvement, but the intention behind it was to facilitate accession to the instrument that would emerge from the draft. If, as he believed, the draft articles were meant to provide a uniform approach to the status of the diplomatic courier and the diplomatic bag and to be applied within the framework of the four codification conventions, modalities should be devised to ensure that the régime established operated flexibly and without prejudice to the main principles.

12. Lastly, the Commission had stated at its thirty-sixth session that it might be in a position to complete the first reading of the draft articles before the end of the present term of office of its members.[8] With that intention in mind, members might wish to consider whether they should deal with draft articles 23 and 36 to 43 together or in three separate stages, namely article 23, articles 36 to 39, and articles 40 to 43.

13. After a procedural discussion in which Sir Ian SINCLAIR, Mr. FLITAN and Mr. AL-QAYSI took part, the CHAIRMAN said that members were free to speak on draft articles 23 and 36 to 43 either separately or by grouping them, as they preferred. However, in view of the close connection between the question of the immunity from jurisdiction of the diplomatic courier, dealt with in article 23, and that of the inviolability of the diplomatic bag, which was the subject of article 36, members might consider it useful to make all their comments in one statement. No decision to refer any of the draft articles to the Drafting Committee would be taken before the end of the discussion on the item as a whole. He hoped the flexible procedure he had outlined would be used effectively by all.

14. Mr. FLITAN congratulated the Special Rapporteur on his comprehensive sixth report (A/CN.4/390) and said that draft articles 23 and 36, concerning the diplomatic courier's immunity from

[6] See article 7 (Non-existence of diplomatic or consular relations and non-recognition) of the draft articles on special missions, and the commentary thereto, adopted by the Commission at its nineteenth session (*Yearbook ... 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, sect. D).

[7] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

[8] *Yearbook ... 1984*, vol. II (Part Two), p. 105, para. 387.

jurisdiction and the inviolability of the diplomatic bag, respectively, had raised the same problems both in the Sixth Committee of the General Assembly and in the Commission.

15. Unquestionably, the difficulties regarding article 23, and more particularly paragraphs 1 and 4, lay in the different possible conceptions of the diplomatic courier and his task. If it was acknowledged that, in many cases, the courier's mission was not confined to one destination and that the courier had to provide communications in both directions, the inevitable conclusion was that the justification for protection of the courier against arrest and detention in conformity with article 16 of the draft also entitled him to immunity from the criminal jurisdiction of the receiving State and the transit State and to exemption from the obligation to give evidence as a witness. In his opinion, without article 23, paragraphs 1 and 4, the sending State would suffer considerable injury if its messenger was forbidden to continue his mission in order to remain available to the courts of a transit State, or even the receiving State. Those two provisions were therefore essential as a matter of functional necessity.

16. Various trends had emerged from the discussions in the Commission and the Sixth Committee. Suggestions had been made to maintain the text of article 23 as proposed by the Drafting Committee, but to delete the square brackets around paragraphs 1 and 4 or to add, at the end of paragraph 1, the words "except for serious offences" or "in respect of all acts performed in the exercise of his functions" and, at the end of paragraph 4, the words "in cases involving the exercise of his functions" or "except in the case envisaged in paragraph 2". The latter wording seemed difficult to accept, for it would raise some practical problems. Again, another proposal had been to delete draft article 23 entirely, a solution to which he was not completely opposed, provided suitable clarification was made in the commentary.

17. The Special Rapporteur, wishing to find a compromise formulation, was proposing that the square brackets around paragraph 1 should be deleted and that paragraph 4 should stipulate that the diplomatic courier was not obliged to give evidence as a witness in cases involving the exercise of his functions but might be required to give evidence in other cases, provided that that would not cause unreasonable delays or impediments to the delivery of the diplomatic bag. The arguments put forward by the advocates of the different theories had not been decisive and had resulted in a stalemate. Some had sought to assimilate the diplomatic courier to other State officials, especially members of diplomatic missions, an argument rejected by others on the grounds that the diplomatic courier performed a very particular function.

18. In his opinion, the debate called for a different approach. The situation of the diplomatic courier should be examined in terms of the international instruments in force. Obviously, the draft articles under preparation should not weaken or strengthen either of the régimes laid down in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations, or again in the two other codification conventions which had not yet entered into force. If States, jurists, or even members of the Commission did not agree with those international instruments, the idea of modifying them might well be considered. In the circumstances, it seemed that the only solution was to model the diplomatic courier's immunity from jurisdiction on the immunity provided for in the 1961 Vienna Convention. Hence it was not by changing article 23 as proposed by the Special Rapporteur, in other words by drawing to some extent on the 1963 Vienna Convention, that the Commission would emerge from the impasse.

19. Draft article 43 reflected a desire for flexibility, since it allowed States to choose one of the legal régimes provided for in the codification conventions. Nevertheless, it must be borne in mind that the Commission could not, in drafting the present instrument, either weaken the régime in the 1961 Vienna Convention or strengthen the régime in the 1963 Vienna Convention. In that respect, paragraph 2 of draft article 36, whereby the receiving State or the transit State could, in certain cases, request that the bag be returned to its place of origin, was not satisfactory. It could sometimes be in the interest of the sending State to have the bag opened. Therefore, it was necessary to keep to the régime in the 1961 Vienna Convention or to adopt the régime in the 1963 Vienna Convention, but, in the latter case, paragraph 2 of article 36 should be altered so as to cover, in addition to cases in which the bag would be returned to its place of origin, cases in which the bag would be opened with the consent of the sending State.

20. The words "unless otherwise agreed by the States concerned", in paragraph 1 of draft article 36, could be deleted, for under article 6, paragraph 2 (*b*), States could modify among themselves "by custom or agreement, the extent of facilities, privileges and immunities for their diplomatic couriers and diplomatic bags".

21. The Special Rapporteur was right to propose a new draft article 37 to replace former draft articles 37 and 38, but the words "as appropriate" should be inserted between "The receiving State or" and "the transit State", in order to make it clear that the words "the entry, transit or exit of the diplomatic bag" did not apply equally to the receiving State and the transit State.

22. Draft article 39 was acceptable, but it would gain in clarity if it were drafted in keeping with the legislative method, which consisted in stating the case and then the obligation. The article should therefore begin with the words "In the event of termination of the functions of the diplomatic courier ...". Also, he was not quite convinced that mention should be made of "circumstances preventing the captain of a commercial aircraft or the master of a merchant ship from delivering the diplomatic bag to an authorized member of the diplomatic mission of the sending State", since another member of the crew could always be found to replace the captain.

23. Draft article 40 was also acceptable as to substance, and as had been pointed out at the previous

session,[9] there was no reason to use the term "third State" because the definition of a transit State under article 3, paragraph 1 (5) drew no distinction between an intended transit State and a State not initially foreseen as a transit State. With regard to form, the words "remain for some time in the territory of a State" should be replaced by "pass through the territory of a State", since that was what actually happened when a diplomatic courier or diplomatic bag was compelled to deviate from his or its normal itinerary. In addition, the receiving State itself was a transit State and therefore the words "the receiving State is bound to accord" could be replaced by "any transit State is bound to accord". Lastly, the words "or to return to the sending State", at the end of the article, could be deleted: the preceding words, namely "to continue his or its journey to his or its destination", covered all possibilities, including that of an *ad hoc* diplomatic courier sent to his own State, in which case the return would be not to the sending State but to the receiving State.

24. Draft article 41, on the non-recognition of States or Governments or absence of diplomatic or consular relations, related to a problem which must be settled. It posed no difficulties regarding substance, but the expression "host State", which was not defined in the draft articles, appeared four times. The Commission could either define that expression in article 3, on "Use of terms", or insert a *renvoi* in article 41 to an existing definition, such as that appearing in the 1975 Vienna Convention on the Representation of States.

25. With regard to draft article 42, on the relation of the draft articles to other conventions and international agreements, the content of paragraph 2 seemed to be already covered by paragraph 2 (*b*) of article 6 as provisionally adopted by the Commission.

26. To facilitate consideration of draft article 43, it would be useful if the secretariat distributed the text of article 298 of the 1982 United Nations Convention on the Law of the Sea. With reference to paragraph 1 of article 43, it would be noted that the signature and ratification of a convention, as well as accession to a convention, entailed a number of obligations under the 1969 Vienna Convention on the Law of Treaties. While he appreciated that the purpose of paragraph 1 was to give States the opportunity of choosing a legal régime from among those established by the four codification conventions, paragraph 2, which stipulated that such a choice could be withdrawn at any time, could well be a source of instability in international relations. He therefore proposed that that paragraph should be deleted.

27. The CHAIRMAN said that an unofficial document containing the text of article 298 of the United Nations Convention on the Law of the Sea would be distributed to members of the Commission in accordance with Mr. Flitan's suggestion.

The meeting rose at 6 p.m.

[9] *Yearbook ... 1984*, vol. I, p. 197, 1847th meeting, para. 50 (Special Rapporteur).

1905th MEETING

Tuesday, 18 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

Draft articles submitted by the Special Rapporteur[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

1. Sir Ian SINCLAIR recalled that, like some other members of the Commission, he had expressed reservations at previous sessions about the utility of the topic under consideration. There was no doubt some limited value in a process of consolidation whereby all rights and obligations relating to the courier, however styled, and the unaccompanied bag were brought together in a single text. Save in very exceptional circumstances, however, the process should not go beyond simple consolidation and, in particular, should not be used as a vehicle to give more extensive privileges and immunities to the courier and more absolute protection to the bag than were provided for under currently applicable rules.

2. That general comment apart, he proposed to confine his remarks to draft article 23, reserving the right to speak on the other draft articles at a later stage. The basic question concerning article 23 was whether it was needed at all. He entirely agreed with the view expressed by the Special Rapporteur in his sixth report (A/CN.4/390, para. 28) that the Commission should make an effort to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. As shown in the Special Rapporteur's fourth report,[5] however, there had never been a case in State practice where the immunity of the courier, whether from civil or criminal jurisdiction, had been at issue. The only instance cited related to the courier's liability to give evidence.[6] Moreover, as the Special Rapporteur had rightly conceded, there were no provisions on the jurisdictional immunities accorded to the diplomatic courier in existing multilateral or bilateral treaties.[7]

3. It therefore had to be decided whether, as a matter of the progressive development of international law going well beyond the primary goal of consolidation, the Commission should propose that the category of persons enjoying jurisdictional immunity should be extended to include diplomatic couriers. If the criterion was functional necessity, he remained totally unpersuaded of the need for such extension. As had been pointed out many times, the diplomatic courier's activities differed enormously from those of a diplomatic agent, consular officer or member of the administrative or technical staff of a mission. What might be considered necessary by way of jurisdictional immunities for a resident diplomatic agent or part-time resident member of a delegation to an international organization or conference was not strictly necessary for a diplomatic courier making relatively infrequent and fleeting visits to a receiving or transit State. The provisions of article 16 were surely sufficient to ensure that the diplomatic courier would be able to carry out his functions unimpeded. If the diplomatic courier was not liable to any form of arrest or detention, neither the receiving State nor the transit State would be able to interfere with the completion of his task, since his freedom of movement out of the country would remain unimpaired even if he were not accorded any degree of immunity from the criminal or civil jurisdiction of the receiving or transit State.

4. To grant the courier jurisdictional immunities would clearly go beyond the existing law deriving from the four codification conventions. The Commission had to be conscious of the likely reactions of Governments to its proposals: where it was evident that a proposal would encounter strong resistance from a number of Governments, it would surely be wise to refrain from making it.

5. In introducing article 23, the Special Rapporteur (1903rd meeting) had spoken of the far-reaching implications of possible changes and had appealed to the Commission to proceed with caution. In his own view, it was article 23 as presented that constituted a change which would have far-reaching implications. A review recently carried out by the United Kingdom Government on the subject of abuses of diplomatic privileges and immunities had shown that 546 serious offences had allegedly been committed by persons enjoying diplomatic privileges and immunities in London during the previous 10 years. Those figures had, of course, to be viewed in perspective: the scale of abuses of diplomatic privileges and immunities should not be exaggerated, but neither could it be ignored. It was against such a background that the proposal to accord jurisdictional immunity to the diplomatic courier had to be considered.

6. In the current climate of opinion, many Governments could not seriously contemplate conferring upon a completely new category of persons complete immunity from criminal jurisdiction and qualified immunity from civil jurisdiction. He was not suggesting that the terms of the existing codification conventions, particularly those of the 1961 Vienna Convention on Diplomatic Relations, should be weakened in any way, but to go beyond those provisions would be to raise very serious issues and make it doubtful whether the draft articles would be accepted by a number of Governments.

7. Mr AL-QAYSI, referring to draft article 23 and reserving the right to comment on the other articles at a later stage, said that the two sets of interests involved in article 23 were the sending State's interest in maintaining free communications with its diplomatic representatives and the receiving State's interest in preserving its integrity and security, the criterion for a successful balance between the two being the maintenance of smooth and friendly relations and the avoidance of abuses. In his sixth report (A/CN.4/390, para. 28), the Special Rapporteur urged the Commission to make an effort to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. Since, however, the States concerned included the sending State and since the legal protection of the courier and the bag unquestionably formed part of the legitimate interests of the sending State, that State's interests appeared to have been taken into consideration twice. The Special Rapporteur also said (*ibid.*) that special attention should be attached to the intrinsic relationship between the principle of personal inviolability of the courier and the latter's immunity from criminal jurisdiction, and

[5] *Yearbook ... 1983*, vol. II (Part One), pp. 80 *et seq.*, document A/CN.4/374 and Add.1-4, paras. 81-138.

[6] *Ibid.*, para. 127.

[7] *Ibid.*, para. 84.

that, in the search for a practical solution, the Commission should take into account the comments made by Member States with a view to achieving wider acceptance of the draft articles. Since the views expressed in the Sixth Committee of the General Assembly had been more or less evenly divided, a nexus had to be found on which a practical solution might be based. In the four codification conventions, that nexus was undoubtedly freedom of communications and it had to serve as the basis for the draft articles under consideration as well.

8. Paragraph 1 of article 4 as provisionally adopted by the Commission referred to "official communications ... effected through the diplomatic courier or the diplomatic bag". It could be argued, however, that the courier carrying or accompanying the bag was not the medium of freedom of communications but only its vehicle. The courier's function was, admittedly, an important one and his performance of that function in a manner which protected freedom of communications should be the measure of the jurisdictional immunity, whether criminal or civil, accorded to him. The only practical solution that would ensure wider acceptance of the draft articles would therefore be to accord the courier functional immunity, as advocated by those holding the third opinion referred to by the Special Rapporteur (*ibid.*, para. 27). The functional limitation which the Special Rapporteur was proposing to introduce in article 23, paragraph 4, could be worded in a general way so as to encompass paragraph 1 as well.

9. In that connection, he said that he disagreed with the view expressed in paragraph 192 of the Commission's report on its thirty-sixth session,[8] namely that confining the courier's immunity from criminal jurisdiction to acts within the performance of his functions would in practice deny him immunity from criminal jurisdiction, since he would have to be subjected to such jurisdiction before a court of the receiving State could decide whether the act concerned was within the performance of his functions. To accept the logic of that argument would be tantamount to equating the functions of a diplomatic courier with those of a diplomatic agent.

10. With regard to Sir Ian Sinclair's point that article 23 went far beyond the limits of the four codification conventions and should therefore be deleted, he said that those conventions, which were general in nature, could not be expected to cover every point relating specifically to the diplomatic courier. If the Commission adopted article 16, as it had done provisionally, it could, in his view, apply the principle of functional jurisdictional immunity to the diplomatic courier without, for all that, going beyond the limits of the legal provisions already in existence.

11. Mr McCAFFREY, referring only to draft article 23, said he agreed with previous speakers that it was extremely important to strike a balance between the interests of the receiving State and those of the sending State and that article 23 had to be considered against the background of a rising tide of public and official discontent with the existing régime. The mere existence of certain instruments, some of which had not even come into force, was no justification for extending the protection accorded under those instruments to a new category of individuals.

12. Associating himself with Sir Ian Sinclair's arguments in favour of deleting article 23, he said that he would confine himself to a brief summary of the main points he had made on the subject at the previous session.[9] First, none of the four codification conventions contained any provision concerning the jurisdictional immunity of the diplomatic courier. Secondly, little support for the jurisdictional immunity, as distinct from the personal inviolability, of the diplomatic courier was to be found in State practice. Thirdly, the necessary degree of protection was already provided in article 16 and any additional provision would be superfluous. Article 23, paragraph 1, was unnecessary in countries like his own, where a person could not be tried *in absentia*. Paragraph 2 was also unnecessary in the light of article 16, since a diplomatic courier, not being liable to any form of arrest or detention, could not be subpoenaed or served process papers.

13. With regard to the arguments advanced by Mr. Al-Qaysi in favour of introducing the notion of functional immunity, he said that, although he had in the past made proposals along the same lines with regard to some paragraphs of article 23, he was now inclined to think that that article should simply be deleted, since it was not clear how functional immunity would be reconciled with article 16. Since States were experiencing serious problems of abuses by diplomatic communities in general, and since existing protection, as reflected in article 16, had not been shown to be inadequate, it would be insensitive to propose that the present immunities—which were already controversial—should be extended even further.

14. Mr. RIPHAGEN said that he entertained the same doubts as the previous speakers with regard to draft article 23, and especially its paragraph 1. A point not previously mentioned concerned the connection between draft article 23, paragraph 1, and draft article 28, paragraph 2, under which the privileges and immunities of the diplomatic courier normally ceased when he left the territory of the receiving State if his official functions had come to an end. Would the diplomatic courier's immunity from criminal jurisdiction extend to acts not performed in the exercise of his functions? Would a diplomatic courier who returned to the receiving State on holiday, having completed his official functions there, enjoy jurisdictional immunity for such offences as he might have committed during the exercise of his functions? Unlike Mr. McCaffrey's country, his own country allowed trials *in absentia*, so that a person tried *in absentia* could be punished upon returning there if he no longer enjoyed diplomatic immunity or enjoyed it only to a limited extent.

15. With regard to draft article 36, paragraph 1, he asked whether the words "other mechanical devices" covered sniffer dogs. He also wondered whether paragraph 1 meant that the diplomatic bag was

[8] *Yearbook ... 1984*, vol. II (Part Two), p. 42.

[9] *Yearbook ... 1984*, vol. I, pp. 57-58, 1824th meeting, paras. 28-30, and p. 294, 1863rd meeting, paras. 14-16.

exempt from the procedures normally applied before an aircraft could be boarded at an international airport. As to the possibility that electronic technology might be used to extract confidential information from the diplomatic bag, as referred to during the discussion in the Sixth Committee of the General Assembly (A/CN.4/L. 382, para. 185) he had been assured by technical experts that no such possibility would exist for at least another 10 years and that, when it did, confidential information could easily be protected by being placed in an envelope provided with a reflective device. In his view, examination of the diplomatic bag by means of electronic or other mechanical devices should not be precluded, provided that it was not used as an excuse for extracting confidential information from the bag.

16. Referring to draft article 37, he asked whether the reference to the exemption of the diplomatic bag from "customs and other inspections" was intended to exclude the application of article 36, paragraph 2. In draft article 39, the words "which prevents him" seemed to refer only to the termination of the diplomatic courier's functions; the wording of the article might be amended to cover other reasons that could prevent the diplomatic bag from being delivered. Draft article 40, as amended by the Special Rapporteur in his introductory statement (1904th meeting, para. 7), might also be redrafted to cover the case, referred to in article 39, of the diplomatic bag being entrusted to the captain of a commercial aircraft or the master of a merchant ship.

17. With regard to draft article 41, paragraph 1, he noted that non-recognition of the sending State by the receiving State would automatically preclude diplomatic relations between the two States; the reference to the receiving State, as distinct from the host State or the transit State, might therefore be deleted. Draft article 42, paragraph 2, referred to international agreements relating to the status of the diplomatic courier and the diplomatic bag "confirming or supplementing or extending or amplifying" the provisions of the present articles, but it did not mention the possibility of limiting them. A drafting change might be required in order to bring that paragraph into line with article 6, paragraph 2 (*b*).

18. In the title of draft article 43, the adjective "optional" should apply to the word "declaration" rather than to the word "exceptions". In paragraph 1 of that article, it was not entirely accurate to state that a declaration of exceptions could be made "without prejudice to the obligations arising under the provisions of the present articles", since some prejudice to those obligations was bound to occur. The words "types of couriers and bags" in the same paragraph required further clarification: the Special Rapporteur might specify in the commentary whether the intended reference was to the four types of diplomatic couriers and of diplomatic bags defined in article 3 or whether a State becoming a party to the future convention would be entitled to specify that a diplomatic bag should be of a certain size or material. Lastly, he noted that paragraph 1 referred to the possibility of making a declaration only when signing, ratifying or acceding to the articles; some States, especially those acting as host States to international organizations, might prefer to be allowed to make a declaration at any time after signature, ratification or accession. Such a possibility existed, for example, under article 298 of the 1982 United Nations Convention on the Law of the Sea.[10]

19. Mr. YANKOV (Special Rapporteur) said that, while he intended to take up points relating to the substance and drafting of the articles when he summed up the debate, he was prepared now to provide any clarifications that might be of assistance to the members of the Commission in their consideration of the draft articles. In reply to one of Mr. Riphagen's questions, he said that the words "types of couriers and bags" in draft article 43, paragraph 1, referred to the definitions provided in article 3 corresponding to the four codification conventions. They did not refer to the physical type, appearance or other characteristics, external or otherwise, of the diplomatic bag. The object of the provision was to cover the case of States which were parties to one or some, but not all, of the four conventions. That explanation could either be included in the commentary to article 43 or be incorporated in the text.

20. Mr. SUCHARITKUL, congratulating the Special Rapporteur on his sixth report (A/CN.4/390), said the point had been reached at which the closest attention should be paid to the degree of immunity from jurisdiction to be accorded to the diplomatic courier under article 23 and to the extent of the inviolability to be accorded to the diplomatic bag under article 36. The two elements were interlinked and could not be separated in any discussion of the topic under consideration. A choice would also have to be made between a number of competing criteria and the various categories of immunities—diplomatic, consular and others—would have to be compared and assessed with a view to adopting the best yardstick by which to measure the degree of immunity to be accorded to the diplomatic courier.

21. One particularly important aspect was the time factor. Diplomatic agents were accorded jurisdictional immunities *eundo, morando et redeundo* and were allowed a certain amount of time in which to wind up their affairs when leaving a post. If they returned to the country in an unofficial capacity, they became amenable to its jurisdiction. A distinction also had to be made between acts performed in the exercise of diplomatic functions and acts of a personal or unofficial nature. For example, in *The Empire* v. *Chang and others* (1921),[11] the Supreme Court of Japan had confirmed the conviction of former employees of the Chinese Legation in respect of offences committed during their employment as attendants, but unconnected with their official duties. Two contrasting Swiss decisions, both arising out of a paternity suit, demonstrated the same point: the court had declined jurisdiction in the first case, on the ground that the defendant was still protected by diplomatic privileges, but in a second action brought by the mother of the child, the court had assumed jurisdiction because the defendant, having been replaced by his Government, was no longer entitled to diplomatic immunities. Former diplomats had likewise been held amenable to the jurisdiction of the

[10] See 1904th meeting, footnote 7.

[11] *Annual Digest of Public International Law Cases, 1919-1922* (London), vol. 1 (1932), p. 288, case No. 205.

French courts: in *León* v. *Díaz* (1892),[12] a Uruguayan Minister in France had been held amenable to jurisdiction on the grounds that his diplomatic functions had come to an end and that his dispute with León was of a purely private nature. Similarly, in *Laperdrix et Penquer* v. *Kouzouboff et Belin* (1926),[13] a former secretary at the Embassy of the United States of America in Paris had been ordered to pay compensation for the injury sustained by two persons in a car accident.

22. United Kingdom and United States practice seemed to support the same proposition. In *Dupont* v. *Pichon* (1805),[14] the court had held that the departing chargé d'affaires was entitled to diplomatic privileges *eundo, morando et redeundo* only. Again, in *Magdalena Steam Navigation Co.* v. *Martin* (1859),[15] Lord Campbell had suggested that a former ambassador could be sued in England in respect of acts performed during his mission if the action was brought after the reasonable time required for closing his official transactions. Other cases in point were *In re Suarez, Suarez* v. *Suarez* (1917),[16] *Rex* v. *A.B.* (*R.* v. *Kent*) (1941)[17] and *District of Columbia* v. *Paris* (1939).[18]

23. The status of personal sovereigns with regard to their public, as opposed to their private, acts was also relevant. Thus, in *Carlo d'Austria* v. *Nobili* (1921),[19] the Court of Cassation in Rome had assumed jurisdiction over the Emperor of Austria in respect of a private act unconnected with his sovereign functions. Although, in *Héritiers de l'empereur Maximilien* v. *Lemaitre* (1872),[20] the court had declared itself incompetent on the ground that the Emperor of Mexico was a reigning sovereign of a foreign State, in *Mellerio* v. *Isabelle de Bourbon* (1872),[21] the same court had assumed jurisdiction on the ground that the defendant, formerly Queen of Spain, no longer held that public office and that the order of jewels from Mellerio was for her own personal use.

24. Jurisprudence and the practice of States was therefore quite clear: even ambassadors, kings and heads of State were, once divested of office, subject to the jurisdiction of territorial courts. In the case of a diplomatic courier, however, the cause of action might well not survive his term of office, since it was inherent in the very nature of that office that, upon return from one mission, he would normally be protected immediately by the immunities afforded to him in respect of the next mission.

25. To his mind, all jurisdictional immunities were vested in the State, and the diplomatic courier, lacking representative capacity, could not possibly claim to be entitled to the type of immunities accorded to the representatives of Governments or States. Nor could he claim to be entitled to the type of immunities accorded to senior officials of international organizations, since such immunities were clearly of a functional character, being accorded not for the personal benefit of the individual, but in the interests of the organization concerned. Moreover, under article V, section 20, of the 1946 Convention on the Privileges and Immunities of the United Nations,[22] the Secretary-General was required to waive the immunity of "any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United Nations". That provided a safeguard against possible abuse while ensuring a proper balance between the interests of the sending State, on the one hand, and those of the receiving or transit State, on the other. In the light of the foregoing considerations, he feared that article 23 as drafted might go somewhat further than was warranted in practice.

26. Draft article 36 responded effectively to the functional need for protection and would enable the diplomatic courier to perform his task. As a Buddhist, however, he found it somewhat difficult to understand the words "shall be inviolable at all times" in paragraph 1, for all things came to an end. It was, moreover, the contents of the bag, not the bag itself, that were being protected and that should therefore be inviolable. At the same time, he recognized the link between draft articles 36 and 37 and considered that Mr. Reuter's point (1879th meeting) had been well taken. The contents of a diplomatic bag could and, indeed, sometimes did consist of drugs. Where, therefore, there were reasonable grounds for suspecting that that was the case, the principle of good faith dictated that the diplomatic mission or consular post receiving the bag should allow it to be examined in the presence of its officials. In such cases, waiver of immunity was not unreasonable and it was not an infringement of the sovereignty of States. Indeed, in line with the practice which had been adopted by the United Nations under the Convention on the Privileges and Immunities of the United Nations and which was increasingly being followed elsewhere, waiver should, when necessary, be recommended in cases where immunity would impede the course of justice and could be waived without interfering in any way with the performance of official functions.

27. As to draft article 39, it was difficult to assume that the receiving or transit State would have knowledge of the whereabouts of the diplomatic bag before its delivery and, without such knowledge, it was difficult to impute any kind of obligation to such State. It would, in his view, also be difficult for a

---

[12] *Journal du droit international privé* (Clunet) (Paris), vol. 19 (1892), p. 1137.

[13] *Ibid.*, vol. 53 (1926), pp. 64-65.

[14] A. J. Dallas, *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and of Pennsylvania*, vol. IV, 3rd ed. (New York, 1912), p. 321.

[15] T. F. Ellis and F. Ellis, *Reports of Cases ... in the Court of Queen's Bench* (1858-1861) (London), vol. 2, p. 94.

[16] *The Law Reports, Chancery Division, 1917*, vol. II, p. 131.

[17] *The Law Reports, King's Bench Division, 1941*, vol. I, p. 454.

[18] See M. M. Whiteman, *Digest of International Law* (Washington (D.C.), U.S. Government Printing Office, 1970), vol. 7, pp. 443-444.

[19] *Giurisprudenza Italiana* (Turin), vol. I (1921), p. 472; summary and translation in *Annual Digest ..., 1919-1922*, vol. 1 (1932), p. 136, case No. 90.

[20] Dalloz, *Recueil périodique et critique de jurisprudence, 1873* (Paris), part 2, p. 24.

[21] *Ibid., 1872*, part 2, p. 124.

[22] United Nations, *Treaty Series*, vol. 1, p. 15.

transit State to comply with the obligation under draft article 40 in the absence of a pre-arranged timetable.

28. With regard to draft article 41, non-recognition of States or Governments, though admittedly rare in practice, could raise important questions in certain jurisdictions. The practice of United States courts in the matter was, for example, very strict. If immunity was claimed on behalf of a State with which the United States did not have diplomatic or consular relations, the court would not recognize the claim, which therefore had to be introduced by the Department of State or by a mission of another country with which the United States did have such relations.

29. While he shared Mr. Riphagen's doubts regarding draft article 42, paragraph 2, he considered that the article would serve as a good means of preparing to upgrade the status of diplomatic couriers and bags. Lastly, he was grateful to the Special Rapporteur for clarifying his understanding of the purpose of article 43.

30. Mr. USHAKOV, congratulating the Special Rapporteur on the clarity of his sixth report (A/CN. 4/390), which on the whole proposed appropriate solutions, said that, for the time being, he would comment only on draft article 23, which, together with draft article 36, might be the key provision of the draft.

31. Until now, the status of the diplomatic courier and the diplomatic bag had been governed by provisions such as article 27 of the 1961 Vienna Convention on Diplomatic Relations, but no solution had been found to the problem of whether the diplomatic courier should enjoy immunity from the criminal jurisdiction of the receiving State and the transit State. In his view, there was no doubt that the diplomatic courier should benefit from such immunity because, if he did not, a diplomatic bag accompanied by diplomatic courier would no longer be a medium of communication. Such immunity was therefore a functional necessity.

32. The diplomatic bag sometimes had to be accompanied by diplomatic courier in order to ensure its inviolability; but, if the diplomatic courier was to perform his functions without pressure from the receiving State or transit State, he had to enjoy the same immunity from criminal jurisdiction as diplomatic agents, the administrative and technical staff of missions and members of their families. If the receiving State or the transit State exerted pressure on a member of the family of a diplomatic agent or on the administrative or technical staff of a mission, the sending State would automatically be affected.

33. Although the diplomatic courier might commit abuses, it should be recognized that States could commit even more serious abuses, for example by threatening to implicate a courier in a criminal case or, as had happened in the 1920s, by organizing conspiracies in which a diplomatic courier could be killed. It was quite obviously not enough to provide that the diplomatic courier "shall enjoy personal inviolability and shall not be liable to any form of arrest or detention", as stated in article 27, paragraph 5, of the 1961 Vienna Convention, because the personal inviolability of the courier would not prevent the receiving or transit State from detaining him in its territory so that he could be tried and, possibly, convicted.

34. Some members of the Commission took the view that, since no diplomatic courier had ever been involved in criminal proceedings, draft article 23, paragraph 1, was superfluous; but that argument could also work against them, for it could be stated in favour of that provision and to the credit of diplomatic couriers that none of them had ever committed any criminal offence.

35. Sir Ian SINCLAIR said that, while he fully understood the reasons advanced by Mr. Ushakov, diplomatic couriers had managed without any equivalent of draft article 23 ever since they had been in operation and, despite diligent research, the Special Rapporteur had not unearthed any occasion on which practical problems had in fact arisen. Since the proposal made in article 23 went beyond the four codification conventions, the Commission should examine it very carefully.

36. Draft article 36, on which he would comment more fully at the next meeting, involved a fairly intractable problem. That problem stemmed in part from the differing degrees of protection given to the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and to the diplomatic bag *stricto sensu* under article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations; and that in turn created a problem when it came to drawing up a uniform régime covering all types of bags. Another aspect of the problem stemmed from the notorious abuses of the diplomatic bag that had been highlighted by recent events. It was therefore necessary to find a *via media* with a view, on the one hand, to ensuring protection of the contents of the bag and, on the other, to dealing at least in part with the problem of abuses.

The meeting rose at 1 p.m.

1906th MEETING

Wednesday, 19 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

1. Sir Ian SINCLAIR said that, at the previous meeting, he had sketched out the background against which the problem raised by draft article 36 should be viewed and had pointed out that a way would have to be found to ensure the protection of the contents of the bag, on the one hand, and to go some very limited way towards trying to deal with the problem of abuses of bag facilities, on the other. While he recognized that the Special Rapporteur had made a major effort to tackle the problem in paragraph 2 of the revised text of article 36, he found that that paragraph also posed a problem.

2. As he had explained at the thirty-sixth session,[5] had the Commission been starting with a clean slate, the solution advocated by the Special Rapporteur would have been the one he would have preferred. He had, however, conceded at the time that such a solution might appear to involve a modification of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations. For that reason and for the reasons advanced by Mr Flitan (1904th meeting), he therefore felt unable to go so far as to apply the consular régime as a general rule to the régime governing the diplomatic bag *stricto sensu*. The problem was exacerbated by the terms of draft articles 42 and 43 submitted by the Special Rapporteur in his sixth report (A/CN.4/390). Under article 43, it would be open to a State to declare that it would apply the provisions of the articles to the diplomatic courier and diplomatic bag *stricto sensu*, but not to any other type of courier or bag. That State could then invoke article 36, paragraph 2, to claim entitlement to challenge a suspect diplomatic bag and to request that the bag should be returned to its place of origin. That, again, might be thought to be inconsistent with the unqualified principle embodied in article 27, paragraph 3, of the 1961 Vienna Convention, which provided that "The diplomatic bag shall not be opened or detained". It was by no means clear that draft article 42, paragraph 1, would restore the primacy of the rule stated in article 27, paragraph 3, of the 1961 Vienna Convention. If it did so, however, that would completely destroy whatever value draft article 36, paragraph 2, might otherwise be thought to have. The root of the problem lay in the fact that, given the difference in treatment accorded under existing conventions to the consular bag and to the diplomatic bag *stricto sensu*, it was extremely difficult to establish a uniform rule that applied to all bags.

3. One solution would be to differentiate in article 36 itself between the consular bag and other types of bag and then to provide States with an option to apply to all bags the more qualified régime applicable to the consular bag. That would not, in his view, conflict with existing conventions. Such an option could be regarded as falling within the scope of article 47, paragraph 2 (*a*), of the 1961 Vienna Convention, which provided for an exception to the rule of non-discrimination, since any State exercising the option would have to accept that the qualified régime applicable to the consular bag would be applied to all its bags.

4. He did not think that the solution he had in mind would be covered by draft article 43, as, judging from the sixth report, the Special Rapporteur seemed to think. All article 43 did was to allow a State to apply the articles as a whole to certain types of couriers and bags only. It did not offer an option which was confined to article 36 alone and which, in his view, was what was required in order to provide the kind of solution that would be acceptable to all members of the Commission.

5. As to article 36, paragraph 1, he was of the opinion that the notion of inviolability should be avoided in any formal text. As Mr. Sucharitkul had rightly pointed out (1905th meeting), it was not so much the bag as the contents of the bag that were inviolable. It would be advisable to avoid inflated language and to use the wording of the existing conventions to indicate the degree of protection to be accorded, which was extensive.

6. According to a literal interpretation of article 27, paragraph 3, of the 1961 Vienna Convention, scanning, as referred to at the end of draft article 36,

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

[5] *Yearbook ... 1984*, vol. I, p. 184, 1845th meeting, paras. 30-31.

paragraph 1, was not precluded. The real question, however, was whether it was an effective safeguard against abuse. The United Kingdom, in the course of its recent review of diplomatic privileges and immunities, had given close consideration to the question of the examination of bags. A White Paper issued in April 1985, from which he quoted extracts, stated that the United Kingdom Government had decided against the introduction of scanning as a matter of routine, but accepted that there might be specific circumstances when the grounds for suspicion were sufficiently strong to justify scanning. Accordingly, he was opposed to the retention of any absolute prohibition, which would not only be inconsistent with the view taken by a number of Governments regarding the legal position under the existing conventional régimes, but also preclude scanning, under certain strictly controlled conditions, as a possible, though not decisive, safeguard against abuse. He could, however, agree to the inclusion of some reference to scanning in the commentary, together with an indication that it should be carried out only under strictly controlled conditions.

7. In the light of the above considerations, he proposed that draft article 36 should be reformulated along the following lines:

"1. The diplomatic bag shall not be opened or detained.

"2. However, in the case of a consular bag within the meaning of article 35 of the Vienna Convention on Consular Relations, the competent authorities of the receiving State may, if they have serious reason to believe that the bag contains something other than the official correspondence, documents or articles referred to in article 32 of these articles, request that the bag be opened in their presence by an authorized representative of the sending State. If this request is refused by the authorities of the sending State, the bag shall be returned to its place of origin.

"3. Notwithstanding paragraph 1 of this article, a State may, when signing, ratifying or acceding to these articles or at any time thereafter, make a written declaration that it will apply to the diplomatic bag the rule applicable to the consular bag by virtue of paragraph 2 of this article.

"4. In relation to other States Parties to these articles, a State which has made a written declaration under paragraph 3 of this article shall not be entitled to raise objection to the application to its diplomatic bags of the rule stipulated in paragraph 2 of this article."

That proposal was entirely consistent with the terms of existing conventions and with the economy of the draft as a whole. It had always been his understanding that the draft articles were intended as a complement to the 1961 Vienna Convention, the 1963 Vienna Convention and the corresponding provisions of the other codification conventions; indeed, such a provision had been included at an earlier stage, but had not been retained in the revised draft. In his view, there were grounds for reinstating it.

8. He welcomed the proposal to combine draft articles 37 and 38 in a single provision, but considered that, in the light of the link between draft article 36 and the revised draft article 37, the Drafting Committee would have to consider such drafting points as the meaning of the words "and other" appearing in the expression "customs and other inspections".

9. He could agree in principle with the substance of draft article 39, although its wording might give rise to misinterpretation and would therefore require close attention. In particular, he considered that the absolute requirement regarding notification of the sending State in the event of termination of the functions of the diplomatic courier would have to be qualified. Those functions could be terminated either by the sending State itself, in which case there would obviously be no need for the receiving State to notify the sending State, or upon the diplomatic courier being declared *persona non grata,* in which case the receiving State would in any event notify the sending State. Notification would be required only in rare cases of illness or accident, for example, where the circumstances were known to the receiving State but not to the sending State, or where some special purpose would be served by notification. The obligation to notify the sending State might therefore be appropriate in some, but certainly not all cases.

10. Mr. LACLETA MUÑOZ thanked the Special Rapporteur for having taken account, in his reports, of the views expressed in the Commission and in the Sixth Committee of the General Assembly; he welcomed that method of work, which was helpful to the members of the Commission.

11. Referring first to draft article 23, he said it was his opinion that the immunity from the criminal jurisdiction of the receiving State and the transit State accorded to the diplomatic courier in paragraph 1 should be strictly limited to activities connected with the performance of his official functions. He did not share the opinion of those who disagreed with that provision because they thought that granting such immunity expressly to the diplomatic courier would amount to modifying previous conventions or that it was sufficient to grant him personal inviolability. It was not necessarily true that immunity from criminal jurisdiction would follow directly from the personal inviolability of the diplomatic courier. He had always been opposed to the idea of treating the diplomatic courier as a member of the diplomatic staff of a mission, but thought that, in the performance of his functions and in regard to privileges and immunities, the courier could be assimilated to a member of the administrative or technical staff. A person instructed by a diplomatic mission to collect a diplomatic bag entrusted to the captain of a commercial aircraft or the master of a merchant ship was in fact always a member of the diplomatic, administrative or technical staff of the mission concerned and he thus performed functions which were normally those of a diplomatic courier; but a mission would never entrust a diplomatic bag to a person who was not protected at least by the privileges and immunities enjoyed by its administrative and technical staff. Hence the necessity of granting such immunities to the diplomatic courier, who was not, moreover, a mere carrier, since his functions were, *inter alia,* to guarantee the transport and delivery of the bag as required and to ensure its safety. He could, however,

agree with the idea of not completely exempting the diplomatic courier from the obligation to give evidence as a witness, as suggested by the Special Rapporteur in paragraph 4 of article 23.

12. Draft article 36 was a compromise between the two positions taken by members of the Commission. Like Sir Ian Sinclair, he had some doubts about the effect that such a text would produce. The words "unless otherwise agreed by the States concerned" in paragraph 1 and the words "they may request that the bag be returned to its place of origin" in paragraph 2 raised two questions in his mind. First, would the agreement between the States concerned be an agreement *ex ante,* a general agreement or a special agreement establishing a régime that would apply to all diplomatic bags and be applicable in case of difficulties? Secondly, what would happen if the bag was not returned to its place of origin, as the competent authorities of the receiving State or the transit State had requested? Like other members of the Commission, he had often said that he was worried about the possibilities of abuse of privileges and immunities in general and of the diplomatic bag in particular, and he was therefore in favour of adopting wording such as that suggested by Sir Ian Sinclair.

13. Unfortunately, absolute inviolability of the diplomatic bag was not appropriate. Abuses were so flagrant, so frequent and so dangerous for the receiving State that it was the Commission's duty to find a remedy, especially as, with the form the draft was assuming, it seemed that it would not be possible to distinguish, by their external appearance only, between two bags with entirely different contents. In referring to the legitimate contents of a bag, the Commission meant all kinds of articles intended for official use, which might represent a considerable volume, for example furniture for a mission. That being so, how could a receiving State be asked to recognize enormous packing-cases as diplomatic bags, without having been previously notified of their contents?

14. As to electronic means of detection, he thought that a State intending to misuse a diplomatic bag could easily protect the objects it wished to pass through fraudulently so that they would not be detected. On the other hand, a receiving State or a transit State could easily ascertain by such means the legitimate contents of the bag of a sending State acting in good faith, the confidential nature of which it ought to respect. It had been suggested at the previous meeting that, in a few years time, it would be possible to read documents contained in a diplomatic bag, and impressive results could already be obtained with a scanner. For those reasons, he was not in favour of the bag being examined by electronic means, though the Commission should not categorically prohibit all means of examination, since some of them appeared to be perfectly justified and even necessary; that applied, for instance, to dogs trained to find narcotic drugs. Lastly, the receiving State and the transit State must be permitted to open a suspect bag with the consent and in the presence of a representative of the sending State and they should have the right not to request, but to demand that the bag be returned to its place of origin.

15. The text of draft article 37 proposed by the Special Rapporteur to replace draft articles 37 and 38 as originally submitted improved the draft as a whole, but he doubted whether the phrase "in accordance with such laws and regulations as it may adopt", which was taken from the 1961 Vienna Convention on Diplomatic Relations where it referred to the duty-free import of all sorts of articles for the use and consumption of diplomatic agents and missions, was acceptable in the case of the diplomatic bag. It was obvious that the receiving State would adopt provisions to regulate the quantity and frequency of duty-free imports. The reference to the laws and regulations of the receiving State was therefore superfluous in the context of article 37.

16. Draft article 39 raised no particular difficulties. With regard to draft article 40, however, he wondered why the obligations of an unforeseen transit State were assimilated to those of a receiving State rather than to those of a transit State. As to draft article 41, he had some doubts: non-recognition of States or Governments naturally did not affect the entry into the territory of the host State of a conference of a diplomatic bag from a State which had not been recognized by the host State, but the situation was different in the case of bilateral relations. It would, of course, be exceptional for a State to send a diplomatic bag to a temporary mission accredited to an unrecognized State, even though it was conceivable that a mission might have been sent precisely in order to negotiate recognition of the State in question. In any event, a transit State could not be required to admit in transit a diplomatic bag coming from a State which it had not recognized.

17. He shared Sir Ian Sinclair's opinion with regard to draft article 42, paragraph 1, which should be carefully examined; and he emphasized that he had serious doubts about the possible interpretation of the words "without prejudice to the obligations", in draft article 43, paragraph 1. In designating by written declaration those types of couriers and bags to which it wished the provisions of the articles to apply, a State would inevitably modify the obligations arising from the articles as a whole. Hence different wording would have to be found.

18. Mr. AL-QAYSI, referring to draft articles 36 to 43, said that the main issue with regard to article 36 was how to strike a balance between the freedom and confidentiality of official communications between the sending State and its diplomatic missions abroad, on the one hand, and the interest of receiving and transit States in security and the prevention of abuse, on the other. One school of thought favoured absolute inviolability, as provided for in the 1961 Vienna Convention on Diplomatic Relations, and held that there should be no right of verification or examination by electronic or other means. The other opted for relative inviolability, as provided for in the 1963 Vienna Convention on Consular Relations, which allowed for a right of verification by the receiving or transit State.

19. Those who espoused the former viewpoint could rest assured that it was largely corroborated by well-established legal rules set forth in the main codification conventions. Accordingly, it was for those

who held the latter view to show that some limitation was required in the interests of security and integrity. One argument advanced in support of their contention was the prevalence of abuse. Admittedly, abuse did exist and it was most unfortunate. It was, however, highly doubtful whether it was good policy to legislate solely on the ground of abuse if such abuse was not in fact prevalent, since that would be tantamount to predicating that the legislation was enacted on a negative premise. Why should abuse as such, if not prevalent, detract from the validity of a legal principle? Another argument adduced by those who stipulated for limitation concerned the question whether or not the concept of inviolability applied to the bag or only to the contents of the bag. That seemed to him to be a somewhat spurious argument, for he failed to see how the bag and its contents could be dissociated. Yet another argument put forward by those who favoured limitation was that the régime prior to the 1961 Vienna Convention had been more in line with the safeguard régime under the 1963 Vienna Convention than with that of absolute protection under the 1961 Vienna Convention. That might be so, but it did not alter the fact that the 1961 Vienna Convention had been almost universally accepted as law.

20. As to the text of draft article 36, he noted that paragraph 1, which enshrined the principle of inviolability, differed in certain marked respects from the 1961 and 1963 Vienna Conventions. It might be advisable, in the first place, to provide that the diplomatic bag was inviolable "by virtue of its contents" so as to meet some of the objections raised, although those objections would, in his view, require close scrutiny. A more important difference perhaps was that, whereas the 1961 and 1963 Vienna Conventions provided categorically that the diplomatic or consular bag should not be opened or detained, that principle was qualified in draft article 36, paragraph 1, by the phrase "unless otherwise agreed by the States concerned". In other words, the rule laid down in paragraph 1 was of a residual character and, while the phrase in question undoubtedly softened the rigidity of the basic rule, it could also affect the fundamental principle of the inviolability of the bag and its contents.

21. With regard to scanning, it was generally recognized that acceptance of the personal inviolability of the diplomatic agent was in no way affected by preflight security procedures. It might be said by way of analogy that the same applied to the diplomatic bag. The analogy was not complete, however, since in the case of the bag scanning could compromise the confidential nature of its contents. Also, scanning might not always be effective. Was it really possible, for instance, to scan a diplomatic bag that took the form of something as large as a container? Sir Ian Sinclair had provided information regarding United Kingdom practice, under which, if he had understood correctly, scanning was permitted under strictly controlled conditions. What, however, would be the legal responsibility of the receiving State towards the sending State if the bag was scanned under those conditions, but nothing suspicious was found? The situation would, of course, be different if scanning were regarded as a preliminary step taken before the bag was actually examined.

22. With a view to flexibility, the Special Rapporteur had introduced in paragraph 2 of draft article 36 a further measure, which seemed to have been conceived as a compromise, bearing in mind the terms of the former paragraph 2. Clearly, the new provision did not follow the régime of the 1963 Vienna Convention inasmuch as article 35, paragraph 3, of that Convention struck a balance between the request to inspect and the obligation to return the bag if the request was refused, whereas, under draft article 36, paragraph 2, the right to request related specifically to the return of the bag. What, however, would be the position if the sending State offered to allow inspection? Would that point be covered by the residual character of paragraph 1 of the article? In his view, it would be better to clarify the matter in paragraph 2.

23. Furthermore, paragraph 2 of draft article 36 seemed to leave the way open for undue harassment of the sending State, since the competent authorities not only of the receiving State, but also of the transit State were entitled to request that the bag should be returned: that was another marked difference from the corresponding provisions of the 1963 Vienna Convention. Another question that might arise was that of the persons to whom the competent authorities of the receiving State should address their request if the sending State had no diplomatic mission in the transit State. All those questions should perhaps be taken up in the Drafting Committee, but the basic question as to the relationship between the draft articles and the 1961 and 1963 Vienna Conventions remained. In that connection, he favoured the idea of an optional declaration, as suggested by Sir Ian Sinclair. That would permit the States involved to regulate their mutual obligations according to the principle of reciprocity and would obviate the need to grapple with the principle of the relativity of treaty obligations.

24. He agreed that it would be necessary to reconsider the wording of draft article 37, and in particular the phrase "customs and other inspections", in the light of the decision reached in respect of draft article 36. He also agreed with Sir Ian Sinclair's remarks concerning draft article 39, particularly the word "termination". The Drafting Committee might also wish to decide whether it was grammatically correct to state, as did draft article 40, that the diplomatic bag was "compelled to deviate" from its normal itinerary. He shared the doubts expressed with regard to the fact that draft article 41 was intended to apply in the context of bilateral diplomatic relations and even in the case of non-recognition. In fact, the article could apply only in relation to host States of international organizations and international conferences.

25. He failed to understand the purpose of draft article 43 and, although he welcomed the Special Rapporteur's desire to introduce a measure of flexibility, he thought that, in the present case, such flexibility would be inconsistent with the underlying objective of the draft articles and would result in

uncertainty as to their application. Since the Special Rapporteur had indicated that the types of couriers and bags referred to were diplomatic and consular bags and diplomatic and consular couriers, considerable inconsistency would ensue if a State made a declaration, under article 43, to the effect that it applied the régime to the consular courier and the consular bag. In his view, it should therefore be possible to do without article 43 and to provide for such flexibility as was required in the context of the articles that had proved most controversial.

26. Mr. BARBOZA said he was glad to note that the Special Rapporteur had taken into consideration the comments made during previous discussions and had shown some flexibility.

27. In the case of draft article 23, the Commission had several options. It could delete the article; adopt the original text and remove the square brackets; approve the Special Rapporteur's amended text; or adopt other amendments. He was in favour of the last option, since he believed that the purpose of the draft was to explain and give a structure to the principles embodied in the four codification conventions. In so doing, the Commission could, if necessary, go beyond what was provided in those instruments or, on the contrary, remain within the present régime. The solution proposed by the Special Rapporteur with regard to the inviolability of the diplomatic bag was more restrictive than the 1961 Vienna Convention on Diplomatic Relations. He understood the position of some members of the Commission who were in touch with public opinion in their countries, which had been sensitized by certain incidents; but he warned them against being influenced by recent events. The Commission was trying to draft a text applicable to situations which occurred regularly, not occasionally, in international life. While it should not ignore recent events, it should not attach undue importance to them either.

28. Two ideas, whose interaction had been described by Mr. Al-Qaysi at the previous meeting, were associated in draft article 23, paragraph 1: the personal inviolability of the diplomatic courier and his immunity from criminal jurisdiction. The first idea was so firmly established in draft article 16 and in article 27 of the 1961 Vienna Convention that, if paragraph 1 of draft article 23 were deleted, the diplomatic courier would, in practice, still enjoy immunity from criminal jurisdiction. Although the receiving State could neither arrest nor detain the diplomatic courier, there was nothing to prevent a prosecution *in absentia.* If a diplomatic courier were sentenced *in absentia*, the receiving State would be able to apply for his extradition; but if the courier continued to reside in his own country, he would obviously not be extradited—and that would amount to his enjoying immunity from criminal jurisdiction. If he went to live in a different country, however, he might be handed over to the competent authorities of the receiving State. If the Commission was looking for a concrete result, it had to propose means by which that result could be achieved directly and not be satisfied with roundabout means.

29. He was opposed to the principle of absolute immunity, but agreed with Mr. Lacleta Muñoz and Mr. Al-Qaysi that a possible solution would be to adopt the principle of the functional immunity of the diplomatic courier for acts performed in the exercise of his functions. That compromise would not diminish the prestige of the courier and would meet real needs.

30. The Commission had given little attention to draft article 23, paragraph 4, on which he would like the Special Rapporteur to provide further clarifications. The first sentence exempted the diplomatic courier from the obligation to give evidence as a witness in cases involving the exercise of his functions. The courier should not, however, be required, to appear before a court of the receiving or transit State in any circumstances and it should not be provided that he was not obliged to give evidence as a witness only in cases involving the exercise of his functions. The diplomatic courier could be clearly distinguished from a diplomatic agent, who lived in the country where the case was being tried, but was not required to appear in court for functional reasons. The courier would remain for only one or two days in the receiving or transit State and then return to his own country and, unless he did so voluntarily, would not give evidence in court because of the time constraints involved. He might, however, be called upon by a rogatory commission from the competent authorities of the receiving State to those of the sending State to give evidence before the court of the district in which he was permanently domiciled in the sending State. There was thus nothing to prevent the diplomatic courier from giving evidence, whether or not the circumstances involved the exercise of his functions. For the reasons he had already given, he did not see, either, how the second part of paragraph 4 could be applied. The obligation to give evidence was bound to cause "unreasonable delays or impediments to the delivery of the diplomatic bag".

31. When he had referred to draft article 36 in a previous discussion,[6] he had said that, although measures should be taken against manifest abuses of the diplomatic bag, there was no reason to adopt the principle of the absolute inviolability of the bag. He had expressed his preference for the solution in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, according to which the authorities of the receiving State could request that the bag be opened in their presence by an authorized representative of the sending State if they had serious reason to believe that it contained something other than correspondence, documents or articles intended exclusively for official use; that paragraph also provided that, if that request was refused by the authorities of the sending State, the bag should be returned to its place of origin. It was thus for the sending State to decide whether the bag should be opened or returned to its place of origin. That solution was logical, since the sending State was the owner of the bag; it was preferable to the solution which had been proposed by the Special Rapporteur in draft article 36, paragraph 2, clearly with a view to conciliation, and which gave the receiving State and

[6] *Ibid.*, pp. 193-194, 1847th meeting, paras. 19-23.

the transit State direct power over the bag, since they could decide that it should be returned to its place of origin.

32. With regard to article 36, paragraph 1, he said that, like other members of the Commission, he did not think it possible to prohibit "any kind of examination" of the bag. Such a prohibition would not only exclude olfactory examination by dogs, but would prevent external visual examination of the bag. The use of electronic devices should not be authorized, for it could be very dangerous to permit States to penetrate a container in order to examine its contents. In view of the rapid rate of technical progress, the development of means of reading documents inside a bag could not be ruled out. In that connection, it would be well to remember Mr. Al-Qaysi's comment that, in the last analysis, it was the diplomatic bag that was inviolable, even though its inviolability depended on that of its contents. With regard to the rate of technical progress, the 1958 Convention on the Continental Shelf [7] might serve as a lesson. That instrument had defined the outer limit of the continental shelf according to the possibilities of exploiting natural resources; yet, a few years later, such possibilities had been extended to the bed of the high seas.

33. Mr. McCAFFREY, speaking on draft articles 36 to 40 and reserving the right to refer to the remaining articles at a later stage, said that, in dealing in draft article 36 with the question of the inviolability of the diplomatic bag, the Commission had to make sure that the advantages to be derived from its proposals were not outweighed by the disadvantages. He had some sympathy with the view expressed by previous speakers, and in particular by Mr. Flitan (1904th meeting), that it was dangerous to tamper with the régime established by the 1961 Vienna Convention on Diplomatic Relations or by later instruments. At the same time, the existence of serious and widespread abuses of the diplomatic bag and of diplomatic immunities in general could not be ignored. Sir Ian Sinclair's proposal (paragraph 7 above) that States should be allowed to exercise an option in respect of draft article 36 therefore warranted serious consideration, especially in the light of Mr. Al-Qaysi's point concerning the fact that the customary-law régime existing prior to the 1961 Vienna Convention allowed a similar challenge procedure. He was not yet in a position to support Sir Ian Sinclair's proposal, since it was open to question whether an attempt to modify the régime established by the 1961 Vienna Convention would really represent an improvement, but he strongly urged that the proposal should be discussed both in the Commission and in the Sixth Committee of the General Assembly.

34. The idea of an option apart, he would prefer the wording of article 36 to be modelled more closely on that of the 1961 Vienna Convention, which did not refer to the inviolability of the diplomatic bag. The provision contained in the first part of paragraph 1 was novel and unnecessary and should be deleted. As for the second part of the paragraph, he had no strong objection to it at the present stage, but noted that a number of speakers had expressed dissatisfaction with its wording, and in particular with the phrase "exempt from any kind of examination directly or through electronic or other mechanical devices", which seemed to exclude routine examination by means of metal detectors and, possibly, even the use of sniffer dogs. The question of remote screening raised by Sir Ian Sinclair was a debatable one; some countries, including his own, did not regard remote screening as a permissible practice. However, since the provision in question appeared to be inconsistent with the views and practice of many countries, it might be inadvisable to retain it. With regard to paragraph 2 of draft article 36, he agreed with previous speakers that it would be more acceptable to use wording closer to that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations, which provided that, if a request for the opening of the bag was refused by the sending State, the bag "shall" be returned to its place of origin.

35. In draft article 37, a greater degree of precision might be achieved by the insertion of the word "similar" between the words "other" and "inspections" and of the word "free" between the words "the" and "entry". Draft article 39, as some other speakers had pointed out, failed to take account of the fact that the diplomatic courier might be prevented from delivering the diplomatic bag to its destination by circumstances other than the termination of his functions. As Mr. Sucharitkul (1905th meeting) had correctly noted, moreover, the Commission should exercise restraint in imposing additional obligations on the receiving State and the transit State, which could, after all, not be expected to know exactly where the diplomatic bag was at all times. With regard to draft article 40, he agreed with Mr. Lacleta Muñoz that the obligations imposed on a State not initially foreseen as a transit State should not be the same as those imposed on a receiving State. In conclusion, he said that he would submit some drafting points concerning articles 36 to 40 directly to the Drafting Committee.

36. Mr. CALERO RODRIGUES said that, of all the draft articles before the Commission, article 23 occupied a special place in that it had been referred to the Drafting Committee and returned to the Commission with two paragraphs in square brackets. He hoped that the discussion of that article could be brought to a successful conclusion without further referral to the Drafting Committee; exceptionally, minor drafting matters might be settled in plenary.

37. With regard to paragraph 4 of article 23, he hoped that the new text proposed by the Special Rapporteur would prove acceptable. On the other hand, he did not consider paragraph 1 to be strictly necessary in view of article 16, already adopted on first reading, and therefore suggested that it should be deleted. If a strong trend emerged in favour of according the diplomatic courier functional immunity from criminal jurisdiction, he would have no objection to paragraph 2 being amended in an appropriate manner, for example by deleting the words "civil and administrative" in the first sentence.

---

[7] United Nations, *Treaty Series*, vol. 499, p. 311.

38. Turning to draft article 36, he noted that some members were in favour of deleting the reference to the inviolability of the diplomatic bag. As had already been pointed out, however, article 54, paragraph 3, of the 1963 Vienna Convention on Consular Relations referred to the "inviolability and protection" of consular bags in transit and he saw no reason why the same degree of protection should not be extended to the diplomatic bag. As for the reference to exemption from any kind of examination directly or through electronic or other mechanical devices, he was of the opinion that, in endeavouring to protect the diplomatic bag against abuses, the Commission should be careful not to open the door to such abuses: electronic technology was developing very rapidly and what was not practically possible today might be so tomorrow. The Commission should try to arrive at wording which preserved the full confidentiality of the contents of the diplomatic bag, while permitting the receiving or transit State to satisfy itself as to the nature of the contents.

39. With regard to paragraph 2 of draft article 36, he thought that the provision which applied to the consular bag under article 35, paragraph 3, of the 1963 Vienna Convention should also apply to the diplomatic bag, and that the text of paragraph 2 should be amended accordingly. Sir Ian Sinclair's suggestion that States should be allowed to exercise an option in respect of article 36 might be acceptable as a last resort, but it would, of course, detract from the future convention's precision.

40. He had no objection to draft article 37, although, like some previous speakers, he would find it more logical if the article dealt only with matters relating to taxation and if those relating to customs and other inspections were covered in article 36. Draft articles 39 and 40 appeared reasonable. In article 40, however, the status of a State not initially foreseen as a transit State should, in his view, be assimilated to that of a transit State rather than to that of a receiving State. Draft article 41 was also acceptable, but he agreed with Mr. Lacleta Muñoz that care should be taken not to impose obligations on States with regard to the diplomatic bags of countries not recognized by them. In draft article 42, paragraph 2, the words "confirming or supplementing or extending or amplifying" might well be replaced by the word "modifying", in line with article 6, paragraph 2 (*b*).

41. Although a worthwhile attempt had been made in draft article 43 to solve the problem that would arise if a State was not prepared to apply the articles to all four types of couriers and bags, he agreed with other members of the Commission that paragraph 1 was quite obviously incorrect in stating that a declaration of optional exceptions would be "without prejudice to the obligations arising under the provisions of the present articles". Some prejudice was bound to result from such a declaration and the text of paragraph 1 should therefore be amended accordingly.

The meeting rose at 1 p.m.

1907th MEETING

Thursday, 20 June 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

Draft articles submitted by the Special Rapporteur[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

1. Mr. BALANDA said that the draft articles submitted by the Special Rapporteur in his sixth report (A/CN.4/390) revealed his concern to take account of the views expressed in the Commission and in the Sixth Committee of the General Assembly and his desire to reconcile the interests involved.

2. Nearly all the possible arguments regarding draft article 23 had already been advanced. Some speakers thought that the Commission should not go beyond the texts of the codification conventions. It should be noted, however, that the reason why the General Assembly had asked the Commission to study the question of the status of the diplomatic courier and the diplomatic bag was that it considered the subject to be insufficiently regulated by those conventions. They should therefore be supplemented by a set of articles that were autonomous and coherent, but in conformity with the existing texts.

3. The need to strengthen the privileges and immunities of the diplomatic courier derived from the present state of international relations. Both freedom of movement and freedom of communication were being subjected to increasingly numerous obstacles. It sometimes happened that a diplomatic courier could not travel freely throughout the territory of a State and that restrictions were placed on the use of means of communication. It was the growing complexity of the network of interests involved which explained the deterioration of the situation and made it necessary to protect the diplomatic courier more effectively in the exercise of his functions. There could be no doubt that the system established when the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had been adopted now needed strengthening.

4. The fear of abuse was another argument which had often been advanced in regard to article 23. The many examples of abuse which had been given, however, seemed to involve diplomatic agents, not diplomatic couriers. The Commission should therefore take care not to condemn couriers for their intentions and propose remedies without really knowing what the situation was. Moreover, even if diplomatic couriers were to be blamed for abuses, it could not be concluded, by *reductio ad absurdum*, that diplomatic relations must be discontinued in order to stop abuses. Diplomatic relations met a need, and the diplomatic courier was, after all, only one official agent among others. As some members of the Commission had observed, it would be inappropriate to legislate for exceptions, and abuses were exceptions by definition.

5. In order to define the status of the diplomatic courier, it was necessary to know who the courier was. The courier was an agent sent by a State to provide contact with diplomatic, consular or other mssions and was responsible for the safekeeping and transport of the diplomatic bag. Although that was a specific task, he was an official agent just as much as a member of a mission. As the granting of privileges and immunities was based on the functional aspect, which was the same for all such agents, there was no reason to impose limitations on the privileges and immunities accorded to the diplomatic courier. Moreover, the ultimate beneficiary of privileges and immunities was the State, whoever the official agents might be whose activities had to be facilitated by the granting of privileges and immunities. The diplomatic courier should therefore be accorded all the privileges and immunities necessary for the protection of the State. In that connection, Mr. Ushakov had observed (1905th meeting) that, under article 31, paragraph 1, and article 37, paragraph 1, of the 1961 Vienna Convention, the members of the family of a diplomatic agent enjoyed immunity from the criminal jurisdiction of the receiving State, just as the agent himself did. As that immunity was accorded to them irrespective of any consideration of functional necessity, it should, *a fortiori*, be granted to the diplomatic courier in the interests of the efficient performance of his functions.

6. Since the final object was to protect the State, not to favour the individual, the Commission should not fear being too generous in the granting of privileges and immunities to the diplomatic courier. Besides, draft article 23 contained a safeguard, since under the terms of paragraph 5 a diplomatic courier could be prosecuted by the authorities of his own country. Those auhorities could also waive his immunity at any time or take administrative measures against him. The possibility of sanctions thus removed any absolute character from the immunity from jurisdiction.

7. Unlike other members of the Commission, he thought that draft article 23 was justified, even though article 16 established the principle of the inviolability of the person of the diplomatic courier and draft article 36 that of the inviolability of the diplomatic bag. For, in each of the codification conventions, the inviolability of the person, which protected against any form of arrest or detention, was stipulated along with immunity from criminal jurisdiction, the former constituting, as it were, the prerequisite of the latter. Thus in the 1961 Vienna Convention the inviolability of the person of the diplomatic agent and the principle of immunity from criminal jurisdiction were provided for in articles 29 and 31, respectively. The corresponding provisions of the 1975 Vienna Convention on the Representation of States deserved special attention, because they applied to agents whose functions were generally performed within a short time, like those of the diplomatic courier. That instrument specified not only inviolability of the person, but also immunity from criminal jurisdiction. To remain within the logical system of the codification conventions, the status of the diplomatic courier should be aligned with that of other official State agents.

8. Both paragraph 1 and paragraph 4 of the text of article 23 proposed by the Special Rapporteur in his sixth report were justified. Paragraph 4 introduced an important particular, namely that the diplomatic courier was not obliged to give evidence as a witness. That principle, which was stated in article 31, paragraph 2, of the 1961 Vienna Convention, allowed the courier to give evidence if he thought it necessary, provided that his testimony did not involve the exercise of his functions or impair their performance. In his opinion, the succinct wording of paragraph 4 of

the original draft article, which was based on the corresponding provision of the 1961 Vienna Convention, was preferable to the new wording proposed by the Special Rapporteur. He also noted that, under article 44, paragraph 1, of the 1963 Vienna Convention, members of a consular post could be "called upon to attend as witnesses", but no penalty could be imposed on them if they declined to give evidence. Those terms should be interpreted as implying no obligation to testify. Paragraph 5 of draft article 23 should be retained, but the word "any", qualifying immunity, added no shade of meaning and could be deleted.

9. Draft article 36, paragraph 1, provided for effective protection of the confidential nature of the contents of the diplomatic bag. He was anxious not to restrict such protection and was therefore opposed to the use of any means of inspection at a distance. Moreover, the use of such means, if authorized, would place the developing countries at a disadvantage, since they would often be unable to afford such devices to use by way of reciprocity. Article 36, paragraph 2, gave too much power to the authorities of the receiving State or the transit State, for if they had serious reason to believe that the bag contained prohibited articles, they could request that it be returned to its place of origin. As such a provision was open to abuses, it should be recast on the model of article 35, paragraph 3, of the 1963 Vienna Convention, according to which the opening of the bag could be requested and, if that request was refused, the bag must be returned to its place of origin. It was true that such a provision might be difficult to apply in view of the short time the diplomatic courier remained in the territory of the receiving State or the transit State, but it was important not to give those States the power to decide at their discretion that the bag must be returned to its place of origin.

10. Draft article 37 called for no comments except that the wording should be aligned with that of the corresponding provisions of the other codification conventions. In draft article 39, the words "in the event of termination of the functions of the diplomatic courier, which prevents him" could be replaced by the words "in the event of circumstances which prevent the diplomatic courier", and in order to conform with the terminology of the other conventions, the word *capitaine* in the French text should be replaced by *commandant.*

11. The application of draft article 40 should be facilitated by providing, if not in the text of the article, at least in the commentary, for an obligation to notify the State concerned of the presence in its territory of a diplomatic courier or diplomatic bag compelled to remain there for some time as a consequence of *force majeure* of fortuitous event. Lastly, he considered that draft article 41, concerning non-recognition of States or Governments or absence of diplomatic or consular relations, was a useful reminder which strengthened the protection due to the diplomatic courier.

12. Mr. EL RASHEED MOHAMED AHMED said that the discussions in the Sixth Committee of the General Assembly and in the Commission pointed to broad agreement on the topic and to the emergence of an acceptable text. The question of the diplomatic courier's jurisdictional immunity, dealt with in draft article 23, was none the less one on which views still diverged, with the majority of representatives in the Sixth Committee preferring limited, or functional, immunity to absolute immunity. In recognition of the force of that current of opinion, the Special Rapporteur had amended paragraph 4 so as to reconcile the opposing views, without, however, amending paragraph 1 in a similar way.

13. The article had to be viewed as a whole, and since the intention was to accommodate the two sets of interests referred to at the previous meeting by Mr. Al-Qaysi, to which a third set of interests—those of the transit State—should also be added, the logical conclusion was that paragraph 1 should likewise be amended by adding at the end the words "in cases involving the exercise of his functions". It would be odd, to say the least, to bestow upon the diplomatic courier—who was not even accredited to the receiving or transit State—privileges which neither heads of mission nor even heads of State enjoyed. The argument that criminal proceedings could be taken against the courier *in absentia* after the termination of his functions was inapplicable in countries such as his own, which did not allow such proceedings. In any case, as some members had pointed out, the diplomatic courier's stay in the receiving or transit State was so brief that, even if his jurisdictional immunity were limited, there would be no time to institute proceedings against him. The fact that, under paragraph 5, the courier was not exempt from the jurisdiction of the sending State and that, in addition, there was a possibility of the immunity being waived should also be taken into account. On the whole, therefore, he was inclined to regard article 23 as acceptable, subject to the suggested amendment to paragraph 1.

14. With regard to draft article 36, he agreed that the reference to the inviolability of the diplomatic bag was justified, especially in view of the corresponding provisions of the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States. As to the exemption of the diplomatic bag from electronic scanning, in the light of the government study carried out in the United Kingdom he now tended to take the view that scanning constituted a form of inspection and should be carried out only with the consent of the sending State and in the presence of its authorized agent. In the absence of such consent the diplomatic bag should, if there was serious reason to believe that it contained prohibited articles, be returned to its place of origin. The commentary, if not the article itself, should make it clear that, in such an event, the sending State was not allowed to refuse to take back the diplomatic bag.

15. In connection with draft article 40, the Special Rapporteur was right to affirm that the concept of "transit State" was preferable to that of "third State". Lastly, he disagreed with Mr. Riphagen's observation (1905th meeting) regarding paragraph 2 of draft article 42 that the list of changes to the provisions of the draft articles which could be made

by international agreement should be extended to include the possibility of limiting those provisions. The fact that the paragraph as it stood was something of a one-way street was quite appropriate.

16. Chief AKINJIDE said that draft article 23 was a logical consequence of article 16 and he was not persuaded by the arguments against retaining it. The main thrust of the article must be preserved. However, as already suggested, paragraph 1 could be amended so as to limit the diplomatic courier's immunity from criminal jurisdiction to cases involving the exercise of his functions as defined in article 10. Paragraph 4 of article 23 as originally submitted by the Special Rapporteur was acceptable and the square brackets added by the Drafting Committee should be removed.

17. Draft article 36 was much more problematical. At the previous meeting, Mr. Al-Qaysi had spoken of two sets of interests and Mr. El Rasheed Mohamed Ahmed had just mentioned a third set of interests, those of the transit State. Yet it would be wrong to overlook a fourth set of interests, namely those of the international community at large. Since the adoption of the four codification conventions, the world had entered a new phase of violence. Terrorism, whether by individuals or sponsored by a State, had become a common phenomenon, one which article 36 must take into account. As everyone was aware, misuse of the diplomatic bag could involve the illegal transport of gold, drugs or currencies. Although the number of countries actually involved in such abuses was very small, the effect on the international community at large was devastating. A connection between acts of terrorism and misuse of the diplomatic bag was very difficult to establish; what was beyond question, however, was the fact that vast sums were being spent on measures to prevent and control terrorism. Consequently he had reached the conclusion that article 36 as proposed was inadequate; for one thing, airlines over which the Governments of receiving or transit States had no control might well refuse to carry diplomatic bags unless they could be examined. Serious consideration should be given to Sir Ian Sinclair's proposals (1906th meeting) so as to combine them with the terms of article 36 in its present form.

18. Mr. TOMUSCHAT said that, by placing the diplomatic courier on a level similar to that of the diplomatic agent and higher than that of consular officers, draft article 23 undoubtedly embodied some progressive development of the rules currently in force. It had been argued that denial of total immunity from jurisdiction to the diplomatic courier was inconsistent with the basic principles of inter-State relations or even with the principle of the sovereign equality of States. Yet the courier, unlike the diplomatic agent, was no more than an instrument ensuring a free flow of information between the sending State and its outposts abroad. Consequently, only functional necessity would appear to warrant restricting the territorial sovereignty of the receiving or transit State. Functional necessity, however, had to be assessed in real terms. When it proposed an extension of the immunities accorded to the courier, the Commission should be able to point to some specific deficiency in the law. For his own part, he was at a loss to perceive any such deficiency: in the absence of any complaints about interference with the diplomatic courier's work, there would appear to be no need to modify the law.

19. The crucial difference between a diplomatic courier and a diplomatic agent posted to the receiving State on a long-term, short-term or *ad hoc* basis was, quite simply, the length of their stay abroad. If a diplomatic agent was protected only against arrest or detention but remained subject to criminal jurisdiction, his ability to perform his functions could be seriously impaired by having to appear in court in order to defend himself. However, as a resident of the receiving State he could not ignore proceedings instituted against him. The diplomatic courier's situation was entirely different. Under article 16, the courier enjoyed full personal inviolability. If the receiving State none the less tried to initiate unjustified court proceedings against him, he could simply leave the country. The receiving State had no means of bringing pressure to bear upon the diplomatic courier. In such circumstances, court proceedings would only be a hollow threat.

20. However, since inviolability almost amounted to immunity from criminal jurisdiction, he was inclined to agree with Chief Akinjide that paragraph 1 of draft article 23 followed logically upon article 16, and he was not in principle opposed to it. Restricting the diplomatic courier's immunity from criminal jurisdiction to acts performed in the exercise of his functions would be difficult to reconcile with the absolute prohibition in article 16 on subjecting him to any form of arrest or detention. Moreover, there was no justification, in the case of the diplomatic courier, for singling out specific acts as demanding a higher degree of protection. The diplomatic courier was, after all, only a messenger.

21. Again, it was difficult to identify specific acts performed in the exercise of the courier's functions. Unlike a diplomatic agent or consular officer, both of whom were vested with authority by the sending State and acted as representatives of that State, the courier did not, when travelling in the territory of the receiving or transit State, exercise the public authority of the sending State, nor did he represent it when concluding contracts in connection with the fulfilment of his mission. His sole task was to deliver the bag to its destination and, in completing that task, he often used facilities that were the same as those used by any private citizen or ordinary tourist. Hence there was no real basis for granting preferential status to the courier in respect of acts performed in the exercise of his functions, since those functions were not performed in the capacity of a representative of the sending State.

22. It seemed to him that the term "jurisdiction", in the context of administrative jurisdiction, had a much broader meaning than the French term *juridiction*. It was an important point, because the term could be taken to refer to the courts alone or to the jurisdiction of the administrative authorities. The manner in which the term was interpreted under article 23

would therefore determine the extent to which the courier came under the jurisdiction of the receiving State.

23. The compromise formulation in paragraph 4 of draft article 23 was acceptable, since there was no fundamental reason why the courier should not give evidence provided that the performance of his mission was not delayed. It should, however, be made absolutely clear that the courier could not be prevented from leaving the territory of a foreign State and returning to the sending State, perhaps by adding an express provision to that effect either in article 15 or in article 16.

24. In the case of draft article 36, it would be preferable for paragraph 1 to retain the wording of the codification conventions. Although that would result in a dual régime, it would be unwise at the present stage to increase the guarantees accorded to the diplomatic bag. The best course might be to place a full stop after the word "detained" and delete the remainder of the paragraph. It had been said that it was not advisable to legislate on the basis of a limited number of cases of abuse, although abuses that were insignificant in statistical terms could well have far-reaching and devastating consequences. Another point was that the prohibition on examination of the diplomatic bag by electronic or other devices could be held to extend to airlines, as a result of which they might refuse to take on board any bag not accompanied by a courier. It was necessary to be quite clear whether the intention was in fact to extend the prohibition beyond the scope of purely inter-State relations to cover third parties, particularly airlines. With regard to paragraph 2, he would prefer the approach adopted in the 1963 Vienna Convention on Consular Relations, one which could possibly be used along the lines suggested by Sir Ian Sinclair (1906th meeting).

25. He appreciated that the reference to "other inspections" in draft article 37 had been included to cover the case of border controls carried out for sanitary purposes or to prevent art treasures from leaving the country. Yet it would perhaps be preferable, as had been suggested, for article 36 to cover all kinds of control and inspection, and for article 37 to refer solely to taxation.

26. From the point of view of drafting, he agreed that draft article 39 was at once too broad, since it could also cover cases in which the sending State had terminated the functions of the courier, and too narrow, since other situations might arise in which the receiving or transit State should ensure the safety of a diplomatic bag, provided it had knowledge of a mishap to the courier.

27. He had some doubt about the need for draft article 40. According to his reading of the draft, there was no requirement that a transit State had to be informed beforehand that a courier or bag was to pass through its territory. Consequently, a third State which was not originally foreseen as a transit State would automatically assume the obligations of a transit State if, as a result of *force majeure* or fortuitous event, a courier or bag entered its territory. If that interpretation was correct, the provisions of article 40 would be relevant only in cases in which a State made the entry of a courier dependent upon a visa.

28. The rule stated in draft article 41 was right and proper, and any problems in that connection stemmed merely from its all-encompassing nature. Obviously, if there were no diplomatic relations between a sending State and a receiving State, there could be no diplomatic bag *stricto sensu*. However, there might be consular relations, in theory at least, and a consular bag was a diplomatic bag within the meaning of article 3, paragraph 1 (2) (*b*), and article 41 of the draft. Only at first sight, therefore, did the provision appear to be too broad.

29. Draft article 42 posed serious problems and, in its present form, contained a statement that was simply not true in the light of the terms of articles 23 and 36, which purported to modify the existing legal régime. He preferred the original text, which stated that the draft articles supplemented the four codification conventions. Again, the drafting of paragraph 2 would be simplified if the phrase "or supplementing or extending or amplifying" were replaced by "or modifying".

30. Lastly, with regard to draft article 43, paragraph 1, he agreed that the phrase "without prejudice to the obligations arising under the provisions of the present articles" was misleading and should be deleted.

31. Mr. KOROMA, thanking the Special Rapporteur for a well-structured sixth report (A/CN.4/390), said that, in the light of the discussion and particularly Mr. Balanda's comprehensive statement, which he endorsed, few comments were required.

32. The Commission's mandate was to elaborate rules on the status of the diplomatic courier and the diplomatic bag that would represent a development of the four codification conventions, and he agreed that no attempt should be made to disentangle those conventions. Once it was accepted that article 16, which provided for the personal inviolability of the diplomatic courier, was relevant to the endeavour to elaborate rules on the courier and the diplomatic bag, it followed logically that article 23, which stipulated the immunity of the courier from criminal juridiction, had a place in the draft. No argument had been advanced to the contrary or to the effect that article 23 was not predicated on the four codification conventions. He was ready to endorse the idea that the courier's immunity should be confined to acts performed in the exercise of his official functions, for that would meet the concern of those States which took the view that immunity should not be extended to a new category of individuals, even though their arguments were not very persuasive. Couriers were a limited group of individuals and, invariably, persons of the highest integrity. There was simply no evidence to suggest that couriers in particular had been abusing their positions. In order to facilitate their task, therefore, and in the light of both customary international law and the relevant multilateral treaties in the matter, article 23, which was well-founded, should be retained.

33. The purpose of draft article 36 was to protect official diplomatic communications. Regrettably, the diplomatic bag had recently been misused and something would have to be done about it. There had been a tendency in the past to concentrate on narcotics smuggling, but the issue was much wider, even universal in nature. It included the smuggling of currencies, with the resulting destabilization of the economies of the developing countries; of precious stones such as diamonds, on which the viability of the economies of some countries largely depended; and also of works of art. The developing countries, which stood to lose most, were faced with a dilemma, for most of them could not afford to instal expensive scanning equipment.

34. Accordingly, he supported Sir Ian Sinclair's proposal (1906th meeting, para. 7), subject to certain modifications. In the first place, at the end of paragraph 1 of that proposal, the phrase "by the representatives or authorities of the receiving State or the transit State" should be added for the sake of greater clarity. Secondly, given the realities of the modern world, he could accept the compromise proposal in paragraph 2; if there was serious reason to believe that the bag contained something other than official correspondence, documents or certain specified articles, it would be entirely proper for the competent authorities of the receiving State to request that the bag be opened in their presence by an authorized representative of the sending State. Should that request be refused, however, return of the bag to its place of origin would not resolve the matter, particularly in the case of an attempt to smuggle currency or precious stones; in such a case, the attempt would probably be renewed. He had no ready solution to offer, but urged the Commission to give its attention to that and other matters which had been raised.

35. It had been said that steps should be taken to ensure that the diplomatic bag was not misused by States themselves. In that connection, he wished to point out that there was a tendency on the part of the popular press to sensationalize abuses and to try and to judge people without a full investigation. Even if a retraction was made by a newspaper, the harm had already been done. There were, of course, some abuses by diplomats, but matters should be kept in perspective.

36. Mr. USHAKOV said that, according to draft article 36, the diplomatic bag was inviolable at all times and wherever it might be in the territory of the receiving State or the transit State: it was therefore exempt from any kind of examination, whether by electronic or by other means. Any inspection of the bag would infringe its inviolability. Several members of the Commission had spoken of abuses which could be committed by the receiving or transit State and by the sending State. How was the term "abuse" to be understood in law? In the first case, the abuse would consist in examining the diplomatic bag despite its inviolability, which provided legal protection for the sending State; in the second case, the abuse would be to introduce into the receiving or transit State, in the diplomatic bag, articles subject to an import prohibition, which provided legal protection for the receiving State or transit State. In both cases, the State violating its obligation committed an internationally wrongful act, which could be a delict or a crime and which engaged its international responsibility.

37. Many violations were possible, as had been shown by the statements of previous speakers. For instance, examination of a diplomatic bag by X-rays could render films contained in the bag completely useless. Such a measure could elicit countermeasures by the sending State, which would try to ensure better protection of the contents of its bag. There would then be an escalation of measures and countermeasures.

The meeting rose at 1 p.m.

1908th MEETING

Friday, 21 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, 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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

1. Mr. USHAKOV, continuing his comments on draft article 36, which he had begun to examine at the previous meeting, said that, if the Commission wished to obtain results, it should suggest to receiving States and transit States which were in danger of being duped by sending States that they systematically open all diplomatic bags. Once a bag had been opened, it should be examined throughly, since an apparently harmless object could have an entirely different use from the one it appeared to have at first sight. Would not the wisest course therefore be to return all diplomatic bags?

2. Having carried that argument to the extreme, he observed that the important point was that the mission should receive the diplomatic bag, the contents of which should be of no concern to the transit State or the receiving State, in so far as they were intended exclusively for the use of the mission's staff. The only real need for the receiving State was to ensure that the contents of the diplomatic bag, whether narcotic drugs or anything else, did not leave the mission. The diplomatic bag should serve the purposes of the mission, whatever they were, and must therefore be inviolable. That guarantee was the counterpart of the prohibition on sending by diplomatic bag articles which would not be used by the mission itself. Once the inviolability of the diplomatic bag was recognized, it was obvious that it must be exempted from all customs examination, as provided in draft article 37.

3. The title of draft article 39 was acceptable, but he had doubts about the meaning to be attached to the words "in the event of termination of the functions of the diplomatic courier". In draft article 40, he thought it sufficient to mention *force majeure*; there was no need to refer to the case of "fortuitous event", a term which might cause difficulties of interpretation. He saw no objection to adopting draft article 41.

4. Draft article 43 was closely connected with article 3, on the use of terms, including the term "diplomatic courier". States which were not parties to the four codification conventions should be allowed to choose between the different types of couriers and bags and to decide which they would like to be covered by the future convention. States should be free not to apply the convention to all the couriers and bags listed in article 3. For the convention to be applicable, it must include a provision such as article 43, which nevertheless required some slight drafting amendments. Lastly, he proposed adding to the draft a provision on non-discrimination between States based on article 83 of the 1975 Vienna Convention on the Representation of States.

5. Mr. DÍAZ GONZÁLEZ commended the Special Rapporteur for having taken into consideration in his sixth report (A/CN.4/390) the comments made at previous sessions of the Commission and in the Sixth Committee of the General Assembly. In introducing his sixth report (1903rd meeting), the Special Rapporteur had evoked the idea already put forward of making the diplomatic courier a kind of "super ambassador". He himself did not think it was necessary to go so far and to give the diplomatic courier more privileges and immunities than a head of mission. As Mr. Flitan had observed in relation to draft article 23 (1904th meeting) the Commission had not received a mandate from the General Assembly to amend the existing conventions, either by stopping short of the provisions of the 1961 Vienna Convention on Diplomatic Relations or by going beyond those of the 1963 Vienna Convention on Consular Relations, especially as article 16 of the draft ensured the protection and personal inviolability of the diplomatic courier. Why should the diplomatic courier need immunity from criminal jurisdiction during the short time that he spent in the transit State or the receiving State? If he entered those States with the intention of committing an offence, he would enjoy the protection provided under article 16.

6. It should also be noted that no diplomatic courier had ever misused the bag, because in most cases he did not know what it contained; and, since no offence had yet been committed by a diplomatic courier, none had had any need of immunity from criminal jurisdiction. That being so, the Commission should remain within the limits laid down by the conventions in force and not include a provision such as article 23, particularly its paragraphs 1 and 4, in the draft. The suggestion made by the Special Rapporteur in his sixth report (A/CN.4/390, para. 29) that "the most appropriate option would perhaps be the adoption of draft article 23 as proposed by the Drafting Committee" was in contradiction with the views expressed in the Sixth Committee (*ibid.*, paras. 16-17), which showed the very clear opposition between two schools of thought, one favouring article 23 and the other categorically opposed to it.

7. As he understood it, the adjective "inviolable" had a precise meaning in the context of draft article 36 and referred not to the bag itself, but to its contents, namely the correspondence exchanged between the sending State and its missions. It was thus one thing to open the diplomatic bag, but quite another to read the correspondence it contained. He accepted the idea of exempting the bag from detailed examination, but thought that it could be subjected to an inspection that would enable the authorities of the receiving State or the transit State to make sure that no object carried in the bag could be used for the commission of an offence. The aim should be to ensure a balance between the need to guarantee freedom of communication and the need to protect the receiving State and the transit State, in accordance with the 1961 and 1963 Vienna Conventions. To prohibit all examination would be going too far. The

[4] For the texts, see 1903rd meeting, para. 1.

solution would be to provide that the bag could be opened by the receiving State or the transit State or, if the sending State objected, returned to that State. The amendment proposed by Sir Ian Sinclair (1906th meeting, para. 7) was therefore generally acceptable and provided a useful starting-point for recasting article 36, which the Commission should examine carefully in order to reach a consensus. He was convinced that the majority of States would not be willing to accept articles 23 and 36 as they now stood and that the Commission should take account of that fact. The conventions in force offered sufficient safeguards and should not be revised or amended, but only supplemented where necessary, if the Commission found any important gaps.

8. The Spanish text of draft article 37 should be brought into line with the English. The word *promulguen* should be replaced by the words *puedan promulgar* and the words *de los correspondientes a otros servicios determinados prestados,* which made no sense, should be replaced by the words *de los correspondientes a la prestación de otros servicios especiales (o específicos, o particulares)*. In addition, in draft article 40, the words *hecho fortuito* should be replaced by the words *caso fortuito.*

9. Lastly, he did not understand why the Special Rapporteur had included draft article 41 obliging a State to grant facilities to a diplomatic courier or diplomatic bag in the absence of diplomatic or consular relations between that State and the sending State and, consequently, in the absence of a mission of the sending State in that State—unless it was a mission to an international organization, although such a mission would be protected by the headquarters agreement of the organization concerned and by the 1975 Vienna Convention on the Representation of States. That provision would cause more confusion than it would solve problems. It was impossible to imagine that a State would have a diplomatic or consular mission in a State which did not recognize it or with which it had no diplomatic relations. Article 41 should therefore be deleted. He had no objection to draft articles 42 and 43.

10. Sir Ian SINCLAIR said that draft article 40 dealt with what might be called the unintended or unforeseen transit State, as in the case, for example, where an aircraft diverted because of adverse weather conditions was forced to land in a third State not initially envisaged as a transit State. He agreed that such a situation could arise and that it might be necessary to regulate it. In principle, a parallel should be established with the treatment to be accorded not by the receiving State, but by a true transit State, although that might make little difference in practice, since there was little if any distinction under the draft articles between the obligations of those two States. The general question whether there should be a distinction, in particular areas, between the obligations of the transit State and those of the receiving State might, however, have to be re-examined on second reading. Also, he had considerable difficulty with the word "inviolability" used in reference to the diplomatic bag: in his view, article 40 should provide simply for the same protection as the transit State was bound to accord.

11. With regard to draft article 41, he failed to see how paragraph 1 could possibly be applied in the context of bilateral diplomatic or consular relations. In the event that such relations were severed, the normal modern practice was for the sending State to entrust the protection of its interests to a third State acceptable to the receiving State; indeed, specific provision to that effect had been made in article 45 of the 1961 Vienna Convention on Diplomatic Relations. It might be that one or two junior members of the diplomatic mission of the sending State would be attached, by agreement, to the diplomatic mission of the protecting State, but, in that case, communications would be effected through the medium of that State and its diplomatic couriers and bags. It therefore seemed quite wrong, if not actually absurd, to imply that severance of bilateral diplomatic or consular relations between the States concerned would not affect the facilities, privileges and immunities accorded to the diplomatic courier and the diplomatic bag. Similar considerations applied to nonrecognition of the sending State or of its Government by the receiving State, since, almost by definition, bilateral diplomatic relations would not have been established between them.

12. There was the further question, raised by Mr. Díaz González, whether article 41 was needed at all, given that, in the case of host States to international organizations, such matters would be regulated by means of headquarters agreements. Admittedly, the kind of principle incorporated in article 41 could have some value, in the context of the obligations of the host State and the sending State, in the case of missions to international organizations, and that was no doubt why article 82 of the 1975 Vienna Convention on the Representation of States contained a special provision on the point, but the rule could not be generalized to cover more specific problems arising in the context of bilateral relations. If any part of article 41 was to be retained, therefore, some major surgery would have to be done in the Drafting Committee to arrive at a satisfactory text.

13. As to draft article 42, he, like Mr. Tomuschat (1907th meeting), much preferred the original version, since it would be useful to stress that the draft articles were intended to supplement the codification conventions and such a statement could also be helpful in the search for a solution to the problem raised by draft article 36. He would therefore like to know why the Special Rapporteur had rejected what seemed in principle to be a much clearer draft of article 42. He was also not sure to what extent it could be said, as it was in paragraph 1, that the articles were "without prejudice to the relevant provisions in other conventions". In his view, the question warranted further consideration.

14. He shared Mr. Riphagen's reservation (1905th meeting) with regard to the words "confirming or supplementing or extending or amplifying" in draft article 42, paragraph 2. Those words were, admittedly, used in article 73 of the 1963 Vienna Convention on Consular Relations, but they had always puzzled him. They were presumably not designed to prohibit *inter se* modification of the draft articles by two or more States within the limits set by article 41 of the 1969 Vienna Convention on the Law of Treat-

ies, but they could bear that meaning, since paragraph 2 made no mention of modification. He therefore proposed that those words should be deleted, since their interpretation was not clear and they might limit the freedom of two or more States parties to any future convention to agree on *inter se* modification of some of its provisions.

15. With regard to draft article 43, he agreed in large measure with the substance of what Mr. Ushakov had said and, in general, could approve the text of the provision relating to optional exceptions. While he welcomed the introduction of that element of flexibility, he had serious reservations about the use of the words "without prejudice to the obligations arising under the provisions of the present articles" in paragraph 1. What the Special Rapporteur might have had in mind was to preserve the applicability of those provisions of the draft articles that were otherwise binding on the State making the declaration by virtue of a customary rule of international law or of any other international agreement in force for the State concerned. If so, the words in question could be deleted and a new paragraph added along those lines.

16. Mr. MAHIOU commended the Special Rapporteur on his valuable efforts to propose solutions that would be acceptable to all members of the Commission. The sixth report (A/CN.4/390) showed that the Special Rapporteur was willing to take account of all points of view and it even anticipated the Commission's wishes.

17. Referring to draft article 23, he said that, although many States were opposed to the idea of granting the diplomatic courier absolute immunity from criminal jurisdiction, the Commission could not completely rule out that idea, which would meet a particular need. The arguments that had been put forward in favour of not granting such immunity were both valid and inadequate. The instruments in force did not expressly provide for the immunity of the diplomatic courier from criminal jurisdiction, but nor did they exclude it. It could thus be said that they recognized it implicitly.

18. There were, moreover, different interpretations of custom and practice. One view was that it would be enough to guarantee the personal inviolability of the courier in article 16. He was, however, not certain that that was true because article 16 and article 23, paragraph 1, applied to different situations and article 16 would not prevent the courier from being involved in a lawsuit. It had also been stated that those two provisions overlapped; but it should be borne in mind that the 1975 Vienna Convention on the Representation of States contained two provisions that were closely related, namely articles 58 and 60 on personal inviolability and on immunity from jurisdiction respectively. Such overlapping had not appeared to cause the authors of the 1975 Vienna Convention any problems. Draft article 23, paragraph 1, nevertheless differed from article 60, paragraph 1, of the 1975 Vienna Convention in that it did not place any restrictions on the immunity of the diplomatic courier from criminal jurisdiction by linking such immunity to the exercise of the courier's functions. Even if the courier was not regarded as a diplomatic agent, there was some analogy between his functions and those of some members of the staff of a mission. Since he spent only a short time in the receiving State, his functions were also similar to those of a representative to a conference. The solution would therefore be to provide in article 23, paragraph 1, that the diplomatic courier enjoyed immunity from criminal jurisdiction "in respect of all acts performed in the exercise of his official functions".

19. Article 23, paragraph 4, reflected what had been said during the discussions at the previous session. Mr. Barboza's suggestion (1906th meeting) that the diplomatic courier might, where necessary, be required to give evidence as a witness before a court of his own country should, however, be given further consideration. Such a course would not affect the courier's immunity from the criminal jurisdiction of the receiving State or the transit State.

20. Draft article 36 was controversial because it was the counterpart of draft article 23. He had some doubts about the need for the distinction which Mr. Díaz González had drawn between the inviolability of the bag and the inviolability of its contents. National constitutions normally embodied the right to confidentiality of personal correspondence and legal decisions showed that opening an envelope was in itself enough to breach that right. He had been most interested in what Mr. Barboza and Mr. Calero Rodrigues (*ibid.*) had had to say with regard to the examination of the bag by electronic devices. If the aim was, as Mr. Barboza had said, to codify for the future, developing countries would be at a disadvantage in relation to developed countries because they would not be able to keep up with technological developments. It would therefore be necessary to rule out any possibility of examining the bag, but there would also have to be a safeguard clause to protect the receiving State and the transit State. He nevertheless noted that no diplomatic courier or diplomatic bag had ever been implicated in the hijacking of an aircraft, for example, and it was the smuggling of narcotic drugs or currency, rather than of weapons, that could be used as an argument in favour of returning a bag to its place of origin. The exemption of the bag from any examination, together with a safeguard clause allowing the transit State and the receiving State to request that the bag should be opened or returned, would thus strike a balance between the rights and duties of the States concerned.

21. Although he agreed in principle with draft articles 37 and 39, he thought that the wording of the latter article should be improved because the phrase "in the event of termination of the functions of the diplomatic courier" might give rise to problems of interpretation. He had no difficulty with draft article 40. He understood that the Special Rapporteur's purpose in draft article 41 had been to guarantee the sending State's freedom of communication, but the wording of the article was too general and might even be dangerous. A State could deliberately send a bag or a courier through a State with which it had no relations in order to create problems for that State. Article 41 would therefore have to be reformulated to avoid any such situations to which States might object and which might prevent the draft articles

from being accepted. He also found that the new wording of draft article 42 was less satisfactory than the original wording. In his view, draft article 43 would be detrimental to the codification of the régime applicable to the diplomatic courier and the diplomatic bag and he therefore had some doubts about it. The problem was not so much one of drafting as one of substance: the draft articles were intended not merely to be residual rules, but to supplement the codification conventions.

22. Mr. AL-QAYSI said that he had earlier advocated the deletion of draft article 43 but, following the statements by Sir Ian Sinclair and Mr. Ushakov, he was beginning to see its underlying purpose in a clearer light. Particularly in view of what Mr. Mahiou had said, however, he was still not convinced of the need for that article. If, for example, the article were retained, Sir Ian Sinclair's proposed text for article 36 (1906th meeting, para. 7) were accepted and a State A declared that it would apply the articles only to diplomatic bags, what would be the relationship between State A and a State B which made a declaration under article 36, paragraph 3, as proposed by Sir Ian, but not under article 43?

Co-operation with other bodies (*continued*)*

[Agenda item 11]

Statement by the Observer for the Inter-American Juridical Committee

23. The CHAIRMAN welcomed Mr. Vieira, Observer for the Inter-American Juridical Committee, and invited him to address the Commission.

24. Mr. VIEIRA (Observer for the Inter-American Juridical Committee) said that he had greatly admired the Commission since the beginning of its work. The Commission and, to a lesser extent, the Inter-American Juridical Committee represented, respectively, the world conscience and the regional conscience of international law. Despite the enormous cultural, social, political, racial and religious differences which divided them, the members of the two bodies were indissolubly united by the strong link of the law.

25. In recent years, the Committee had gone on from the study of questions of private international law to topics of public international law. During the past decade, the secretariat of OAS had encouraged work on the codification of private international law, which had led to the adoption of 18 treaties. Between August 1984 and January 1985, the Committee had prepared two draft conventions and drafted several documents on essential questions of public international law.

26. In the field of *jus in bello*, noted for the Hague and Geneva Conventions, the Committee had adopted a draft inter-American convention prohibiting the use of certain weapons and methods of combat. It had based its work on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, concluded under the auspices of the United Nations in 1980.[5] In the preamble to the draft convention, which it had adopted unanimously, the Committee reaffirmed the obligation of all States to refrain from the threat or use of force in their international relations and declared its concern at the proliferation of armed conflicts in which many civilians were victims. In view of the recommendation by the United Nations Conference which had adopted the abovementioned Convention in 1980 urging States to take measures or conclude regional agreements to prohibit or restrict the use of the weapons in question, the Committee had endeavoured to codify that aspect of *jus in bello*.

27. Under the terms of the draft convention, international law placed limits on the methods of combat which States could choose in armed conflicts, national or international. In addition, States parties undertook to refrain from using certain weapons which might increase suffering unnecessarily or be certain to cause death. Moreover, the draft convention established the obligation to take measures to distinguish between civilian populations and combatants and between civilian or cultural property and military targets. The draft did not contain an exhaustive list of the weapons to which it applied, but referred to the three protocols annexed to the United Nations Convention of 1980. It established the obligation to punish, under internal law, conduct contrary to the convention, which would constitute a sufficient legal basis to apply for the extradition of persons committing offences. The contracting parties also undertook to meet every year at the same time as the OAS General Assembly to consider the application of the convention; special meetings could also be held to consider new weapons. At the request of one third of the contracting parties, the convention could be revised at least five years after its entry into force. It should be noted that article 8 authorized the parties to declare, at any time, in accordance with article 64 of the American Convention on Human Rights,[6] that they recognized the competence of the Inter-American Court of Human Rights for all questions relating to the interpretation of the convention.

28. The second draft convention recently adopted unanimously by the Committee was designed to facilitate disaster relief and was based on a draft prepared by the Inter-American Bar Association. When a disaster occurred, such as the floods which had devastated Brazil and Argentina in 1984, and one State wished to help another, many bureaucratic obstacles were bound to arise at both the national and international levels.

29. According to article 1 of the draft convention, relief occurred when a State provided assistance at the request of another State; the acceptance of the offer of assistance by a State was deemed to be a request for assistance. States were not prevented from agreeing on other procedures. Among the different aspects of the problem treated in the draft

* Resumed from the 1903rd meeting.

[5] United Nations, *Juridical Yearbook 1980* (Sales No. E.83. V.1), p. 113.

[6] The "Pact of San José, Costa Rica", signed on 22 November 1969 (to be published in United Nations, *Treaty Series*, No. 17955).

convention, it should be noted that, although relief personnel were subject to the laws and customs of the assisted State and transit States, they could freely enter the territory of such States without being subject to customs formalities relating to passports, visas or baggage. Means of transport were exempt from payment of charges or taxes and all other formalities. Assisted States were entitled to limit the areas in which relief was provided. They were required to facilitate the work of the relief teams, in particular by giving them information on the extent of the disaster and on infrastructure, including bridges, roads and landing-strips.

30. Relief must, of course, be provided in such a way as to cause the least possible damage. As accidents were inevitable, however, it was provided that assisted States should not claim compensation from other States parties which had provided relief and that they undertook to take the place of those States if actions were brought by third parties. Such renunciation and subrogation applied only to acts directly connected with the provision of relief. Although the relevant article did not expressly say so, he believed that that rule did not apply in the case of fraud. Relief personnel enjoyed immunity from criminal, civil and administrative jurisdiction in respect of acts performed in the exercise of their official functions, unless the State providing relief waived that immunity in writing. The assisted State retained its territorial jurisdiction for all criminal proceedings concerning unlawful acts committed by relief personnel in that State outside the exercise of their official functions.

31. One of the most interesting aspects of the draft convention was that it contained a rule of interpretation according to which relief work must be encouraged and facilitated in the event of a disaster and relief personnel must be given the best possible support and protection. The draft convention also provided that national and international organizations, both governmental and non-governmental, which provided disaster relief could, by agreement with the assisted State, invoke the provisions of the convention, with the exception of those relating to immunity from criminal jurisdiction.

32. The Committee was competent to give opinions on points of international law at the request of the OAS General Assembly or any other OAS organ. The General Assembly had decided to carry out a study with a view to the possible amendment of the OAS Charter,[7] the Pact of Bogotá[8] and the Inter-American Treaty of Reciprocal Assistance.[9] The secretariat had been asked to prepare a draft and to request the views of Governments and the Committee had then suggested that the Permanent Council should convene a special conference during the last quarter of 1985, which he personally considered to be too soon.

33. The OAS General Assembly had consulted the Committee on the form of the coercive measures of an economic character referred to in article 19 of the OAS Charter. Mr. MacLean, a member of Peruvian nationality, had been appointed Special Rapporteur, in which task he had been assisted by Mr. Galo Leoro, the present Chairman of the Committee, and other members. The document adopted by the Committee on that question gave an outline of the work done on economic coercion in the American continent, beginning with the Eighth Inter-American Conference, held at Lima in 1938, and going on to discuss the Conference of Chapultepec on problems of war and peace, held at Mexico City in 1945, and the Ninth Inter-American Conference, held at Bogotá in 1948. The latter conference had drafted article 16—which later became article 19—of the OAS Charter in the same terms as article 8 of the Economic Agreement of Bogotá. Article 19 provided that no State could use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind. The document also mentioned the Charter of Economic Rights and Duties of States, adopted in 1974,[10] and the work of a special committee set up to study the inter-American system and propose means of restructuring it. After referring to various consultative meetings of the Ministers of Foreign Affairs of the States of the inter-American system, the Committee had reached the provisional conclusion that article 19 of the OAS Charter contained sufficient substantive criteria to give a general idea of unlawful coercive measures. The Committee also considered that the application of coercive economic measures was an urgent problem of concern to all American States which justified the convening of a consultative meeting, without prejudice to the setting up of *ad hoc* machinery.

34. In 1983, the OAS General Assembly had instructed the Secretary-General of OAS to study, with the assistance of the Committee, the procedures for the peaceful settlement of disputes provided for in the OAS Charter, as well as additional measures for their promotion, updating and extension. It was those measures that the Committee had taken up. It had drawn attention to a number of ways in which the system of peaceful settlement of disputes could be strengthened: the right of members of OAS to use the machinery provided for in the Charter of the United Nations; a study of the Pact of Bogotá showing why certain States had made reservations to that instrument or had not ratified it, with a view to forming an idea of the viability of the Pact, subject to certain reforms; the possible establishment of one or more dispute-settlement bodies which would operate at the request of an American State (the statute of the Inter-American Peace Committee might be revised for that purpose); the preparation of fact-finding guidelines; the preparation of a guide to the means available to States under both the OAS system and that of the United Nations; the preparation of a study on the possibility of amending the relevant articles of the OAS Charter to enable any State to request the good offices of the Permanent Council or

---

[7] Signed at Bogotá on 30 April 1948 (United Nations, *Treaty Series*, vol. 119, p. 3); amended by the Protocol of Buenos Aires of 27 February 1967 (*ibid.*, vol. 721, p. 324).

[8] American Treaty on Pacific Settlement, signed at Bogotá on 30 April 1948 (*ibid.*, vol. 30, p. 55).

[9] Signed at Rio de Janeiro on 2 September 1947 (*ibid.*, vol. 21, p. 77).

[10] General Assembly resolution 3281 (XXIX) of 12 December 1974.

of the Inter-American Committee on Peaceful Settlement, to introduce the notions of equity and justice as precepts to be respected, and to empower the Secretary-General of OAS to call the attention of its organs to any question which, in his opinion, might endanger the maintenance of peace. In addition to those proposals, the Committee had stated the opinion that, in conformity with Article 103 of the Charter of the United Nations, article 137 of the OAS Charter and article 10 of the Inter-American Treaty of Reciprocal Assistance, a balanced system had been set up under which a member of the inter-American system could rely on the competence of the Security Council. That opinion had, however, not been unanimously approved.

35. The Committee had also adopted, at its January 1985 session, a document in which it had defined and developed the principles—other than those stated in the OAS Charter—which should govern relations between States. That document had been presented as a memorandum addressed to the secretariat, to be brought to the notice of the contracting parties. The Committee believed that the revision of the basic instruments of the inter-American system would entail the strengthening of the regional body and it had put forward various considerations, some of which dealt with the facts and others with the legal aspects of the matter. It had, for instance, suggested that the Inter-American Treaty of Reciprocal Assistance, as amended in 1975, should come into force and that periodic official meetings should be held by the member States of OAS to discuss current problems; it had also stressed the problem of economic aggression and the need for an agreement on economic security and an *ad hoc* application instrument. The Committee had further indicated that it was necessary to draft an inter-American agreement on internal development.

36. The document had also dealt with the difficult problem of non-intervention, regarding which the Committee had suggested a study of cases of intervention as it had characterized them in a 1959 resolution. A study of the sources of international law and of the impact of the resolutions of international bodies on the establishment of a new legal order had also been contained in the document. The Committee had suggested establishing the principle of economic security and the principle that international law constituted a norm of conduct in international relations, as well as recognizing the development of international law, especially with regard to developing countries, including ideological plurality; it had also suggested that aggression should be regarded as generating American solidarity, but only for States which had ratified the Inter-American Treaty of Reciprocal Assistance—a reservation about which he had doubts. In addition, the Committee had proposed recognition of the principles relating to the environment, education and the participation of everyone in political, economic, social and cultural life. It had also studied the relationship between the problem of reservations to multilateral treaties and that of the functions of a depositary performed by the secretariat. It had recommended the unification of the texts of international instruments relating to reservations.

37. Lastly, the Committee had requested the secretariat to prepare a catalogue on the interpretation and application of the provisions of the OAS Charter by the organs of OAS; it had adopted a resolution by which it urged the OAS General Assembly to request member States to take part in the campaign against drug abuse; it had asked the secretariat for information on the progress made by member States in improving their judicial system and had appointed rapporteurs on that subject to submit a report and recommendations to the Committee. In that connection, he pointed out that, unlike the Commission, the Committee could take up the study of a subject at the request of an individual member State.

38. The course in international law had been a great success, as it was every year, and a tribute had been paid to the United Nations in the form of a special vote to mark the fortieth anniversary of the signing of the Charter of the United Nations on 26 June.

39. In conclusion, he stressed that co-operation between the Commission and the Inter-American Juridical Committee was extremely valuable, not only as an opportunity for the presentation of their respective activities, but also at the level of personal contacts.

40. The CHAIRMAN thanked the Observer for the Inter-American Juridical Committee for providing the Commission with a comprehensive survey of his organization's activities in so many fields of interest to the international community.

41. Mr. YANKOV speaking also on behalf of Mr. Flitan and Mr. Ushakov, expressed his appreciation for the statement by the Observer for the Inter-American Juridical Committee. When visiting the Committee on behalf of the Commission, he had been deeply impressed by the Committee's accomplishments in many fields and by the high intellectual and professional level at which its activities were conducted. The Commission and the Committee pursued common objectives and had much to learn from each other; in particular, the Committee's working methods, while similar to those of the Commission, were less formal, creating an atmosphere propitious to productive work. He requested Mr. Vieira to convey his personal thanks to the Committee for the warm hospitality it had extended to him.

42. Mr. EL RASHEED MOHAMED AHMED, speaking on behalf of the African members of the Commission, said that there were many similarities between problems and developments in Africa and Latin America. Both continents possessed vast resources that had not yet been fully tapped and, in both, military régimes were now being replaced by democratic Governments. His own country had learned a great deal from Latin America: for example, the tradition which it had inherited from the United Kingdom whereby embassies were not regarded as foreign enclaves was now giving way to the Latin American principle of treating foreign embassies as sanctuaries which the police could not enter. That was undoubtedly a positive development, for it helped to save the lives of persecuted persons. Another example was the principle of *uti possidetis*. In the field of international law, as in many others, Latin America had a great deal to offer to mankind.

43. Mr. DÍAZ GONZÁLEZ, speaking on behalf of the Latin American members of the Commission, thanked Mr. Vieira for his outstanding statement on the activities of the Inter-American Juridical Committee, which was the regional counterpart of the Commission. As Mr. Vieira had pointed out, both represented the conscience of the law.

44. America has always been regarded as the continent of law and it had tried to be the continent of peace, although external events had not always permitted peace to be maintained. Since the beginning of relations between America and Europe, America had attracted the concern and consideration of European jurists, in particular the founders of international law. It had first been necessary to establish the legal capacity of the indigenous populations of the American continent and then to organize their protection. A whole body of law adopted for that purpose showed Spain's concern to protect the indigenous peoples of America and organize social life in the New World, where the American, European and African civilizations had come together as one.

45. America had been the subject of the first international arbitration, for Spain and Portugal had agreed to submit their dispute on the delimitation of their zones of influence to the arbitration of Pope Alexander VI. It should also be noted that, at the end of the wars of independence, Bolívar had had recourse to the law to defend the new States. It was then that the Congress of Panama had been held, in 1826, in an attempt to organize peace within a legal framework by establishing the principles of the inviolability of the territory of States and the defence of each by the whole community of States in the event of attack. The Congress of Panama had been the progenitor not only of OAS, but also of the League of Nations.

46. The Inter-American Juridical Committee, which was an organ of OAS, reflected the concern of the people of America to be governed by law and to regulate their relations within a legal framework. The list of the Committee's recent activities was an impressive one and the Commission could benefit greatly by it. As Mr. El Rasheed Mohamed Ahmed had pointed out, moreover, the Committee's activities in furtherance of the law were not confined to America, but had repercussions in Africa and in Asia as well.

47. Mr. LACLETA MUÑOZ, speaking on behalf of the members from Mediterranean countries and of Mr. McCaffrey, expressed his admiration for the work of the Inter-American Juridical Committee, which was characterized not only by its value, but also by its intensiveness.

48. Mr. SUCHARITKUL, speaking also on behalf of Mr. Al-Qaysi and Mr. Ogiso, thanked Mr. Vieira for his excellent account of the Committee's activities. Having had the honour, some years previously, to represent the Asian-African Legal Consultative Committee at a session of the Inter-American Juridical Committee, he had been able to observe that the two Committees shared the same ideals and were interested in the same problems. Both of them were composed of developed countries, such as the United States of America, Japan, Australia and New Zealand, and developing countries.

49. The Commission, which always paid the greatest attention to the work of the Inter-American Juridical Committee, could only benefit from even closer co-operation with that Committee and the other regional committees, in the interests of the codification and progressive development of international law.

50. Mr. BARBOZA said that, as a national of a country which was a neighbour and friend of Mr. Vieira's country and as one who enjoyed excellent personal relations with him, he wished to thank him for attending a meeting of the Commission and congratulate him on his masterly account of the activities of the Inter-American Juridical Committee.

The meeting rose at 1.15 p.m.

1909th MEETING

Monday, 24 June 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

1. Mr. OGISO said that, in his sixth report (A/CN.4/390), the Special Rapporteur had made a commendable effort to take account of the many different views expressed. The report thus provided a good basis for the Commission's consideration of the topic of the diplomatic courier and the diplomatic bag, which raised a number of rather controversial points.

2. He had already expressed his views on draft article 23 at the previous session. At the present session, Sir Ian Sinclair (1905th meeting) had made a strong case for deleting the article, and he himself was also in favour of its deletion. In paragraph 27 of his sixth report, the Special Rapporteur had summarized the three main trends of opinion on article 23. The first favoured retaining the article as submitted by the Special Rapporteur or as amended by the Drafting Committee without the square brackets enclosing paragraphs 1 and 4; the second favoured deleting the article altogether; and the third favoured amending paragraphs 1 and 4 as indicated in paragraph 27 of the report. The Special Rapporteur had gone on to suggest, in paragraph 28, that an effort should be made to strike a balance between the legal protection of the courier and the bag and the legitimate interests of the States concerned. It might therefore have been expected that the Special Rapporteur would propose a formula in line with the third trend of opinion. Rather unexpectedly, however, he had suggested amending only paragraph 4 of the article, leaving paragraph 1 unchanged. But if the intention was to strike the balance referred to, it would be necessary to amend not only paragraph 4, but also paragraph 1, as indicated in paragraph 27 of the report.

3. He remained in favour of deleting article 23 in its entirety, or at least deleting paragraphs 1 and 4. He might, however, find it possible to consider a compromise based on the introduction into paragraphs 1 and 4 of all the amendments advocated by the third trend of opinion on the article, as set out by the Special Rapporteur. Assuming that article 23 would take that form, he would like some clarification from the Special Rapporteur regarding a case recently reported in the Japanese press. A diplomat had been travelling constantly between the State where he was assigned and Japan, sometimes for pleasure, sometimes in the capacity of diplomatic courier, and sometimes on other assignments. The Japanese police had been informed that, in the State where he was accredited, he had been in contact with an individual connected with the organized narcotics traffic. That had given rise to the suspicion that he might be acting as a carrier in the smuggling of narcotic drugs. The diplomat concerned had been recalled by the sending State, but had denied the accusations made against him, which had not been proved. It did seem possible, however, that a courier might carry narcotic drugs in the diplomatic bag at the same time as official documents, and he would like to know how, in a case of that sort, the words "in cases involving the exercise of his functions" in the new paragraph 4 of article 23 would apply. The point was not made clear, either in paragraph 27 of the report or in the new paragraph 4 proposed by the Special Rapporteur.

4. If the answer was that such a case was covered by the formula "involving the exercise of his functions", the provision would be totally unacceptable to him. That interpretation would deprive the receiving State and the transit State of the possibility of requesting the courier to give evidence in doubtful circumstances. If the answer was that such a case would not be regarded as coming within the exercise of official functions, then that should be made clear, preferably in the text itself, but at least in the commentary to the article.

5. The wording of draft article 36 should, he thought, be kept close to that of article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations. Of course, that would introduce a conflict between the provisions of the new convention on the courier and the bag and those of the 1961 Vienna Convention on Diplomatic Relations. He took the view that the new convention, once adopted, must prevail. Even before the new convention was adopted by the majority of States Members of the United Nations, such conflicts might arise. Some States would continue to apply to the diplomatic courier the régime provided in the 1961 Vienna Convention, while others would apply article 36 as reformulated, which was closer to the 1963 Vienna Convention. States which were parties to the 1961 Vienna Convention would, however, be able, on the basis of reciprocity, to apply the régime of inviolability of the diplomatic bag restrictively even before acceding to the new convention. The possibility of such restrictive application was reserved by article 47, paragraph 2 (*a*), of the 1961 Vienna Convention.

6. In draft article 42, he would prefer to see paragraph 1 deleted. Draft article 43 should be reformulated so as to make it clear that the option of making the declaration was available only to States acceding to the new convention which had not yet ratified one of the four codification conventions mentioned in paragraph 1 of article 3, as provisionally adopted by the Commission. He was somewhat hesitant about the declaration procedure set out in draft article 43. That procedure could well make treaty relations unnecessarily complicated, particularly when another State objected to a declaration made by a State party under article 43. In such cases it would be necessary to refer to the registration machinery, which would complicate the application and interpretation of the new convention, especially article 36. It should be remembered that, in accordance with ordinary practice, only the text of a treaty was published, not the various declarations or reservations made in connection with it.

[4] For the texts, see 1903rd meeting, para. 1.

7. He also had some doubts about the practical application of the text proposed by Sir Ian Sinclair (1906th meeting, para. 7), although he fully understood its purpose. According to that proposal, a declaration could be made by a State when signing, ratifying or acceding to the convention or at any time thereafter; and if a declaration could be made at any time, so could an objection to it. There could be no doubt that that would greatly complicate the interpretation and application of the convention; not, perhaps, for a legal adviser to a ministry of foreign affairs, but for a country's missions abroad and for the other ministries concerned. For those reasons, he would prefer the treaty relationship to be kept on a simpler basis.

8. Most of the points he had intended to make on the remaining articles had been made by previous speakers. He endorsed the objections raised to the term "inspections" in draft article 37. In draft article 39, he had doubts about the reference to "termination of the functions" of the courier and urged that a drafting change should be made. He had no objection to the inclusion of a provision on *force majeure* in draft article 40, although the case would no doubt be rare. It would not be practical, however, to require prior notice, since a situation of *force majeure* necessarily implied unforeseen circumstances. Lastly, as a matter of drafting, he had doubts about the proviso in paragraph 1 of draft article 43, "without prejudice to the obligations arising under the provisions of the present articles". It would seem that any declaration made under article 43 would, to some extent, have the effect of prejudicing the obligations arising under the provisions of the articles.

9. Mr. ROUKOUNAS said that it had been an intellectual pleasure to read the reports of the Special Rapporteur, which were both comprehensive and well documented.

10. Referring to draft article 23, he pointed out that in the 1961 Vienna Convention on Diplomatic Relations the status of the diplomatic courier had been amplified as compared with existing general international law, and that the other three codification conventions adopted during the subsequent two decades had faithfully followed that lead. The draft articles under preparation also emphasized the importance of the diplomatic courier's functions. Some members of the Commission considered that the régime of inviolability provided for in the four codification conventions was sufficient to protect the person of the courier, and that contemporary practice did not call for increased protection. On the other hand, the Special Rapporteur and other members considered that the protection of the diplomatic courier was incomplete, especially as the various régimes applicable under diplomatic and consular law granted immunity from jurisdiction to persons who could not be regarded as representatives of the sending State. The diplomatic courier's immunity from jurisdiction therefore appeared to them to be the corollary of his personal inviolability.

11. On that point, he noted that, apart from the status of the courier, the inviolability of the person was indeed always affirmed, in each of the four conventions, concurrently with immunity from jurisdiction. The difference between the persons protected was at the level of the nature and extent of the immunity, not at that of the immunity itself. Immunity from criminal jurisdiction was general for some persons, whereas for others it covered only acts performed in the exercise of their official functions. It was on that basis that some members thought that immunity from criminal jurisdiction should be accorded only for acts performed by the diplomatic courier in the exercise of his functions. That position was consistent with the wording of article 16 as provisionally adopted by the Commission, which to some extent followed the corresponding provisions of the four conventions. That article first stated the principle that the diplomatic courier must be protected by the receiving State or the transit State in the performance of his functions and then specified that he enjoyed personal inviolability. It remained to be seen whether that inviolability was or was not restricted to the performance of official functions, but the immunity from jurisdiction could only be relative, in view of the principle first stated in article 16. Thus, if the Commission adopted the régime of functional immunity from jurisdiction, article 16 would have to be amplified.

12. Draft article 36 contained two provisions which might appear contradictory, since paragraph 1 provided that the diplomatic bag could not be detained or examined, whereas paragraph 2 provided that in certain conditions it could be returned to its place of origin. It was true that, despite its rigid and unconditional aspect, paragraph 1 of article 36 contained the phrase "unless otherwise agreed by the States concerned", but it was precisely in the absence of agreement that difficulties arose.

13. The discussion on the absolute inviolability of the diplomatic bag went back to the preparation of the 1961 Vienna Convention. The formula adopted in article 27, paragraph 3, of that instrument was a compromise which had not brought the discussion to an end. Three attitudes could be adopted on the subject. The provision could be considered as not excluding possible examination of the bag by mechanical or other means; it could be maintained that any inspection must take place in conformity with the provisions of the 1963 Vienna Convention on Consular Relations, that was to say in the presence of a representative of the sending State, and that in case of refusal to have the bag opened, it could be returned to its place of origin; and lastly, it could be maintained that the receiving State was required to accept the bag without being able to examine it, since the sanction of return was not provided for in the 1961 Vienna Convention.

14. In draft article 36, paragraph 1, the Special Rapporteur opted for a rigid régime, extending the prohibition of examination to electronic and mechanical means. He used, among others, the term "inviolable", which was widely used in diplomatic and consular law and applied both to protected persons and protected property. The inclusion of that term in paragraph 1 would therefore meet the needs of the case and the provision could state both that the diplomatic bag was inviolable and that it could not be opened or detained.

15. Referring to the flexible and conditional aspect of paragraph 2 of draft article 36, he observed that,

unlike article 35, paragraph 3, of the 1963 Vienna Convention, which provided for the possibility of opening the bag in the presence of a representative of the sending State and for its possible return to its place of origin, paragraph 2 of draft article 36 mentioned only the second possibility. In that context, Mr. Sucharitkul's observation that the term "diplomatic" appeared three times in the title of the topic under consideration was of particular importance. As they stood, the draft articles seemed to refer to couriers and bags of a different type from those contemplated in the four codification conventions. He therefore understood why Sir Ian Sinclair (1906th meeting) had suggested amending article 36 to keep to the régime provided for the consular bag in the 1963 Vienna Convention. That proposal could solve the problem, at least provisionally, since everything depended on the final orientation which the Commission would give to articles 42 and 43.

16. Draft article 41 appeared to be entirely new, not only because there were no similar provisions in the four codification conventions, but also because, in dealing with the transit State, each of them expressly reserved the case in which a visa was required. But article 41 clearly did not concern visas, since it dealt with an anomalous situation in relations between States. It was possible that a State or a Government that was not recognized could send its diplomatic courier or bag across certain States merely as a provocation. It was also necessary to distinguish between a State or a Government that was not recognized and a State with which diplomatic relations had been broken off. In his oral introduction (1903rd meeting), the Special Rapporteur had explained that the wording of article 41 covered couriers and bags sent to or coming from international organizations. There was, indeed, a gap on that point in the 1975 Vienna Convention on the Representation of States, but not in the headquarters agreements, although they dealt with the receiving State and not with the transit State. He was not sure whether draft article 41 laid down a rule in favour of third States, or whether it would only apply if the unrecognized State or Government was already a party to the future convention. In short, the article did not seem to be necessary.

17. In regard to draft articles 42 and 43, it seemed too late to ask whether the draft was carrying out consolidation, systematization or renovation. It was important, however, not to depart from two imperatives: respect for treaties in force and the possibility of establishing an independent régime. If those two requirements were met, the "*à la carte*" commitments provided for in article 43 could be envisaged. As to respect for treaties in force, he thought that article 42 should specify the relevant treaties and their links with the draft articles. Article 3, on the use of terms, might give the impression of being valid for the four codification conventions, an impression which should be corrected in article 42.

18. Finally, with regard to the system of legal relations provided for in draft article 43, he emphasized that it should not be possible to opt for only one category of courier or bag; that was not clear from paragraph 1. Paragraph 2 created a state of legal uncertainty. It was true that article 298 of the 1982 United Nations Convention on the Law of the Sea[5] established a "revolving door" régime which allowed States to enter the system of settlement of disputes provided by that instrument and then to leave it; but that was not a matter of substantive rules, whereas draft article 43 did apply to substantive rules and not to dispute-settlement machinery.

19. Mr. REUTER commended the Special Rapporteur for the patience and open-mindedness he had shown as the difficulties of an apparently easy subject had come to light. Before taking up three important questions, he wished to make two preliminary remarks. First, he approved of the new draft article 37 which replaced the former draft articles 37 and 38. Secondly, he hoped that the Special Rapporteur would consider combining draft articles 39 and 40, or in any case harmonizing them in regard to their substance and titles. For article 40 dealt with *force majeure* and fortuitous event, while article 39 dealt with prevention by circumstances which seemed also to constitute *force majeure*. The significance of those concepts in international law should be made clear, at least in the commentary to the articles, since it must not depend on internal law.

20. Turning to questions of substance, he referred first to the diplomatic bag, making a comparison with the matter covered by article 110 of the 1982 United Nations Convention on the Law of the Sea, namely verification of the flag. Under the law of the sea, a ship was protected by a sign—the flag—which determined the jurisdiction of States. But appearances could be deceptive and, in well-defined cases, if there were serious suspicions, a warship could check whether a vessel was really entitled to fly a certain flag; in case of error, compensation had to be paid for loss or damage. The diplomatic bag was in a similar situation, since it, too, was protected by a sign, namely the certificate by which the sending State guaranteed that it was a diplomatic bag. If another State had serious reason to believe that the bag contained prohibited articles, the situation was more serious than under the law of the sea, since a certificate given by a State was involved, not a mere presumption. There was thus a dispute between two States and the legal situation would differ according to whether or not the solution provided in the 1963 Vienna Convention on Consular Relations was adopted. When such a situation of conflict arose, the means of verifying the contents of the bag were really very limited.

21. It seemed hardly conceivable that a treaty provision would be sufficient to prevent the carrying of prohibited articles in the bag. In that regard, the view expressed by small countries was particularly significant: those countries were even less inclined than others to accept the danger of asserting that a great Power did not respect international law. Yet, certain particularly heavy bags, or bags consisting of a convoy of heavy vehicles, were bound to cause some astonishment and raise questions. But such cases appeared less frequently in law reports than in the press.

22. In his opinion, it did not make such difference in practice, whether the 1961 Vienna Convention on

[5] See 1904th meeting, footnote 7.

Diplomatic Relations or the 1963 Vienna Convention on Consular Relations was applied. A State which caused a diplomatic bag to be opened, whether that bag was governed by the provisions of one or the other Convention, might be obliged to pay compensation to the sending State. Perhaps the Special Rapporteur had not gone far enough in his attempted reconciliation and Sir Ian Sinclair's proposal (1906th meeting, para. 7) might be preferable. After all, it might be wiser for the Commission to confine itself to a text providing that the bag should not be opened or detained. As Mr. El Rasheed Mohamed Ahmed had suggested (1907th meeting), it might then be explained in the commentary that the provision was without prejudice to the positions adopted. In his own view, the 1961 Vienna Convention did not exclude what was provided in the 1963 Vienna Convention.

23. While he agreed that examination of the bag by means of electronic or mechanical devices should be ruled out, as most members of the Commission maintained, the fact remained that the luggage of all airline users could be subjected to such examination. It was quite normal that a diplomatic bag which a diplomatic courier carried with him in an aeroplane should be subject to ordinary law: the safety of the other passengers depended on it. It should also be noted that, under the terms of draft article 36, paragraph 1, the diplomatic bag was inviolable "in the territory of the receiving State or the transit State", which seemed to exclude its location elsewhere. But following an air disaster or shipwreck, the bag might be on the high seas in a place beyond the jurisdiction of any State.

24. The second question of substance was that of immunity from jurisdiction, which, as regulated by the codification conventions, called to mind the protective veil of Salambo. It was in fact the bag which, by its inviolability, protected the courier, not vice versa. In each of the conventions, the inviolability of the bag was treated as an immunity which gave protection against all measures of execution, legal or physical. It was held by some that that immunity did not extend to jurisdiction, whereas others proposed that immunity from jurisdiction should be limited to functional necessity. Personally, he was opposed to immunity from criminal jurisdiction, whatever its extent. Indeed, he believed that the diplomatic courier should perform his task quickly, in the official interests of the diplomatic bag and the receiving State. Moreover, that was the solution which had been adopted when each of the four codification conventions had been drawn up. Consequently, he thought it would not be wise to retain paragraph 1 of draft article 23. On the other hand, he believed that, as provided in paragraph 4, the diplomatic courier should not be obliged to give evidence as a witness, since that might delay the performance of his task.

25. Thirdly, it might not be too late to try to solve the problems which some members had wanted the Commission to solve earlier. As to whether the draft articles under preparation were to become a treaty, the Commission had always considered that it was not called upon to pronounce on that question, but that it should proceed on the assumption that a draft would become a treaty. As to whether the future treaty would amend the four codification conventions, it should be pointed out that those instruments did not contain any special provisions concerning their amendment, and that they were therefore subject to the rules of the 1969 Vienna Convention on the Law of Treaties. If the Commission's draft was to be an independent convention, it must not be forgotten that the codification conventions contained provisions which considerably limited the freedom of the contracting parties. For instance, under the terms of article 47, paragraph 2 (*b*), of the 1961 Vienna Convention, discrimination was not regarded as taking place where, by custom or agreement, States extended to each other more favourable treatment than was required by the provisions of that Convention. But if the text proposed by Sir Ian Sinclair (1906th meeting, para. 7), were adopted, would it be compatible with that provision, in so far as the treatment of the diplomatic bag would be not more favourable, but more severe? Under the terms of article 73, paragraph 2, of the 1963 Vienna Convention, nothing in that instrument precluded States from concluding international agreements "confirming or supplementing or extending" its provisions. Lastly, under article 49, paragraph 2 (*b*), of the 1969 Convention on Special Missions, States could modify among themselves the extent of facilities, privileges and immunities provided for in that instrument, provided that such modification was not incompatible with the object and purpose of the Convention and "does not affect the enjoyment of the rights or the performance of the obligations of third States". Such provisions raised a whole series of difficult problems. That being so, if the Commission decided to retain the various provisions of the codification conventions, it would be inviting complications. He would therefore prefer it, as far as possible, to adopt simple texts and give the necessary explanations in the commentary.

26. Mr. YANKOV (Special Rapporteur), referring to draft article 36, said he had suggested (1903rd meeting, para. 9) that the words "in the territory of the receiving State or the transit State" in paragraph 1 should be deleted because they were too restrictive and would not cover, for instance, the inviolability of the bag when carried in a ship on the high seas or in an aircraft.

27. Mr. McCAFFREY said that he had objected (1906th meeting) to the use of the word "inviolable" in draft article 36 on the ground that it was not used in any of the four codification conventions in reference to the bag. A number of speakers had pointed out, however, that the word "inviolable" was in fact used in that context in certain articles of those conventions, and that article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations—the wording of which was reproduced in the corresponding provisions of the other codification conventions—did indeed provide that diplomatic couriers who had been granted a passport visa, if such visa was necessary, and diplomatic bags in transit would be accorded "the same inviolability and protection" as the receiving State was bound to accord. It seemed to him, on a plain reading of the wording of that provision, that the term "inviolability" applied to the first item—diplomatic couriers—and the term "protection" to the second item—diplomatic bags. According to his interpretation, the wording of draft

article 36 added nothing new to that of the 1961 provision, and the two were entirely compatible.

28. Draft article 41 appeared, on the face of it, to imply a routine right of transit for the courier, who would be enveloped in the protective veil in which the draft articles clothed him. Such a proposition, which seemed to have no basis in law or practice, would be unacceptable to many States, including his own. The article required close scrutiny and he would welcome the Special Rapporteur's clarification of its purpose. He doubted whether article 41 as a whole was necessary; if it was to be retained, it should perhaps be confined to communications between States and their missions to international organizations, as implied in the Special Rapporteur's sixth report (A/CN.4/390, para. 55).

29. He shared the doubts about draft article 42 expressed by a number of speakers and fully agreed on the need to be clear as to the function of the draft articles. As he saw it, the fundamental problem in regard to both draft article 42 and draft article 43 arose from the uniform approach in article 3, which defined the diplomatic courier and the diplomatic bag by reference to the four codification conventions. The treatment of couriers and bags under those conventions varied, however, and questions would inevitably arise as to the relationship between the draft articles and the conventions. He would therefore like to know, first, what was the true function of the draft, and secondly whether, in the light of that function, an article such as article 42 could really stand. He would be grateful if the Special Rapporteur could clarify those two points.

30. So far as paragraph 1 of article 42 was concerned, it was possible that a provision along the lines of that contained in the original text of the article was the most that would be acceptable, although even that provision was somewhat vague. The word "complement" presumably meant that the articles did not derogate from the relevant provisions of the four codification conventions; but did it also mean that, if the draft articles provided for additional protections, those protections would stand, even though they were not provided for in the codification conventions? The question that arose in regard to paragraph 1 of article 42, therefore, was whether the draft articles were indeed "without prejudice to the relevant provisions in other conventions". As to paragraph 2 of the article, he agreed that a reference should be included to enable States to modify, as well as confirm, supplement, extend or amplify, the provisions of the articles.

31. If the uniform approach were retained, some provision on the lines of draft article 43 would clearly be essential, to allow States to distinguish between the four codification conventions as to the manner in which the draft articles would ultimately apply. But if that approach were abandoned in favour of distinctions between different types of couriers and bags, the need for article 43 would obviously disappear.

32. He agreed that article 43, paragraph 1, seemed to be prejudicial, rather than without prejudice, to the obligations arising under the draft articles; the Drafting Committee should examine that point. He further agreed that the phrase "or at any time thereafter", or some similar wording, should be added to paragraph 1 to enable States to designate couriers and bags not only when they signed, ratified or acceded to the articles, but at any time. That would bring the wording of article 43 into line with article 298 of the 1982 United Nations Convention on the Law of the Sea,[6] on which it was modelled.

33. He did not agree with those members who believed that article 43 was inconsistent with Sir Ian Sinclair's proposal (1906th meeting, para. 7) to provide States with an option under article 36 to apply the consular régime to the diplomatic bag. In his view, if a State made a declaration under article 43 that it would apply the provisions of the draft articles to diplomatic couriers and bags only, that declaration would presumably exclude any option the State might have exercised under article 36, including the option to apply the consular régime to diplomatic bags.

34. Lastly, he expressed the hope that it would be possible to complete at least the first reading of the draft articles before the expiry of the Commission's current mandate.

35. Mr. RAZAFINDRALAMBO said that the opinions expressed at the current session were not such as to persuade him to change his position on the draft articles under consideration. At the previous session, draft article 23 had been exhaustively discussed both in the Commission and in the Drafting Committee, which had been unable to reach a final decision on paragraphs 1 and 4. As to paragraph 1, the word "jurisdiction" should be understood to cover both trial courts and examining magistrates, since the preliminary examination of criminal cases could be carried out by a court or by a magistrate. That brought out the link between immunity from criminal jurisdiction and exemption from the obligation to give evidence in a criminal case. In the absence of the provisions proposed by the Special Rapporteur, a courier could be called upon to give evidence either before an examining magistrate or before a court. But under certain legal systems, the fact that evidence was given before an examining magistrate without a lawyer being present might present a real danger and lead to an immediate charge against the witness; consequently, the usual obligation of the courier to give evidence would have the effect of allowing the competent authorities to bring charges against him without his enjoying the normal safeguards associated with the rights of defence. He believed that some conventions on diplomatic law established a parallel between the provisions relating to immunity from criminal jurisdiction and those exempting the courier from the obligation to give evidence. The application of the principle of immunity from criminal jurisdiction logically implied exemption of the courier from the obligation to give evidence before a criminal court. But should the courier really enjoy immunity from criminal jurisdiction?

36. Some members believed that the personal inviolability of the courier provided for in article 16 accorded sufficient protection and made immunity

[6] *Ibid.*

from criminal jurisdiction unnecessary or even inappropriate. It had rightly been answered that, in some diplomatic conventions, the principle of inviolability coexisted with that of immunity from criminal jurisdiction. The mere obligation to appear before a criminal court was, indeed, a disguised form of arrest, for the courier could be sent an enforceable summons and, if he refused to appear, could be charged with contempt of court. Hence immunity from criminal jurisdiction was the corollary of inviolability. But the real problem was whether the courier should enjoy the same status as diplomatic agents, the technical and administrative staff of a mission and certain international officials. Weighty arguments had been advanced on both sides and, all things considered, the options were more political than legal. The choice depended on whether the emphasis was placed on the absolute freedom of communication of the sending State with its missions, or on the legitimate interests of the transit State and the receiving State.

37. In his opinion, none of the interests involved would suffer from a solution limiting the application of the principle of immunity from criminal jurisdiction to acts performed by the courier in the exercise of his functions. Even if the distinction between acts really performed by the courier in the exercise of his functions and acts performed while he was exercising his functions was not easy to make, it was commonly made in internal law and could be dealt with in the commentary. In order to grant the courier functional immunity, the obligation to give evidence could be limited to acts not performed in the exercise of his functions.

38. Referring next to draft article 36, he observed that no one contested the inviolability of official correspondence, and that it was the correspondence that was inviolable, not the diplomatic bag itself. The conventions on diplomatic and consular relations stipulated only that the bag must not be opened or detained; but it was obvious that to say that the correspondence was inviolable was equivalent to recognizing the inviolability of the bag itself. Since the Commission's mandate was to codify international law, it should draft a text capable of attracting a wide consensus; it therefore seemed advisable to keep to the terms used in the codification conventions and provide that the bag must not be opened or detained and that the correspondence was inviolable.

39. The proposal for article 36 made by Sir Ian Sinclair (1906th meeting, para. 7) deserved particular attention. Unfortunately, it did not mention the principle of exemption of the bag from any kind of examination. But if it was accepted that the bag must not be opened, that implied that it was exempt from examination. In internal law, the inviolability of private correspondence meant that it could not be opened. The prohibition of any kind of examination was all the more necessary because modern techniques, if they did not already do so, would make it possible in the foreseeable future to ascertain the exact contents of the packages, including official correspondence, contained in a diplomatic bag. Exemption from any kind of examination should not be understood to include the routine inspections carried out by airlines; but he did not think it necessary to make express provision for that exception. As to the return of the bag, provided for in paragraph 2 of draft article 36, that might lead to reprisals if the sending State considered that it had acted within its rights and fulfilled its legal obligations, and thus set off a process that would be dangerous to international relations. Sir Ian Sinclair's proposal, in providing for exemption of the bag from any kind of examination, could satisfy the main demands of all the interested parties.

40. Draft article 37, which laid down the rule of exemption from customs inspection, proceeded from the principle of exemption from any kind of examination expressly stated in draft article 36. He approved of draft article 39 in principle, but thought that the Drafting Committee should find a more general formulation to replace the phrase "in the event of termination of the functions of the diplomatic courier". Draft articles 40, 41 and 42 raised no problems of substance, only drafting points; but he would prefer the original text of draft article 42, which was clearer.

41. Draft article 43, paragraph 1, raised difficulties of application and Sir Ian Sinclair's proposal for article 36 provided a more practical and flexible solution. Perhaps the Special Rapporteur could further clarify the real meaning and scope of article 43.

42. Mr. AL-QAYSI said he noted that Mr. McCaffrey interpreted the word "inviolability" in article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations as referring to the courier and the word "protection" as referring to the bag. In the absence of some phrase such as "as the case may be" or some word such as "respectively", however, his own remarks (1906th meeting) on the inviolability of the bag still stood.

43. He had not said that draft article 43 was inconsistent with Sir Ian Sinclair's proposal (*ibid.*, para. 7) for article 36, but had wished rather to raise the following question. If State A, a party to the 1961 Vienna Convention on Diplomatic Relations but not to the 1963 Vienna Convention on Consular Relations, wished to ensure that the latter Convention would not apply and made a declaration under article 43 of the draft under consideration, it would presumably consider the diplomatic bag as being subject to the régime under article 36; but if State B, being a party to both conventions and wishing to apply the régime of the 1963 Vienna Convention to the diplomatic bag, made a declaration under article 36 as proposed by Sir Ian Sinclair, what interrelationship between the two States was to be inferred?

The meeting rose at 6.10 p.m.

1910th MEETING

Tuesday, 25 June 1985, at 11 a.m.

Chairman: Mr Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, 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. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Appointment of two new special rapporteurs

1. The CHAIRMAN said that, as a result of the election of Mr. Evensen to the International Court of Justice and the untimely death of Mr. Quentin-Baxter, two vacancies had arisen for the posts of special rapporteur for the topics of the law of the non-navigational uses of international watercourses and international liability for injurious consequences arising out of acts not prohibited by international law. Accordingly, at a meeting held that morning, the Enlarged Bureau had decided to recommend that Mr. McCaffrey should be appointed Special Rapporteur for the first topic and Mr. Barboza for the second.

The recommendation was adopted by acclamation.

2. The CHAIRMAN said that the Enlarged Bureau had further recommended that each new Special Rapporteur should be requested to prepare a paper making an objective appraisal of the status of his topic to date and indicating lines of further action. Those papers could then be considered by the Commission between 17 and 19 July 1985.

It was so agreed.

3. The CHAIRMAN said that he would convey the Commission's decision to Mr. Barboza, who was not present at the meeting.

4. Mr. McCAFFREY said that he was deeply honoured to have such great trust placed in him. He assured members that he would do his utmost to further the work of the Commission on the topic that had been entrusted to him.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

5. Mr. SUCHARITKUL said that he supported Mr. Ushakov's suggestion (1908th meeting) that the draft articles should perhaps include a provision on non-discrimination along the lines of article 47 of the 1961 Vienna Convention on Diplomatic Relations. In draft article 36, his objection was not to the use of the term "inviolability", but to the words "at all times", for the simple reason that there were occasions on which the bag was empty or contained only other empty bags. "Inviolability", as had already been noted, appeared in the context of the expression "inviolability and protection" in both the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. It was, however, a generic term and so did not suffice to convey precisely what was involved. The degree of inviolability therefore had to be quantified and the Special Rapporteur had done so in article 36 by providing that the bag should not be opened or detained. Inviolability was distinguishable from immunity because inviolability took two forms. On the one hand, it involved, as did immunity, a negative obligation on the part of the receiving State or transit State not to arrest or detain the courier and not to open or detain the bag. On the other hand, there was a positive obligation of protection, which immunity did not involve, but which was reflected in the provision for the protection of the diplomatic courier by the receiving State made in article 27 of the 1961 Vienna Convention. The basic issue was again one of the extent of the protection to be accorded to the bag and that would vary according to the needs of the mission concerned. The test of reasonableness was also relevant. The obligation of the receiving State was not an obligation of result—in the sense of an obligation to prevent the occurrence of a certain event—but only an obligation to provide protection by taking appropriate measures, and a State could discharge that obligation by exercising due care in the circumstances.

6. Lastly, he would mention for the Special Rapporteur's information that article 1 of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

Diplomatic Agents,[5] contained a definition of internationally protected persons which, while it did not extend to the diplomatic courier, did cover, *inter alia*, representatives or officials of a State or officials or other agents of an international organization of an intergovernmental character.

7. Mr. YANKOV (Special Rapporteur) said that Mr. Sucharitkul's first remark was perhaps covered by article 6 on non-discrimination and reciprocity, which had been provisionally adopted by the Commission and was modelled on the relevant provisions of the codification conventions. The Commission might wish to consider whether that article was sufficient to cover the point.

8. With regard to the words "at all times" in draft article 36, paragraph 1, he pointed out that article 24 of the 1961 Vienna Convention on Diplomatic Relations provided that "the archives and documents of the mission shall be inviolable at any time and wherever they may be", and that almost identical provisions were contained in the 1963 Vienna Convention on Consular Relations (article 33), the 1969 Convention on Special Missions (article 26) and the 1975 Vienna Convention on the Representation of States (article 25). If, for instance, a diplomatic mission or consular post was requested by its Government to return archives that had accumulated at the mission or post over the years, those archives would be archives and documents of the mission within the meaning of the provisions to which he had just referred and, accordingly, should be protected at all times, even on the high seas or in an aircraft. The issue at stake was not the philosophical notion of time but, rather, the common-sense interpretation of the words "at all times" or the words "at any time and wherever they may be". He did, however, fully agree with Mr. Sucharitkul's comments concerning the obligation to provide protection. If article 36 was not altogether satisfactory, it was perhaps more a question of language than of concept.

9. Mr. USHAKOV, noting that the discussion which had just taken place had been prompted partly by a suggestion he had made, admitted that, in making his suggestion (1908th meeting), he had forgotten that the Commission had provisionally adopted article 6, entitled "Non-discrimination and reciprocity".

10. The CHAIRMAN, speaking as a member of the Commission, said that, by a combination of scholarship and flexibility, the Special Rapporteur had pointed the way towards the solution of most of the problems that arose with regard to draft articles 23 and 36 to 43, the only ones which remained outstanding now that the Drafting Committee had completed its work on draft articles 28 to 35.

11. Many difficulties with the present topic stemmed from the fact that, if the draft now being prepared became a convention, it would be the fifth convention on the same subject. It would, of course, be restricted to a particular matter, namely freedom of official communications between States and their missions and protection of the means and instruments for facilitating such freedom of communications. Since the four existing conventions contained varying provisions on that matter, the two main questions that had to be decided were whether the proposed fifth convention could remove or harmonize those variations and what legal effect that convention would have on the four existing ones.

12. The Commission had taken a decision on the first of those questions when it had provisionally adopted the definitions of the terms "diplomatic courier" and "diplomatic bag" contained in article 3, paragraph 1 (1) and (2). For the purposes of the proposed fifth convention, the terms "diplomatic courier" and "diplomatic bag" would thus refer to all couriers and all bags within the meaning of the four existing conventions.

13. That approach provided a solution to the problem of definitions, but not to the problem of harmonization, with which the Special Rapporteur had dealt by drafting uniform provisions and suggesting ways and means by which those provisions could be accepted, with certain qualifications or restrictions that could, for example, be specified in the declaration of optional exceptions provided for in draft article 43. That method would thus solve the problem of a possible conflict between the provisions of the proposed fifth convention and the régimes established in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. It would, of course, lead to a plurality of régimes, but it had to be recognized that such plurality already existed.

14. Turning to the individual articles under consideration, he noted that draft article 23 still gave rise to controversy. Its deletion had been suggested on the grounds that it was a new provision which did not exist in any of the four codification conventions. It had also been pointed out that article 16 as provisionally adopted already dealt with the personal inviolability of the diplomatic courier. Under that article, the courier could not be arrested or detained; it had been argued that he could therefore not be tried. Since a courier's stay in a receiving State was very short, it had also been argued that he did not need immunity from criminal jurisdiction.

15. Those in favour of retaining article 23 had pointed out that the provision of article 16 on freedom from arrest or detention was not sufficient. It would not prevent a diplomatic courier from being prosecuted *in absentia*, declared a fugitive criminal or even having extradition proceedings instituted against him. Article 23 thus flowed logically from article 16 and it was therefore essential to grant the courier immunity from criminal jurisdiction, at least for acts performed in the exercise of his official functions. Different views had been expressed with regard to the extent of the immunity to be accorded to the courier. The Special Rapporteur had equated the status of the courier with that of the administrative and technical staff of a diplomatic mission, who enjoyed absolute immunity under article 31 and article 37, paragraph 2, of the 1961 Vienna Convention.

16. It should, however, be remembered that, under article 3 as provisionally adopted by the Commission, the term "diplomatic courier" covered couriers within the meaning of all four codification conventions, not only couriers within the meaning of the

[5] United Nations, *Treaty Series*, vol. 1035, p. 167.

1961 Vienna Convention. Consequently, a consular courier might be accorded absolute immunity not enjoyed by any consular official, even the head of a consular post. He therefore supported the idea of granting only functional immunity to the courier. That result could be achieved by adding the following words at the end of paragraph 1 of draft article 23: "in respect of acts performed by him in the exercise of his functions". With that qualification, article 23, paragraph 1, could be justified as a logical consequence of article 16 and its wording would obviously then be politically more acceptable than it was now.

17. The other controversial provision in article 23 was its paragraph 4, the revised text of which proposed by the Special Rapporteur he found acceptable. He nevertheless suggested that the Drafting Committee should consider replacing the words "in cases", in the first sentence, by the words "in respect of acts or facts". Paragraphs 2, 3 and 5 of article 23 were acceptable subject to minor drafting changes.

18. Draft articles 36 and 43 were the heart of the matter with regard to the second main question which the Commission had to decide, namely what legal effect the proposed fifth convention would have on the four existing ones. In that connection, draft article 36 gave rise to three problems. Should the term "inviolable" be used to refer to the diplomatic bag or would it be better to use the wording of article 27 of the 1961 Vienna Convention? Should it be provided that the bag could be inspected or scanned? Lastly, was it possible for the bag to be returned to its place of origin in the event of suspicion as to its contents and, if so, on what terms?

19. The declaration of optional exceptions provided for in draft article 43 might be of some assistance in finding a solution to those problems. A State could thus make a declaration to the effect that it would apply to all bags the provision contained in article 35, paragraph 3, of the 1963 Vienna Convention. In the event of suspicion, the receiving State could then request that the bag be opened in the presence of an authorized representative of the sending State and, if the request were refused, the bag would be returned to its place of origin. Another possible solution to those problems might be to adopt the reformulation of article 36 proposed by Sir Ian Sinclair (1906th meeting, para. 7). Paragraph 1 of that new text stated: "The diplomatic bag shall not be opened or detained"; it thus reproduced the wording of article 27, paragraph 3, of the 1961 Vienna Convention. Paragraph 2 referred to the case of a consular bag within the meaning of article 35 of the 1963 Vienna Convention. Paragraph 3 provided that, notwithstanding paragraph 1, a State which became a party to the articles might "make a written declaration that it will apply to the diplomatic bag the rule applicable to the consular bag by virtue of paragraph 2 of this article". That new text thus established a restrictive régime based on the 1963 Vienna Convention.

20. There were three possible options that the Commission could choose with regard to draft articles 36 and 43. One would be to retain article 36 with paragraph 1 reworded simply as paragraph 3 of article 27 of the 1961 Vienna Convention, which stated: "The diplomatic bag shall not be opened or detained." The possibility of restrictive application and the manner of such application would then be covered in article 43, to which the substance of Sir Ian Sinclair's proposal would be transferred.

21. The second option would be to retain article 36 as proposed by the Special Rapporteur and to allow for restrictive application by including in article 43 a provision based on paragraphs 2 and 3 of Sir Ian's proposal. That approach would create a plurality of régimes, but article 36 itself would provide for a uniform régime. If a State made no declaration under article 43, article 36 would then apply.

22. The third option would be to provide in article 36 for the possibility of a declaration of optional exceptions concerning the diplomatic bag, as in paragraphs 2 and 3 of Sir Ian's proposal. Article 43 would then refer only to a declaration concerning the diplomatic courier. If article 23 were retained, a State could make a declaration under article 43 stating that it would apply the articles to the diplomatic courier only. If article 23 were deleted, there would be no need for article 43.

23. His own preference would be for the Commission to choose between the first and second options. If article 36 was to be retained as it now stood, however, paragraph 1 should be amended to read: "The diplomatic bag, by virtue of its contents, shall be inviolable ...". The end of paragraph 2 should also be amended to read: "... the bag shall, at their request, be returned to its place of origin".

24. Subject to amendments of form by the Drafting Committee, he agreed generally with draft articles 37, 39 and 40. He also agreed with the substance of draft article 41, which was a matter of usual practice, but its wording went too far and was tilted against the receiving State and the transit State. The obligations of those States should, in his view, be left to State practice and to negotiations, if need be through the protecting State. The substance of article 41 might therefore be included in article 40, since a provision concerning the non-recognition of States or Governments or the absence of diplomatic or consular relations could be useful in dealing with the problems arising with regard to the obligations of an unforeseen transit State in case of *force majeure* or fortuitous event.

25. The main question that arose in connection with draft article 42 was that of the relationship between the draft articles and the four codification conventions. That question should be clarified both in the text of the draft articles and in the commentary and it had to be explained whether the proposed fifth convention would prevail over the earlier ones or not. Lastly, he said that he preferred the wording of paragraph 3 of article 42 as originally submitted to its new version, namely paragraph 2 of the revised article 42.

26. Sir Ian SINCLAIR said that it was the problem of the relationship between draft article 36 and draft articles 42 and 43 that had led him to propose a new text for article 36. Under article 43 as it now stood, the only available option was to apply the uniform provisions of the draft articles to designated types of couriers and bags.

27. If, for example, paragraph 1 of article 36 provided simply that the diplomatic bag must not be opened or detained and a State then used article 43 to declare that it would apply the articles to the consular bag and the consular courier only, would that State be bound to apply the régime of article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations without any possibility of challenging a suspicious bag, notwithstanding the provision to that effect contained in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations? He had been trying to work out the answer to that kind of question and he did not think that the option in draft article 43 was wide enough to take account of the fact that different régimes applied to the various types of bags, particularly the consular bag and the diplomatic bag.

28. He had proposed a possible solution to that problem in his reformulation of article 36 (1906th meeting, para. 7), but the same result could be achieved by widening the scope of article 43, which, as it now stood, would not cover the kind of case under consideration. He was, of course, assuming that there was a material difference between the régime established in the 1961 Vienna Convention and that provided by the 1963 Vienna Convention. In any event, the question whether it was appropriate to make all the options available in a single article was a matter that would best be left to the Drafting Committee.

29. At the previous meeting, Mr. Ogiso had expressed doubts about the declaration procedure which he (Sir Ian) had advocated in his proposed reformulation of article 36 and had stated that it would give rise to complex treaty relations. He could only say that, since the problem at issue was a complex one, complex provisions would be needed to solve it. Mr. Ogiso had also raised the question of possible objections to a declaration. On that point, he wished to make it clear that the type of declaration which he had in mind was an option that would be contained in the draft articles themselves. Such an option would be accepted in advance by the negotiating States and there could be no question of any objection to it. Under general international law, objections were possible only to a unilateral reservation, not to a declaration accepted in advance by all the negotiating States.

30. The question whether the type of option he had in mind would be compatible with the existing conventions had been raised by Mr. Reuter (1909th meeting). That was a very difficult question, but he recalled that, with regard to article 27, paragraph 3, of the 1961 Vienna Convention, a number of States parties had already made a series of unilateral reservations to which no objection had been taken and which in effect opened up the possibility of applying to the diplomatic bag the régime provided for the consular bag. Thus, within the framework of the 1961 Vienna Convention, there were already different types of régimes that were applicable as between parties to that Convention.

31. Lastly, he said that he preferred the text originally submitted by the Special Rapporteur for article 42, which would be more helpful than the revised text in providing a solution to the problem raised by article 36.

32. The CHAIRMAN, speaking as a member of the Commission, said he did not think that the example referred to by Sir Ian Sinclair would give rise to any inconsistency, because a State making such a declaration would be applying a more liberal régime to the consular bag, not a more restrictive régime. Such a possibility was, moreover, provided for in article 73 of the 1963 Vienna Convention on Consular Relations, which had been taken by the Special Rapporteur as the basis for draft article 42. An agreement to modify the provisions of the latter Convention was thus permissible. If a State encountered any difficulties because it had made that choice, such difficulties could easily be overcome, because draft article 43, paragraph 2, allowed a declaration to be withdrawn.

The meeting rose at 1.05 p.m.

1911th MEETING

Wednesday, 26 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Al-Qaysi, 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. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Ushakov, Mr. Yankov.

Fortieth anniversary of the United Nations

1. The CHAIRMAN recalled that the Charter of the United Nations had been opened for signature 40 years previously, on 26 June 1945. The fortieth anniversary of the United Nations would be celebrated in 1985 by the General Assembly and by the Sixth Committee; and, since the Commission had been created by the United Nations, it was appropriate for it to join in that celebration. The Commission's task was to promote the progressive development and codification of international law and it had always performed that task in the conviction that the world community should be governed by international law, however inadequate it might be.

Visit by a member of the International Court of Justice

2. The CHAIRMAN welcomed Mr. Ago, a Judge of the International Court of Justice and a former member of the Commission. It was under the guidance of Mr. Ago, as Special Rapporteur, that part 1 of the draft articles on State responsibility had been adopted on first reading.

3. Mr. AGO said that he appreciated the kind words of welcome by the Chairman, under whose able guidance the Commission could not fail to make substantial progress on the topics it was considering, particularly that of State responsibility. He believed that frequent contacts between the Commission and the ICJ were useful and even necessary, since the Court's task of ruling on particular cases and settling disputes between States on points of law was the counterpart of the Commission's task of defining general rules, and the two tasks were essential for the international community.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

4. Mr. PIRZADA commended the Special Rapporteur on his sixth report (A/CN.4/390), in which he had demonstrated flexibility and a willingness to take account of all points of view.

5. Article 16, which provided that the diplomatic courier enjoyed personal inviolability and was not liable to any form of arrest or detention, would not be enough to prevent the courier from being tried, even *in absentia*, although that might be contrary to the principles of natural justice and equity. He was therefore of the opinion that draft article 23, paragraph 1, which gave the courier immunity from criminal jurisdiction, should be retained, provided that it related only to acts performed by the courier in the exercise of his functions.

6. No serious exception had been taken to paragraphs 2 and 3 of article 23. Paragraph 4 consisted of two sentences, the first of which exempted the courier from giving evidence as a witness "in cases involving the exercise of his functions". That provision would be acceptable if the use of the word "cases" were avoided. In line with article 44, paragraph 3, of the 1963 Vienna Convention on Consular Relations, it should therefore be amended to specify that the diplomatic courier was "under no obligation to give evidence concerning matters connected with the exercise of his functions". It would, however, be difficult for him to agree to the second sentence, which stated that the courier might be "required" to give evidence. The word "required" was too strong and might enable a court to apply coercive measures, or even impose penalties, in the event of failure to give evidence, thereby contravening the provisions of article 16. He therefore suggested that the word "required" should be replaced by "requested". He further suggested that provision should be made for the acceptance of a statement in writing, an affidavit, or of some other means of giving evidence, in lieu of oral evidence.

7. Draft article 36, paragraph 1, provided that the diplomatic bag "shall be inviolable at all times and wherever it may be" and that "it shall not be opened or detained". The use of the word "inviolable" had been criticized on the grounds that it had not been used in article 27, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations or in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations and it had been suggested that it should be replaced by the word "protected", which was more appropriate for the bag. In that connection, he agreed with Mr. Sucharitkul (1910th meeting) that "inviolability" was a generic term which had to be qualified.

8. Although article 27, paragraph 3, of the 1961 Vienna Convention simply stated that the diplomatic bag "shall not be opened or detained", article 24 provided that the archives and documents of the mission "shall be inviolable at any time and wherever they may be" and article 30 specified that the papers and correspondence of a diplomatic agent enjoyed inviolability. Article 1, paragraph 1 (*k*), of the 1963 Vienna Convention stated that "consular archives" included all the papers, documents and correspondence of a consular post and article 33 provided that "the consular archives and documents shall be inviolable at all times and wherever they may be". The 1975 Vienna Convention on the Representation of States contained almost identical provisions.

9. In view of the definition of the diplomatic bag contained in article 3 as provisionally adopted, draft article 36, paragraph 1, was entirely in keeping with article 33 of the 1963 Vienna Convention and it rightly stated that the diplomatic bag was inviolable

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

at all times and wherever it might be. The definition contained in article 3 would also make it unnecessary to insert the words "by virtue of its contents" after the words "diplomatic bag", as suggested by Mr. Jagota at the previous meeting.

10. The most important issue with regard to draft article 36 was, however, that of suspect bags. It was dealt with in paragraph 2 and in the proposal made by Sir Ian Sinclair (1906th meeting, para. 7). Experience had shown that abuses of the diplomatic bag were becoming increasingly frequent. There had been instances of bags containing contraband articles, currencies or gold, narcotic drugs, weapons, explosives and even human beings. Consideration might therefore be given to the possibility of providing for the inspection of the bag and for its return to its place of origin in the event that a request for inspection was refused by the authorities of the sending State.

11. He accepted the principle of the inviolability of the diplomatic bag, but was also in general agreement with paragraphs 2, 3 and 4 of Sir Ian Sinclair's proposal. If that proposal were adopted, draft article 43 would no longer need to be a separate provision.

12. During the discussion, it had been said that the draft articles were to be without prejudice to the relevant provisions in other conventions and it had been asked whether the declaration of optional exceptions should cover all or only some articles. The question of a plurality of régimes had also been raised. In his view, those points could all be dealt with in paragraphs 2, 3 and 4 of Sir Ian Sinclair's proposal, whose wording could be amended accordingly.

13. While he agreed with draft article 40, he was inclined to share the concern expressed by some members with regard to the cases of non-recognition of States or Governments referred to in draft article 41.

14. The CHAIRMAN said that the Commission had completed its consideration of draft articles 23 and 36 to 43 as submitted by the Special Rapporteur, who would sum up the discussion at a later meeting.

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (A/CN.4/L.384)

ARTICLES 28 TO 32, 34 AND 35

15. The CHAIRMAN invited the Chairman of the Drafting Committee to present articles 28 to 32, 34 and 35,[5] as adopted by the Committee (A/CN.4/L.384).

16. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) noted that the articles adopted by the Drafting Committee each had two numbers: the first was the number originally assigned by the Special Rapporteur and the second, which appeared in square brackets, was the new number that would be used once the article had been included in the set of draft articles provisionally adopted by the Commission.

17. The changes made by the Drafting Committee to the texts of the articles, purely for the purpose of alignment with articles already adopted, included the deletion of the adjective "official" before the word "functions" and the insertion in the appropriate places of the words "or, as the case may be". The Committee had also attempted to bring the different language versions into line with the terminology used in the corresponding provisions of the codification conventions.

ARTICLE 28 [21] (Duration of privileges and immunities)

18. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 28 [21] as proposed by the Drafting Committee, which read:

Article 28 [21]. Duration of privileges and immunities

1. The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions, or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions. Such privileges and immunities shall normally cease at the moment when the diplomatic courier leaves the territory of the receiving State or the transit State. However, the privileges and immunities of the diplomatic courier *ad hoc* shall cease at the moment when the courier has delivered to the consignee the diplomatic bag in his charge.

2. When the functions of the diplomatic courier come to an end in accordance with article 11 (*b*), his privileges and immunities shall cease at the moment when he leaves the territory of the receiving State, or on the expiry of a reasonable period in which to do so.

3. Notwithstanding the foregoing paragraphs, immunity shall continue to subsist with respect to acts performed by the diplomatic courier in the exercise of his functions.

19. The title of article 28 remained unchanged, but the structure of the text was somewhat different.[6] The article now consisted of three paragraphs instead of two.

20. Paragraph 1 now dealt both with the question of when the diplomatic courier's privileges and immunities began and with that of when they normally ceased. On the basis of the four codification conventions, the Drafting Committee had also decided to refer to the moment when those privileges and immunities began for a courier who was already in the territory of the receiving State, namely the moment when he began to exercise his functions. In the commentary, the Special Rapporteur would explain in greater detail the meaning of the words "from the moment he begins to exercise his functions", which might depend on whether the courier was a professional courier or an *ad hoc* courier. The last sentence of paragraph 1 dealt with the special case of the moment when the privileges and immunities of the diplomatic courier *ad hoc* ceased. The Drafting Committee had deemed it appropriate to take account of article 27, paragraph 6, of the 1961 Vienna Convention on Diplomatic Relations, which dealt with that specific point. That new sentence, to

[5] Referred to the Drafting Committee after consideration by the Commission at its thirty-sixth session; see *Yearbook ... 1984*, vol. II (Part Two), p. 20, para. 76.

[6] For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 65 *et seq.*, 1826th to 1829th meetings.

which one member of the Committee had taken exception, had accordingly been added to reflect the existing law on that question.

21. Paragraph 2 concerned the special case covered in article 11 (*b*), namely when the functions of the diplomatic courier came to an end upon notification by the receiving State to the sending State that, in accordance with article 12, it refused to recognize the person concerned as a diplomatic courier. In that case, the courier's privileges and immunities ceased at the moment when he left the territory of the receiving State or on the expiry of a reasonable period in which to do so. The Drafting Committee had not found it necessary to refer in paragraph 2 to the situation covered in article 11 (*a*).

22. Paragraph 3 embodied an idea put forward by the Special Rapporteur in the original text of article 28, but it was now clear that it applied to the situations covered in both paragraph 1 and paragraph 2.

23. He recalled that, when the Commission had provisionally adopted article 12 at the previous session, paragraph 2 of that article had been placed in square brackets pending consideration of article 28.[7] Having reviewed the matter, particularly in the light of the 1961 Vienna Convention, the Drafting Committee now recommended that the square brackets around paragraph 2 of article 12 should be removed. The commentary would explain the interplay between article 12, paragraph 2, article 11 (*b*) and article 28.

24. One member of the Drafting Committee had expressed reservations about the need for article 28, since agreement had not yet been reached on whether article 23 should be included in the draft. In that connection, he stressed that the articles were, of course, all being adopted provisionally at the current stage. If any future decision had an impact on articles already provisionally adopted, those articles would of necessity have to be reviewed and amended accordingly.

25. Mr. USHAKOV, referring to article 28, paragraph 1, said it seemed to him that there was a contradiction between the words "The diplomatic courier shall enjoy privileges and immunities from the moment he enters the territory of the receiving State or, as the case may be, the transit State in order to perform his functions" and the words "or, if he is already in the territory of the receiving State, from the moment he begins to exercise his functions", because it was as a private individual, not as a diplomatic courier, that he might already be in the territory of the receiving State. It would be better to refer to the case where he was already in the territory of the receiving State when he was appointed as a diplomatic courier. Although that question might be settled on second reading, it would be preferable to deal with it immediately.

26. The CHAIRMAN said that Mr. Ushakov's purpose could be achieved by amending the words "if he is already in the territory ..." to read: "if, when appointed, he is already in the territory ...". If that question were explained in the commentary, there would be no need to change the text of article 28, paragraph 1.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Special Rapporteur's original text had dealt only with a diplomatic courier who entered the territory of a receiving State or transit State. The present text also dealt with the case of a person who was appointed as a courier when he was already in the territory of a receiving State. The suggestion made by Mr. Ushakov was a useful one and could best be considered during the second reading of the draft articles.

28. Mr. YANKOV (Special Rapporteur) pointed out that, before the second reading, the Commission would have before it a commentary which would make the matter clear.

29. Mr. USHAKOV said that he would not insist that his suggestion be considered immediately.

30. The CHAIRMAN said that he would take it that the Commission agreed that Mr. Ushakov's suggestion should be considered on second reading.

It was so agreed.

31. Mr. RIPHAGEN said that he did not understand the use of the word "normally" in the second sentence of article 28, paragraph 1. His main problem was with the time element and with the question of how long a courier was considered to be a courier. Paragraph 1 indicated that he ceased to be a courier when he left the territory of the receiving State or the transit State.

32. The provisions of article 28 should be read together with those of article 7, on the documentation of the diplomatic courier. The courier needed such documentation in order to be recognized as a courier. There was also the problem of the status of the diplomatic courier between journeys, particularly after he had delivered the diplomatic bag and proceeded to his next destination.

33. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the word "normally" was used in the second sentence of article 28, paragraph 1, in order to draw a distinction between the usual case, which was covered by that sentence, and the exceptional situation dealt with in paragraph 2.

34. As to the question of the cessation of privileges and immunities, he drew attention to the situation of the diplomatic courier *ad hoc*, whose privileges and immunities ceased at the moment when he had delivered the diplomatic bag. That situation was less satisfactory than that of the professional courier, who enjoyed privileges and immunities until he left the territory of the receiving State or the transit State.

35. Mr. YANKOV (Special Rapporteur) pointed out that the word "normally" had been used in the same context throughout the four codification conventions. With regard to the time factor and to Mr. Riphagen's comment that article 28 had to be read in conjunction with article 7, he said that article 1 (Scope of the present articles) and article 10 (Functions of the diplomatic courier) were also relevant. The scope of the functions of a diplomatic courier was quite broad. A courier who was waiting to receive a diplomatic bag was acting in the exercise of

[7] See paragraph (6) of the commentary to article 12 (*Yearbook ... 1984*, vol. II (Part Two), p. 49).

his functions, which ended only when he had delivered the bag to its final destination.

36. The last sentence of article 28, paragraph 1, relating to the diplomatic courier *ad hoc* was based on the corresponding provisions of the four codification conventions, and in particular those of article 27 of the 1961 Vienna Convention on Diplomatic Relations. The *ad hoc* courier enjoyed less protection than the professional courier. It was of course assumed that, in most cases, the *ad hoc* courier would be a diplomatic agent who already enjoyed diplomatic immunities and had no need for further protection.

37. The lower degree of protection for the *ad hoc* courier was also understandable if it was remembered that a consular courier would enjoy absolute immunity from arrest or detention while carrying out his duties. It would not be appropriate to extend that immunity any further, since the consular courier was normally a consular officer who enjoyed only functional immunity in respect of acts performed in the exercise of his functions. There were a number of precedents from State practice which supported that approach.

38. Mr. USHAKOV said that, under the four codification conventions, the immunity enjoyed by certain persons with respect to acts performed in the exercise of their functions subsisted after their functions had come to an end. Under article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations, for example, an ambassador who returned to the receiving State as a private individual after leaving his post in that State could not be prosecuted for acts performed in the exercise of his functions. That was the rule embodied in paragraph 3 of draft article 28, although that paragraph referred to "the diplomatic courier", not to "a person". It should be explained in the commentary that reference was being made to the diplomatic courier as a private individual.

39. Sir Ian SINCLAIR thanked the Chairman of the Drafting Committee for drawing attention to the reservations that he himself had with regard to article 28. An article on the duration of privileges and immunities had to be included in the draft, since the diplomatic courier had at least one important immunity, namely freedom from arrest and detention. The Commission could, however, not finalize the wording of article 28 on the duration of privileges and immunities until it had reached a decision on article 23, relating to immunity from jurisdiction.

40. Under article 16, a diplomatic courier enjoyed immunity from arrest or detention in respect of all acts performed by him, not only in respect of acts performed in the exercise of his functions. The words "immunity shall continue to subsist" in draft article 28, paragraph 3, might therefore be interpreted to mean that the courier could be arrested, detained or even sued in a civil court in respect of acts performed outside his functions during a previous stay in the receiving State. Much would, of course, depend on the final wording of article 23, if it was retained. He was therefore grateful to the Chairman of the Drafting Committee for his assurance that article 28, and especially its paragraph 3, would be reviewed in the light of the action to be taken with regard to other articles.

41. Mr. SUCHARITKUL said he agreed with Sir Ian Sinclair that article 28, paragraph 3, could not be approved until it had been decided what was meant by "immunity from jurisdiction" under article 23. If article 23, paragraph 1, related only to acts performed by the courier in the exercise of his functions, there would be no immunity *ratione personae*. He recalled that, from the outset, he had advocated that no immunity *ratione personae* should be granted to the courier.

42. Mr. McCAFFREY noted that article 28 tied the duration of privileges and immunities both to the location of the courier in the territory of the receiving State or transit State and to the performance of his functions. The Commission had, however, not yet come to grips with the problem of determining when a courier was actually performing his official functions, which were defined in article 10. Article 11 (*b*) indicated that the functions of the courier came to an end upon notification by the receiving State of its refusal to recognize the person concerned as a diplomatic courier. Article 11 (*a*) specified that the courier's functions came to an end when he was recalled by the sending State. In the context of article 28, it was therefore essential to refer to "a person acting as a diplomatic courier". The commentary should explain what was meant by the words "in the exercise of his functions" so that it would, for example, be clear that a courier waiting to pick up a diplomatic bag was performing his official functions.

43. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the opening clause of article 11 showed that the two special cases referred to in that article were not the only ones in which the courier's functions came to an end. Article 10 also indicated that the functions of the courier ended with the delivery of the diplomatic bag. The purpose of paragraph 3 of article 28 was, however, to make it clear that immunity would nevertheless subsist with respect to acts performed by the courier in the exercise of his functions.

44. Mr. REUTER said that he could not adopt a position with regard to article 28, paragraphs 1 and 2, because he did not really understand them; but since they were based on article 39, paragraphs 1 and 2, of the 1961 Vienna Convention on Diplomatic Relations, he would fall in with the Commission's tradition of following the wording of existing conventions.

45. He was, however, unable to accept paragraph 3 of draft article 28, which was based on the second sentence of paragraph 2 of article 39 of the 1961 Vienna Convention and also referred to "immunity" in the singular. If that singular was not meant to be a plural, it would have to be made clear whether or not reference was being made to "immunity from jurisdiction".

46. Mr. ARANGIO-RUIZ, referring to Mr. Ushakov's comments, said that it was also possible for a courier to commence his functions in the territory of a transit State. That might occur, for instance, when a courier moving from country A to country C stopped in country B and had to be replaced for some reason by the diplomatic mission of country A in country B. In such a case, the functions of the second courier would commence in the transit State. To meet

that point, he would suggest that the words "or the transit State" should be added after the words "if he is already in the territory of the receiving State" in the first sentence of paragraph 1 of article 28.

47. Mr. MAHIOU said that the replies by the Special Rapporteur and the Chairman of the Drafting Committee to the questions raised by several members of the Commission showed that, if the diplomatic courier was granted privileges and immunities, including immunity from jurisdiction, during the period when he exercised his functions, immunity from jurisdiction had to subsist. Paragraph 3 of article 28 was thus the logical consequence of paragraph 1 and did not give rise to any problems of interpretation. The Chairman of the Drafting Committee had, moreover, explained that a distinction had to be drawn between the status of the courier and his functions, on which his privileges and immunities depended and which could come to an end for a variety of reasons.

48. Sir Ian SINCLAIR had raised the more serious problem of the link between article 28, paragraph 3, and article 23. It was obvious that the immunity in question was immunity from jurisdiction, but whether or not it was necessary to say so was not certain. It was also obvious that article 28, paragraph 3, would be required only if the Commission decided to retain article 23.

49. Mr. AL-QAYSI said that Mr. McCaffrey's misgivings with regard to article 28, paragraph 1, could perhaps be met by defining more closely the criterion for determining the point at which the courier started to exercise his functions, possibly by reference to the moment at which he was appointed.

50. He agreed that article 28, paragraph 3, could not be considered in isolation from article 23 and that, as drafted, it gave rise to a problem. If the paragraph were approved and if some form of immunity from jurisdiction were provided for under article 23, the courier could not possibly be made amenable to the jurisdiction of the receiving State, unless of course he returned to that jurisdiction in a private capacity. The solution would therefore be to indicate, possibly in a footnote to article 28 or by placing its paragraph 3 in square brackets, that it would be necessary to revert to the matter when the Commission took its final decision on article 23.

51. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that, in order to expedite matters, a decision on article 28, paragraph 3, should be deferred on the understanding that the paragraph would be reviewed by the Drafting Committee at the current session in conjunction with article 23.

52. Mr. KOROMA said he was prepared to agree to the suggestion that the Drafting Committee should reconsider the matter but, if it were agreed—as seemed to some extent to be the case—that the courier should not be amenable to the jurisdiction of the receiving State or the transit State, it followed that article 28, paragraph 3, would have to be accepted. It was necessary first of all to decide whether the courier should enjoy personal as well as functional immunity and that question should therefore be discussed both in the Drafting Committee and in the Commission itself.

53. Mr. FLITAN said that the fate of article 28, paragraph 3, would not depend on the decision to be taken with regard to article 23, because if the Commission decided not to retain article 23, it would still have article 16. The scope of article 28, paragraph 3, would, however, be broader if article 23 were not deleted. Since the problems raised by article 28, paragraph 3, were of a drafting nature, he agreed with the members of the Drafting Committee who were in favour of basing the wording of that provision on that of article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. The words "by such a person" would thus be better than the words "by the diplomatic courier" because, at the moment in question, the person concerned would no longer be performing his functions as a courier. Perhaps that point might be explained in the commentary. The expression "in the exercise of his functions" in article 28, paragraph 3, also gave rise to problems because the Commission did not yet know whether immunity from jurisdiction would apply only to acts performed by the courier in the exercise of his functions or also to acts which he performed outside his functions. That expression should therefore be replaced by the words "during the period in which he exercises his functions". In conclusion, he suggested that article 28, paragraph 3, should have a minimum content, since the Commission had adopted article 16 on first reading without waiting for a decision to be taken on article 23.

54. Mr. LACLETA MUÑOZ said that, in the first sentence of article 28, paragraph 1, a drafting error had been made in referring to a person who was already in the territory of the receiving State and to whom the functions of a courier were entrusted. The words "if he is already in the territory of the receiving State" in the second part of the sentence thus referred to the diplomatic courier *ad hoc*, not to "the diplomatic courier" mentioned at the beginning of the sentence. He therefore suggested that the words "if he is already in the territory of the receiving State" should be replaced by the words "in the case of the diplomatic courier *ad hoc*" or by the words "in the case of a person already in the territory of the receiving State". What appeared to be a drafting problem also raised the question whether a diplomatic mission could appoint only diplomatic couriers *ad hoc* or whether it could also appoint "professional" couriers.

55. With regard to article 28, paragraph 3, he was of the opinion that the word "immunity" could refer only to immunity from jurisdiction and that that paragraph was therefore closely linked to article 23. It would be absurd to say that the diplomatic courier enjoyed functional immunity only from civil and administrative jurisdiction, and not from criminal jurisdiction. The same problem arose in article 29.

56. Mr. BALANDA said he also thought that article 28, paragraph 3, and article 23 were closely linked and that they should be discussed at the same time. He was not sure whether the Commission would be able to agree on the use of the words "during the period in which he exercises his functions" proposed by Mr. Flitan, which went further

than the words "in the exercise of his functions". The Commission would encounter the same problem in article 29.

57. Mr. DÍAZ GONZÁLEZ said that, before deciding on article 28, paragraph 3, the Commission should first take a decision on article 23. Article 28, paragraphs 1 and 2, had also given rise to a number of objections because of their ambiguity, the fact that they were based on the 1961 Vienna Convention on Diplomatic Relations and the drafting error pointed out by Mr. Lacleta Muñoz. In that connection, he agreed with the view expressed by Mr. Reuter. Since article 29 would raise the same problems, the Commission should not take a decision on article 28 as a whole until it had decided what should be done with article 23.

58. Sir Ian SINCLAIR said that it would be acceptable to him to adopt paragraphs 1 and 2 of article 28 and place paragraph 3 in square brackets, with an indication that its wording would be reviewed in the light of any decision the Commission might reach on article 23. The same problem arose in connection with article 29, paragraphs 3, 4 and 5, and those paragraphs should perhaps also be placed in square brackets. If there was any major difficulty he could agree to a lesser solution whereby it was clearly recorded that the Commission provisionally adopted article 28 on the explicit understanding that the wording of paragraph 3 would be reviewed by the Drafting Committee and by the Commission as a whole in the light of any decision the Commission might reach on article 23. The same reservation could also be made in respect of article 29.

59. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he did not favour the suggestion to place paragraph 3 of article 28 in square brackets, since he considered that the Drafting Committee should discuss article 23 at the current session, if possible; it could discuss paragraph 3 of article 28 at the same time.

60. The CHAIRMAN suggested that, in view of the late hour, members should revert to the matter at the next meeting.

The meeting rose at 1.10 p.m.

1912th MEETING

Thursday, 27 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/L.384, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLES 28 (*continued*) to 30

ARTICLE 28 [21] (Duration of privileges and immunities)[1] (*continued*)

1. The CHAIRMAN said that, following the detailed discussion held at the previous meeting and on the basis of consultations with the Chairman of the Drafting Committee, the Special Rapporteur and Sir Ian Sinclair, he would suggest that article 28 be provisionally adopted, on the understanding that paragraph 3 would be reviewed in the light of the Commission's decision on article 23. The comments made by members would be taken into account in drafting the commentary to the article.

2. Mr. DÍAZ GONZÁLEZ said that he did not see how the Commission could adopt an article when it did not know what the text would be, since paragraph 3 would be amended according to the decision taken on article 23. Moreover, there had been no consensus on article 28 as a whole, and it could not be considered as being approved. The best course would be to await the Commission's decision on article 23 before pronouncing on article 28 as a whole.

3. The CHAIRMAN said that it was, of course, possible to leave article 28 in abeyance; that was a matter for the Commission to decide. It should be borne in mind, however, that the text of article 28 was based on the corresponding provisions of the four codification conventions, so that any change in that text might raise questions as to the interpretation of those conventions.

4. Mr. McCAFFREY said that, while he would have no difficulty in accepting the Chairman's suggestion, he considered it important to clarify whether the immunity referred to in paragraph 3 of article 28 was qualitatively different from the immunities referred to in paragraphs 1 and 2.

5. Mr. REUTER said that he could not support the interpretation given to article 16 at the previous meeting.

6. Mr. USHAKOV said that, as a member of the Commission, he enjoyed the same immunities as a head of mission. According to article 28, paragraph 3, he could not be arrested or detained even after the conclusion of the session for acts performed during the session. The immunity subsisted, whatever it might be.

7. Mr. LACLETA MUÑOZ said he did not think that paragraph 3 of article 28 could be retained if the Commission deleted article 23, because personal inviolability had a much wider scope than immunity, in so far as it implied protection of the courier. There

---

[1] For the text, see 1911th meeting, para. 18.

was no question of the inviolability subsisting during a fresh visit of the courier to the receiving State outside the performance of his functions. Moreover, if the diplomatic courier enjoyed personal inviolability when he committed an act giving rise to a legal proceeding in the receiving State and took advantage of his inviolability to leave the country, he would be abusing that privilege to evade his obligation to respect the laws of the receiving State. He was in favour of the diplomatic courier having immunity from jurisdiction for acts performed in the exercise of his functions and thought that paragraph 3 would make sense only if the Commission retained article 23. Hence it was important to make clear, in one way or another, that the final decision on paragraph 3 of article 28 would depend on the position taken on article 23.

8. Mr. SUCHARITKUL said it was his understanding that the word "immunity" in article 28, paragraph 3, did not, and was not intended to, cover inviolability under article 16, since the personal inviolability of the courier would in any event disappear upon the cessation of his functions. If the courier returned to the receiving State or transit State in his capacity as a diplomatic courier, he would be covered by new personal inviolability; on the other hand, if he returned in a private capacity, his earlier personal inviolability could not subsist.

9. Mr. MAHIOU said that he interpreted paragraph 3 in the same way as Mr. Lacleta Muñoz. The Commission could adopt paragraphs 1 and 2 of article 28 and indicate that its decision on paragraph 3 would depend on what happened to article 23.

10. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said there seemed to be general agreement that paragraph 3 of article 28 should be referred back to the Drafting Committee, in which event the Committee could at the same time consider whether the term "immunity", in that paragraph, extended to immunity within the meaning of article 23 and inviolability under article 16. The Commission might wish to adopt paragraphs 1 and 2 of article 28 provisionally, as the Chairman had suggested, and leave paragraph 3 pending, on that understanding.

11. Mr. USHAKOV said there could be no doubt that personal inviolability was an immunity, as was shown by article 37, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, according to which "The members of the family of a diplomatic agent forming part of his household shall, if they are not nationals of the receiving State, enjoy the privileges and immunities specified in articles 29 to 36". Article 29 of that Convention established the personal inviolability of the diplomatic agent.

12. Mr. RIPHAGEN said that he did not understand the meaning of the second sentence of paragraph 1 of article 28, since in any event the courier would leave the territory of the receiving State or transit State in the course of his functions. That point could not be clarified in the commentary; it should be made clear in the body of the article.

13. Mr. YANKOV (Special Rapporteur) said that he fully agreed with Mr. Ushakov's interpretation of the relationship between inviolability and the notion of immunity, which was borne out by State practice.

14. As to the duration of immunities and, more specifically, the use of the word "immunity" in the singular in paragraph 3 of article 28, he reminded members that in the earlier stages of the work it had been proposed that the phrase "during the exercise of" should be used in order to import the more objective criterion of time, thus obviating the need to establish a relationship between the act performed and the immunities, which was difficult in practice. As he understood it, the restrictive approach had been adopted as a further exception, so that only those immunities which related to acts performed by the diplomatic courier during the exercise of his functions would subsist after those functions had come to an end. The same idea was reflected in the second sentence of article 39, paragraph 2, of the 1961 Vienna Convention on Diplomatic Relations. Other expressions which could give rise to differing interpretations appeared in that Convention, however, such as "the course of their duties" in article 37, paragraphs 2 and 3. That point would require consideration.

15. In reply to Mr. Riphagen he pointed out that the wording of the second sentence of paragraph 1 of article 28 appeared in article 39, paragraph 2, of the 1961 Vienna Convention and in the corresponding provisions of the other codification conventions. There seemed to be a logic in those provisions, although it might not be immediately apparent. He did not, however, share the view that there was a contradiction between the second sentence of paragraph 1 and paragraph 3 of article 28.

16. Mr. SUCHARITKUL said he did not dispute the fact that inviolability could consist of a number of immunities. Indeed, the personal inviolability of a diplomatic courier was translated into at least two immunities: immunity from arrest and immunity from detention. Immunity in the sense used in article 28, paragraph 3, however, was a generic term with the connotation of immunity from jurisdiction. It would be misleading to adopt the same formula as that of the 1961 Vienna Convention on Diplomatic Relations if the diplomatic courier did not have the same jurisdictional immunity as a diplomatic agent. As to personal inviolability in the form of immunity from arrest and detention, the question did not arise once the courier had left the country.

17. Mr. USHAKOV warned members of the Commission against any attempt to interpret conventions in force. It would be inconceivable for diplomatic agents to enjoy only immunity connected with the exercise of their functions. An ambassador was performing his functions even when he went for a trip in the country, since part of his mission was to get to know his country of residence. The administrative and technical staff of a mission, on the other hand, such as a gardener, performed their functions only on the mission's premises. Consequently, if an ambassador on holiday in the country was attacked by miscreants whom he wounded in retaliation, he could not be arrested or detained by the receiving State.

18. Mr. McCAFFREY said that Mr. Ushakov's remarks highlighted the importance of the distinction

that would have to be made between immunities, as contemplated in paragraphs 1 and 2 of article 28, and immunity, as contemplated in paragraph 3; that in turn related to his own earlier point (1911th meeting) regarding the ambiguity of articles 10 and 11.

19. His position on paragraph 3 of article 28 was akin to that of Mr. Lacleta Muñoz and Mr. Sucharitkul. He found it inconceivable that States would agree to an obligation to provide affirmative protection to a former courier returning to the receiving State, since it would be extremely difficult, if not impossible, to determine in advance when such protection would be necessary. Jurisdictional immunity might be necessary for certain diplomatic officials returning to a State in a private capacity to protect them from harassment or attempts to discover matters of State. In that sense, it was the immunity of the State that subsisted, so that the immunity referred to in paragraph 3 must be jurisdictional immunity. But in article 28, language applicable to ambassadors was being applied to couriers. He recognized that, in article 39, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations, the words "every person" covered the members of the family of a diplomatic agent and the members of the technical and administrative staff of the mission, but such persons were normally resident in the receiving State for long periods of time and their immunities were necessary for the functioning of the mission. The crucial issue was whether the same immunities should apply not only during the performance of the courier's functions, but also after he had ceased to be a courier and had returned to the sending State. It seemed to be the view of many members that it would be stretching the tolerance of States too far to expect them to extend to erstwhile couriers the protection that they were bound to accord to former diplomats.

20. The CHAIRMAN, noting that there were no further comments, proposed that the Commission should provisionally adopt paragraphs 1 and 2 of article 28 and refer paragraph 3 back to the Drafting Committee for further consideration in the light of the discussion, with particular attention to be paid to the scope of the word "immunity" and bearing in mind the paragraph's link with the Commission's decision on article 23.

It was so agreed.

ARTICLE 29 [22] (Waiver of immunities)

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 29 [22] as proposed by the Drafting Committee, which read:

Article 29 [22]. Waiver of immunities

1. The sending State may waive the immunities of the diplomatic courier.

2. Waiver must always be express, except as provided in paragraph 3 of this article, and shall be communicated in writing.

3. The initiation of proceedings by the diplomatic courier shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of the diplomatic courier in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

22. Article 29 followed fairly closely the text originally submitted by the Special Rapporteur,[2] although some minor adjustments had been made to bring it into line with the corresponding provisions of the codification conventions. Paragraph 1 simply provided that it was the sending State which could waive the immunities of the diplomatic courier. Paragraph 2 introduced two new elements, the first of which was that the terms of paragraph 3 would operate as an exception to paragraph 2, and the second that the waiver should be not only express, but also communicated in writing. Thus the only case in which waiver would not be express and in writing would be that provided for in paragraph 3. Paragraph 4 embodied a general principle, and no change had been made to the original wording. Paragraph 5 expressed the same basic idea as had been contained in the text submitted by the Special Rapporteur, but some adjustment of language had been made. An explanation of the relationship between paragraphs 3 and 4 of the article would be made in the commentary. Reservations had again been expressed on the need for all or part of the article, pending a decision on article 23.

23. Sir Ian SINCLAIR said that, although no major problems of substance were involved, he wished to enter reservations on paragraphs 3, 4 and 5 of article 29, pending a final decision by the Commission on article 23. If it were decided not to include article 23 or to modify it substantially, the need for those three paragraphs would have to be reviewed. In the circumstances, the Commission might wish to approve paragraphs 1 and 2 provisionally and place asterisks against paragraphs 3, 4 and 5.

24. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, since all the draft articles proposed by the Drafting Committee were intended for provisional adoption, changes arising out of a subsequent decision by the Commission could always be made. At the same time, it was both possible and necessary, in his view, for the Commission to pronounce on article 23 at the current session, so that, if necessary, a decision on paragraphs 3, 4 and 5 of article 29 could be deferred.

25. Mr. RIPHAGEN said that he wished to enter a reservation on paragraph 3 of article 29, the precise meaning of which should be made clear in the commentary.

26. Mr. OGISO asked whether paragraph 5 of article 29 would also apply where the sending State did not waive the immunity of the diplomatic courier in respect of the execution of a judgment as well as in respect of civil proceedings.

27. Mr. YANKOV (Special Rapporteur) said that the substance and, to a great extent, the language of paragraph 5 of article 29 were based on article 31 of the 1975 Vienna Convention on the Representation of States. It was a novel provision and had been discussed at length in the Commission. Basically, the

[2] For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 65 *et seq.*, 1826th to 1829th meetings.

intention was to provide an assurance that, in the event of damage caused to persons in the receiving State, the sending State would make every effort to bring about a just settlement of the case. Although the question of the execution of a judgment had not been singled out, his understanding was that the terms of paragraph 5 would apply to all steps in the proceedings, including execution of judgment, inasmuch as the ultimate aim was to arrive at a just settlement based on equitable principles. That point could perhaps be brought out in the commentary.

28. The CHAIRMAN proposed that, as suggested by Sir Ian Sinclair, the Commission should provisionally adopt paragraphs 1 and 2 of article 29 and place asterisks against paragraphs 3, 4 and 5 as an indication that those paragraphs would be reviewed in the light of its decision on article 23. He further proposed that the commentary should clarify the points raised by Mr. Riphagen and Mr. Ogiso.

It was so agreed.

ARTICLE 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

29. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 30 [23] as proposed by the Drafting Committee, which read:

Article 30 [23]. Status of the captain of a ship or aircraft entrusted with the diplomatic bag

1. The captain of a ship or aircraft in commercial service which is scheduled to arrive at an authorized port of entry may be entrusted with the diplomatic bag of the sending State or of a mission, consular post or delegation of that State.

2. The captain shall be provided with an official document indicating the number of packages constituting the bag entrusted to him, but he shall not be considered to be a diplomatic courier.

3. The receiving State shall permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him.

30. In an attempt to achieve greater economy and clarity in drafting, the text of article 30 had been considerably simplified, though without any loss of substance.[3] It now consisted of three paragraphs instead of the original four, and the paragraphs had been shortened.

31. In paragraph 1, the references to "the captain of a commercial aircraft" and "the master of a merchant ship" had been combined to read: "The captain of a ship or aircraft in commercial service". The words "in commercial service" had been preferred as having a broader meaning than the original expression "merchant ship". That change was reflected in the various language versions, and it was recognized that the corresponding expression in Spanish *(comandante de un buque o una aeronave comerciales)* was not very felicitous. But since the codification conventions used similar expressions and since it would complicate the drafting to try to introduce further distinctions, it had been decided to adopt the wording proposed. The commentary would explain that the word "captain" was a functional expression and did not have the particular meaning attributed to that word in internal law.

32. The Drafting Committee had decided to delete the reference to "an authorized member of the crew" which had appeared in the original text, because it believed that it would add an unnecessary complication. It was not clear how such a crew member would be authorized and, in any event, the captain of a ship or aircraft was always the highest authority on board. It had been considered more prudent to deal with the matter in the commentary, explaining that the text of the article—which referred only to the captain—was not intended to prejudice State practice with regard to entrusting the bag to an authorized member of the crew.

33. Paragraph 1 also referred to the ship or aircraft as being one "scheduled to arrive at an authorized port of entry". That phrase had been included to show that what was meant was a ship or aircraft engaged in regular or scheduled service, not one operating on an *ad hoc* basis.

34. The reference to the captain being "entrusted" with the diplomatic bag emphasized the fact that he was not considered to be a diplomatic courier, as expressly stated in paragraph 2.

35. The former paragraphs 2 and 3 of article 30 had been combined in the new paragraph 2. The former paragraph 4 had been redrafted as the new paragraph 3, to convey the intended meaning more clearly and precisely. The Drafting Committee had considered it important to stress that members of a mission, consular post or delegation of the sending State must be allowed unimpeded access to the ship or aircraft in order not only to take possession of the bag from the captain, but also to deliver it to him, and that in both cases that should be done directly and freely.

36. The former paragraph 4 had provided that the captain should be accorded "facilities for free and direct delivery" of the bag. The new paragraph 3 referred to the obligation of the receiving State to "permit a member of a mission, consular post or delegation of the sending State to have unimpeded access to the ship or aircraft in order to take possession of the bag directly and freely". The reason for that inversion was to show that the facilities in question were to be granted to the member of the mission concerned, rather than to the captain.

37. The title of article 30 had been adjusted to correspond to the new drafting.

38. Mr USHAKOV suggested that, for the sake of clarity, the words "or, as the case may be, a" should be added after the words "a mission", at the beginning of paragraph 3.

39. Mr. LACLETA MUÑOZ observed that article 30 as originally submitted by the Special Rapporteur in his fourth report had covered the common case in which the diplomatic bag was entrusted not to the captain, but to a member of the crew under his command.[4] That case had been included as a result of

[3] For the text submitted by the Special Rapporteur and the Commission's consideration thereof, *ibid.*, pp. 89 *et seq.*, 1830th meeting (paras. 1-25), pp. 107 *et seq.*, 1832nd meeting (paras. 17 *et seq.*) and pp. 162 *et seq.*, 1842nd and 1843rd meetings and 1844th meeting, paras. 1-20.

[4] *Yearbook ... 1983*, vol. II (Part One), p. 108, document A/CN.4/374 and Add.1-4, paras. 240-243.

comments made not only in the Commission, but also in the Sixth Committee of the General Assembly.

40. Speaking as a member of the Drafting Committee, he drew attention to the fact that, because it had been unable to agree on adequate wording or to settle the question whether it was for the captain or the sending State to decide that the bag could be entrusted to a member of the crew, the Drafting Committee had omitted to mention that case. The reasons for that omission should be stated in the commentary, which should explain that the Commission had not intended to rule out the possibility of the bag being entrusted to a crew member.

41. Mr. RIPHAGEN said that the use of the word "scheduled" in paragraph 1 appeared to restrict the application of its provisions to scheduled air services. In fact, it could well be in the interests of the sending State to entrust the diplomatic bag to the captain of a chartered aircraft.

42. Mr. YANKOV (Special Rapporteur) said that the term "scheduled" had been used advisedly, because paragraph 1 covered the regular transport of the bag by sea or air. Other arrangements were, of course, possible on an *ad hoc* basis. Two States could arrange between themselves for the transport of the bag by non-scheduled services, but it was not desirable to derive a general rule from such arrangements, since the result would be to place an excessive burden on the receiving State.

43. Mr. RIPHAGEN said that he saw no reason to exclude the possibility of entrusting the bag to the captain of a chartered aircraft. Charter flights were sometimes just as regular as scheduled flights.

44. Sir Ian SINCLAIR explained that there had been a general feeling in the Drafting Committee that the provisions of paragraph 1 should relate to regular services. Of course, other means were possible; a State might, for example, entrust the diplomatic bag to the captain of a private aircraft. That, however, would be done under an arrangement between the two States concerned. The Drafting Committee had not considered it desirable to include such cases in the facility provided for in paragraph 1.

45. Mr. McCAFFREY agreed with Sir Ian Sinclair. In his view, however, regular charter flights would probably be covered by paragraph 1. A principal reason for using the word "scheduled" was that it would be extremely difficult for receiving States to fulfil their obligations in respect, for example, of the provision of facilities in the case of flights that were not scheduled.

46. Mr. TOMUSCHAT said that the question was of interest to his country. In the summer, there were regular charter flights from the Federal Republic of Germany to certain countries in Africa to which there were no Lufthansa scheduled flights. Those charter flights provided a safe way of conveying the diplomatic bag to the countries concerned, and he saw no reason why such flights should be excluded from the operation of paragraph 1.

47. Mr. DÍAZ GONZÁLEZ said that the word "scheduled" did not present any difficulty and could even be deleted, which would give States more freedom of choice. Under the privileges which they enjoyed in regard to communications, States could very well entrust the diplomatic bag to the captain of an aircraft on a special flight. Venezuela, for instance, used regular airlines, private aircraft and aircraft of the Venezuelan Air Force for the transport of its couriers and diplomatic bags.

48. Mr. AL-QAYSI suggested that the difficulty might be overcome by referring to a "regular service", instead of using the word "scheduled". In paragraph 3, the meaning might be made clearer by replacing the concluding words "to him" by the words "to the captain".

49. Mr. YANKOV (Special Rapporteur) pointed out that the competent specialized agency—ICAO—drew a clear distinction between charter flights and regular or scheduled flights. Under ICAO rules, special services required special arrangements. The purpose of article 30, paragraph 1, was to state the general rule; it accordingly reflected the prevailing State practice in the matter. The commentary would make that clear and explain that States could act otherwise by arrangement.

50. The CHAIRMAN, speaking as a member of the Commission, said he found the provisions of paragraph 3 unduly strict. The corresponding provisions of the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States all contained a reference to arrangements between the mission of the sending State and the appropriate local authorities. But no such reference was contained in paragraph 3 of draft article 30, which followed the precedent of article 27, paragraph 7, of the 1961 Vienna Convention on Diplomatic Relations.

51. That formulation for paragraph 3 could lead to results contrary to the provisions of draft article 36. He therefore suggested that the words "by prior arrangement", between commas, should be inserted after the words "The receiving State shall" at the beginning of paragraph 3 of article 30. He further suggested that the reference to "unimpeded access to the ship or aircraft" should be deleted. The paragraph would then read:

> "3. The receiving State shall, by prior arrangement, permit a member of a mission, consular post or delegation of the sending State to take possession of the bag directly and freely from the captain or to deliver the bag directly and freely to him."

As he saw it, the reference to "unimpeded access" could create unnecessary difficulties; the receiving State might have reasons for not wishing to allow direct access to the ship or aircraft.

52. Mr. YANKOV (Special Rapporteur) said that the Chairman's suggested addition of the words "by prior arrangement" could be accepted. Alternatively, the matter could be explained in the commentary without altering the text of the article.

53. He could not accept the Chairman's other proposed amendment, however, because it was essential to make provision for the right of unimpeded access to the ship or aircraft by a member of the sending State's mission. There had been cases in which the captain of a ship or aircraft had been made to carry a bag to a specified place, leaving it there for the

mission to collect. Such an arrangement was clearly not satisfactory from the point of view of the sending State.

54. Chief AKINJIDE supported the text of article 30 as it stood and the position taken by the Special Rapporteur.

55. The CHAIRMAN, speaking as a member of the Commission, said that he could accept the text as it stood, subject to a satisfactory explanation in the commentary. His main concern was that article 30 should not provide an easy escape from the provisions of article 36.

56. Mr. RIPHAGEN said that, if a reference to a prior arrangement was needed, it must be made in the text of the article, not in the commentary.

57. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the requirement of a prior arrangement had been discussed in the Drafting Committee, but it had been considered that such a requirement would constitute a limitation on unimpeded access to the ship or aircraft. The two points raised by the Chairman had also been extensively discussed in the Drafting Committee.

58. Sir Ian SINCLAIR said that the general feeling in the Drafting Committee had been that to insert the formula "by prior arrangement" in the article itself could be considered as limiting the right given to the sending State. There had been instances of access being refused by the authorities of the receiving State, relying on the argument that no prior arrangement had been made.

59. He did not share Mr. Riphagen's reservations about making the reference in the commentary. Practical arrangements could be made for the exercise of the rights of the sending State, and it would therefore be perfectly appropriate for the commentary to mention them. Of course, the commentary should also stress the great importance of unimpeded access to the ship or aircraft.

60. Mr. USHAKOV said that the reason why an "arrangement" was mentioned in article 28, paragraph 8, of the 1969 Convention on Special Missions and in article 27, paragraph 7, of the 1975 Vienna Convention on the Representation of States was simply in order that the receiving State or host State might be informed of the situation, so that it could be required to allow free access to the ship or aircraft. The idea of an arrangement was in no way restrictive in that case. Moreover, an arrangement could also be necessary for the member of the mission, consular post or delegation of the sending State who was authorized to take possession of the bag from the captain or deliver it to him. Those details should be included in the commentary.

61. Mr. TOMUSCHAT, referring to the relationship between article 30 and article 36, suggested that the commentary should explain that the rules in article 30 were subject to those in article 36.

62. He felt strongly that the question of using regular charter flights for the transport of the bag should not be left to individual agreements between States. Charter flights were in fact just as regular as scheduled flights and differed from them only in respect of the booking system. The distinction between the two was not relevant to the rules in article 30.

63. The CHAIRMAN said that that point could be clarified in the commentary.

64. Mr. KOROMA urged that the point be settled in the article itself, not merely in the commentary. He suggested that the wording of paragraph 1 should be broadened to include regular charter flights, which were widely used. The qualification "by prior arrangement" should be inserted in the text of paragraph 3. It was not enough to refer to the matter in the commentary, which would not be disseminated as widely as the future convention.

65. The CHAIRMAN proposed that article 30 should be adopted on first reading, on the understanding that the commentary would clarify the various points which had been raised. In particular, it would indicate that the term "scheduled" was to be understood as including regular charter flights. It would also make clear that prior arrangement would be necessary for the exercise of the right of access provided for in paragraph 3.

66. If there were no further comments, he would take it that the Commission agreed to adopt article 30 [23] on first reading, on that understanding.

It was so agreed.

Article 30 [23] was adopted.

The meeting rose at 1.05 p.m.

1913th MEETING

Friday, 28 June 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

later: Mr. Khalafalla EL RASHEED MOHAMED AHMED

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN extended a warm welcome to Mr. Evensen, a Judge of the International Court of Justice and a former member of the Commission.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*) (A/CN.4/L.384)

ARTICLES 31 to 35

ARTICLE 31 [24] (Identification of the diplomatic bag)

2. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 31 [24] as proposed by the Drafting Committee, which read:

Article 31 [24]. Identification of the diplomatic bag

1. The packages constituting the diplomatic bag shall bear visible external marks of their character.

2. The packages constituting the diplomatic bag, if unaccompanied by a diplomatic courier, shall also bear a visible indication of their destination and consignee.

3. The article was a shortened version of the original text,[3] which had been reduced to two paragraphs. The only change in paragraph 1 was the deletion of the word "official" before the word "character".

4. Originally, paragraph 2 had required that the packages constituting the bag should bear an indication of any intermediary points on the route or transfer points, but that requirement had been deleted in the light of the discussion in the Commission.

5. Paragraph 3 of the original text concerned the maximum size or weight of the bag. It had been deleted in the light not only of the debate, but also of the provisions of article 34, which specified that the conditions established nationally and internationally to govern the use of the postal service should apply to the transmission of the bag by post. It had been thought that the question of the maximum size or weight should be a matter for agreement between the sending and receiving States. On the other hand, the text should omit any reference to such an agreement, which might imply that agreement was necessary; a requirement of that kind could interfere with freedom of communication. The purpose of paragraph 3 had been to limit possible abuse, but the Drafting Committee had taken the view that the question could be solved by bilateral agreement. Moreover, with regard to misuse of the bag, the most important factor was the content rather than the size or weight of the bag.

6. The title had been adjusted in order to reflect more accurately the subject-matter of the article. Lastly, the Drafting Committee had carefully examined all the matters involved in the deletions, which had been made out of a desire to simplify the text but also because the Committee had considered that article 31 would be more effective if it were limited to the essentials.

[3] For the text submitted by the Special Rapporteur and the Commission's consideration thereof, see *Yearbook ... 1984*, vol. I, pp. 89 *et seq.*, 1830th meeting (paras. 1-25), pp. 107 *et seq.*, 1832nd meeting (paras. 17 *et seq.*) and pp. 162 *et seq.*, 1842nd and 1843rd meetings and 1844th meeting, paras. 1-20.

7. Mr. USHAKOV noted that, under the terms of paragraph 1 of article 31, the packages constituting the diplomatic bag "shall" bear visible external marks of their character and that, under the terms of paragraph 2, they "shall also" bear a visible indication of their destination and consignee. The first obligation, relating to the sending State, was stricter than the second obligation, which could relate equally to the postal service or the transport company concerned. In the absence of the visible external marks mentioned in paragraph 1, a bag did not enjoy the status of a diplomatic bag. On the other hand, if the packages constituting a diplomatic bag not accompanied by a courier did not bear an indication of their destination and consignee, as stipulated in paragraph 2, it could not be reasonably inferred that they did not constitute a diplomatic bag. In due course, the commentary to article 31 could perhaps explain that the obligation under paragraph 2 was not so strict as the obligation set forth in paragraph 1 and that failure to observe it had no effect on the legal status of the diplomatic bag.

8. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the character of the diplomatic bag did not stem from the marks in question. The usual practice was for all bags, whether accompanied or unaccompanied, to bear some visible indication of their destination. It had not been deemed essential to stipulate that requirement, however, when the bag was accompanied by a diplomatic courier.

9. Mr. YANKOV (Special Rapporteur) pointed out that, by virtue of paragraph 1 of article 31, all diplomatic bags had to bear visible external marks of their character. The additional requirement in the case of unaccompanied bags was a visible indication of their destination, in order to permit dispatch to the appropriate consignee. Of course, even when a bag was accompanied by a courier, the destination was normally indicated.

10. Mr. USHAKOV said the fact that the diplomatic bag was not accompanied by a courier did not signify that it was not accompanied by an agent of a transport company, in which case it did not seem really necessary to require an indication of the destination and the consignee of the bag. The most troublesome point was that the absence of the indication mentioned in paragraph 2 might be interpreted as depriving the bag of its diplomatic character.

11. The CHAIRMAN said that the matter could well be clarified in the commentary by explaining that the word "also" had been inserted in paragraph 2 in order to emphasize that the unaccompanied bag was subject to the rule in paragraph 1 as well.

12. Mr. KOROMA said that the point could be made clearer by replacing the word "also" by the words "in addition". It would thus be apparent that paragraph 1 applied to all bags and that paragraph 2 contained an additional requirement for unaccompanied bags.

13. Sir Ian SINCLAIR said that there would be little difference in substance between the word "also" and the expression "in addition", although the latter would supply some extra emphasis. The matter could be handled in the commentary by explaining that

paragraph 2 embodied an additional requirement for unaccompanied bags, intended for the practical purpose of enabling the bag to reach its destination. The commentary should also make it plain that the absence of any indication of destination or consignee would not detract from the status of the bag as a diplomatic bag.

14. Mr. FRANCIS said that small countries like his own did not have diplomatic couriers; their diplomatic bags were always unaccompanied, hence the special interest for them of the problems under discussion. His own concern was mainly with the use in paragraph 1 of the formula "The packages constituting the diplomatic bag". The term "packages" could be taken to refer to the actual contents of the bag. If the seal of the diplomatic bag was broken, perhaps accidentally, a serious problem would arise if the individual packages were not properly identified; the contents might even be lost.

15. Mr. FLITAN, referring to the comments made by Mr. Francis, said it was apparent from the definition of the term "diplomatic bag" in article 3, paragraph 1 (2), that the diplomatic bag consisted of packages.

16. Neither Mr. Ushakov nor Mr. Koroma had made a formal proposal to amend article 31 and account might be taken of their concern on second reading of the article, more particularly in the commentary.

17. Chief AKINJIDE explained that the Drafting Committee's main reason for using the words mentioned by Mr. Francis had been the need harmonize the text of article 31 with the wording of article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

18. Mr. EL RASHEED MOHAMED AHMED drew attention to the definition of "diplomatic bag" contained in article 3, paragraph 1 (2), which stated that: "'diplomatic bag' means the packages containing ...". Accordingly, the use of the term "bag" by itself would imply that it could consist of a number of packages. The point could be explained in the commentary.

19. The CHAIRMAN, speaking as a member of the Commission, said that, as a practical matter, if a bag consisted of several packages, each package had to be marked.

20. Mr. REUTER said it was essential to explain clearly that, in the definitions in the draft, which were taken from the 1961 Vienna Convention on Diplomatic Relations, the term "bag" had no physical connotation. It was a legal concept, and since a legal concept could not be opened, it might seem surprising to assert that the bag should not be opened. However, it was a convenient form of language taken from the 1961 Vienna Convention. Specifically, if the bag consisted of a sack, it was in keeping with the concept of a diplomatic bag. On the other hand, if the bag consisted of a number of physical objects, such as a case, sacks and a container, each one formed a separate package and those packages had to be identified in order to form the abstract concept of a diplomatic bag. Just as the physical concept of a bag had become a legal concept, the physical notion of a portfolio had become a theoretical concept in the case of the leather portfolio formerly handed to members of the French Government and now referred to only in such expressions as "holder of a ministerial portfolio".

21. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that he had nothing to add to the explanations given by the Chairman and by Mr. Reuter, who had clarified the matter sufficiently.

22. The CHAIRMAN, speaking as a member of the Commission, said that paragraph 3 of the original text, now deleted by the Drafting Committee, had been intended to avoid misuse of the bag and his own preference would have been to retain it. Admittedly it had stated that the maximum size or weight of the diplomatic bag "shall be determined" by agreement between the sending State and the receiving State, and he would have agreed to tone down the words in question and say "may be determined", so as to indicate that States were free to impose size and weight limitations by agreement. He did not, however, wish to press the point and would be content to see the matter explained in the commentary.

23. Mr. YANKOV (Special Rapporteur) said that the commentary would refer to the practice of certain States, in particular Latin American States, of establishing limits for the size and weight of diplomatic bags. It would also mention the international agreements on the subject and the UPU regulations, which would of course govern the dispatch of unaccompanied bags by post.

24. Mr. OGISO endorsed the Special Rapporteur's comment. As to Mr. Ushakov's contention that the wording of paragraph 2 was much too mandatory, the receiving State and the transit State were obliged under article 35 to provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag. Accordingly, if a bag was not accompanied by a courier, it was very useful for the packages to bear a visible indication of the destination and consignee so as to ensure safe delivery.

25. Mr. KOROMA said that, further to Sir Ian Sinclair's comment, he could accept the word "also" in paragraph 2, provided that the commentary explained that its purpose was to indicate that the paragraph embodied an additional requirement in the case of unaccompanied bags.

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) drew attention to the definition of the diplomatic bag given in article 3, paragraph 1 (2). The bag could consist of only one package, which would then constitute the diplomatic bag, or it could consist of two or more packages. The terms of article 31 were sufficiently clear to indicate that they covered the packages which constituted the bag, not the contents. Equally clear was the fact that the marks and indications referred to in the article had to be on the outside of the packages.

27. The CHAIRMAN pointed out that paragraph 1 of article 31 had to be interpreted in the light of State practice with regard to the form of language used in article 27, paragraph 4, of the 1961 Vienna Convention on Diplomatic Relations.

28. Mr. USHAKOV said that the Russian text of article 31 used a very precise word which corresponded more or less to "pieces".

29. Mr. LACLETA MUÑOZ said that the word *bultos*, in the Spanish text, was equally clear.

30. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 31 [24] on first reading in the form proposed by the Drafting Committee.

Article 31 [24] was adopted.

ARTICLE 32 [25] (Content of the diplomatic bag)

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 32 [25] as proposed by the Drafting Committee, which read:

Article 32 [25]. Content of the diplomatic bag

1. The diplomatic bag may contain only official correspondence, and documents or articles intended exclusively for official use.

2. The sending State shall take appropriate measures to prevent the dispatch through its diplomatic bag of articles other than those referred to in paragraph 1.

32. Paragraph 1 of the original text of article 32[4] had not been changed; it emphasized that the "documents" and "articles" referred to were those "intended exclusively for official use". There had been lengthy discussion about whether the word "exclusively" should be used. That wording had been taken from article 35, paragraph 4, of the 1963 Vienna Convention on Consular Relations. Moreover, article 3, paragraph 1 (2), as provisionally adopted by the Commission, contained the same form of words. The Drafting Committee had accordingly decided to retain it, but it could, of course, revert to the matter at a later stage.

33. One member of the Committee had expressed reservations regarding paragraph 1 of article 32 because it allowed too much room for possible abuse of the diplomatic bag as a means of transport, for example for the dispatch of inappropriate articles like weapons or furniture without the consent of the receiving State. In that member's view, the bag should be used for communication, not transport.

34. Lastly, in the light of the Commission's discussions and at the suggestion of the Special Rapporteur, the Committee had decided to delete the last phrase of the original text of paragraph 2, which had dealt with the prosecution and punishment of persons responsible for misuse of the bag.

35. Mr. LACLETA MUÑOZ explained that the Chairman of the Drafting Committee had been alluding to him. The reason for his own attitude in the Committee had been that the words "articles ... for official use" in paragraph 1 of article 32 were taken virtually word for word from article 36, paragraph 1 (*a*), of 1961 Vienna Convention on Diplomatic Relations, a provision which in fact covered articles that could be imported by a mission into the receiving State. When interpreted literally, the words in question encouraged the belief that the bag was not a means to facilitate the mission's communications but a means of transport of any article, regardless of size, intended for the official use of the mission. However, the word "bag" clearly brought to mind a package of moderate size intended essentially to hold confidential correspondence and documents that were small in format. Since he had held a minority view in the Drafting Committee and consensus had been deemed desirable, he could do no more the express reservations in that regard.

36. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 32 [25] on first reading in the form proposed by the Drafting Committee.

Article 32 [25] was adopted.

ARTICLE 33

37. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the Committee was proposing the deletion of article 33, on the status of the diplomatic bag entrusted to the captain of a commercial aircraft, the master of a merchant ship or an authorized member of the crew.[5] It provided that articles 31, 32 and 35 to 39 would apply to a bag entrusted to the persons in question. The Drafting Committee believed that, with one possible exception, those articles did not imply that they would not be applicable if the bag were entrusted to a captain. The one possible exception related to article 36, which had been considered by the Commission. As originally proposed, that article had contained a territorial limitation, but in his oral introduction of his sixth report (A/CN.4/390) the Special Rapporteur had revised the text to eliminate the limitation (1903rd meeting, para. 9). Article 36 would thus apply to a diplomatic bag "at all times and wherever it may be", including on board a ship or aircraft in commercial service, on or over the high seas. Hence it seemed pointless to burden the draft with an unnecessary article whose substance could easily be covered elsewhere and in the commentaries. Of course, in the Commission's consideration of other articles, it might well be deemed advisable to return to the question.

38. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to endorse the Drafting Committee's decision to delete article 33.

Article 33 was deleted.

ARTICLE 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport)

39. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 34 [26] as proposed by the Drafting Committee, which read:

Article 34 [26]. Transmission of the diplomatic bag by postal service or by any mode of transport

The conditions governing the use of the postal service or of any mode of transport, established by the relevant international or national rules, shall apply to the transmission of the packages constituting the diplomatic bag.

[4] See footnote 3 above.

[5] See footnote 3 above

40. The text of article 34 had been reduced to one short paragraph. In the original text,[6] paragraph 2 had dealt with postal services and paragraph 3 with ordinary means of transportation. The version now being submitted used the terms employed in international conventions and spoke of "mode of transport". If the packages constituting the bag were transmitted by postal service or by any mode of transport, the conditions established by the relevant international or national rules would apply.

41. Sir Ian SINCLAIR suggested that the words "by the particular means utilized" should be inserted at the end of the article. In its efforts to achieve simplicity, the Drafting Committee had arrived at a text which could lead to misunderstanding. The purpose of his suggestion was to prevent any misinterpretation of article 31 whereby it would be regarded as covering cases in which the bag was accompanied by a diplomatic courier.

42. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that the meaning intended by Sir Ian Sinclair was already implicit in article 31, but he had no objection to inserting the additional words, which would make the matter more explicit.

43. Mr. YANKOV (Special Rapporteur) said that he agreed with the Chairman of the Drafting Committee.

44. Mr. TOMUSCHAT expressed concern at the reference to "national rules" and suggested that the commentary should explain that it was not intended to confer some kind of discretion on national legislation.

45. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said it was extremely unlikely that any rules established by national legislation would be in breach of the obligations arising under the articles. The purpose of the reference to the "relevant international or national rules" was to indicate that, if the diplomatic bag were sent by mail, for example, it would naturally be subject to the general rules applicable to the use of postal services, rules which were national and international, in other words the UPU rules.

46. Mr. MAHIOU pointed out that article 34 related to the diplomatic bag not accompanied by a courier; hence it might be preferable to make that clear in the article itself by adding, at the end, the words "not accompanied by diplomatic courier".

47. Mr. USHAKOV said that he endorsed that view.

48. Mr. KOROMA said that Mr. Tomuschat's point was a very important one. The reference to "national rules" could be interpreted as meaning that national legislation could derogate from the international régime. Inviolability of the diplomatic bag was indispensable and the Commission had agreed that the bag should not be subject to any form of inspection by electronic or other devices. Some national postal administrations had in fact introduced systems of electronic inspection or scanning of material sent through the post. As a result, the reference to "national rules" could lend itself to abuse.

Mr. El Rasheed Mohamed Ahmed, First Vice-Chairman, took the Chair.

49. Sir Ian SINCLAIR withdrew his suggestion, on the understanding that the matter would be taken up on second reading.

50. Mr. FLITAN, referring to Mr. Koroma's comments, said that the wording adopted by the Drafting Committee was intended to reserve the rules of international law and internal law specifically governing the postal service and any other mode of transport. It was important for the draft to make no kind of change either in relevant international agreements, such as those concluded under the auspices of UPU, or in national regulations.

51. Mr. RIPHAGEN pointed out that, in air transport, regulations for the safety of passengers and aircraft would always have to be observed.

52. Mr. FRANCIS said that he agreed with Mr. Koroma about the importance of the point raised by Mr. Tomuschat. It should be made clear that national rules could not override the provisions of the draft.

53. Mr. AL-QAYSI said that he failed to see how the reference to "national rules" could be construed as opening the door to the kind of conflict mentioned by Mr. Tomuschat.

54. Chief AKINJIDE said that he agreed with Mr. Al-Qaysi. Article 34 stated simply that, if the diplomatic bag was sent by post, the rules governing the national postal service and the UPU rules would have to be observed.

55. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 34 [26] on first reading in the form proposed by the Drafting Committee.

Article 34 [26] was adopted.

ARTICLE 35 [27] (Facilities accorded to the diplomatic bag)

56. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) presented article 35 [27] as proposed by the Drafting Committee, which read:

Article 35 [27]. Facilities accorded to the diplomatic bag

The receiving State or, as the case may be, the transit State shall provide the facilities necessary for the safe and rapid transmission or delivery of the diplomatic bag.

57. Article 35 had been modified only slightly[7] and had been brought into line with article 13, on facilities accorded to the diplomatic courier. The words "transportation and delivery" had been replaced by "transmission or delivery" and such transmission was required to be "safe and rapid", instead of "safe and speedy". The word "general" had been deleted from the title, consistent with article 13, already provisionally adopted, which bore the title "Facilities" not "General facilities".

[6] See footnote 3 above.

[7] See footnote 3 above.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 35 [27] on first reading in the form proposed by the Drafting Committee.

Article 35 [27] was adopted.

Mr. Jagota resumed the Chair.

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[8] (*continued*)*

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[9] (*continued*)

59. The CHAIRMAN invited the Special Rapporteur to sum up the Commission's debate on draft articles 23 and 36 to 43.

60. Mr. YANKOV (Special Rapporteur) thanked members for their suggestions and comments, which would receive close attention.

61. In connection with the topic under consideration, certain general considerations relating to the nature and purpose to the work had to be borne in mind. In the first place, it was necessary to be clear whether the Commission was involved simply in the codification of international law, within the meaning of article 15 of its statute, or in the progressive development of international law, also within the meaning of article 15 of its statute. It had always been his understanding that the Commission's work on the present topic fell somewhere between codification and progressive development in that it contained an element of codification *stricto sensu* but was also concerned with the amplification and development of certain rules.

62. It had rightly been said that the Commission's task was sometimes complicated by the need to follow established rules. The 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations had now been ratified by approximately 140 and 110 States, respectively, and thus formed part of international law. Although the two other main codification conventions had still not been ratified by the requisite number of States, in their respective areas they too represented international law in many respects. It was therefore important, so far as possible, to abide by those instruments.

63. Another general point was the need for a comprehensive and uniform approach to couriers and bags, in which connection he had endeavoured to devise in draft articles 42 and 43 some mechanism for adaptation to legal realities.

64. Yet another factor was the importance of the principle of reciprocity, both as a general rule and as it related to specific provisions concerning the facilities, privileges and immunities accorded to the courier and bag, including the inviolability of the diplomatic bag. There were few areas of international law in which the principle of reciprocity was of such significance as in diplomatic and consular law. A sending State, it should be remembered, was also a receiving State and, very often, a transit State as well. The need for a viable balance between the sovereign rights and legitimate interests of the receiving or transit State, on the one hand, and those of the sending State, on the other, therefore had to be viewed in the context of a two-way legal relationship.

65. As to draft article 23, the diplomatic courier had been variously described in the course of the discussions as a vehicle, an instrument and a messenger. All such designations were apposite, but the legal status of the courier had to be evaluated by reference to the main features of his duties. First of all, the courier was an official of the sending State who carried out a confidential mission on behalf of that State in the field of diplomatic communications. In doing so, he performed a task that was indispensable to the external functions of the sending State. The diplomatic courier was only one of many official agents of the State, but his significance was that he carried particularly sensitive information and documents to their destination; bags containing less confidential material were sent by the ordinary postal services or other means of commercial transport. Thus professional couriers normally belonged to the communications service of the ministry of foreign affairs, whereas couriers *ad hoc* were usually members of the diplomatic, administrative or technical staff of the mission.

66. Secondly, a diplomatic courier, unlike a diplomatic agent or consular officer, did not exercise representative functions. The significance of his duties lay not in any representative capacity, but in the official and confidential character of the mission assigned to him. The protection of the courier and the facilities, privileges and immunities accorded to him were an important element in the external functions of the State, and all the immunities, including the jurisdictional immunities, were vested in the State. From the standpoint of functional necessity, the scope of the personal inviolability of the diplomatic courier was akin to that of a member of the

---

* Resumed from the 1911th meeting.

[8] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[9] For the texts, see 1903rd meeting, para. 1.

administrative and technical staff of a mission who, while enjoying diplomatic privileges and immunities, was not entitled to exercise any representative function.

67. A third feature of the diplomatic courier was his mobility and the short duration of his stay in a given country. That aspect of the courier's functions, which had been stressed by a number of speakers, could not be considered in isolation from the other, official and confidential, aspects of his functions. Adequate legal protection and appropriate facilities, including personal inviolability and jurisdictional immunities, were a functional necessity no matter how long they were required, and they should always be available.

68. Those comments brought him to the main issue in the debate on draft article 23, namely the relationship between the personal inviolability of the courier under article 16 and immunity from jurisdiction under article 23, paragraph 1. Two main questions had arisen. The first was whether the provision in article 16 to the effect that the diplomatic courier would not be liable to any form of arrest or detention afforded sufficient legal protection, or whether there should be an additional provision on the jurisdictional immunities to be accorded to the courier as a logical consequence of personal inviolability. The second question was whether, if an additional provision were inserted, the immunity from criminal jurisdiction should be unqualified or confined to acts performed by the courier in the exercise of his functions.

69. Some members had considered that the provision in article 16 was sufficient, bearing in mind the nature of the courier's functions and his short stay in the receiving or transit State, and they argued that to grant jurisdictional immunity to the courier would be to go beyond the existing law under the four codification conventions. Other speakers had taken the view that article 16 alone would not provide the courier with adequate legal protection and had maintained that immunity from criminal jurisdiction was a logical consequence of personal inviolability. Personal inviolability could not be separated from jurisdictional immunity, for, in the absence of a provision on jurisdictional immunity, criminal proceedings could be instituted against the courier *in absentia.*

70. Article 16 was virtually identical with the last sentence of article 27, paragraph 5, of the 1961 Vienna Convention on Diplomatic Relations, and a broad interpretation of the scope of the personal inviolability of the diplomatic courier was supported by legislative history. As early as 1957, the Commission had adopted a draft provision reading: "The diplomatic courier shall be protected by the receiving State. He shall enjoy personal inviolability and shall not be liable to arrest or detention, whether administrative or judicial."[10] That formulation had later been replaced by the more general "any form of arrest or detention", which was the wording used in article 27, paragraph 5, of the 1961 Vienna Convention with reference to the courier, and in article 29 of that Convention with reference to a diplomatic agent. It was thus apparent that, so far as inviolability was concerned, the 1961 Vienna Convention accorded the same treatment to the diplomatic courier as to the staff of the mission. The same wording was also used in article 35, paragraph 5, of the 1963 Vienna Convention on Consular Relations with reference to the personal inviolability of the consular courier, although the personal inviolability of the consular officer was circumscribed by article 41, paragraph 1, of that Convention.

71. In that regard, it was interesting to note that, at the United Nations Conference on Consular Relations in 1963, the Japanese representative had proposed that a provision should be included in the Convention whereby the consular courier would be accorded the same protection as consular staff. Many representatives had opposed that proposal and the United Kingdom representative had stated that it was essential for couriers to enjoy complete inviolability, not the limited inviolability accorded to consular officers.[11] That uniform approach had been adopted by the Conference and was abundantly reflected in State practice. The two later codification conventions had also adopted the same stance. On that basis, he had concluded that there was a uniform régime applicable to all types of couriers, one which provided for their unqualified inviolability, including exemption from any form of arrest or detention.

72. A further argument in support of a special provision on jurisdictional immunities of the courier was that all four codification conventions contained an express provision on personal inviolability and jurisdictional immunity. It had been said that those conventions did not contain any provision specifically on the jurisdictional immunities of couriers. On the other hand, they did not exclude such immunities, and it might be an appropriate moment to fill the lacuna.

73. As to the extent of the jurisdictional immunities of the courier, from his own reading of the relevant provisions of the four codification conventions he had come to the conclusion that a consistent system supported by State practice did exist. Many members had been in favour of functional immunity from criminal jurisdiction, confined to acts performed by the courier in the exercise of his functions. The opposing view had been that, in order to ensure safe and unimpeded delivery of the bag, the courier should be free from any pressure or coercion that might interfere with the performance of his official duties.

74. It had been noted quite properly that the sending State would be severely prejudiced if its messenger were forbidden to continue his mission in order to remain at the disposal of the courts of the transit State or receiving State. While on mission a courier had to be in permanent physical contact with the bag and needed the protection provided by the four conventions. Whether or not express reference was made to the exercise of his functions, the ultimate objective should always be the same, namely protection of the courier as an official of the sending State acting in the performance of the task assigned to him. Any limitation of immunity from criminal jurisdiction would,

---

[10] See the fourth report of the Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), p. 74, document A/CN.4/374 and Add. 1-4, para. 49.

[11] *Ibid.*, p. 75, para. 53.

therefore, be a derogation from the system of inviolability provided for under the codification conventions. The final decision obviously lay with the Commission, but his own view was that qualified immunity from criminal jurisdiction would create more problems than it would solve: quite apart from any other impediment, the courts would be required to determine the relationship between the act committed by the courier and his official functions in each individual case.

75. With regard to paragraph 2 of draft article 23, a question had been raised regarding the meaning of the term "administrative jurisdiction". In his opinion, the term related to administrative proceedings and not to any wider notion of jurisdiction, at least in the case in point, since the other powers that the administration and the police could exercise fell within the context of the courier's personal inviolability and exemption from arrest or detention.

76. It had been suggested, in connection with paragraph 4 of article 23, that written evidence could be provided for to facilitate the administration of justice. The matter could be considered together with certain other drafting points by the Drafting Committee.

The meeting rose at 1.15 p.m.

1914th MEETING

Monday, 1 July 1985, at 12.10 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Riphagen, Mr. Sucharitkul, Mr. Yankov.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*continued*) (A/CN.4/382,[1] A/CN.4/390,[2] A/CN.4/L.382, sect. C, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 23 (Immunity from jurisdiction)

ARTICLE 36 (Inviolability of the diplomatic bag)

ARTICLE 37 (Exemption from customs inspection, customs duties and all dues and taxes)

ARTICLE 39 (Protective measures in circumstances preventing the delivery of the diplomatic bag)

ARTICLE 40 (Obligations of the transit State in case of *force majeure* or fortuitous event)

ARTICLE 41 (Non-recognition of States or Governments or absence of diplomatic or consular relations)

ARTICLE 42 (Relation of the present articles to other conventions and international agreements) *and*

ARTICLE 43 (Declaration of optional exceptions to applicability in regard to designated types of couriers and bags)[4] (*continued*)

1. Mr. YANKOV (Special Rapporteur), continuing his summing-up, said that one of the main substantive issues raised in connection with draft article 36 had been the inviolability of the bag and its contents. Several members of the Commission had said that reference should be made to the inviolability of the bag's contents rather than to that of the bag itself. In the opinion of other speakers, the inviolability of the bag, namely the packages constituting the bag, and that of their contents were intrinsically linked and could not be dissociated. He shared the latter view. The term "inviolability", whether it related to physical objects or to abstract legal concepts or rules, entailed an obligation to keep those objects, concepts or rules intact and undisturbed. That was the sense in which the term was used in the four codification conventions and other international agreements in the field of diplomatic and consular law. The rule that the diplomatic bag should not be opened or detained had been regarded as an important component of the general principle of freedom of official communications and respect for their confidential character. In that connection, he referred to article 24, article 27, paragraphs 2 and 4, and article 40, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations, which constituted a coherent system of rules relating to the inviolability of the bag. Similar provisions were contained in the other codification conventions.

2. During its work on those conventions, the Commission had emphasized the overriding importance it attached to observance of the principle of the inviolability of the diplomatic bag and of the consular bag.[5] The concept of unqualified inviolability of the diplomatic bag implied that opening the bag, detaining it or examining its contents would be an infringement of its inviolability and thus prejudicial to the secret and confidential character of its contents. In that connection, the point made by Mr. Mahiou (1908th meeting) and Mr. Razafindralambo (1909th meeting) concerning the inviolability of personal correspondence under constitutional law had been well taken.

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Articles 1 to 8 and commentaries thereto, provisionally adopted by the Commission at its thirty-fifth session: *Yearbook ... 1983*, vol. II (Part Two), pp. 53 *et seq.*

Article 8 (revised) and articles 9 to 17, 19 and 20, and commentaries thereto, provisionally adopted by the Commission at its thirty-sixth session: *Yearbook ... 1984*, vol. II (Part Two), pp. 45 *et seq.*

Articles 24 to 35, referred to the Drafting Committee at the Commission's thirty-sixth session: *ibid.*, pp. 21 *et seq.*, footnotes 84 to 90 and 93 to 97.

Article 23 and articles 36 to 42, submitted at the Commission's thirty-fifth and thirty-sixth sessions: *ibid.*, pp. 21 and 25-27, footnotes 82 and 98 to 104.

[4] For the texts, see 1903rd meeting, para. 1.

[5] See the fourth report of the Special Rapporteur, *Yearbook ... 1983*, vol. II (Part One), pp. 123-124, document A/CN.4/374 and Add.1-4, paras. 328-337.

3. There were precedents in State practice in support of such an understanding of the relationship between the inviolability of the diplomatic bag and that of its contents. For example, the reservations to article 27, paragraph 3, of the 1961 Vienna Convention formulated by four Arab States,[6] which had claimed the right to open the diplomatic bag if there were grounds for presuming that it contained articles whose import or export was prohibited by municipal law, had been formally opposed by a number of States parties to the Convention on the grounds that opening the bag would be contrary to article 27 of the Convention and would constitute an infringement of its inviolability. In 1981, the Government of Australia had sent the Government of Jordan a note protesting about the detention at Amman Airport of an Australian container marked "diplomatic mail" and addressed to the Australian Embassy in Damascus. When the container had been opened, it had been found to contain telex equipment as well as diplomatic mail. The note had stated that the materials carried were entirely in accordance with the 1961 Vienna Convention and that the container should not have been opened or detained.

4. Replying to a point raised by Mr. Lacleta Muñoz (1906th meeting), he said that inviolability applied to the entire contents of the bag, including official correspondence and documents or articles intended exclusively for official use. It was not possible to apply a different approach to articles included in the bag, such as coding and decoding equipment or communications devices, without revealing their specific features and possibly their secret nature.

5. In the light of those considerations, he was of the opinion that the provisions of article 36, paragraph 1, including the requirement that the diplomatic bag should not be opened or detained, were in substance justified. He had no strong feelings as to whether the article should provide for the inviolability of the diplomatic bag "at all times" or "at any time"; the former phrase was to be found in the three conventions adopted after the 1961 Vienna Convention, while the latter phrase was used in the text of that Convention itself.

6. Another major issue raised in connection with article 36 had been the inviolability of the bag and the means of examining it. Several questions had been asked concerning the scope of examination and the admissibility of certain methods and procedures, such as safety checks at airports, the use of sniffer dogs and scanning by means of electronic and other mechanical devices. Some speakers had, moreover, criticized the words "exempt from any kind of examination" in paragraph 1 as being too categorical. A routine identification check of the visible marks, seals and other external features attesting to the bag's official character would obviously not affect its inviolability and the confidential character of its contents, but a close examination of the packages constituting the bag which was carried out in a manner that might reveal their contents or even result in the extraction of confidential information was an entirely different matter. At the time of the drafting of the Vienna Convention on Diplomatic Relations, in 1961, it had been assumed that the only way to reveal the contents of the bag was to open it. Today, however, the use of electronic and other sophisticated technical devices could jeopardize the confidentiality of the diplomatic bag's contents and thus hamper one of its most essential functions as a means of official communication. Since 1961, States had concluded as many as 30 or 40 bilateral consular agreements which explicitly provided that the consular bag was inviolable and should not be subject to examination, but which did not specify the nature of such examination.

7. It had been suggested that scanning might be permitted in strictly controlled conditions. The discretionary character of the use of that type of examination might, however, cause prejudice to the confidentiality of the bag and place economically and technologically less developed States at a disadvantage. Scanning or any inspection capable of revealing the contents of the diplomatic bag should not be permitted under any circumstances, since they might be detrimental to the bag's confidentiality and incompatible with the principle of its inviolability.

8. Various points of substance and of drafting had been raised in connection with the provision embodied in article 36, paragraph 2. Without going into details, he explained that that provision had been based on State practice, as evidenced in a number of bilateral consular agreements, and had also been considered in connection with the declaration of optional exceptions referred to in draft article 43. To apply the régime established in article 35, paragraph 3, of the 1963 Vienna Convention on Consular Relations to the diplomatic bag without any previously agreed procedure would clearly be to derogate from the régime established in the 1961 Vienna Convention on Diplomatic Relations and in the other two codification conventions. If a special régime were established by way of reciprocity through unilateral declarations of optional exceptions, as envisaged in paragraphs 3 and 4 of the text proposed by Sir Ian Sinclair (1906th meeting, para. 7), then such declarations could, in his own view, also provide for the application of article 27, paragraph 3, of the 1961 Vienna Convention to the consular bag, as was in fact the case with a number of bilateral consular agreements; in other words, the option should be a two-way one.

9. Concluding his remarks on article 36, he said that the Commission and possibly the Drafting Committee might consider the suggestion that article 36 should state as a general rule that the diplomatic bag should be inviolable at all times, or at any time, and wherever situated; that it should not be opened or detained; and that it should be exempt from customs and other similar inspection or examination through electronic or other mechanical devices which might be prejudicial to its inviolability and confidential character. The article might also contain a provision concerning the consular bag and the application of the rule embodied in article 35, paragraph 3, of the 1963 Vienna Convention, as well as a reference to the declaration of optional exceptions provided for in draft article 43.

10. Turning to draft article 37, he noted that the revised text based on the former draft articles 37 and 38 had received favourable consideration as to its

[6] *Ibid.*, p. 125, para. 340.

substance. Most of the critical comments made and amendments proposed had related to drafting matters. Some speakers had expressed the view that the reference to customs and other inspections should be relegated to article 36, so that article 37 would deal only with exemption from customs duties, dues and taxes. He had no objection to that suggestion, provided that the wording of article 36 was amended accordingly.

11. The main thrust of draft article 39 and the practical significance of the protective measures for which it provided had, generally speaking, met with a positive response. Most of the comments and proposals by members of the Commission had focused on drafting improvements. As to the point raised by Mr. Sucharitkul (1905th meeting) concerning the difficulty of assuming that receiving or transit States would have knowledge of the whereabouts of the diplomatic bag in cases where it went astray, he said that the operation of article 39 would depend on the circumstances of each particular case and that no general prescription could be provided. The sending State should, of course, be notified in such circumstances and the provision to that effect might therefore be worded in a more flexible manner. Several speakers had said that the scope of article 39 should be broadened to include exceptional circumstances other than the termination of the functions of the diplomatic courier. He thought the point well taken and believed that appropriate wording could be found without any great difficulty. The Drafting Committee might also be requested to try to accommodate Mr. Reuter's suggestion (1909th meeting) that draft articles 39 and 40 should be combined into a single article whose paragraph 1 would deal with circumstances in which the courier, the captain of a commercial aircraft or the master of a merchant ship was unable to deliver the bag or in which the diplomatic bag, having gone astray, was found in the territory of the receiving or transit State, while paragraph 2 would cover the obligations of an "unforeseen" transit State in case of *force majeure* or fortuitous event.

12. In his oral introduction (1904th meeting) of his sixth report (A/CN.4/390), as well as in that report itself and in earlier reports, he had made a point of explaining that draft article 41 was specifically intended to ensure the protection of the diplomatic courier and the diplomatic bag in the case where the bag was being dispatched to or by a special mission, a delegation to an international conference or a permanent mission to an international organization. The use of the term "receiving State" might give the impression that the text referred to bilateral relations in the case of non-recognition of a State or Government or in the absence of diplomatic or consular relations, but that would of course be meaningless. It should nevertheless be noted that the term "receiving State" was used in the 1969 Convention on Special Missions, while the 1975 Vienna Convention on the Representation of States employed the term "host State". Some speakers had questioned the practical need for article 41. However, as had been pointed out during the discussion in the Sixth Committee at the thirty-ninth session of the General Assembly (A/CN.4/L.382, para. 197), the provisions of article 41 were necessary to guarantee a State freedom of communication with its missions abroad. A text consolidating and supplementing existing provisions would, moreover, form part of a coherent legal system of rules governing the status of all kinds of couriers and bags, as set out in article 3 of the draft. In his opinion, it was the wording of article 41, not its substance, that gave rise to problems and efforts should therefore be concentrated on drafting improvements.

13. A number of critical comments had been made with regard to draft article 42. He had, for example, been asked why he had not retained paragraph 1 of the original text.[7] The answer to that question was that he had deleted paragraph 1 in accordance with a proposal made at the Commission's previous session.[8] The use of the words "The provisions of the present articles are without prejudice to the relevant provisions in other conventions" in the new paragraph 1 had also been criticized, but, as he understood them, those words meant that there should be compatibility in object and purpose between the present draft articles and the four codification conventions and other international agreements with a bearing on the status and, especially, the legal protection of the courier and the bag. The same wording was used in article 4 (*a*) of the 1975 Vienna Convention. He would, however, have no objection if the words "without prejudice" were suitably clarified. With regard to paragraph 2 of article 42, it had been suggested that the words "confirming or supplementing or extending or amplifying" might be replaced by the word "modifying". Although the proposed wording was modelled on article 73, paragraph 2, of the 1963 Vienna Convention, he agreed that the suggested simplification would be an improvement.

14. As to draft article 43, he said that the existence of a plurality of régimes was a result of the régimes established in the four codification conventions and, more specifically, of the difference between the status of the consular bag and that of bags referred to in the three other conventions. Although a plurality of régimes might obviously create highly complex situations, flexibility was undoubtedly needed. Most of the comments made on article 43 had related to its wording. He therefore suggested that paragraph 1 should state that a declaration of optional exceptions could be made without prejudice "to the object and purpose of the present articles". In the same paragraph, the words "or at any time thereafter" should be added after the words "acceding to these articles". A new sentence should be added at the end of paragraph 2 to show that the withdrawal of a declaration had to be made in writing. Special provisions should also be introduced on the application of the régime of article 35, paragraph 3, of the 1963 Vienna Convention to all kinds of bags, or of article 27, paragraph 3, of the 1961 Vienna Convention to the consular bag, through a declaration of optional exceptions and by way of reciprocity.

15. Reverting to draft article 23, which he had discussed at the previous meeting, he said that he personally would prefer paragraph 1 to remain unchanged. It might, however, contain an additional provision stipulating that the diplomatic courier's

[7] *Yearbook ... 1984*, vol. II (Part Two), p. 27, footnote 104.

[8] *Ibid.*, pp. 36-37, para. 150.

immunity from the criminal jurisdiction of the transit State was confined to acts performed in the exercise of his functions. Paragraphs 2 and 3 could remain unchanged. Apart from the necessary drafting changes, paragraph 4 should also contain a provision stating that the diplomatic courier might be requested to give written evidence. The word "Any" at the beginning of paragraph 5 should be replaced by the word "The".

16. In conclusion, he thanked members of the Commission for their helpful and constructive criticism and suggestions and proposed that draft articles 23 and 36 to 43 should be referred to the Drafting Committee, which should try to consider draft article 23 before the end of the current session.

17. The CHAIRMAN thanked the Special Rapporteur for his statement and for his proposals with regard to particular articles. The Special Rapporteur would undoubtedly agree that the Drafting Committee's consideration of the articles should be based on all the views expressed during the debate and on his proposals and that it should make such changes as it might consider appropriate. The Drafting Committee should also bear in mind the Commission's decision that draft articles 28 and 29 should be reviewed in the light of the conclusion reached with regard to draft article 23.

18. Mr. SUCHARITKUL said he was not sure that the Drafting Committee would have time to consider draft article 23 at the current session, as the Special Rapporteur has suggested, without detriment to the urgent consideration of other topics.

19. Mr. CALERO RODRIGUES, speaking as Chairman of the Drafting Committee, said that, without prejudice to any work it might have to do on the topic of "Jurisdictional immunities of States and their property", the Drafting Committee would make every effort to deal with draft article 23 at the current session, so that articles 1 to 35 might be submitted in their entirety to the General Assembly at its fortieth session.

20. The CHAIRMAN suggested that draft articles 23 and 36 to 43 should be referred to the Drafting Committee on the understanding that draft article 23 would be considered at the current session if that were possible without prejudice to the consideration of other topics.

It was so agreed.[9]

The meeting rose at 1.05 p.m.

[9] For consideration of draft article 23 as proposed by the Drafting Committee, see 1930th meeting, paras. 27-49.

1915th MEETING

Monday, 1 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

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. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Pirzada, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC(XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3]

ARTICLE 19 (Ships employed in commercial service) *and*

ARTICLE 20 (Arbitration)*

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 21 to 28

1. The CHAIRMAN recalled that, at its previous session, the Commission had decided[4] to resume at the present session its consideration of draft articles 19 and 20, which completed part III of the draft articles on jurisdictional immunities of States and their property.

2. Draft article 19, submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233), consisted of two alternatives, A and B. At the conclusion of the Commission's debate, the Special Rapporteur withdrew alternative A and submitted the following revised text[5] of article 19:

* Resumed from the 1841st meeting (*Yearbook ... 1984*, vol. I, pp. 156 *et seq.*).

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] *Yearbook ... 1984*, vol. II (Part Two), p. 59, para. 205.

[5] A/CN.4/L.380.

Article 19. Ships employed in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns, possesses, employs or operates a ship in commercial service cannot invoke immunity from the jurisdiction of a court of another State in a proceeding relating to the commercial operation of that ship and cargo, whether the proceeding is instituted against its owner or operator or otherwise, provided that, at the time when the cause of action arose, the ship and cargo belonging to that State were in use or intended for use for commercial purposes.

2. Paragraph 1 does not apply to:

(*a*) warships or ships operated or employed by a State in governmental service;

(*b*) cargo belonging to a State which is destined for non-commercial use.

3. Draft article 20, also submitted by the Special Rapporteur in his sixth report (*ibid.*, para. 256), read as follows:

Article 20. Arbitration

1. If a State agrees in writing with a foreign natural or juridical person to submit to arbitration a dispute which has arisen, or may arise, out of a civil or commercial matter, that State is considered to have consented to the exercise of jurisdiction by a court of another State on the territory or according to the law of which the arbitration has taken or will take place, and accordingly it cannot invoke immunity from jurisdiction in any proceedings before that court in relation to:

(*a*) the validity or interpretation of the arbitration agreement;

(*b*) the arbitration procedure;

(*c*) the setting aside of the awards.

2. Paragraph 1 has effect subject to any contrary provision in the arbitration agreement, and shall not apply to an arbitration agreement between States.

4. He then invited the Special Rapporteur to introduce his seventh report (A/CN.4/388), which contained draft articles 21 to 24 and 25 to 28, constituting parts IV and V of the draft, respectively, as follows:

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY FROM ATTACHMENT AND EXECUTION

Article 21. Scope of the present part

The present part applies to the immunity of one State in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution by order of a court of another State.

Article 22. State immunity from attachment and execution

1. In accordance with the provisions of the present articles, State property, or property in the possession or control of a State, or property in which a State has an interest, is protected by the rule of State immunity from attachment, arrest and execution by order of a court of another State, as an interim or precautionary pre-judgment measure, or as a process to secure satisfaction of a final judgment of such a court, unless:

(*a*) the State concerned has consented to such attachment, arrest or execution against the property in question; or

(*b*) the property is in use or intended for use by the State in commercial and non-governmental service; or

(*c*) the property, being movable or immovable, intellectual or industrial, is one in respect of which it is the object of the proceeding to determine the question of ownership by the State, its possession or use, or any right or interest arising for the State by way of succession, gift or *bona vacantia*; or

(*d*) the property is identified as specifically allocated for satisfaction of a final judgment or payment of debts incurred by the State.

2. A State is also immune in respect of its property, or property in its possession or control or in which it has an interest, from an interim or final injunction or specific performance order by a court of another State, which is designed to deprive the State of its enjoyment, possession or use of the property or other interest, or otherwise to compel the State against its will to vacate the property or to surrender it to another person.

Article 23. Modalities and effect of consent to attachment and execution

1. A State may give its consent in writing, in a multilateral or bilateral treaty or in an agreement or contract concluded by it or by one of its agencies with a foreign person, natural or juridical, not to invoke State immunity in respect of State property, or property in its possession or control or in which it has an interest, from attachment, arrest and execution, provided that the property in question, movable or immovable, intellectual or industrial:

(*a*) forms part of a commercial transaction or is used in connection with commercial activities, or is otherwise in use for non-public purposes unconnected with the exercise of governmental authority of the State; and

(*b*) is identified as being situated in the territory of the State of the forum.

2. The effect of paragraph 1 is further limited by the provisions of article 24.

Article 24. Types of State property permanently immune from attachment and execution

1. Notwithstanding article 23 and regardless of consent or waiver of immunity, the following property may not be attached, arrested or otherwise taken in forced execution of the final judgment by a court of another State:

(*a*) property used or intended for use for diplomatic or consular purposes or for the purposes of special missions or representation of States in their relations with international organizations of universal character internationally protected by inviolability; or

(*b*) property of a military character, or used or intended for use for military purposes, or owned or managed by the military authority or defence agency of the State; or

(*c*) property of a central bank held by it for central banking purposes and not allocated for any specified payments; or

(*d*) property of a State monetary authority held by it for monetary and non-commercial purposes and not specifically earmarked for payments of judgment or any other debts; or

(*e*) property forming part of the national archives of a State or of its distinct national cultural heritage.

2. Nothing in paragraph 1 shall prevent a State from undertaking to give effect to the judgment of a court of another State, or from consenting to the attachment, arrest or execution of property other than the types listed in paragraph 1.

PART V

MISCELLANEOUS PROVISIONS

Article 25. Immunities of personal sovereigns and other heads of State

1. A personal sovereign or head of State is immune from the criminal and civil jurisdiction of a court of another State during his office. He need not be accorded immunity from its civil and administrative jurisdiction:

(*a*) in a proceeding relating to private immovable property situated in the territory of the State of the forum, unless he holds it on behalf on the State for governmental purposes; or

(*b*) in a proceeding relating to succession to movable or immovable property in which he is involved as executor, administrator, heir or legatee as a private person; or

(*c*) in a proceeding relating to any professional or commercial activity outside his sovereign or governmental functions.

2. No measures of attachment or execution may be taken in respect of property of a personal sovereign or head of State if they cannot be taken without infringing the inviolability of his person or of his residence.

Article 26. Service of process and judgment in default of appearance

1. Service of process by any writ or other document instituting proceedings against a State may be effected in accordance with any special arrangement or international convention binding on the forum State and the State concerned or transmitted by registered mail requiring a signed receipt or through diplomatic channels addressed and dispatched to the head of the Ministry of Foreign Affairs of the State concerned.

2. Any State that enters an appearance in proceedings cannot thereafter object to non-compliance of the service of process with the procedure set out in paragraph 1.

3. No judgment in default of appearance shall be rendered against a State except on proof of compliance with paragraph 1 above and of the expiry of a period of time which is to be reasonably extended.

4. A copy of any judgment rendered against a State in default of appearance shall be transmitted to the State concerned through one of the channels as in the case of service of process, and any time for applying to have the judgment set aside shall begin to run after the date on which the copy of the judgment is received by the State concerned.

Article 27. Procedural privileges

1. A State is not required to comply with an order by a court of another State compelling it to perform a specific act or to refrain from specified action.

2. No fine or penalty shall be imposed on a State by a court of another State by way of committal in respect of any failure or refusal to disclose or produce any document or other information for the purposes of proceedings to which the State is a party.

3. A State is not required to provide security for costs in any proceedings to which it is a party before a court of another State.

Article 28. Restriction and extension of immunities and privileges

A State may restrict or extend with respect to another State the immunities and privileges provided for in the present articles to the extent that appears to it to be appropriate by reason of reciprocity, or conformity with the standard practice of that other State, or the necessity for subsequent readjustments required by treaty, convention or other international agreement applicable between them.

5. Mr. SUCHARITKUL (Special Rapporteur) said that the urgency of the topic had increased as a result of recent legislation enacted in various countries. Commenting on the progress of the work, he reminded the Commission that, in part I of the draft, article 1 had been adopted, and also part of article 2. The definitions of the terms "territorial State" and "foreign State", in paragraph 1 (*d*) and (*e*) of article 2 had been withdrawn, and the expressions "one State" and "another State" would be used instead. The Commission would have to re-examine the remaining provisions of article 2, and in particular the need for a definition of the term "jurisdiction", possibly at its next session. Paragraph 2 of draft article 3 had been adopted, but not paragraph 1. Although the definition of the term "foreign State" had been withdrawn, one member still considered that it would be useful to refer expressly, in the interpretative provisions, to the component elements of a foreign State. The Commission would have to revert to draft article 4 before referring it to the Drafting Committee, since it might be necessary to add another subparagraph to cover internationally protected persons under the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.[6] Draft article 5 would also have to be reconsidered.

6. In part II of the draft, article 6 had already been provisionally adopted, but it had subsequently been decided that some change was required in the light of the amendment to article 1. On the basis of informal suggestions made to him, he would suggest that paragraph 1 of article 6 be reworded to read:

> "1. A State is immune in respect of itself and its property from the jurisdiction of the courts of another State to the extent and subject to the limitations specified in the provisions of the present articles."

The Drafting Committee would have to consider whether paragraph 2 of article 6 should be retained as worded or deleted. In article 7, the brackets around the words "under article 6" would be removed if article 6 were amended and adopted. Articles 8, 9 and 10, the remaining articles in part II, had been provisionally adopted, although one representative in the Sixth Committee of the General Assembly had proposed that, in article 9, paragraph 2, the words "the sole purpose" should be replaced by "the purpose, *inter alia*" (see A/CN.4/L.369, para. 190).

7. In part III of the draft, the Commission had adopted articles 12 to 18 on first reading. A proposal that a provision on territorial connections should be added to article 12 would be considered on second reading. The Commission had been about to adopt paragraph 2 of article 11, but that provision had not been referred to the Drafting Committee; it would therefore be in order to refer the article as a whole to the Drafting Committee at the current session.

8. Draft article 19, which had been discussed in detail at the previous session, had not been referred to the Drafting Committee because one member had not been ready to take part in the discussion. In his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233), he had proposed two alternative texts for article 19, alternative A being close to English law and alternative B closer to the 1926 Brussels Convention[7] and the 1972 European Convention on State Immunity.[8] It had been considered, however, that both drafts reflected unduly the legal principles of English and United States law, which used somewhat esoteric terms such as "suits in admiralty" or "actions *in rem* and *in personam*". Those expressions had therefore been deleted in the revised text of article 19 submitted to the Commission.

[6] United Nations, *Treaty Series*, vol. 1035, p. 167.

[7] International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels, 10 April 1926) and Additional Protocol (Brussels, 24 May 1934) (League of Nations, *Treaty Series*, vol. CLXXVI, pp. 199 and 215; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 173 *et seq.*).

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

9. Article 19 provided for a very important exception relating to maritime trade. The whole area of jurisdictional immunities had been involved in shipping since the classic case, *The Schooner "Exchange"* v. *McFaddon and others* in 1812 (*ibid.*, para. 136). All the British cases cited in the sixth report (*ibid.*, paras. 149-153) related to shipping and the less qualified concept of immunity, as recognized in the United Kingdom in *The "Parlement belge"* (1980), *The "Porto Alexandre"* (1920) and *The "Cristina"* (1938), and by the Supreme Court of the United States of America in *Berizzi Brothers Co.* v. *SS "Pesaro"* in 1926 (*ibid.*, para. 157). The change had come about as far back as 1922, when a British Admiralty judge had proposed the abolition of jurisdictional immunities in the case of public vessels, particularly where their commercial activities were concerned. That proposal had subsequently been adopted by treaty. The substance of the exception was therefore not in dispute, but the drafting might require attention and he trusted that the article would be referred to the Drafting Committee as soon as possible.

10. Draft article 20 dealt with arbitration, not of the international or governmental kind, but arbitration as provided for under various government or State contracts. It was, in a sense, international commercial arbitration, but international only in that the other party was not a national of the State that had agreed to the arbitration. A foreign element was thus involved. The materials cited in the sixth report (*ibid.*, paras. 247-253) covered judicial practice, governmental practice, national legislation, and international and regional conventions. In that connection, he drew attention to article 12 of the 1972 European Convention on State Immunity, reproduced in the sixth report (*ibid.*, para. 251).

11. Provisions in treaties, such as the 1923 Protocol on Arbitration Clauses[9] and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[10] had led him to the conclusion that consent to the exercise of jurisdiction must be implied where a State had agreed in writing with a foreign natural or juridical person to submit to arbitration a dispute which had arisen or might arise out of a civil or commercial matter. One objection to that proposition had apparently been made on the mistaken assumption that arbitration within the terms of article 20 was to be regarded as an alternative to international judicial settlement. Article 20 was not concerned with arbitration in that sense at all, but solely with consent of a State to submit to the jurisdiction of a court of another State, consent which was implied when the former State agreed to submit to arbitration a dispute arising out of a civil or commercial matter.

12. Turning to his seventh report (A/CN.4/388), he expressed gratitude to those members of the Commission who had supplied him with legal materials from their national legislation and thanked the Secretariat for its assistance. Although many members of the Commission thought that it would be better to concentrate on immunities of States and leave aside, for the time being, the question of immunities from attachment and execution, he considered that, during the course of the study, the Commission would necessarily come upon the property aspects of immunity in a number of instances. He had followed the suggestion that he should borrow the definition of State property given in the draft articles which later became the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.[11] He had incorporated that definition in draft article 2, paragraph 1 (*f*), which read:

> (*f*) "State property" means property, rights and interests which are owned by a State according to its internal law;

13. That statement might raise another question, especially in regard to property taken in violation of the generally accepted principles of international law, such as property expropriated without compensation. It was not possible at the present stage of the study, however, to deal with the question of the legality of conflicting claims under different legal systems in regard to proprietary rights or the constitutionality of seizure of property under private or, for that matter, public international law. That question had arisen in connection with the *Hong Kong Aircraft* case (1953) and the seizure of vessels in *Juan Ysmael & Co. Inc.* v. *Government of the Republic of Indonesia* (1954) (see A/CN.4/376 and Add.1 and 2, para. 150 and footnote 145). The connection between State property and State immunity was clearly discernible in the dictum of Lord Atkin in *The "Cristina"*, which was cited in his seventh report (A/CN.4/388, para. 6): the "specific property" referred to by Lord Atkin was more in the nature of specific performance than of a proprietary right. Furthermore, article 7, paragraph 2, of the draft, contained a provision on which State property appeared to have had an important bearing.

14. In another, entirely separate, connection, property came into direct contact with jurisdictional immunities of States inasmuch as States were also immune from attachment, arrest and execution by order of a court of another State under part IV of the draft, not only in respect of State property, but also invariably in respect of property in their possession or control or in which they had an interest.

15. In yet another connection, there were several specified areas under part III of the draft in which the question of property arose. For instance, questions of ownership, possession and use of property situated in the State of the forum might, in appropriate circumstances, be determined by the *forum rei sitae*, or court of the State where the property was situated, without any claim of State immunity, as provided in article 15. Similarly, proceedings relating to intellectual or industrial property which enjoyed legal protection in the State of the forum would not be barred by the rule of State immunity.

16. Referring next to individual draft articles, he observed that article 21, though not perhaps strictly necessary, served a useful purpose in that it provided an indication of the scope of part IV of the draft and marked the transition from part III to part IV. As he

---

[9] League of Nations, *Treaty Series*, vol. XXVII, p. 157.

[10] Signed at New York on 10 June 1958 (United Nations, *Treaty Series*, vol. 330, p. 38); hereinafter referred to as "1958 New York Convention".

[11] A/CONF.117/14.

had emphasized (*ibid.*, paras. 15-17), certain distinctions had to be maintained between immunity from attachment and execution, on the one hand, and immunity from judicial jurisdiction, on the other. Jurisdiction was normally understood to refer to the power to adjudicate or settle disputes by adjudication, but immunity from attachment and execution related more specifically to immunities of States in respect of their property from pre-judgment attachment and arrest as well as from execution of the judgment rendered. That distinction emerged clearly from jurisprudence, particularly in regard to waiver, because waiver of immunity from jurisdiction did not automatically entail waiver of immunity from execution. In that connection, he had referred (*ibid.*, para. 17) to *Duff Development Company Ltd.* v. *Government of Kelantan and another* (1924) and *Dexter & Carpenter, Inc.* v. *Kunglig Järnvägsstyrelsen et al.* (1930), which showed that immunity from jurisdiction and immunity from attachment were not interconnected and, as the Court of Appeal of Aix-en-Provence had observed in *Socifros* v. *USSR* (1938), waiver of the one had never entailed loss of the right to invoke the other before French courts (*ibid.*).

17. Some linkage between immunity from attachment and execution and immunity from jurisdiction had, however, been seen in a number of instances. In his writings, C. F. Gabba had supported absolute immunity from jurisdiction for the reasons cited in the seventh report (*ibid.*, para. 20). That was one view of the linkage, but there was also another, which regarded the exercise of jurisdiction as leading to the power to execute. Thus, in the *Socobelge* case (1951), the court had rejected immunity from execution once jurisdiction had been exercised on the merits, on the grounds cited in the seventh report (*ibid.*, para. 22). That view had been reflected in the conclusion of the Avocat général in an earlier Belgian case that the power to proceed to forced execution was but a consequence of the power to exercise jurisdiction; and it was further reflected in the case-law of certain countries, such as Switzerland.

18. A further question was whether there should be immunity from execution, attachment or seizure arising under or pursuant to an executive order or legislative decree. Although the type of cases covered by such orders or decrees would be beyond the scope of the present study, they raised an interesting point which should perhaps be pursued later.

19. Draft article 22 covered immunity from seizure to found jurisdiction, immunity from pre-judgment attachment and immunity from execution. The principles of immunity from attachment, arrest and execution flowed from the same principle as did jurisdictional immunity, namely *par in parem imperium non habet*, and were thus founded on the principles of the independence and sovereign equality of States. Like jurisdictional immunity, a degree of immunity from attachment was linked to the question of consent.

20. In his seventh report, he had examined national legislation on the matter, noting *inter alia* that the two Italian decree laws of 1925 and 1926 were declaratory of existing customary law on immunity from execution and attachment (*ibid.*, paras. 49-51), as was article 61 of the Fundamentals of Civil Procedure of the USSR and the Union Republics (*ibid.*, para. 52). The question of reciprocity had been dealt with in both cases, though somewhat differently. He had also examined the relevant legislation of Canada, the Netherlands, Norway, Pakistan, the United Kingdom, the United States and Yugoslavia.

21. With regard to international and regional conventions, he drew attention in particular to article 23 of the 1972 European Convention on State Immunity (*ibid.*, para. 65), and referred to other multilateral treaties (*ibid.*, para. 68). The 1926 Brussels Convention contained an interesting provision relating to proceedings *in rem*, which provided that certain specified ships and cargoes were immune from attachment, arrest and execution (*ibid.*, para. 69). Similar provisions were to be found in the other specialized conventions mentioned (*ibid.*, para. 70).

22. A number of bilateral treaties dealt with immunity from attachment and the question had assumed considerable importance in certain recent cases involving the bank accounts of embassies. It had caused concern to Governments, particularly those represented in the Asian-African Legal Consultative Committee. That was because the cost of establishing immunity from jurisdiction and from attachment could be exorbitant. Case-law on the question of bank accounts was extremely interesting. In the Federal Republic of Germany, the courts had decided that the assets of embassies, including bank accounts, if used for the running of the embassy, were exempt from attachment. A case involving the Embassy of the United Republic of Tanzania in the United States of America, however, had gone the other way. The leading case was *Alcom Ltd.* v. *Republic of Colombia*, decided in 1984 by the United Kingdom House of Lords. He had referred at the previous session to the judgment of Lord Diplock in that case.[12] He had been pleased to learn that a case decided recently in the United States might throw further light on the matter and that Congress was considering the possibility of enforcement through diplomatic channels, rather than through the national courts. It was an area in which international opinion seemed to favour more absolute and less qualified immunity.

23. Consent to attachment and execution, dealt with in draft article 23, was normally expressed in writing, either in multilateral treaties or in bilateral agreements. In his seventh report (*ibid.*, paras. 92 *et seq.*), he had cited examples of treaties concluded by States with widely different structures. He had also given examples of government practice, which showed that consent was often tailor-made. The case-law on waiver of immunity or on expression of consent did not indicate the ways in which consent could be validly expressed.

24. Draft article 24, which imposed certain limitations on the effectiveness of consent, was designed to protect States that might unwittingly have agreed in writing to allow their embassies or diplomatic premises to be seized, without realizing the extent of the resultant disruption of their diplomatic relations. There were certain types of property whose seizure

[12] *Yearbook ... 1984*, vol. I, p. 112, 1833rd meeting, para. 9.

might conceivably cause outbreak of hostilities. The character of property could change, however, so that diplomatic premises, for instance, might cease to be diplomatic premises, although that would be a rare occurrence. He had also referred in his seventh report (*ibid.*, paras. 105 *et seq.*) to various types of unattachable State property, such as property of a military nature or under the control of defence agencies. There were at least five categories of property that were immune from attachment and execution and they were listed in paragraph 1 of article 24.

25. Part V of the draft consisted of articles 25 to 28, which were self-explanatory and could perhaps be referred to the Drafting Committee for consideration at the next session.

26. He suggested that the Commission should consider articles 19 and 20 forthwith, so that they could be referred to the Drafting Committee as soon as possible. Articles 21 to 24 should also be referred to the Drafting Committee at the current session if possible.

27. Mr. McCAFFREY said that he had spoken at the previous session[13] on draft article 19 as originally submitted (A/CN.4/376 and Add.1 and 2, paras. 232-233). His conclusion then had been that he was prepared to support an article of that nature. He had also stressed the importance of referring the article to the Drafting Committee without delay, so that action could be taken on it.

28. The new draft article 19 now before the Commission went in the right direction. At the same time, he suggested that the Drafting Committee should examine the wording with a view to eliminating certain redundancies. In paragraph 1, reference was made to a ship "in commercial service". Then the same paragraph mentioned a proceeding relating to "the commercial operation" of the ship. Finally, the concluding words of the paragraph were "intended for use for commercial purposes". The Drafting Committee should examine whether all those three references to the commercial element were really necessary.

29. Moreover, in view of the emphasis in paragraph 1 on the commercial character of the service performed by the ships in question, it did not seem necessary to provide for a specific exception relating to warships and ships in governmental service in paragraph 2 (*a*).

30. He was aware that draft article 20, dealing with arbitration, was modelled on article 12 of the 1972 European Convention on State Immunity (*ibid.*, para. 251). He would revert to article 20 at greater length at the next meeting. At the present stage, he only wished to raise a question concerning the introductory provision of paragraph 1, stating that, where a State had agreed in writing to submit a civil or commercial dispute to arbitration, it was considered to have consented to the exercise of jurisdiction by "a court of another State" on whose territory or in accordance with whose law the arbitration had taken place or would take place. His question related to the position with regard to a State other than that in which arbitration had been contemplated. In such other State, would the State that had agreed to arbitration be immune from being held to that agreement?

[13] *Ibid.*, pp. 160-161, 1841st meeting, paras. 25-30.

Co-operation with other bodies (*continued*)*

[Agenda item 11]

Statement by the Observer for the European Committee on Legal Co-operation

31. The CHAIRMAN welcomed Mr. Albanese, Deputy Director of the Legal Division of the Council of Europe, Observer for the European Committee on Legal Co-operation, and invited him to address the Commission on the Committee's activities during the past year.

32. Mr. ALBANESE (Observer for the European Committee on Legal Co-operation) said that, in November 1984, Sir Ian Sinclair had made an interesting statement to the European Committee on the work of the Commission. The Committee had been particularly interested in the draft articles on jurisdictional immunities of States and their property, because it had itself prepared the European Convention on State Immunity, which had entered into force on 11 June 1976 and was at present binding on six States. It should be noted that an Additional Protocol to that Convention had entered into force on 22 May 1985 and had been ratified by Austria, Belgium, Cyprus, the Netherlands and Switzerland.[14]

33. That optional Protocol made provision for two specific European procedures for the settlement of disputes arising from the application of the Convention. The first related to applications submitted by private persons against a State which did not comply with a judgment rendered against it. Such persons could apply to the competent court of the State against which the judgment had been rendered, requesting the court to decide whether the judgment had to be executed in accordance with the Convention. They could also apply to the European Tribunal set up under the Protocol, provided that the State against which the judgment had been given was a party to the Protocol and had accepted the procedure in question. It was in fact open to a State, by making a declaration, to limit the application of the Protocol to proceedings between States, but none of the five States which had ratified the Protocol had done so. The Tribunal was required to decide whether the judgment had to be executed, without examining it as to the merits of the case. The second procedure dealt with inter-State disputes relating to the interpretation or application of the Convention in relations between parties to the Protocol. Such disputes could be brought before the European Tribunal, whose jurisdiction was compulsory, since a dispute could be submitted to it not only under a *compromis*, but also by a unilateral application.

34. The European Tribunal consisted of the members of the European Court of Human Rights and was presided over by the President of that Court. Its secretariat was provided by the Registry of the European Court. The Tribunal adopted its own rules of

* Resumed from the 1908th meeting.

[14] See footnote 8 above.

procedure. When a case was submitted to it by a private individual, a seven-member division was formed which had to include a member of the Tribunal who was a national of the State against which the judgment had been rendered and a member who was a national of the forum State. The other members were chosen by lot. If a State which was not a member of the Council of Europe acceded to the Convention and its Protocol, the composition of the Tribunal had to be broadened to include a member designated by that State, with the consent of the Council of Ministers, for a period of nine years. When an inter-State dispute was submitted to the Tribunal, the members who were nationals of the States parties to the dispute had to be included in the division hearing the case. If the dispute raised a serious issue relating to the interpretation of the Convention or the Protocol, the division could decide not to proceed with the case and transfer it to the European Tribunal sitting in plenary session. That procedure was compulsory if the settlement of the case was likely to lead to a conflict with an earlier decision of a division or of the plenary Tribunal. The decisions of the Tribunal were taken by a majority of the members present; the reasons had to be stated, there was no right of appeal and the decisions had binding force.

35. He also drew attention to the finalization of the draft European convention on recognition of the legal personality of international non-governmental organizations. The purpose of that draft was to facilitate the work of those organizations at the international level, in view of their importance and their contribution to furthering the objectives of the Council of Europe. The expression "international non-governmental organizations" had not been defined, but the preamble and article 1 of the draft showed that they were organizations, foundations or other private institutions which satisfied the requirements of that article, which carried on an activity useful to the international community, in particular in the scientific, cultural, philanthropic, public health and educational fields, and which contributed to the fulfilment of the purposes and principles of the United Nations and of the Council of Europe.

36. Many international non-governmental organizations, though set up in one State, had an international vocation, so that when carrying on their activities in other States they were faced with the problem of recognition of their legal personality. To establish their legal personality in those States they had to set in motion a recognition procedure. That was particularly difficult when the organization's headquarters was movable, that was to say when it depended on the residence of its president or secretary-general. In order to overcome that difficulty, article 2 of the draft convention provided that the legal personality and capacity of an organization, as recognized in the contracting State of its statutory headquarters, would be automatically recognized in the other contracting States. However, if any restrictions, limitations or special procedures dictated by an essential public interest applied to the exercise of the rights deriving from the organization's legal capacity under the laws of the State which had recognized that capacity, they would also apply in the other contracting States.

37. For an international non-governmental organization's legal personality and capacity to be recognized abroad, it must have a non-profit-making purpose of international utility as described in the preamble to the draft, must have been set up by an instrument governed by the internal law of a contracting State—which excluded public entities—must carry on effective activities in at least two States, and must have its statutory headquarters in the territory of a contracting State and its working headquarters in that States or another contracting State. If those conditions were met, the legal personality of the organization had to be recognized by the other contracting States. Nevertheless, an organization could be denied legal personality if its object, purpose or activities effectively carried on conflicted with national security, public safety, public order, the prevention of crime, the protection of health and public morals or the protection of the rights and freedoms of others, or jeopardized relations with another State or the maintenance of international peace and security. The Council of Ministers was examining the draft convention, which had received a favourable opinion from the Parliament of the Council of Europe.

38. As in the past, the other activities of the Committee relating to public international law had been concentrated in the Committee of Experts on Public International Law. That Committee had two main tasks: to study specific problems of public international law which lent themselves to action at the regional level, and to carry out exchanges of views and information on the activities of other international bodies, so that the States members of the Council of Europe could adopt common positions. Among other specific problems of public international law was the question of the exercise of a gainful occupation by members of the family of the staff of diplomatic missions and consular posts—a subject on which model clauses would be drafted.

39. A comparative study was being prepared on the means by which member States expressed their will to be bound by a treaty and on the national procedures applicable. That study, which dealt with national procedures as found not only in the laws, but also in the constitutional and parliamentary practice of States, should make it possible to reflect on the best means of applying the conventions prepared within the Council of Europe.

40. Lastly, he drew attention to a study on reciprocity in the application of the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations. Three important matters had already been the subject of exchanges of views and information within the Committee of Experts: the process of drawing up multilateral treaties, on the basis of the questionnaire prepared by the Secretary-General of the United Nations; the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts;[15] and the draft international convention against the recruitment, use, financing and training of mercenaries, which was under preparation by an *ad hoc* committee of the United Nations. At its next

[15] A/CONF.117/14.

meeting, the Committee of Experts was to hold an exchange of views and information on the preparation of the conference that was to meet in Vienna in 1986 to study the question of treaties concluded between States and international organizations or between international organizations.

41. By holding such consultations, the European Committee on Legal Co-operation was doing useful work not only for the States members of the Council of Europe, but also for the international community as a whole, since those regional activities were bound to facilitate the work of the United Nations. It was in that spirit that the Committee approached the problems of public international law; in doing so, it gave expression to its will to co-operate as closely as possible with the Commission and the United Nations.

42. The CHAIRMAN thanked the Observer for the European Committee on Legal Co-operation for his interesting account of the Committee's activities. The Committee and the Commission had much in common and worked in parallel on many subjects. The two bodies were constantly helping each other and he hoped that their future relations would be strengthened so as to enhance that co-operation to their mutual advantage.

43. Sir Ian SINCLAIR expressed his sincere gratitude to the European Committee on Legal Co-operation for the cordial welcome extended to him when he had represented the Commission at the Committee's session in November 1984. The European Committee was engaged in the study of subjects that were related—or partly related—to items on the Commission's agenda. It was gratifying for members of the Commission to know that they were not alone in undertaking the study of certain difficult topics.

44. Mr. USHAKOV, speaking also on behalf of Mr. Flitan and Mr. Yankov, thanked the Observer for the European Committee on Legal Co-operation for his interesting statement. The work of the Committee was very useful to the Commission, since the subjects which it examined were often connected with topics before the Commission. Of course, the draft conventions prepared by the Committee were of only regional application, and that application was limited to Western Europe. But the fate of its drafts was often very similar to that of the Commission's own: it was not uncommon for the number of ratifications and accessions to be rather small. The process of development of international law by means of regional or general treaties was certainly a slow one.

45. Chief AKINJIDE, speaking on behalf of the members of the Commission from the African region, stressed the affinity between Africa and Europe. That affinity, for which there were hisorical reasons, had not come to an with independence. Centrifugal forces in Europe had led to the tragedy of two world wars, but in recent decades there had been, fortunately for Europe and the world, a centripetal movement. Europe now offered an example of stability. Africa needed stability and the ability to feed itself. In all its endeavours, Africa drew largely upon European experience; thus the legislation of practically all African countries was based on French, English, Portuguese, Spanish or Italian models.

46. Mr. CALERO RODRIGUES, speaking on behalf of the members from the Latin American region, thanked the Observer for the European Committee on Legal Co-operation for his interesting statement and joined in the tributes which had been paid to the Committee's work. It was very important for the Commission to keep abreast of developments in the work being done in the various regions by the European Committee on Legal Co-operation, the Inter-American Juridical Committee and the Asian-African Legal Consultative Committee. He hoped that co-operation with the European Committee would be continued and strengthened in the future.

47. Mr. SUCHARITKUL, speaking on behalf of the members from the Asian region, said that co-operation between Asia and Europe went very far back in history. With regard to international law, it was worth recalling that Asia had had an international law of its own for many centuries. Thailand, for example, had sent its first diplomatic representative to Amsterdam at the time of Grotius—an ambassador who had concluded the first commercial agreement between the two countries. Asia was a continent of great diversity; indeed, countries such as China and India had a large variety of cultures within their own borders. Asian efforts to arrive at harmony and unity met with obstacles no less great than those encountered in Europe. In its work on international law, Asia was associated with Africa in the Asian-African Legal Consultative Committee.

48. He welcomed the statement by the Observer for the European Committee on Legal Co-operation and thanked him for his account of the Committee's endeavours, from which so much could be learnt in view of the very advanced stage of its work on many topics.

The meeting rose at 6.10 p.m.

1916th MEETING

Tuesday, 2 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 19 (Ships employed in commercial service) *and*

ARTICLE 20 (Arbitration)[4] (*continued*)

1. Sir Ian SINCLAIR, referring to draft article 20, the last in the set of provisions dealing with exceptions to State immunity, said that arbitration was becoming more and more frequent as a means of resolving disputes arising out of contracts between States and private companies or other entities. It was in the interest of the parties that such disputes should be settled speedily and with as little acrimony as possible. Arbitration might therefore be as much in the interest of a State party to a contract as in that of a private company or entity.

2. It was often suggested that developing countries were at a disadvantage in arbitration when they were opposed by a powerful multinational company. That was, however, not necessarily true, as shown by *Baruch-Foster Corporation* v. *Imperial Ethiopian Government*, which had been decided by an arbitral tribunal in 1974 and to which Mr. Jean-Flavien Lalive had referred in a series of lectures he had given in 1983 at The Hague Academy of International Law.[5] The dispute in question had arisen out of a contract under which the Ethiopian Government had accorded an oil exploration concession to Baruch-Foster, a Texas oil company. Although the Ethiopian Government had initially been somewhat reluctant to go to arbitration, it had finally decided to do so and had obtained from the arbitral tribunal not only the rejection of the claim made by the oil company, but an award of damages amounting to $US 700,000 plus interest under its own counter-claim. Perhaps the most interesting development in that case had been that, since the oil company had refused to execute the award, the Ethiopian Government had sought execution in the United States courts on the basis of the 1958 New York Convention.[6] A federal district judge in Texas had confirmed the award and the company had been compelled to pay more than $900,000 to the Ethiopian Government. That case demonstrated that recourse to arbitration could be in the interest of a State party to a contract. The problem was, however, that awards in many important arbitrations involving States parties to contracts had not been published and were thus not well known.

3. Turning to the text of article 20, he drew attention to an interesting passage from the report by the Australian Law Reform Commission on "Foreign State immunity",[7] which stated that most countries regulated the conduct of arbitration within their jurisdiction on the basis that the forum State had an interest in the conduct of such arbitration in accordance with basic standards of due process and fairness. The extent to which a State might wish to exercise such a supervisory role was a matter of legal policy. Conflicting considerations came into play in that regard. For example, a Government might wish to encourage the use of its capital as an arbitration centre. It was well known that there was a keen rivalry between cities such as Paris, London and Kuala Lumpur, which were willing to offer the necessary facilities for international commercial arbitration. That was no doubt one of the reasons why the United Kingdom *Arbitration Act 1979*[8] had very significantly limited the extent to which United Kingdom courts could exercise their supervisory role over arbitrations taking place in the United Kingdom. To the extent that that was a general phenomenon, cases in which arbitration between a private person and a foreign State could come before the courts of the forum State would be very rare. Nevertheless, the plea of immunity should not be allowed to prevail in cases where the foreign State had agreed to arbitrate and the jurisdiction of the court of the forum State was confined to the exercise of its normal supervisory role.

4. In his sixth report (A/CN.4/376 and Add.1 and 2, para. 249), the Special Rapporteur cited section 9 of the United Kingdom *State Immunity Act 1978*, whose wording was not clear. No case involving the interpretation of that section had yet come before the courts, but he did not think that it could be said to

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, paras. 2-3.

[5] "Contrats entre Etats ou entreprises étatiques et personnes privées: développements récents", *Collected Courses of The Hague Academy of International Law, 1983-III* (The Hague, Nijhoff, 1984), vol. 181, pp. 73 *et seq.*

[6] See 1915th meeting, footnote 10.

[7] Australian Law Reform Commission Report 24, *Foreign State Immunity* (Canberra, Australian Government Publishing Service, 1984).

[8] United Kingdom, *The Public General Acts, 1979*, part II, chap. 42, p. 1047.

apply to the enforcement of arbitral awards, since it dealt with "adjudicative jurisdiction", not with "enforcement jurisdiction". It was thus preferable to specify, as did article 12 of the 1972 European Convention on State Immunity (*ibid.*, para. 251) and draft article 20, the three cases in which the supervisory role of the courts of the forum State could be exercised.

5. Although he generally agreed with article 20 as submitted by the Special Rapporteur, he did not think that the scope of the provision should be limited to disputes arising out of "a civil or commercial matter". In that connection, the report of the Australian Law Reform Commission had stressed that the interest of the State was the same whatever the subject-matter of the dispute. He therefore suggested the deletion of the words "which has arisen, or may arise, out of a civil or commercial matter" in article 20, paragraph 1.

6. Lastly, he stressed that article 20 related only to immunity from jurisdiction and not to enforcement jurisdiction. The question of the enforceability of arbitral awards should be left aside and dealt with in the context of draft articles 21 to 24.

7. Mr. CALERO RODRIGUES said that the present formulation of draft article 19 represented a considerable improvement compared with the two earlier alternatives submitted by the Special Rapporteur, which were too technical and based too closely on a particular legal system and would therefore have been difficult to apply. The revised text now under consideration was sufficient for the Commission's present purposes.

8. The words "Unless otherwise agreed between the States concerned" at the beginning of paragraph 1 gave a subsidiary character to the provision contained in that paragraph. He endorsed that approach, as well as the reference to a State which "owns, possesses, employs or operates" a ship, which covered all possibilities.

9. He nevertheless had some doubts about the words "that ship and cargo". Any proceedings that might take place would be against the ship rather than the cargo. He also saw no reason for the inclusion of the words "whether the proceeding is instituted against its owner or operator or otherwise", which would only lead to unnecessary complications. He did, however, agree with the inclusion of the words "provided that, at the time when the cause of action arose ...", which dealt with the important time factor. A ship could be in use for commercial puposes at one moment and for other purposes at another.

10. Paragraph 2 provided for two exceptions to the exceptions stated in paragraph 1. The one in paragraph 2 (*a*) was clearly unnecessary. Paragraph 1 clearly related only to ships in commercial service and therefore did not apply to the warships and ships in governmental service which paragraph 2 (*a*) purported to exclude. The same was true of paragraph 2 (*b*), which referred to cargo "destined for non-commercial use". It was sometimes claimed that it was an advantage to state the obvious, but, in his view, statements of the obvious only served to create confusion and doubt in respect of texts which were otherwise clear.

11. The exception in draft article 20 related to arbitration. A State which agreed to go to arbitration was deemed to have waived its immunity from jurisdiction in respect of the court exercising supervisory jurisdiction over the arbitration. That, of course, presupposed that, under the laws of the foreign State concerned, the foreign court in question could exercise such jurisdiction; but that was not the case, for example, under Brazilian law.

12. He welcomed the provision in paragraph 2 which stated that paragraph 1 did not apply to an arbitration agreement between States. That paragraph also gave a subsidiary character to the rule in paragraph 1 by specifying that "Paragraph 1 has effect subject to any contrary provision in the arbitration agreement".

13. In conclusion, he said that articles 19 and 20 should be referred to the Drafting Committee for the necessary drafting changes.

14. Mr. McCAFFREY said that he supported draft article 20, which provided that an agreement to arbitrate a dispute arising out of a transaction amounted to an implied waiver of immunity from the jurisdiction of a court of a foreign State. Sir Ian Sinclair's comment on the general usefulness of arbitration in the present-day world had been entirely relevant. In contracts between States and private parties, both sides preferred arbitration as a means of settling disputes expeditiously, at less cost and without public attention.

15. Referring to the relevant legislation in his own country, he said that, although the *Foreign Sovereign Immunities Act of 1976* did not contain any provision on arbitration, the legislative history of that Act indicated that the intention of Congress had been that actions to enforce arbitration agreements could be brought in the United States of America under the provision which allowed suits to be brought against foreign States that had waived immunity from jurisdiction. That interpretation had been confirmed by the United States Court of Appeals in *Victory Transport Inc.* v. *Comisaría General de Abastecimientos y Transportes* (1964).[9]

16. Legislation to amend the *Foreign Sovereign Immunities Act* had been introduced in the United States Senate to provide expressly for jurisdiction to enforce arbitral agreements and awards. Bill No. S.1071, which had been introduced on 3 May 1985,[10] would thus allow intervention by United States courts (*a*) if the arbitration took place in the United States; (*b*) if the agreement or award was governed by a treaty or other international agreement which was in force for the United States and called for the recognition and enforcement of arbitral awards; (*c*) if the underlying claim against the foreign State could have been brought in a United States court under the *Foreign Sovereign Immunities Act*. Examples of such treaties were the 1958 New York

[9] *Federal Reporter, 2d Series*, vol. 336 (1965), p. 354; *International Law Reports* (London), vol. 35 (1967), p. 110.

[10] For the text, see *American Journal of International Law*, (Washington, D.C.), vol. 79, No. 3 (July 1985), pp. 784 *et seq.*; see especially the proposed amendment to section 1605, subsection (*a*) (6).

Convention,[11] the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[12] and the 1981 Iran-United States Agreement concerning the Settlement of Claims.[13] In the light of that proposed amendment to the *Foreign Sovereign Immunities Act*, he considered that the text of draft article 20 might be unduly restrictive.

17. Another possibility which might or might not be covered by article 20 was illustrated by *Libyan-American Oil Company* v. *Socialist People's Libyan Arab Jamahiriya* (1980),[14] which had gone to arbitration as a result of Libya's expropriation of a petroleum concession in 1973. The dispute-settlement provisions of the contract had provided for arbitration in a place on which the parties or the arbitrators might agree. The court had concluded that, "although the United States was not named [as a place of arbitration], consent to have a dispute arbitrated where the arbitrators might determine was certainly consent to have it arbitrated in the United States". Accordingly, the court had found that Libya had waived the defence of sovereign immunity and had implicitly consented to the jurisdiction of the United States courts for the purpose of the enforcement of the agreement to submit to arbitration.

18. With regard to *Maritime International Nominees Establishment (MINE)* v. *Republic of Guinea*, to which the Special Rapporteur had referred in his sixth report (A/CN.4/376 and Add.1 and 2, para. 248), stating that

> ... the United States Court of Appeal concluded that the defendant was immune under the *Foreign Sovereign Immunities Act of 1976* and that the court lacked subject-matter jurisdiction to confirm the award, as the suits were between foreign plaintiffs and foreign States,

it should be noted that the dispute had arisen from a contract for shipping services to transport Guinean bauxite to foreign markets. The contract had provided for arbitration by arbitrators to be selected by the Chairman of the International Centre for Settlement of Investment Disputes (ICSID),[15] which was located in Washington. An ICSID arbitration had, however, never been organized. Instead, MINE had obtained an order from a United States court compelling arbitration under the auspices of the American Arbitration Association and it had subsequently brought an action in the Federal District Court to enforce an award resulting from that proceeding for more than $US 25 million.

19. Guinea had failed to appear in the original judicial proceedings and the arbitration, but had appeared in the enforcement action to plead, *inter alia*, sovereign immunity and the exclusivity of the contractual ICSID remedy. The Court of Appeal had considered that the issue before it was whether agreement to ICSID arbitration in Washington constituted an implicit waiver of sovereign immunity under section 1605 (*a*) (1) of the *Foreign Sovereign Immunities Act*. The Court had concluded that, as the parties had not contemplated judicial enforcement of their agreement to arbitrate, Guinea had not waived its immunity in an action to enforce a non-ICSID award. There was thus no doubt that an agreement to ICSID arbitration in Washington did not constitute a waiver of immunity from the general jurisdiction of United States courts.

20. In conclusion, he supported the suggestion that draft article 20 should be referred to the Drafting Committee.

21. Mr. MAHIOU said that the two alternatives of draft article 19 originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233) had given rise to a number of objections. Some members of the Commission had taken the view that the analysis and presentation of the article gave the impression that account was being taken of the position of only one or two States and had pointed out that the legal system of, for example, the United Kingdom and the concepts employed therein could not be used as the basis for an article forming part of an international convention.

22. Article 19 actually raised the quite simple problem of whether the principle of the jurisdictional immunities of States applied in the case of ships employed in commercial service; but the solutions to that problem were not simple. In some countries, particularly developing countries, there were ships that belonged to government enterprises or national or mixed companies which had independent legal personality and whose activities were subject to trade law. Immunity could be said not to apply in such cases, since such enterprises or companies had to be governed by the same trade law rules as all other enterprises and companies. A State as such could, however, use ships for operations that were not easily classifiable, such as the carriage of foodstuffs under technical assistance programmes for drought-stricken Sahelian countries. Could such ships and their cargoes be regarded as being in commercial service and as not being entitled to any immunity whatsoever? With regard to any claim that might be brought against them, would they be subject to the same rules and obligations that applied to ordinary commercial ships? It was because such questions had been raised that the Special Rapporteur had submitted the revised version of article 19.

23. He was not sure that the new text of article 19 would dispel all the doubts that had been expressed. Since some developing countries owned only one or two commercial ships, it was, for example, open to question whether, in the event of a dispute concerning a commercial debt, those ships could be immobilized and made liable to proceedings, with the result that the developing country concerned might be deprived of all or part of its fleet. Article 19 thus had to be considered from the point of view of its practical consequences.

---

[11] See 1915th meeting, footnote 10.

[12] Opened for signature at Washington on 18 March 1965 (United Nations, *Treaty Series*, vol. 575, p. 159); hereinafter referred to as "1965 Washington Convention".

[13] See *International Legal Materials* (Washington, D.C.), vol. XX, No. 1 (January 1981), p. 230.

[14] *Federal Supplement*, vol. 482 (1980), p. 1175; see especially p. 1178.

[15] Established by the 1965 Washington Convention (see footnote 12 above).

24. In view of the growing importance of arbitration in international trade relations, article 20 had a place in the draft. In his sixth report (*ibid.*, para. 248), the Special Rapporteur had referred to *Maritime International Nominees Establishment (MINE)* v. *Republic of Guinea*. MINE had concluded a transport contract with the Republic of Guinea which had contained a clause providing for arbitration by ICSID. Guinea had, however, been brought by MINE before a United States court, which had decided that the arbitration procedure to be applied would be that of the American Arbitration Association, not that of ICSID. Although Guinea had refused to take part in the proceedings on the grounds that it had agreed only to the ICSID arbitration clause, the court had decided to refer the matter to an arbitral tribunal set up under the auspices of the American Arbitration Association and an award of $US 25 million had been made against Guinea. MINE had then applied to the arbitral tribunal for the enforcement of the award and Guinea had appeared—unsuccessfully—to oppose the application for enforcement. It had then brought its own appeal, which had been based on two arguments: first, that its consent to arbitration by ICSID excluded any other remedy, and secondly, that it had not waived its jurisdictional immunities. The Court of Appeal had considered only the second argument, without ruling on the first. Solely on the basis of the United States *Foreign Sovereign Immunities Act of 1976*, it had concluded that Guinea had not waived its jurisdictional immunity and that it (the Court) lacked competence in the matter.

25. One of the lessons to be drawn from that case was that national courts tended to rely exclusively on internal law and did not always take account of international conventions. Although, in the case in question, and following the appeal by Guinea, the outcome had been favourable to the State, that tendency could create problems because a State might be involved in proceedings in the courts of another State on the basis of a particular interpretation of internal law or of an international convention, despite the fact that the 1965 Washington Convention[16] established the obligation of national courts to refrain from intervening. A State could thus be involved in proceedings and even ordered to pays a certain amount under a procedure that was, from the legal point of view, rather singular, not to say dubious.

26. The practice of other western States could vary. France had a large body of case-law that was somewhat contradictory. Some lower courts might decide that a State's acceptance of a commercial arbitration clause meant that it waived jurisdictional immunity, while others might reach the opposite conclusion. The Court of Cassation had, however, taken a definite position in favour of the latter view and Mr. Robert, the former President of the Court of Arbitration of the International Chamber of Commerce, had endorsed that position. In the final analysis, the issue was one of the relationship between national courts and arbitration, since some national courts had a tendency to try to intervene in arbitration proceedings. As a result of that tendency, a number of States, including France, had adopted legislation to keep national courts under closer supervision.

27. In his sixth report (*ibid.*, para. 252), the Special Rapporteur had cited a passage from article 1 of the 1923 Geneva Protocol on Arbitration Clauses relating to recognition of the validity of an arbitration agreement and the consequences it might have with regard to the submission of a dispute to arbitration and, possibly, with regard to the role of national courts. Since the Commission was now discussing the role played by the law of the country in which arbitration took place and by the courts of that country, it might, however, have been more to the point to refer to the first paragraph of article 2 of that Protocol, which stated that the arbitral procedure, including the constitution of the arbitral tribunal, would be governed by the will of the parties and by the law of the country in whose territory the arbitration took place.

28. It was perhaps not quite correct to state, as the Special Rapporteur had done in the subheading preceding paragraph 255 of his sixth report, that consent to arbitration was "an irresistible implication of consent" to the exercise of jurisdiction. When jurisdiction existed, it was limited to specific aspects of a case. The Special Rapporteur's trenchant assertion could, moreover, be countered by what arbitrators had been know to say, namely that to consent to arbitration was to deny the competence of national courts. For example, Mr. René-Jean Dupuy, sole arbitrator in *Texaco Overseas Petroleum Company and California Asiatic Oil Company* v. *Government of the Libyan Arab Republic* (1977), had considered that, in that case, the arbitration clause constituted evidence of the internationalization of the contract, which removed it from the sphere of internal law and the national courts.[17]

29. Arbitration such as that provided for in the 1965 Washington Convention usually precluded the exercise of jurisdiction. Many of the provisions of that instrument were, moreover, intended to avoid proceedings in national courts. It thus contained a detailed procedure for the appointment of arbitrators, but made no provision for an enforcement procedure, although an arbitral award could normally not be executed in the territory of a State without that State's approval. The problem of the relationship between arbitration clauses and jurisdiction was thus an extremely complex one. Draft article 20 should be reviewed in the light of those considerations, and he reserved the right to suggest some amendments to the Drafting Committee.

30. Mr. USHAKOV said that the Special Rapporteur had been right to suggest (1915th meeting) that the Drafting Committee should be requested to consider article 6, whose present wording was far from perfect. The principle of State immunity had to be clearly stated in that article, which had a direct bearing on many of the other articles in the draft.

31. He was opposed in principle to draft article 19. The best way to deal with the practical difficulties it involved was to leave it to States to agree on juris-

[16] See footnote 12 above.

[17] *International Law Reports* (Cambridge), vol. 53 (1979), p. 389; see especially paragraph 44 of the arbitral award.

dictional immunity. In accordance with the position adopted by the Soviet Union, he took the view that, although the jurisdictional immunities of States and their property had to be respected, a State could, by agreement, consent to the exercise of jurisdiction by another State. Such consent could, moreover, apply not only to the jurisdiction of courts of countries having trade relations with the USSR, but also to measures of execution.

32. Before analysing article 19, he pointed out that the term "State property" had to be explained more clearly. If the Commission drew on the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts[18] and defined that term as property, rights and interests owned by a State according to its internal law, it would still have to agree on what the idea of "ownership" meant. Under Soviet law, it meant the possession, employment and administration of property and those three elements were also to be found in most other legal systems. Without those three elements, ownership did not exist.

33. In the French and English texts of article 19, paragraph 1, there was a glaring contradiction between the words "a State which owns, possesses, employs or operates a ship in commercial service cannot invoke immunity" and the words "at the time when the cause of action arose, the ship and cargo belonging to that State were in use or intended for use for commercial purposes". To his mind, the ownership of property derived not only from possession of that property, but also from its employment and administration. Paragraph 1 might thus be construed as covering the case of a State which had chartered a ship from a company—possibly a private company—and was using it to transport a cargo belonging to it; but it would be going too far to take account of such a case, for it did not really bear any relation to the topic of jurisdictional immunities. Article 19 should deal only with the case of a State which employed and operated a ship that it owned.

34. The title of the article was also unacceptable. Might it mean that ships were employed in commercial service by private companies? In the Soviet Union, for example, ships belonged to the State, but were employed and operated on a temporary basis by shipping companies, which were not State bodies and for which the State was not responsible. Article 7 of the draft notwithstanding, proceedings could be instituted against such shipping companies, which did not enjoy jurisdictional immunity. But that was an entirely different issue.

35. The case which the Commission should consider was that of a State which owned a ship in commercial service and also employed and operated that ship. The question would then arise whether proceedings could or could not be instituted against that State. The States to which that definition applied were, for the most part, developing countries. To provide that they could not invoke immunity from the jurisdiction of a court of another State would be contrary to their interests and would assuredly give rise to many difficulties.

36. Although he was somewhat at a loss to understand the meaning of the title of draft article 20, he could agree with the principle on which that provision was based, but he was firmly opposed to its wording, which gave rise to more problems than it solved and was far too vague. It failed to specify that a dispute must have arisen out of the application or interpretation of the clauses of a commercial contract, that arbitration had to be of a commercial nature, that consent to the exercise of jurisdiction by a court of another State was valid only in the particular case of arbitration in the territory or in accordance with the law of a particular State, and that the applicable law was the law indicated in the commercial contract in question. What would happen if the arbitration clause contained in the commercial contract provided that the arbitral award could not be set aside and could not be appealed?

37. With regard to proceedings in relation to the validity or interpretation of the arbitration agreement, as referred to in paragraph 1 (*a*), he pointed out that the interpretation of the arbitration agreement was the object and purpose of arbitration. As to paragraph 1 (*b*), he said that, in consenting to submit a dispute to permanent commercial arbitration machinery, the parties were considered to have consented to the established arbitration procedure, of which the award formed part. It was legally impossible for a court to rule on an arbitral award that had been rendered. Paragraph 1 (*c*) did not make it clear under what clause of a contract a State which had agreed to submit to commercial arbitration and was considered to have consented to the exercise of jurisdiction of a court could invoke immunity from jurisdiction in any proceedings before that court in relation to the setting aside of the arbitral award. Such a situation would be possible only if the parties had agreed to submit the matter to any court of any State so as to ask that court to decide whether the arbitral award was fair or not and whether the arbitrator or arbitrators had followed the prescribed rules. In any other case, that situation would be impossible, since, as a matter of principle, arbitral awards were final and binding and could not be appealed.

38. Mr. REUTER suggested that, in the French text of draft article 19, paragraph 2 (*a*), the words *navires exploités ou employés par un Etat à son propre service* should be replaced by the more commonly used words *navires en service gouvernemental*.

39. Article 19 seemed to give rise to three substantive problems. The first had been discussed by Mr. Calero Rodrigues and concerned the question of the link between ships and cargo. It thus had to be determined whether, under maritime law, cargo was linked to the ship, particularly for the purpose of legal proceedings, or in other words whether, under the general principles of maritime law, the captain always represented the ship and its cargo as well. That was an important point on which he would like the Special Rapporteur to provide further clarification. He personally was of the opinion that article 19

[18] A/CONF.117/14.

referred to general principles of maritime law and that what had to be solved was a drafting problem, since the title of the article referred only to "ships employed in commercial service" and did not mention "cargo intended for commercial use".

40. The second substantive problem related to the scope of immunity, in connection with which the Special Rapporteur had tried to propose a compromise solution. Instead of using the term "commercial ships" in paragraph 2 (*a*), however, the Special Rapporteur had used the broader and more flexible term "ships operated or employed by a State in governmental service", which would imply the idea of "ships employed in commercial service" and cover not only a fairly large number of situations, but also the case of a commercial ship employed in governmental service. He could endorse that approach, which was implied by the text, since it would make immunity considerably broader in scope. To his mind, however, a "commercial ship" would normally be employed in commercial service. For the purposes of the burden of proof, it would therefore have to be presumed that a commercial ship was being employed in commercial service. There had, however, been examples of the rather surprising case in which a warship had been employed in commercial service. During the First World War, for instance, the Germans had employed a submarine as a commercial ship to transport valuable dyes to the United States of America. Another presumption that had to be made was that cargo carried on board a ship employed in commercial service would normally be intended for commercial purposes. It would be helpful if the Special Rapporteur could explain whether he had considered the possibility of cargo which was on board a ship employed in commercial service but which was not intended for commercial purposes, because it was not clear how the first few articles of the draft—except, of course, article 4—would apply in the case of cargo which was not intended for commercial purposes or for any of the governmental services of a State in the territory of another State.

41. The third substantive problem related to the question of property. He understood Mr. Ushakov's point of view and, in particular, his basic theory that each State's legal system would determine how that State's title to a particular type of property was to be defined. In article 19, the Special Rapporteur appeared to have tried to propose a solution which would cover a number of cases that could arise in maritime law. The rule that only the internal law of a State determined the status of property transported to another State did, however, not apply in many cases. That was a problem of private international law with which the Commission would have to deal. Article 2, paragraph 1 (*f*), of the draft, which provided that "'State property' means property, rights and interests which are owned by a State according to its internal law", would thus not be appropriate in every case. A building located abroad would not be owned by a State according to its internal law. Its rules of capacity might be applicable in such a case, but the rules concerning the formation of title to property would not be. He would refer to the question of movable property when the Commission came to discuss draft articles 21 to 28.

42. Subject to the clarifications he had requested the Special Rapporteur to provide, article 19 would be acceptable and could be referred to the Drafting Committee.

43. Arbitration, as dealt with in draft article 20, was a matter of concern to developed and developing countries alike because it involved considerable risks. A developing country would, however, have more to lose than a developed country if an arbitral award went against it. The position of such a country was easy to understand, for, in submitting to arbitration, it took a risk and, as often happened, could ever go so far as to decide that there could be no appeal against any arbitral award that might be rendered. In the absence of such a decision, it was the appeals procedure provided for under the system of arbitration chosen that would apply. The 1965 Washington Convention,[19] for example, provided for an appeal to an international court within the framework of ICSID. The International Chamber of Commerce system was in itself a kind of appeals procedure because, although a special arbitral tribunal could be set up by the parties, no award would be binding until it had been examined by the Court of Arbitration of the International Chamber of Commerce. That procedure offered some security. In addition, all legislative systems provided that, in an ordinary arbitration case, a party to a dispute could request a national court to provide it with guarantees against particularly serious risks. The purpose of article 20 was thus simply to make it clear that, in the absence of any provision to the contrary—which frequently existed—a State could not, in submitting to an arbitral tribunal, decide to resort to measures of supervision by a national court and still claim immunity from jurisdiction.

44. The *Pyramids* case[20] provided an example of how a developing country had recently benefited from the rule embodied in article 20. A United States company had concluded an agreement in 1974 with a public body, the Egyptian General Organization for Tourism and Hotels, for the construction by that company of a large tourist complex near the site of the pyramids. The United States company had demanded the Egyptian Government's signature on the contract and the signature had been given. The project had, of course, raised a general outcry and the Egyptian Parliament had ultimately blocked its implementation, even though the United States company had already spent large amounts of money on preliminary studies. In 1983 the case had been brought before the International Chamber of Commerce, which had ruled that the Egyptian Government was bound by the contract. The Egyptian Government had then requested the Court of Appeals of Paris to set aside the arbitral award, which the Court had done in 1984, stating that the terms of the contract binding the Egyptian Government did not imply that that Government had waived its immunity from jurisdiction. In his view, that example showed that article 20 was useful. That provision did not, of

[19] See footnote 12 above.

[20] See *Arab Republic of Egypt* v. *Southern Pacific Properties, Ltd. et al.* (1984) (*International Legal Materials* (Washington, D.C.), vol. XXIII, No. 5 (September 1984), p. 1048).

course, eliminate all the risks involved in submitting to arbitration, but going to law was, in any event, never a totally safe proposition.

45. A number of comments had already been made on the words "a civil or commercial matter" used in article 20, paragraph 1. His own opinion was that, even if reference were made to a commercial contract, as Mr. Ushakov had suggested, or if some other wording were used, there would still be a drafting problem that would have to be resolved by the Drafting Committee.

46. With regard to the words "a court of another State on the territory or according to the law of which the arbitration has taken or will take place", also in paragraph 1, it had rightly been pointed out that a reference to "the law" might give rise to problems. The Special Rapporteur had modelled paragraph 1 on article 12 of the 1972 European Convention on State Immunity. In the French text, however, the word *loi* was a literal translation of the word "law". It might have been better to use the word *droit*, even though in private international law the word *loi* was usually used to mean *droit*. The simplest course would therefore be to explain in the commentary that reference was being made to the applicable law in a State, including international law which formed part of the internal law of that State.

47. Referring to the possible link between draft article 20 and the question of the enforcement of arbitral awards, he said that, in his view, it would be logical to take account not only of the case of a court of another State on the territory of which the arbitration had taken or would take place and the case of a court of another State in accordance with the law of which the arbitration had taken or would take place, but also of the case of another State in which an application for the enforcement of an arbitral award had been submitted. In the event of a dispute between a company and a State, efforts were usually made to avoid applications for enforcement because they involved considerable expense. If enforcement was sought, then it was usually applied for in a court of the country where the property in question was located. The non-application of immunity should probably be extended to that case as well. A State might, of course, also apply for the enforcement of an arbitral award, but the problem of immunity from jurisdiction would then not arise.

48. Referring to article 20, paragraph 2, he noted that the words "arbitration agreement" had been translated as *convention d'arbitrage* in French. In English, an "agreement" was a rather modest type of instrument, whereas in French the term *convention* had more lofty connotations. He therefore suggested that, in the French text, the words *accord d'arbitrage* should be used instead in order to take account of all possibilities.

49. It had been suggested that article 20 should refer only to agreements concluded under international law or, in other words, to commercial arbitration agreements concluded between two States. Such agreements would be exceptional, but there had in fact been a case in which one had been concluded. In 1955, René Cassin had rendered an arbitral award in a maritime dispute between the United Kingdom and the Government of Greece.[21] One of the points at issue had been whether there had been a transaction and commercial arbitration or a transaction and arbitration under public international law. Paragraph 2 should therefore be drafted in more explicit terms.

The meeting rose at 1.05 p.m.

[21] The *Diverted cargoes* case (*International Law Reports, 1955* (London), vol. 22 (1958), p. 820).

1917th MEETING

Tuesday, 2 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

ARTICLE 19 (Ships employed in commercial service) *and*
ARTICLE 20 (Arbitration)[4] (*continued*)

1. Mr. OGISO thanked the Special Rapporteur for submitting a revised version of draft article 19 which took account of the various views expressed at the previous session. He had no objection, in principle, to referring the article to the Drafting Committee, but wished to seek further enlightenment on some points. First, the Special Rapporteur's sixth report (A/CN.4/376 and Add.1 and 2) appeared to contain no mention of a case of collision between ships. It seemed unlikely that no ship owned or operated by a State had been involved in the large number of cases brought before the courts as a result of such collisions. In the hypothetical event that a ship owned or operated by a State for commercial purposes collided with an ordinary commercial ship in the territorial waters of another coastal State, would paragraph 1 of article 19 mean that the court of the coastal State had jurisdiction over the case if the matter was brought before it by the owner of the ordinary commercial ship? If that interpretation was correct, he would welcome confirmation of the assumption that, in so far as the State was engaged as an owner in a commercial operation consisting of the carriage of goods from that State to another coastal State, a case brought before a court in the event of a collision or other accident would constitute a "proceeding relating to the commercial operation of that ship" under the terms of the article.

2. A further question related to the proviso at the end of paragraph 1, namely "provided that ... the ship and cargo belonging to that State were in use or intended for use for commercial purposes". He wondered whether the text in its present form made it sufficiently clear that the proviso did not exclude the case of a ship owned by State A carrying cargo belonging to State B.

3. With regard to draft article 20, he asked for an explanation of the significance of, or need for, the reference to the territory of the other state in which the arbitration had taken or would take place. As far as he could see, it would be sufficient merely to say "another State according to the law of which the arbitration has taken or will take place". That comment apart, he had no objection to the article being referred to the Drafting Committee.

4. Chief AKINJIDE said that, coming as he did from a developing country, he could not but feel the gravest concern over the implications of the two draft articles under consideration. The past 15 years had seen the demolition of the principle of the absolute immunity of States in commercial matters, the greatest assault upon that principle having been made by the *Foreign Sovereign Immunities Act of 1976* of the United States of America and the *State Immunity Act 1978* of the United Kingdom. That development had coincided with the emergence of the developing countries, when many commercial transactions were carried out by States rather than by private companies.

[4] For the texts, see 1915th meeting, paras. 2-3.

5. Three main groups of interests were affected by draft articles 19 and 20: those of the developed Western countries, 80 or 90 per cent of whose commercial transactions were in the hands of private companies or corporations; those of the developing countries, where the overwhelming majority of commercial transactions was carried out by the State; and those of countries with centrally planned economies, where the State was responsible for all commercial transactions. Far from attempting to maintain an equilibrium between those competing interests, the main thrust of the two articles appeared to be to bring international practice as a whole into line with the United States and United Kingdom Acts he had already mentioned. The meaning of article 19 was in effect that, unless otherwise agreed, a State dealing with a private or public company in another State would enjoy no immunity whatsoever. The resulting situation would have very serious implications. His own experience of commercial litigation in various European countries led him to doubt that any Government of a developing country would sign, still less ratify, either of the two articles now before the Commission. Mr. Ushakov's approach, although perhaps too categorical in some respects, was closer to the reality of the situation. The Soviet Union, which, under the United Kingdom *State Immunity (Merchant Shipping) (Union of Soviet Socialist Republics) Order 1978* (see A/CN.4/376 and Add.1 and 2, paras. 195-196), was exempt from the *State Immunity Act 1978*, could hardly be expected to become a party to a convention that included articles 19 and 20 as proposed by the Special Rapporteur.

6. An aspect of article 20 that should not be overlooked was that, as a rule, nationals of a State involved in arbitration before a court of another State were not allowed to appear as counsel before that court, If, as often happened, a case involving a developing country brought before a court in a developed country was submitted to arbitration under the law of another developed country, the developing country had to retain counsel from both those countries, at enormous cost and with devastating effect upon its economy.

7. For all those reasons, he considered that articles 19 and 20 were too one-sided and failed to reflect the fundamental interests of all members of the international community. They required a very radical review and he was not in favour of their being referred to the Drafting Committee at the present stage.

8. The CHAIRMAN asked whether the review of the kind Chief Akinjide had in mind could be carried out in the Drafting Committee or whether it entailed returning the draft articles to the Special Rapporteur.

9. Chief AKINJIDE said that the issues involved were so fundamental that the articles would, in his view, have to come back to the Commission for further discussion. To accept them would be to subscribe to the proposition that the rich should continue to be rich and the poor should continue to be poor.

10. Mr. RAZAFINDRALAMBO, congratulating the Special Rapporteur on work that reflected a great

deal of research, said that the sixth report (A/CN.4/376 and Add.1 and 2) revealed the developments in State practice and the shift from the doctrine of absolute immunity to restricted immunity. It was apparent from the report that the maritime powers had observed the principle of absolute immunity when they had had a virtual monopoly over the seas. The reversal on the part of the United States dated back to 1952 and on the part of the United Kingdom to 1981. Subsequently, the newly independent countries had necessarily concurred with the changes in doctrine, for they could not remain outside the trade flows that had taken shape without them. Trade relations and North-South relations had made those countries economically dependent on the countries of the North, and they had therefore become countries of demand rather than supply, even though for the most part they did possess raw materials needed by the industrialized countries.

11. The countries which had ratified the 1958 Geneva Conventions on the law of the sea (*ibid.*, paras. 208-210) had been able to do no more than accept the distinction drawn between ships according to the nature of their service or activities or according to the nature of their operation. While he appreciated and shared the concerns expressed by Chief Akinjide, it was difficult to see how the countries of the third world could win acceptance for their views in that regard.

12. He endorsed the principle set forth in draft article 19, which provided a new example of an exception to the jurisdictional immunity of States. As to paragraph 1, in his opinion the notion of operation in the words "employs or operates a ship in commercial service" took first place over employment of the ship. What counted was use for commercial purposes: a State could employ or requisition a ship in commercial service for governmental purposes. Furthermore, article 19 covered jurisdiction from immunity only in respect of commercial operations. However, the distinction between "ship" and "cargo" was acceptable in principle, but he wondered why no reference was made to the owner of the cargo. Surely a proceeding could be instituted against the owner of the cargo. If the word "otherwise" signified the owner of the cargo, it would be better to make that point clear. Again, the article spoke of ships "intended for use for commercial purposes". Did that signify intended or actual use? There, too, clarifications were required.

13. Unlike some members of the Commission, he considered that paragraph 2 of article 19 was of some value, since it embodied a distinction established by practice and endorsed by the various conventions on the law of the sea. Failure to mention warships would make for an unfortunate lacuna.

14. Draft article 20 should be referred to the Drafting Committee, for it posed no problem. It reflected both court and arbitral and treaty practice and also the provisions of many international conventions on arbitration. Arbitration had increased considerably since the developing countries had acceded to independence and had grown in parallel with the economic development needs of those countries, constituting as it did the most appropriate way of guaranteeing safe investments and commercial contracts signed with newly independent countries whose legal institutions had been considered, rightly or wrongly, not to afford an equivalent guarantee.

15. The vast majority of the contracts signed by developing countries with foreign companies included clauses on arbitration. Before the establishment of ICSID under the 1965 Washington Convention,[5] use had been made of arbitration by the International Chamber of Commerce or *ad hoc* arbitration. Arbitration by the International Chamber of Commerce offered the advantage of an institutional system which had, over the years, formed a body of decisions and precedents that always made for safety in business. However, the disadvantage in the eyes of some people was that the Chamber was a purely private non-governmental body: hence the idea of establishing ICSID and developing UNCITRAL arbitration rules.

16. To his knowledge, no third world country had refused to insert arbitration clauses in the contracts they had signed. An arbitration agreement necessarily entailed a waiver of jurisdictional immunity with respect to the arbitral tribunal and also with respect to a domestic court for any action relating to arbitration. It was essential to stress that point, since it seemed to have given rise to serious misunderstandings. The arbitral tribunal was not necessarily in a position to rule on any point arising in the course of the proceedings. From the outset of the arbitration, the question might arise of the appointment of arbitrators. When the parties could not agree on such appointment, except in the case of an institutional system such as arbitration by the International Chamber of Commerce, they must refer to an external and impartial body; only a court of law fulfilled such criteria. In the course of the proceedings occasion could arise for a further appeal to a court. Issues of that kind had to be settled in accordance with the law of the court and such law might include peremptory provisions from which the parties could not derogate, which removed any possibility of contradiction between the judicial decision and the free will of the parties.

17. Paragraph 1 of article 20 spoke of an agreement in writing, an essential requirement because the arbitration agreement or clause covered matters that were too complex not to be dealt with in writing; they could not be implicit or verbal. With regard to the words "which has arisen, or may arise", the first case related in his opinion to a *compromis* and the second to an arbitral clause, but the words "may arise" should precede "has arisen", for contracts mostly contained an arbitral clause as additional security for investment companies, whereas a *compromis* might not be signed in the event of a dispute later on. The formulation "out of a civil or commercial matter" could also pose problems in the case of investment, for an investment contract was hybrid *sui generis* and might contain clauses under administrative law, such as clauses on public works or clauses concerning concessions. Again, the words "on the territory or according to the law" implied that it was

[5] See 1916th meeting, footnote 12.

the local court which was competent on a point of law arising in the course of the arbitration proceedings. The cases listed in subparagraphs (*a*), (*b*) and (*c*) were three classic examples of referral to a local court of law, especially in the case of an application for provisional measures preceding the initiation of the arbitration procedure. A case of arbitration between a French company, Electricité et Eau de Madagascar, and Madagascar in 1980 was an illustration of the case covered by subparagraph (*b*). The arbitral tribunal, set up under the auspices of the International Chamber of Commerce, had in the course of the proceedings been asked to order the deposit of a sum of money in a bank. Applications to set aside the arbitral award were more frequent—when the losing party was opposed to an order for enforcement. That was the only instance in which appeals were allowed against an arbitral award in cases of *ad hoc* arbitration.

18. Paragraph 2 of article 20 posed no particular problem, but the phrase "subject to any contrary provision in the arbitration agreement", could be placed at the beginning of paragraph 1. As to inapplicability to arbitration agreements between States, like Mr. Reuter (1916th meeting) he took the view that that provision was too absolute. Agreements on commercial or investment matters could certainly be concluded by States. Indeed, the definition of "foreign State" in draft article 3, paragraph 1 (*a*), and particularly in subparagraph (*a*) (iv), should not be overlooked. Consequently, States could easily conclude contracts containing arbitral clauses with the "instrumentalities" in question acting as organs of a State, something which often occurred in the case of nationalized or semi-public companies.

19. Lastly, he had no objection to referring articles 19 and 20 to the Drafting Committee, which could make the necessary changes, including those requested by Chief Akinjide.

20. Mr. ARANGIO-RUIZ said that he had been impressed by Mr. Mahiou's comments at the previous meeting. It was true that national judges might not always be sufficiently objective in the checks they were required to make on arbitral awards and proceedings in most countries. Mr. Mahiou's concerns were quite justified, not only with regard to the developing countries, but with regard to all States and even private persons, whether natural or legal.

21. International commercial arbitration frequently involved one stronger party, or a party supported by a stronger State. However, if certain abuses or injustices were to be avoided, the answer did not lie in clauses precluding supervision by State courts over arbitral awards and proceedings, nor in maintaining jurisdictional immunity *vis-à-vis* such supervision. Supervision by State courts could not be avoided. It was essential precisely in order to restore the balance which might sometimes have been endangered because one of the parties was weaker. Protection of the weaker party should also be sought in other directions, at the time when the contracts were being concluded, particularly when negotiating the arbitration clauses, on such matters as the composition of the arbitral tribunal and the place at which the tribunal was to sit. The parties, whether private or public, did not pay sufficient attention to the choices open to them in covering such issues in arbitration clauses. After all, no State or State agency could easily be forced to accept "any" arbitration clauses. At the time when contracts were being concluded, it was essential that they avoid binding themselves hand and foot to given arbitration centres in given countries. Once arbitration in a given country was accepted, it was difficult to rule out the natural consequence of subjection to the national judicial authority that was required to check the due and proper form of the proceedings and the award. The same was true regarding the choice of the arbitrators and the body or person that was to choose the third arbitrator in the event of disagreement between the parties. States and persons—particularly non-jurists—allowed themselves to be caught up too easily by the atmosphere of optimism that generally prevailed when a contract was being concluded. From that standpoint, he failed to see the conflict referred to by Mr. Mahiou at the previous meeting between the "free will of the parties", on the one hand, and the role of the judicial authorities of the country in which the arbitration proceedings were held, on the other.

22. Mr. BALANDA said that the bulk of what he had intended to say had already been said by Mr. Mahiou at the previous meeting. The shift towards restricted immunity should be viewed from the general standpoint of international economic relations. When the big Powers had been in control of the seas, they had found it necessary to enjoy virtually complete protection, and hence had asserted the principle of absolute immunity. But when other States had emerged on the international economic scene, in order to further their development they had been compelled, willy-nilly, to come into contact with developed countries. The move had then been in the opposite direction, namely a shift to limitation of immunity on the territory of the developed countries, the centres of trade relations. The industrialized countries had sought in that way to cut back the means of action available to the developing countries.

23. Major interests were the cause of a disequilibrium that was all too well known and one for which a remedy was constantly being sought. Contrary to what some people might believe, in most developing countries the burden of development lay largely with the State. Hence major attention should be paid to the way in which the activities of those States were conducted, since it was not always easy to distinguish between acts *jure gestionis* and acts *jure imperii*. The interests of the developing countries therefore called for the best protection possible.

24. In his sixth report (A/CN.4/376 and Add.1 and 2, paras. 128-131), the Special Rapporteur proposed the following classification of vessels: warships, which enjoyed absolute immunity; ships owned by the State, for which immunity could be claimed if they were used for non-commercial governmental service; and privately-owned ships used in the service of the State, for which immunity could not be claimed. With regard to the second category, he wished to reiterate that, in developing countries, it was the State that engaged in the bulk of develop-

ment activities. Such States owned a number of ships operated by para-State enterprises, which carried out commercial activities to foster development. In such cases, it was difficult to argue that those ships, used exclusively for commercial purposes, could not enjoy the protection afforded by the jurisdictional immunity of the State. It was not enough to identify the ship: the purpose for which the ship was being used also had to be identified, as pointed out by the Special Rapporteur himself, who had established a direct link between draft article 19 and article 12, which had given rise to much discussion in that regard at the previous session. The criteria proposed by the Special Rapporteur (*ibid.*, para. 231) should also include ships which belonged to the State and were used for governmental commercial service, and ships which, even if they did not belong to the State, were used for commercial purposes in order to help development and should also benefit from immunity.

25. As to matters of form, article 19 should be brought into line by and large with article 12 and the expression "non-governmental" should also be inserted before the words "commercial service" in paragraph 1. Commercial service came within governmental activity and consequently it should be possible to claim jurisdictional immunity for the ship. Moreover, at the previous session the Special Rapporteur had been urged to use generally acceptable formulations, yet the report spoke of admiralty proceedings, which did not exist in all countries. A more comprehensive term should be found. He also endorsed Mr. Reuter's objection (1916th meeting) to the word "cargo". The Special Rapporteur would obviously provide some clarifications, but it was important to avoid using terms that could lead to difficulties.

26. With reference to draft article 20, he recognized the value and the merits of international arbitration, but shared the doubts expressed by Mr. Mahiou (*ibid.*) about the way it was dealt with in the Special Rapporteur's comments. To say that "an agreement to submit to arbitration" could be equated with "consent to submit to jurisdiction" (A/CN.4/376 and Add.1 and 2, para. 236) was to deny purely and simply the principle of jurisdictional immunity. He doubted whether such acceptance of arbitration entailed *ipso facto* acceptance of the courts of a State. Two different, parallel proceedings were involved and were not necessarily initiated at the same time. Article 20 should affirm the principle of jurisdictional immunity and, possibly, set forth exceptions. In international contracts, free will was becoming very rare. Rather, they were contracts that the developing countries in particular were obliged to accept, otherwise they would not be able to further their own development. Yet such contracts impaired the sovereignty of States, for which reason the very wording of the article must affirm the principle of jurisdictional immunity and then indicate any exceptions in order to facilitate international economic relations.

27. Mr. EL RASHEED MOHAMED AHMED, speaking in connection with draft article 19, noted that article 2, paragraph 1 (*g*) (ii), defined "commercial contract" as "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". He wondered whether those terms included tortious liability or such questions as whether a company which had provided loans to a Government in order to buy certain goods could attach a ship belonging to that Government simply to exert pressure for repayment. In his opinion, to accept such an interpretation would be very dangerous. He agreed with the statements made by Chief Akinjide and Mr. Razafindralambo concerning developing countries, but hoped they would not be interpreted to mean that developing countries were not willing to pay for services rendered to them.

28. An additional point, which had been expressed most clearly by Mr. Balanda, was that commercial operations in developing countries, especially in Africa, were not easily separated from public purposes. For example, in the Sudan, the Government supplied the population with certain essential consumer goods, such as wheat and flour, and was therefore actually engaged in commercial activities, but for no profit. If, under time pressure, a Government was constrained in situations of that kind to commandeer certain private ships, were those ships in governmental service or not? If they were, such situations would be difficult for third world countries under the terms of article 19.

29. He agreed with Mr. Calero Rodrigues (1916th meeting) that article 19, paragraph 2, might well be superfluous since paragraph 1 stipulated that the ship and cargo must be intended for use for commercial purposes. The Special Rapporteur was to be commended for eliminating the distinction between actions *in rem* and *in personam*.

30. Draft article 20 spoke of two types of jurisdiction, that of the State where the arbitration was conducted and that of the State in accordance with whose law the arbitration took place. As Mr. McCaffrey had rightly pointed out, no mention was made of third States. A situation could arise in which a ship of State A was involved in a commercial transaction with State B and the arbitration agreement referred to the law of State C, which would have no connection with the transaction itself. That was often true in arbitration cases in the third world, since countries did not wish to submit to local courts because of the pressure exerted by their governments and preferred to submit to the law of a third State. He wondered whether, in the Special Rapporteur's opinion, that situation was desirable. If jurisdiction was to be given to local courts, it should be given to the courts of countries which had a real relationship with the commercial transaction. However, as Mr. Reuter had said (*ibid.*), that would lead the Commission into the application of the rules of private international law of the country where the jurisdiction was exercised, and as Mr. Arangio-Ruiz had said, judges could not always be relied upon in such situations. Perhaps the words "or according to the law" could be removed from the phrase "on the territory or according to the law of which the arbitration has taken or will take place", in paragraph 1.

31. With regard to paragraph 2 of article 20, he wondered whether the words "has effect subject to any contrary provision in the arbitration agreement"

added to the meaning of that provision. The reference to an arbitration agreement between States, however, was entirely appropriate.

32. Lastly, he endorsed the general opinion that articles 19 and 20 should be referred to the Drafting Committee.

33. Mr. KOROMA said that the Commission might perhaps attempt to set out the two differing opinions about draft article 19 in separate articles. One could be entitled "Ships employed by a State in governmental service", or words to that effect, and the other could retain the present title "Ships employed in commercial service", stating the exception, as it were, which the Special Rapporteur was trying to enunciate.

34. In connection with draft article 20, he agreed in substance with Mr. Mahiou (1916th meeting) and wished that there had been time to discuss in greater detail the cases that had been mentioned. At any rate, the reservations expressed in the course of the discussion would have to be dealt with in order to ensure confidence in an arbitration ruling.

35. Mr. LACLETA MUÑOZ said that, in principle, he approved of draft articles 19 and 20, but the Drafting Committee should re-examine both of them closely, especially article 19. He endorsed the latter, which referred to principles embodied in conventions on the law of the sea, but noted that the conventions in question related to an era when State ships had not been used for commercial purposes.

36. In article 20, the reference in paragraph 1 to the State "according to the law of which the arbitration has taken or will take place" was problematical. Indeed, paragraph 1 seemed to be drafted so broadly as to imply that the submission of a dispute to arbitration implied complete waiver by a State of the exercise of jurisdiction: perhaps that paragraph could be redrafted.

37. Paragraph 2 of article 20 might also be reviewed, since it seemed to give an excessive advantage to a State by allowing it to invoke absolute immunity, which it would probably do in many cases. The reference to an arbitration agreement between States was not necessary, for paragraph 1 already said that the agreement involved a State and a foreign natural or juridical person. Nevertheless, there was no reason why an arbitration agreement between States, not in the context of public international law but in the context of commercial law, should not be submitted to commercial arbitration.

38. Mr. TOMUSCHAT said that he agreed in principle with draft articles 19 and 20. Article 19, however, needed careful scrutiny, since it was complex in its present form and the reader might not always grasp the reasons behind some of the language employed. For example, with reference to the phrase "ship and cargo belonging to that State" in paragraph 1, he wondered why it was necessary for both the ship and the cargo to belong to the State: as Mr. Ushakov (1916th meeting) had rightly said, the article related to ships employed in commercial service. That provision should therefore be revised.

39. With regard to article 20, he realized that the language had been taken from conventions already in force. However, the two criteria adopted, namely the law and the territory, were somewhat contingent. He believed a genuine link was needed. After all, the place of arbitration might well be determined merely by a desire to spend time in a particular place. It would certainly be inappropriate to confer review powers on the local courts in such cases. The best control procedure would be to have an international body to which the parties could appeal against any alleged procedural deficiency or other shortcoming.

40. The CHAIRMAN, speaking as a member of the Commission, emphasized the sensitivity and importance of the topic under study, which had been changing rapidly, especially since 1975. The reaction of the developing countries, and to a certain extent the socialist countries, had been to act by way of reciprocity rather than participate in evolving a law generally acceptable to them. Reciprocity was not very effective, since it placed those States on the receiving side and not in a position of equality. In order not to lose the advantages of certain commercial activities, they had to agree to limitations. The form and shape of their own activities was also changing and they had not yet been able to assess what sort of legal framework should regulate commercial relations between States and how far the purpose for which seemingly commercial relations were carried out by States or State agencies should be relevant in developing that legal framework. The Commission must therefore be conscious of that political context.

41. With regard to substance, in contrast with the two earlier alternatives, draft article 19, paragraph 1, did not make it clear whether the non-immunity of a government ship covered both the ship itself and a sister ship. The present drafting of paragraph 1 could be interpreted in either sense. If the wider interpretation was the correct one, that should be made clear.

42. As Mr. Balanda and Mr. Koroma had stated, in developing countries State ships were increasingly being used for purposes which seemed commercial but were actually governmental. Article 19, paragraph 2 (*b*), covered that situation to some extent, but perhaps further clarification could be provided by adding the words "or a public purpose" at the end of the subparagraph. Apart from those comments, article 19 could be retained in its present form, unless the Drafting Committee decided to make some deletions.

43. As to draft article 20, an important point for developing countries in particular was that, if any question relating to the arbitral award was to be subject to the jurisdiction of a third State, in other words the State of the venue, that should be brought to the notice of the State signing the arbitration agreement. A State might select a country for reasons of convenience or of trust in the persons handling the dispute, but it might not be at all familiar with the local law. Such notice had been provided for in a subsidiary manner in paragraph 2; nevertheless, the phrase "subject to any contrary provision in the arbitration agreement" could be added to paragraph 1 or the paragraph could begin with the words "Unless otherwise provided in an arbitration agreement".

44. Again, the phrase "on the territory or according to the law of which the arbitration has taken or will take place" in paragraph 1 of article 20 could be interpreted as applying to the courts of two different States. For example, if the arbitration agreement stipulated that the dispute would be determined by International Chamber of Commerce rules, but the venue of the arbitration was Geneva, which law would prevail in relation to paragraph 1 (*a*), (*b*) and (*c*)? Were two different forums intended?

45. Mr. ARANGIO-RUIZ said that he wished to make it clear that, in his earlier statement, he had not meant to criticize judges or their objectivity but simply to point out that they were open to errors.

46. In regard to the Chairman's suggestion to add the words "or a public purpose" after the words "non-commercial use" in article 19, paragraph 2 (*b*), he suggested instead using the word "public" before "non-commercial", since addition of the word "or" would make matters more difficult. He had personally been involved in an International Chamber of Commerce arbitration in Geneva, and it had been clear to all that the courts whose jurisdiction would prevail were the Swiss courts. It was difficult to alter that kind of relationship between the seat of a tribunal and the competence of the courts, since that would involve changing the national legislation of countries in the territory of which the arbitral tribunal operated.

47. Mr. SUCHARITKUL (Special Rapporteur), summing up the discussion on draft articles 19 and 20, and referring to comments made by Mr. El Rasheed Mohamed Ahmed, pointed out that draft article 19 concerned maritime law and as such was separate from the law of contracts, as Mr. Ogiso had also stated. The rules governing maritime law had existed for some time in the official bilingual texts of the 1926 Brussels Convention.[6] That form of language was highly technical and the Commission should not try to change it. As to the remarks by Mr. Ushakov (1916th meeting) and Mr. Tomuschat, he had tried in the revised text of article 19 to be concise: clarifications could be made in the Drafting Committee.

48. Arbitration, too, was a highly specialized branch of law. The judicial systems of countries varied, and, in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 238-241), he had cited the most reactionary one, which was that of his own country. Other countries, such as Malaysia, however, had changed the law, and all government contracts had to include a *compromis* clause for commercial arbitration.

The meeting rose at 6.05 p.m.

[6] See 1915th meeting, footnote 7.

1918th MEETING

Wednesday, 3 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 19 (Ships employed in commercial service) *and*

ARTICLE 20 (Arbitration)[4] (*continued*)

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, paras. 2-3.

1. Mr. SUCHARITKUL (Special Rapporteur), continuing his summing-up of the discussion on draft articles 19 and 20, said that article 19 related to a specialized branch of international trade law, covering not only the law of contract and of tort, but also marine insurance and matters such as maritime lien. He had endeavoured, in response to requests, to avoid terminology associated with particular legal systems, such as "common law"; that was why article 19 was couched in terms that might appear to have a hidden meaning and would therefore require close consideration.

2. He recalled that ships were a special type of property, neither movable nor immovable in the strict sense, but floating property with a flag and a nationality. In the case of commercial operation of merchant vessels, the causes and types of action varied widely and the commentaries would have to reflect all the materials included in his sixth report so as to ensure that the position was clear. The decision reached by a German court in *The "Visurgis"; the "Siena"* (1938) provided a useful indication of Continental, United Kingdom and United States practice. That court had held that, allowing for minor differences in the definition of State ships and the extent of the immunities accorded to them, a vessel chartered by a State, but not commanded by a captain in the service of the State, did not enjoy immunity if proceedings *in rem* were brought against it, and that the owner of the vessel could not claim immunity in an action for damages (see A/CN.4/376 and Add.1 and 2, para. 179 *in fine*).

3. The expression "cargo" was a technical term meaning merchandise or goods loaded on board a vessel from the quayside. Ownership of the vessel and ownership of the cargo were two entirely different things, so that a State could own the cargo, but not the vessel. He had cited a number of cases concerning vessels in use, or intended for use, for commercial services. The schooner *Exchange*, for instance, had been an ordinary trading vessel but, following a decree by Napoleon I, had been intended for use as a battleship. The *Prins Frederik*, a Dutch warship, had been used to carry spice from Indonesia; and the *Parlement belge* had carried mail.

4. Some members of the Commission apparently thought there was no need for paragraph 2 of article 19, whereas one member wished that provision to be put in a separate article, to make it clear that there was immunity for one category of ship, but not for another. The general principle, however, was that there was immunity, and that principle was restated in paragraph 2. The primary test could be the nature of the use, but the purpose test should also be considered.

5. With regard to Mr Reuter's remarks (1916th meeting), he pointed out that there were certain triangular transactions in food aid which, though regarded in some United States cases as commercial activity, might be more in the nature of humanitarian and political activity, such as in the case of food aid collected and distributed to the famine-stricken areas of the world by FAO. Another such triangular transaction involved the supply of rice by Thailand to Indonesia, which was often carried in frigates used for non-commercial purposes. The fact that it would be difficult to seize or arrest those ships because of their nature or to institute proceedings *in rem* against them had never been questioned. Paragraph 2 (*b*) of article 19 also represented a reply to a question raised by Mr. Ogiso (1917th meeting) because Japan had engaged in several triangular transactions with food-exporting countries.

6. The whole picture had started to change in the nineteenth century, when the judge in *The "Swift"* (1813) had held that there was no reason why the King of England should not, in his trading, conform to the general rules by which all trade was regulated (A/CN.4/376 and Add.1 and 2, para. 184). Thus trade was a clear exception, and he would challenge those commentators who had cited United States and English cases as following the absolute immunity rule. In the United States, in *The "Pesaro"* (1921), the judge in the lower court had been far more convincing, and the Department of Justice had taken the view that there had been no immunity, although the Supreme Court had been more independent. United Kingdom practice had never been firmly in favour of absolute immunity; on the contrary, immunity had been intermittently restricted. Leading international maritime lawyers and judges had always maintained reservations on that subject. The case in which the application of the principle of absolute immunity had gone farthest was *The "Porto Alexandre"* (1920), although perhaps that case involved the law of prizes, which required study as a separate branch of international law (*ibid.*, para. 152). At the time of the First World War, the maritime Powers had adopted the practice of requisitioning vessels; hence it was not only ownership, but use, possession and operation by a Government that gave the ship some form of immunity.

7. Article 19 therefore contained nothing startling, and any attempt to improve on it should be made solely in order to restore the balance and to ensure that immunity would subsist where a cargo was intended for use by developing countries in dire need and not for commercial purposes.

8. It had been suggested that developing countries should operate merchant fleets, but that was by no means easy. The operation of commercial airlines was much easier: the régime of the Warsaw Convention and the Chicago Convention applied, as well as the IATA agreements, and there was little, if any, question of immunities. For the carriage of goods by sea it was not enough just to set up a merchant fleet with the necessary technical facilities. A Japanese-Thai shipping conference, for instance, consisting of four Japanese and four Thai shipping companies, was dominated not by the Japanese or Thai companies but by shipowners far away; and even had it co-operated closely with India, Pakistan and other neighbouring countries, it would not have been able to intrude on the European conference. There was also the question of cargo. The cost of freight for carrying iron-ore was much higher than that for carrying tapioca, for instance. So far as assistance to developing countries was concerned, therefore, what was needed was co-operation between the shipowners' association and forwarding agents.

9. He noted that, although Mr. Ushakov (1816th meeting) was opposed to article 19, he had said that the USSR, like many socialist countries, had adopted the rules the article embodied in bilateral agreements. Perhaps the difference between Mr. Ushakov's position and his own lay only in the choice of partners or was mainly a matter of confidence. In any case, he trusted that the Commission could agree to refer article 19 to the Drafting Committee.

10. In draft article 20, he had perhaps been remiss in referring to only one kind of arbitration. Mr. Ushakov had helped, however, by saying that he supported the principle and by agreeing that submission to arbitration meant submission to the consequences of arbitration. Reference had also been made to awards under the 1965 Washington Convention,[5] but that Convention provided for self-contained arbitration machinery, and not every type of arbitration was the same. The question arose, therefore, whether article 20 should include a reference to matters other than civil or commercial matters. As he had already observed, it was not possible to interfere with existing legal systems or with the competence of those systems to supervise or control arbitration within their own jurisdictions. There were two points of contact. The courts of the State in which arbitration took place might have jurisdiction to supervise the arbitration, but some courts in that position would go beyond supervision and interfere with the arbitration. It was therefore necessary to provide authority to confirm and enforce the award. Sometimes, however, the law was chosen by the parties; if none of the arbitrators was familiar with the internal law or proper law of the arbitration contract, it would be difficult not to allow the court whose law was applicable to have a say in the interpretation and application of that law. Those two elements had therefore been covered in article 20.

11. The Chairman (1917th meeting) had raised the pertinent question what would happen if there were more then two competent courts and hence a conflict of jurisdiction. The choice would then, of course, lie with the parties seeking the remedy. Mr. Arangio-Ruiz (*ibid.*) had suggested that the parties might not have such a choice, since the law of the territory where the arbitration was being held would favour the competence of the court of that territory: in other words, it was a *forum conveniens*. But there might well be other courts that would have jurisdiction and be willing to exercise it.

12. It had been suggested that the court of the territory in which were located the assets or property of the party against which the award was being sought should have some jurisdiction. If, indeed, submission to arbitration meant submission to the consequences of arbitration, it would also mean submission to the jurisdiction of the court that was competent to enforce the award, and there might be many such courts. In his view, however, submission to arbitration did not constitute a waiver of jurisdictional immunity.

13. The exception to immunity in regard to arbitration was very limited, although arbitration was becoming extremely common. Among other cases in point was *International Association of Machinists and Aerospace Workers* v. *OPEC* (1979),[6] in which it had been decided that, under United States anti-trust law, OPEC could be a plaintiff but not a defendant; it could not be sued, because the court did not have subject-matter jurisdiction. The same applied in another case, in which it had been held that nationalization was not within the competence of the court, since it was an act of State and not shown to be in violation of international law. Arbitration was also linked to pre-trial attachment, enforcement and execution, all of which would be dealt with in more detail in part IV of the draft. He trusted that the Commission would agree to refer article 20 to the Drafting Committee.

14. The CHAIRMAN thanked the Special Rapporteur for his statement and suggested that draft articles 19 and 20 should be referred to the Drafting Committee for review in the light of the discussion and of the Special Rapporteur's explanations.

15. Mr. USHAKOV said that the Commission could not prejudge the Drafting Committee's position or prescribe its point of view. The Drafting Committee could propose that the Commission should delete a particular draft article. Once the Drafting Committee had completed its work, the Commission would be able to take a decision.

16. Sir Ian SINCLAIR said that he agreed entirely with Mr. Ushakov. Although the articles were necessary, in his view, the Drafting Committee should examine their formulation carefully, taking the Commission's views into account.

17. Chief AKINJIDE said that, without prejudice to the position he had taken during the debate (1917th meeting), he wished to endorse the views expressed by Mr. Ushakov and Sir Ian Sinclair. He was still opposed to draft articles 19 and 20, but hoped to put his case more forcefully in the Drafting Committee.

18. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 19 and 20 to the Drafting Committee.

It was so agreed.[7]

19. Mr. USHAKOV recalled that the Special Rapporteur (1915th meeting) and he himself (1916th meeting) had proposed that article 6 of the draft should also be referred to the Drafting Committee.

20. Mr. SUCHARITKUL (Special Rapporteur) said that article 6 had already been referred for re-examination to the Drafting Committee, which also had before it draft article 11, in particular paragraph 2 of that article.

21. Mr. THIAM noted that, in the opinion of some members, the Drafting Committee might find it necessary to delete some particular draft article. Was

[5] See 1916th meeting, footnote 12.

[6] *Federal Supplement*, vol. 477 (1979), p. 553; reproduced in United Nations, *Materials on Jurisdictional Immunities of States and their Property* (Sales No. E/F.81.V.10), pp. 503 *et seq.*

[7] For consideration of draft articles 19 and 20 as proposed by the Drafting Committee, see 1931st meeting, paras. 12 *et seq.*, and 1932nd meeting, paras. 1-37.

the Drafting Committee a sub-commission empowered to re-examine the draft articles as to substance, or a Drafting Committee in the strict sense of that term? In his opinion, the powers given to it were too wide.

22. Mr. McCAFFREY said that he would like to know in what order the Drafting Committee would discuss the draft articles. Some members considered it very important to determine the fate of the articles in part III before article 6 and draft article 11, paragraph 2, were considered.

23. The CHAIRMAN said that, as he understood the position, whenever an article was referred to the Drafting Committee the views expressed in the Commission had to be taken into account. The final decision on the article rested with the Commission, to which the Drafting Committee had to report. There need be no fear that the Drafting Committee was being empowered to examine matters of policy.

24. As to Mr. McCaffrey's point, the usual approach was to deal first with any articles embodying principles and then to proceed to the exceptions to those principles. Given the importance of article 6, however, he thought that it should be left to the Drafting Committee to decide when it would be appropriate to consider that article.

25. Mr. DÍAZ GONZÁLEZ shared Mr. Thiam's concern and welcomed the reply given to Mr. Thiam's question. But he had the impression that the Drafting Committee was some kind of supreme authority and that, until it had made its proposals, the Commission could not act. Why not say that a sub-commission had been set up to check the work of the Commission itself?

26. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that to a great extent he shared the doubts expressed by Mr. Thiam and Mr. Díaz González. The Drafting Committee was a technical body whose task was to prepare draft articles with a view to the adoption of a final text. In so doing, it should be guided by the opinions of the Commission. The difficulty was that the opinions of the Commission were not always made clear, for at the preliminary stage of its work it did not conclude each debate with a decision. Every proposal made by the Drafting Committee was, of course, subject to the approval of the Commission. The Drafting Committee was not a super-body and it was controlled by the Commission. It was regrettable that its functions were not more clearly defined, but he feared that such a definition would not be possible.

27. Normally, the order in which draft articles were considered by the Drafting Committee was decided by the Committee itself, but in the present case it would be useful if the Commission could direct the Drafting Committee to consider articles 19, 20, 11 and 6 in that order.

28. Mr. SUCHARITKUL (Special Rapporteur) endorsed that approach.

29. Mr. USHAKOV said that he had only referred to the Special Rapporteur's proposal that the Drafting Committee should re-examine article 6 at the current session; he had not suggested any order of priority.

30. The CHAIRMAN said that many members would be familiar with the role of other drafting committees, such as that of the Third United Nations Conference on the Law of the Sea, whose functions had been strictly of a drafting and technical nature. The role of the Commission's Drafting Committee was more flexible. It was also a smaller body, but was open-ended. That flexibility was helpful to the Commission and should not be limited by any strict terms of reference. The supreme body, however, was the Commission, which could accept or modify any proposal by the Drafting Committee, and its primacy would be maintained.

31. Mr. DÍAZ GONZÁLEZ welcomed the explanations given in regard to the Drafting Committee's mandate. There had been a misunderstanding, inasmuch as he had not made a statement, but had simply asked to be enlightened on that point. He was entirely satisfied with the reply.

32. The CHAIRMAN suggested that the Drafting Committee be asked to consider articles 19 and 20 first, and then to take up articles 11 and 6.

It was so agreed.

The meeting rose at 11.40 a.m.

1919th MEETING

Thursday, 4 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR [3] (*continued*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4]

1. The CHAIRMAN invited the Commission to consider part IV of the draft articles, dealing with State immunity in respect of property from attachment and execution, and comprising articles 21 to 24.

2. Mr. THIAM said that the difficulty of the topic lay not only in the fact that it related to several branches of law, all of wich the Special Rapporteur handled brilliantly, but also in the fact that two opposing trends always came into play. The contrast between those who favoured absolute immunity and those who advocated restricted immunity promised to be still sharper in connection with immunity from execution than it had been with immunity from jurisdiction. The State, by its very nature, was loath to submit to measures of execution. At the internal level, a very great majority of States refused to submit to such measures. In international relations, they refused to do so all the more, in view of the principle of the sovereign equality of States.

3. The concept of immunity from execution was no doubt a useful one in that it averted the possibility of a State taking unreasonable measures of execution against another State, an action which would inevitably lead to a precarious international situation. Nevertheless, unless the principle of immunity from execution was supplemented by the principle of execution in good faith, it could not fail to give rise to difficulties. The main goal, the stability of States, would be jeopardized if States, under the protection of immunity from execution, were in a position to refuse to execute decisions against them. An attempt therefore had to be made to limit such immunity. A State refusing to execute a decision committed a wrongful act whereby it incurred international responsibility, and the injured State was thus justified in taking countermeasures. Moreover, in certain cases, the matter could be brought before the Security Council and measures could be taken under Chapter VII of the Charter of the United Nations. Hence it was not enough to assert that immunity from execution was necessary for international public order; the possible practical consequences, under certain circumstances, of the application of such immunity also had to be assessed.

4. In draft articles 22, 23 and 24, the Special Rapporteur covered attachment and execution simultaneously and appeared to distinguish the one from the other; yet such a distinction did not seem to be founded on any legal system. Attachment was a measure which enabled the creditor to prevent the debtor from having disposal of property in his possession. Attachment included a number of stages, the first being precautionary attachment or arrest, and the last being execution. But whatever the stage, it was always one of attachment, so that it might be preferable simply to use the expression "immunity from execution" in the draft.

5. The scope of part IV of the draft, dealt with in draft article 21, related to the legal acts which could be performed under the heading of attachment, to the property which could form the object of attachment, and to the grounds on which a State could rely for the purposes of securing attachment. As he had already pointed out, all the legal acts that could be envisaged were covered by the term "attachment" and, so far as property was concerned, he agreed with the views expressed by the Special Rapporteur. With regard to grounds, however, under article 22, paragraph 1, the rule of State immunity applied to "State property, or property in the possession or control of a State". The concepts of ownership and possession posed no difficulties, but the same could not be said of the concept of control. To give it a significance other than those of holding or keeping, which were well-known concepts, would be to open the way to uncertainty.

6. A State could indeed exercise control over private activities, but if it decided to control a company by acquiring participation in it, would it be correct to consider that the company, for that reason alone, should enjoy immunity from execution, regardless of the extent of the State's participation? In internal law, only the assets of a company in which the State owned a share of some size could be regarded as public funds exempt from attachment. If no minimum limit was set at the international level for participation by the State in a company, many companies would be able to benefit from nominal participation by the State solely for the purpose of enjoying immunity from execution. Consequently, if the concept of control was synonymous with participation, it was necessary to specify the level of that participation. An additional reason for a clear definition of the concept was that a State could exercise control in a vast number of fields, such as trade, prices or customs.

7. From draft article 21, it was apparent that the property concerned could be property in which the State had an interest. The concept of interest should be clarified, since it might give rise to difficulties, particularly if it included interest of a moral, cultural

paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

or even national defence nature. It was easy to conceive of an interest in a company that manufactured equipment which could be used for national defence purposes.

8. Draft article 22, which listed exceptions to the rule of immunity, was generally acceptable. It was normal, for example, that property in use or intended for use in commercial service should not be exempt from attachment. That exception was recognized in the law of many countries and was based on the distinction between *acta jure imperii* and *acta jure gestionis*. Similarly, precautionary attachment in respect of property forming the object of proceedings to determine its ownership seemed only right and proper.

9. As to draft article 23, on the modalities and effect of consent to attachment, the Special Rapporteur referred in his seventh report (A/CN.4/388, paras. 98-100) to government contracts. In most cases, they were merely contracts of acceptance, in the sense that the borrower could not do more than accept conditions established by the lender. There had even been cases where, in the borrowing country, the highest judge in the land had been obliged under a clause of the contract to issue a legal opinion that the contract was due and proper both in form and in substance.

10. It was not surprising that the Special Rapporteur should have provided in draft article 24 for limits to consent under article 23. There were certain types of property which, by their nature or because of the use to which they were put, seemed to have to be regarded as unattachable. In internal law that was true of property relating to the integrity and dignity of the individual, and the parallel at the international level was property relating to the integrity, dignity and sovereignty of the State. Among those types of property, the Special Rapporteur mentioned property used or intended for use for diplomatic or consular purposes, which formed the subject of special conventions. As to property used or intended for use by international organizations, the Special Rapporteur regarded as unattachable only the property of international organizations of a universal character, to the exclusion of property of international organizations of a regional character. Regional organizations were encouraged by the Charter of the United Nations and relevant conventions had been concluded by States members of such organizations. Accordingly their property, too, should enjoy immunity from execution.

11. Article 24, paragraph 1 (*e*), concerned, among other things, property forming part of a State's "distinct national cultural heritage". However, property forming part of the national heritage did not necessarily form part of the property covered by article 24, namely State property. Some countries even recognized the existence of national property which was neither State nor private property but was of national interest and could, depending on policy and the exigencies of the moment, be assigned to some particular use. The cultural heritage was a similar phenomenon. An item could be of national cultural interest, yet still be privately owned. Such was the case with buildings classified as historical monuments or with movables which, privately owned though they might be, could not be transferred abroad.

12. With reference to part V of the draft articles, containing miscellaneous provisions, he wondered what "period of time" was meant in paragraph 3 of draft article 26. A period of time of which neither the starting-point nor the duration was specified was a period of time which did not exist. The period of time for applying to have the judgment set aside, referred to in paragraph 4 of the article, should also be specified.

13. Again, paragraph 1 of draft article 27, which stipulated that "A State is not required to comply with an order by a court of another State compelling it to perform a specific act or to refrain from specified action", appeared to be setting forth a general rule. Yet to assert that a State was not obliged to submit to an order by a court of another State whose jurisdiction it had accepted seemed hazardous. At all events, it would be improper to make such an assertion with regard to conservation measures.

14. Mr. REUTER said that, bearing in mind the difficulties of the topic, by and large he approved of the articles proposed by the Special Rapporteur. He wished to emphasize from the outset that, even more than immunity from jurisdiction, immunity from execution was dominated by the general principle of the territorial sovereignty of the State. In principle, a State had no place in the territory of another State. However, international relations meant that States engaged in activities, albeit exceptionally, in the territory of other States. As could be seen from the Special Rapporteur's formulation of draft article 23, paragraph 1 (*b*), the problem of immunity from execution arose only if certain State property, physical or otherwise, was situated in the territory of another State. Such a situation implied that the first State was subject to the legal system of the second State, because even ownership of the property could only be established under internal law. But that led to a preliminary question on which doctrine remained silent, namely the legal capacity of a State to own property in another State. Under French law, the French State was entitled to engage in acts of commerce only with specific legislative authorization.

15. The question of the State's legal capacity was regulated by each country's national law. There was no general rule in public international law empowering a State to perform legal acts in accordance with the national law of another State. It was, of course, possible, by virtue of a particular rule in international law, for a State to perform acts of sovereignty in the territory of another State. The 1961 Vienna Convention on Diplomatic Relations did not stipulate that the receiving State must authorize the sending State to acquire premises for its diplomatic mission; it merely stipulated that a State which received a diplomatic mission of another State had to facilitate the acquisition by that State of premises necessary for its mission or assist it in obtaining accommodation in some other way. Since a State could have legal capacity to exercise a lawful activity on the territory of another State, it was sometimes necessary for the two States to arrive at a settlement, either in general terms

under a multilateral instrument or by bilateral agreement, in order to reconcile that act of sovereignty with the internal law of the territorial State. The problems of definition and the general issues which had arisen in connection with immunity from jurisdiction would arise still more acutely in connection with immunity from execution.

16. The scope of part IV of the draft, which was dealt with in draft article 21 but also cropped up indirectly in the subsequent draft articles, raised two issues. First, article 21 related to State property or property in the State's possession or control or in which the State had an interest. Instead of that long enumeration, which might cause difficulties, it might perhaps be preferable to use a phrase such as "any property to which the State can claim legal title". The question arose, however, whether in addition to legal title, the State could not also claim a *de facto* power, which possibly explained the Special Rapporteur's use of the term "control". Secondly, the term "control" suggested that the Special Rapporteur had in mind financial participation by the State in companies. If that was the case, it would seem most appropriate to use the same formulation in respect of immunity from execution as that adopted for immunity from jurisdiction in article 18 of the draft. In the absence of uniform solutions in different countries with regard to execution, a State's activities under the internal legal system of another State should be protected by common rules.

17. In that connection, he noted that, unlike the preceding articles, draft articles 21 to 24 were confined to State immunity alone. Article 23 spoke of State "agencies", a term which might apply to entities having separate legal personality, and paragraph 1 (*c*) of article 24 mentioned the property of a "central bank", which was an entity that could enjoy such personality. In his view, there were good grounds for extending State immunity to such bodies with separate personality under national law.

18. Draft articles 21, 22 and 24 gave the impression of covering the same ground, but he was not opposed to the way in which the Special Rapporteur had presented that aspect of the topic. As to article 22, he wondered whether paragraph 1 (*c*) was absolutely necessary, since the provision was manifestly concerned with jurisdictional immunity and had a place in the article only if the question of execution arose in the same procedure. The words "in commercial and non-governmental service" in paragraph 1 (*b*) implied in fact that there could be such a thing as commercial and governmental service. Paragraph 1 (*a*) of article 23 gave rise to the same problem, one which would not be easy to resolve since members' views on it were divided. Furthermore, that provision contained a rather unfortunate succession of "ors".

19. In general he agreed with the list in draft article 24 of types of property which should normally be immune from execution. As an example of property intended for use for military purposes, he would cite the case of a warship belonging to a State which was allowed to enter the territorial waters of another State and which took advantage of such permission to take on fresh water and food. Property acquired in that way was plainly intended for military purposes. On the other hand, if a State purchased a civil aircraft intended for conversion into a military aircraft, and if the aircraft underwent repairs in another State before its conversion, there could be some doubt as to whether it should enjoy immunity. As for property used or intended for use for unlawful military purposes, such as espionage, it certainly should not be immune from execution; the determining factor was its unlawful character. With regard to property of a central bank or another State monetary authority, he wondered whether the Special Rapporteur was thinking of property in general or only of funds. In the former case, immunity could be extended to such property, on the understanding, however, that it would be a matter not of State immunity but of the immunity of a public service. Property forming part of "the national archives of a State or of its distinct national cultural heritage" should be designated by other terms. The property in question would be registered in the State of origin but perhaps temporarily taken to another State on the occasion of, say, an exhibition.

20. He appreciated the Special Rapporteur's intention in drafting article 24 but he wished to stress that, under article 23, immunity could be waived in a multilateral or bilateral treaty or in a contract with a private person. To the extent that article 24 established a rule which went back on multilateral or bilateral treaties, it would raise a problem of conflict between treaties. That question was dealt with in draft article 28, which was much more liberal. When all was said and done, it would be sufficient to stipulate that, as between parties to the future instrument, the provisions of the instrument would prevail over all other provisions of multilateral or bilateral treaties to which those States might be parties. As to the question of contracts, the drafting problems were still more delicate. In any case, a distinction should be drawn between the problem of contracts and the problem of treaties.

21. Mr. YANKOV said that the task at hand was not to consolidate regional and national practice but, rather, to work out a set of rules for universal application. The Special Rapporteur had accordingly drawn upon a wide range of sources. Particularly impressive was the Special Rapporteur's remarkable survey of the practice of a wide range of States having different legal, social and economic systems. Such a comprehensive approach augured well for the work on a particularly complex topic.

22. Part IV constituted a very important component of the draft and it was dependent, in terms of substance, on the conceptual approach to the nature, extent and scope of jurisdictional immunity itself. In that regard, he agreed with the emphasis placed in the seventh report (A/CN.4/388) on the significance of consent, whether in the form of prior consent to execution or waiver of immunity.

23. With regard to draft article 21, on the scope of part IV, he noted that the wording "State property, or property in its possession or control or in which it has an interest" differed from that used in draft article 19, which referred to a State "which owns, possesses, employs or operates" a ship in commercial service.

24. The entire basis of draft articles 21 to 24 lay in the separation between two types of immunity: immunity from jurisdiction and immunity from execution. There was of course a similar distinction between two types of waiver: waiver of immunity from jurisdiction and waiver of immunity from execution. Accordingly, article 21 was somewhat inadequate if it was to fulfil a proper role in the draft as a whole. In its present form it failed to contribute much to the understanding of articles 22 to 24. The article should give a more substantive indication of the interrelationship between the various phases of immunity from jurisdiction. That, moreover, was the view expressed by the Special Rapporteur (*ibid.*, para. 42), who, after stressing that immunity from execution must be subject to the conditions and exceptions that were applicable to immunity from jurisdiction, added:

> ... For this reason, the application of article 22 will be in accordance with the qualifications, conditions and exceptions contained in parts II and III of the draft articles. A cross-reference to the two pending parts in the text of the article appears warranted.

It was essential for article 21 to bring out that interrelationship. Otherwise, it would constitute a mere introductory article which, in terms of law, added little to the understanding of the draft.

25. Draft article 22 was very important and all of its provisions stemmed from the general rule of State immunity, which was founded on the equality and sovereignty of States. As the Special Rapporteur stated (*ibid.*, para. 41), the rule of State immunity from execution, although separate from immunity from jurisdiction, derived from the same source of authority. That, in his own view, should be the guiding principle, for in the absence of either prior explicit agreement or an express waiver, the State of the forum would have no means to enforce an award or judgment against the other State. Accordingly, execution was subsequent to and dependent on either the judgment requiring satisfaction or failure by the debtor State to comply with the award.

26. The principle of reciprocity was also an important component of the principle of equality and should have a place in the text, more particularly because certain national legal systems made express reference to reciprocity. Consideration should therefore be given to including an appropriate reference to reciprocity in article 22. In that connection, diplomatic negotiations had been mentioned as a possible means of arriving at a solution before resorting to measures of execution and even before judgment had been made final, a point that could perhaps also be reflected in article 22.

27. With regard to paragraph 1 (*b*) of article 22, he wondered whether there was any material difference between the expression "commercial and non-governmental service" and the expression "non-public purposes unconnected with the exercise of governmental authority of the State" in paragraph 1 (*a*) of article 23.

28. Similarly, he would be grateful for clarification of the meaning of the term "control", as used both in article 21 and in article 22, and he endorsed Mr. Thiam's comments in that regard.

29. As to draft article 23, consent, whether given before or during the proceedings or after trial and judgment, must always play an important role and he fully agreed that it provided a firm basis on which the judicial authority of the other State could exercise jurisdiction in proceedings against or affecting a State. Consent was required at two separate levels, namely as a basis for the exercise of jurisdiction, and to permit measures of execution prior to the proceedings and also after judgment had been delivered. Normally, no attachment, arrest or execution could be ordered by a court of another State, unless the State against which the measures were to be levied had given its consent. That again posed the question whether reciprocity was of some relevance regarding the effect of an expression of consent to measures of attachment and execution.

30. Again, he wondered whether paragraph 1 (*b*) of article 23 was adequate or whether the property's close connection with the principal claim, as referred to in the seventh report (*ibid.*, para. 102), should not also be considered.

31. In regard to draft article 24, he wished to know whether the list of State property in paragraph 1 (*a*) to (*e*) was intended to be exhaustive. He certainly endorsed paragraph 1 (*e*), but thought it should also include a reference to natural resources, over which a State was entitled to exercise permanent sovereignty. Natural resources were of such vital significance that measures of execution levied against them could have an adverse effect on the sovereign attributes of the State. An analogy could be made with unattachable personal property, which, under legal systems such as that in his own country, was exempt from execution if the property was deemed to be indispensable to the normal life and livelihood of the person concerned. A safeguard provision of the type he had in mind would operate as a protection against treaties that could lead to the pillage of natural resources or might be detrimental to a weaker party, especially when the treaty impaired the actual economic foundations of the State. Alternatively, a provision could be added to indicate the nature and use made of property that should not be liable to measures of execution.

32. The reference in article 24, paragraph 1 (*a*), to international organizations should not be confined to those of a universal character. It might also be appropriate to refer in the same provision to delegations to international conferences, since the 1975 Vienna Convention on the Representation of States provided for equal treatment regarding the immunities accorded to delegations to international organizations.

33. Article 23 could apply both to article 22 and to article 24, so that it might be more appropriate to reverse the order in which article 23 and article 24 were arranged. Lastly, he noted that, while the titles to all those articles spoke of attachment and execution, the texts themselves spoke of attachment, arrest and execution.

34. Mr. SUCHARITKUL (Special Rapporteur), referring to the expression "property in its possession or control" in draft article 21, explained that "possession" applied to cases in which the property was in the possession of the State itself or through one of its

agents. Similarly, property such as a ship or aircraft could be under the control of a State through the captain or crew of the ship or aircraft in question. But article 21 was not intended to cover the assets of companies in such a way as to entitle them to immunity from arrest, attachment or execution.

35. As to the scope of the draft articles, the intention was that they should cover attachment, arrest and execution where ordered by a court of law or tribunal, but not decrees of an executive or legislative nature under which property was nationalized or requisitioned.

36. Mr. FRANCIS, referring to draft article 24, paragraph 1 (*c*), said that Mr. Reuter seemed to have suggested that property of a central bank should be immune from attachment. He would be grateful for further clarification on that point.

37. Mr. REUTER, after remarking that the precise meaning of the English term "property"—incidentally, well rendered in French by the word *biens*—still had to be decided, said that he had not adopted any position on paragraph 1 (*c*) of draft article 24 and that his comments had been intended chiefly for the Special Rapporteur. Taken literally, the term "property" obviously covered money (banknotes, gold specie, currency in the general sense of the term) but also applied to other items, such as buildings. He did not know whether it was common for a central bank to own a building in a foreign country, but such a situation was not inconceivable. If the term "property" had a general meaning, it would follow that immunity applied to all of the central bank's property and, consequently, to property of which the State was not necessarily the direct owner. In most countries the central bank had a legal personality separate from that of the State. If it agreed with the relevant terms of article 24, the Commission was preparing to recognize the immunity of entities which were not, properly speaking, the State, an attitude to which he had no objection.

38. Whereas his position with regard to State immunity was more restrictive than that of other members, his views regarding the immunity to be accorded to entities which, while possessing a personality separate from that of the State, none the less enjoyed some of its sovereign rights were more flexible.

39. By replacing the term *biens* by the term *fonds*, which applied to all forms of money, the Commission would be subscribing to the idea put forward by Mr. Yankov, namely that certain types of State property preserved their character as public property even when in hands other than those of public authorities. He was not in favour of extending State immunity in an unlimited manner and under all possible conditions, but he thought that immunity should be extended to entities under public law which were associated with the exercise of sovereignty. When it had considered part 1 of the draft articles on State responsibility, the Commission had accepted the idea that the State should be held responsible for acts committed not only by itself, but also by persons possessing the attributes of public authority. Since the exercise of public power was the source of State immunity, it was right and proper that organizations partaking of public authority should also enjoy immunity.

40. In conclusion, he explained that in his previous statement he had confined himself to reviewing the choices open to the Special Rapporteur and to the Commission in the event that it rejected the draft article submitted by the Special Rapporteur.

41. Chief AKINJIDE said that he wholeheartedly supported paragraph 1 (*c*) of draft article 24, which he regarded as extremely important. In the case of his own country, for instance, the majority of its foreign currency reserves were held abroad and only the absolute minimum was retained in Nigeria for foreign exchange purposes. He had been involved in litigation in which such moneys, held by the Central Bank on behalf of the Government of Nigeria, had been attached and, on one occasion, virtually all its assets in the United Kingdom had been frozen overnight under the wide-ranging terms of a Mareva injunction.[5] The same kind of thing had occurred in Frankfurt when an injunction had been granted to a creditor even before judgment had been delivered. It was therefore highly appropriate to include such an all-encompassing provision in the draft.

42. Mr. THIAM said that he, too, was in favour of limiting immunity from execution, but he shared the views expressed by Mr. Reuter on the subject of the immunity to be accorded to entities exercising public authority.

43. Sir Ian SINCLAIR noted that the opening clause of draft article 24 read: "Notwithstanding article 23 and regardless of consent or waiver of immunity". Bearing in mind the terms of draft article 23, he wondered to what extent that clause might not be incompatible with the existing codification conventions, all of which provided that, once a separate waiver of immunity from jurisdiction had been given, there was no restriction on the property that could be affected in relation to the execution. If there were to be so many types of property in respect of which consent and waiver could not operate, what would be left?

The meeting rose at 1.05 p.m.

[5] See *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria* (1977) (*The All England Law Reports, 1977*, vol. 1, p. 881).

1920th MEETING

Friday, 5 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Boutros Ghali, 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, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

1. Mr. BALANDA thanked the Special Rapporteur for the extensive and instructive documentation he had provided and for constantly taking account of the developing countries' interests. Stability in international relations depended on balanced international law, such as that the Commission was elaborating through the study of the various topics on its agenda. The topic under consideration was an extremely important one, as shown by the Special Rapporteur's seventh report (A/CN.4/388) and, in particular, part IV of the draft articles. Since the principle of State sovereignty lay at the heart of the question of jurisdictional immunities, the Commission had to proceed very cautiously. It must not follow the pattern of internal law too closely or place States on the same footing as private individuals, since State activities were always intended to promote the general interest.

2. At the previous meeting, Mr. Reuter had, in discussing the legal capacity of States engaging in activities in the territory of other States, come to the conclusion that there were as yet no rules of international law to govern that situation and that capacity to acquire immovable property, for example, was governed by bilateral agreements based on reciprocity. Mr. Reuter had rightly pointed out that State sovereignty formed the basis of jurisdictional immunities. The Commission should therefore agree that all activities by the State and its decentralized administrative agencies had to enjoy the protection provided by jurisdictional immunity and should also take account of governmental activities, bearing in mind their purpose. As he himself had already stated (1917th meeting), development activities should be regarded as governmental activities, with all the consequences deriving therefrom. The Special Rapporteur had, moreover, noted that

> ... The question of jurisdictional immunities relates, in this property connection, to the nature of the use of State property or the purpose to which property is devoted rather than to the particular acts or activities of States which may provide a criterion to substantiate a claim of State immunity. (A/CN.4/388, para. 9.)

Immunity from jurisdiction or from execution thus did not mean that a State would not be held responsible for its acts. Immunity did not do away with State responsibility or with the obligation to provide compensation.

3. The articles contained in part IV of the draft were generally acceptable, subject to drafting improvements. In draft article 21, for example, the words "from attachment, arrest and execution" did not cover confiscation and they should therefore be replaced by the more general expression "from any measure of constraint or forced execution, such as attachment, arrest and execution".

4. In draft article 22, paragraph 1, the words "State immunity from attachment, arrest and execution" should also be replaced by the words "State immunity from any measure of constraint or forced execution, such as attachment, arrest and execution". For the sake of precision, a more general term than the word "order" should be used in paragraph 1, for the word "order" applied to pre-judgment attachment, but not to execution, which was the result of a court decision. The words "as an interim ... measure" in the same paragraph would require further clarification. Subparagraph (*a*) should be amended to read: "the State concerned has consented thereto". Subparagraph (*b*) was entirely acceptable. Interpreted *a contrario*, that provision implied that property in use by the State in commercial governmental service enjoyed immunity from execution and it thus met his concern about the protection of the interests of certain countries. Subparagraph (*d*) raised the question whether the property was identified by the State or by a court. An answer to that question should be given either orally by the Special Rapporteur or in the commentary.

5. With regard to draft article 23, he had serious doubts about the soundness of the view that consent, once given, could not be revoked or withdrawn (*ibid.*, para. 86, *in fine*). In the interests of the stability of international relations, it made sense that a State

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

should not be able to withdraw the consent it had given in a particular case; but if it had consented to submit to measures of execution under a bilateral or multilateral agreement and could not then withdraw such consent, it would be mortgaging its sovereignty. States had to be allowed to change their minds. Since it should, moreover, be an obligation, not an option, for a State to give its consent in writing, article 23, paragraph 1, should begin with the words "A State shall be bound to give its consent in writing ...".

6. He appreciated the Special Rapporteur's attempt in draft article 24 to protect certain types of property—to which others might well be added—from any form of attachment or execution. Reference should be made in paragraph 1 (*a*) not only to international organizations of a universal character, but also to international organizations of a regional character.

7. In the title of draft article 25,[5] it would be better not to distinguish between personal sovereigns and other heads of State, since what mattered in that context was the function performed. It seemed, moreover, to be a contradiction in terms that a sovereign might hold private immovable property on behalf of the State, as provided in paragraph 1 (*a*). He also suggested that the word "private" should be added before the word "property" in paragraph 2.

8. Draft article 26[6] referred to certain periods of time, which should be defined more precisely. Paragraph 4 contained a rule that was liable to interfere with the application of the procedural law of some countries. It went into too much detail concerning the internal law of States, whereas a mere reference to such law would be enough. Another solution would be to spell out the rule in even greater detail and invite future States parties to amend their legislation accordingly. In conclusion, he said it was quite clear that the purpose of article 26 was to enable the authorities of a State which had waived immunity from execution to be informed of the content of the judgment rendered and to take any steps the judgment might require, thereby avoiding delays that would be detrimental to the parties' interests.

9. Mr. USHAKOV said he wished to make it clear from the outset that he disagreed almost entirely with the proposals which the Special Rapporteur had made in his seventh report (A/CN.4/388) and which were tantamount to saying that immunity in respect of State property did not exist. States were sovereign in their territory and outside it, on an equal footing with other States: hence the principle, which formed the basis of State immunity, that a State could not be subjected to another State's governmental authority, unless, of course, it had consented thereto. In the case of measures of attachment or execution, that principle was all the more important in that governmental authority would be exercised by force. But it would, in his view, be inconceivable that force might be used—in the case in point, by taking measures of attachment or execution—against the property of a State without the latter's consent. Until now, it had been a principle of international law that State property enjoyed absolute and unlimited immunity from such measures unless the State concerned had expressly consented to waive such immunity. The articles of part IV of the draft appeared to challenge that principle.

10. Referring to draft article 22, he noted that State property should be protected not only from court orders, but also from any decision which might be taken on the orders of an authority of another State, such as the head of State. The concept of State property thus had to be defined more clearly, since the formulae used in draft articles 21 and 22, namely "property in its possession or control" and "property in the possession or control of a State", were confusing. According to article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[7]

> ... "State property of the predecessor State" means property, rights and interests which, at the date of the succession of States, were, according to the internal law of the predecessor State, owned by that State.

State property could therefore be defined only by reference to the internal law of States, as could ownership, which should not be confused with acquisition. It also had to be determined exactly what property was being dealt with and how it happened to be in the receiving State's territory: it might have been imported or acquired on the spot in accordance with the internal law of the receiving State. Under Swiss law, for example, other States were not allowed to acquire land in Swiss territory. A receiving State might or might not allow imports of certain types of property, but, if it did allow them, it had to accept the consequences.

11. In his view, the only exception to the rule of immunity of State property was the case where the State concerned expressly consented to measures of execution. It would thus serve no purpose and would only present difficulties to try to list all the forms of consent in draft article 23. The words "*inter alia*, in an agreement, oral or otherwise" could simply be added at the end of article 22, paragraph 1 (*a*): any list of the methods of expressing consent should, in any case, incorporate the words "*inter alia*" to indicate that it was not limitative. Paragraph 1 (*d*) of article 22 raised the question who would identify the property. In his view, only the State concerned could do so; the mere fact of its consent indicated that it owned the property in question. Paragraph 1 (*c*), which appeared to be inoffensive, was in fact dangerous. Since civil proceedings would be lengthy, the attachment of property which would revert to the State at the end of the proceedings could not be allowed. Paragraph 1 (*b*) undermined the immunity of State property, for it would be difficult to distinguish between property in commercial service and other property, particularly in the case of funds. To provide that the foreign State could, through its courts, determine what use was made of the property in question was to assume that immunity did not exist. Such an approach was unacceptable.

[5] For the text, see 1915th meeting, para. 4.

[6] *Ibid.*

[7] A/CONF.117/14.

12. Draft article 24 was also based on the hypothesis of non-immunity, since all property other than the types of property listed therein could be attached or taken in forced execution.

13. He was at a loss to understand the purpose of draft article 25. If property was not State property, it had to be private property. In the case of diplomatic staff, however, such matters would be governed by diplomatic law; any difficulty that might arise if a head of State spent private holidays in a foreign country would be a matter for international courtesy rather than for international law.

14. Mr. TOMUSCHAT, paying tribute to the Special Rapporteur for his excellent seventh report (A/CN.4/388), said it was one of the basic premises of international law, as laid down by the PCIJ in *The "Lotus"*,[8] that no State could invoke its sovereign powers in the territory of another State. Although the exercise of sovereign powers had been permitted in some cases under international treaties and, in particular, the 1961 and 1963 Vienna Conventions on diplomatic relations and on consular relations, there was no rule of international law enjoining the territorial State to tolerate commercial activities by a foreign State. The foreign State could engage in such activities not as an entity vested with sovereign powers, but as a legal person which could invoke internal law and avail itself of economic opportunities under that law. It was thus bound to comply with all the relevant substantive rules and also to accept the machinery set up to enforce those rules.

15. Article 21 was, to his mind, perhaps the most objectionable of the draft articles. As had already been noted, the scope of the article had been stretched to cover situations which at first glance could not possibly be thought to involve State immunity. There was no reason, for instance, why an ordinary corporation set up for business purposes should benefit from immunity from attachment and execution simply because a State exercised economic control over it or had some sort of interest in it. By referring to property of which a State was not the owner, draft article 21 appeared to include a wide range of other legal subjects in its scope *ratione personae*, in clear derogation from the general purpose of the draft articles, namely that only a foreign State, as defined in draft article 3, paragraph 1 (*a*), should benefit from immunity. If the State was not the owner, there must necessarily be a third person who was and, given the wide definition of a foreign State contained in draft article 3, such a third person must almost by necessity be a private person, whether natural or legal.

16. Mr. Reuter (1919th meeting) had, moreover, rightly pointed out that, in the technical sense State property within the meaning of draft article 21 differed from State property under draft article 2, paragraph 1 (*f*). In the territory of another State, a State generally had no rights by virtue of its own internal law. An autonomous concept of State property would therefore have to be evolved or the definition in draft article 2 would have to be changed.

[8] Judgment No. 9 of 7 September 1927, *P.C.I.J., Series A, No. 10.*

17. Article 21 did not really provide for a variety of modalities of execution and enforcement, for it referred to attachment, arrest and execution "by order of a court". In his own country, however, the attachment of movable property was carried out by an execution officer specifically appointed for the purpose and he assumed that the same was true in other countries as well.

18. The wording of draft article 22, paragraph 1 (*b*), and that of draft article 23, paragraph 1 (*a*), differed considerably and should be harmonized. Only the first criterion, namely the commercial requirement, should be retained, since the retention of the second requirement, namely that property used for commercial purposes should be unconnected with governmental service, would amount to an implicit revision of article 2, paragraph 1 (*g*). It would, moreover, never be enough to determine that any specific assets had been the object of a commercial transaction, since the assumption was that such assets could still—and precisely through the commercial transaction—serve some governmental purpose. Since Governments were, however, always bound to promote the common good, practically no ground would be covered by article 22, paragraph 1 (*b*). In any event, he was not at all sure that the words "non-governmental service" had been used elsewhere in the draft articles.

19. Account also had to be taken of paragraph 2 of article 3 of the draft, which provided that, in classifying a contract as commercial or non-commercial, reference should be made not only to the nature, but also to the purpose, of the contract in question. In draft article 22, paragraph 1 (*b*), the element of purpose would be further emphasized.

20. The purpose of draft article 23 was to determine the manner in which consent could be expressed; but, in his view, it would be a truism to explain that a waiver could be made in writing. It would, however, be important to determine whether consent could be oral and whether it must be explicit.

21. He had some doubts about the use of the words "provided that the property in question ..." at the end of article 23, paragraph 1, since they implied that the intention was to restrict the sovereign freedom of States to waive their immunity to the field of commercial transactions. Draft article 24 seemed to establish a new category of rules of *jus cogens*, as pointed out by Sir Ian Sinclair (*ibid.*), but article 23 went much beyond the reasonable limitations set in article 24. It would not permit States, even if they consented to do so, to forgo immunity from execution if and when the assets at stake did not exactly serve commercial purposes. There appeared to be no justification for such a rule, which might even hamper States in their dealings with each other or with private corporations. Accordingly, article 23 should in his view be reduced to the essential proposition that a waiver could be contained not only in an inter-State instrument, but also in a private contract.

22. From the point of view of legal clarity and certainty, it would also be appropriate to make consent subject to a far-reaching condition of validity. The cases covered by article 24 were easily identifi-

able. The same could, however, not be said of the borderline cases arising from the distinction between assets used for commercial purposes and other property. Indeed, the purpose of a waiver could well be precisely to remove doubts as to whether property belonged to one category or the other. Under article 23 as it now stood, consent could always be challenged as not meeting the requirements of paragraph 1 (*a*). Article 23 might also deprive the consent referred to in article 22, paragraph 1 (*a*), of any significance because consent would always be confined to property used in commercial service, as provided in article 22, paragraph 1 (*b*).

23. With regard to article 24, paragraph 1 (*a*), he agreed with Mr. Thiam (*ibid.*), and Mr. Balanda that the property of regional international organizations should also be protected. Paragraph 1 (*b*) raised the question whether, in the case where a foreign State sent military aircraft which it had bought in another country back to the manufacturers for a general overhaul and then refused to pay the bill, the creditor could make an application for arrest in order to induce its State client to pay its debt. He could see no objection to such a procedure, but the problem might also be dealt with through the exercise of a right of retention.

24. Mr. FLITAN congratulated the Special Rapporteur on his seventh report (A/CN.4/388), which was equal to the difficulty of the topic and provided an overview of the draft articles. Immediately upon taking up the topic, the Commission had been divided as to whether immunity should be absolute or restricted. Numerous arguments had been put forward in support of both positions, but what mattered now was to adopt a pragmatic approach. Relations between States had a tendency to develop and cases in which one State was present in the territory of another were becoming more and more frequent. In order to promote co-operation between States, an equitable balance had to be established between their respective interests. The Commission's task was thus to prepare a draft which would be acceptable to the largest possible number of States and help to promote international co-operation. The successful completion of that task would depend on whether the two positions, opposed though they might seem, could be brought closer together. It must be borne in mind that a State not only granted jurisdictional immunities, but enjoyed them as well, and the interests of a State which granted jurisdictional immunities could not be regarded as more important than those of a State which enjoyed such immunities. The Commission might therefore have provided for too many exceptions to the rule of the jurisdictional immunity of States in part III of the draft. As he had noted in connection with the consideration of draft articles 14 and 15 at the Commission's thirty-fifth session, the effect of the exceptions to State immunity provided for in the draft was almost to render the principle of immunity devoid of content.[9] Part IV of the draft was entirely appropriate in that it seemed to restore the balance by establishing, in respect of certain types of property, the principle of permanent and absolute immunity which neither consent nor waiver could modify.

25. Referring to the distinction that Chief Akinjide had drawn (1917th meeting) between developed, developing and socialist countries, he noted that, from the point of view of their development, countries could be divided into only two categories, that of developed countries and that of developing ones. To add a third category of socialist countries was to introduce the criterion of a country's economic, social or political régime. A socialist country could just as easily be a developed country as a developing one.

26. Draft article 21, which defined the scope of part IV of the draft, would have to be re-examined, primarily from the point of view of form. Unlike other members of the Commission, he did not think that the the article had to be confined to State immunity in respect of property. As the Special Rapporteur explained in his seventh report (A/CN.4/388, para. 4), it was incorrect to refer to "property immunity", since it was ultimately always a State and not property that enjoyed immunity, whether immunity from jurisdiction or immunity from attachment, arrest and execution. According to article 1, moreover, the articles of the draft, including article 21, applied to "the immunity of one State and its property". Article 21 should therefore be drafted in general terms on the basis of the wording of article 1, and might read:

> "The present part applies to the immunity of one State and its property in respect of the circumstances in which the courts of another State may order attachment, arrest and execution."

27. The title of draft article 22 referred only to attachment and execution, while the text referred to attachment, arrest and execution. In the French version, moreover, the title of the article referred to immunity *de l'Etat,* whereas the title of part IV of the draft referred to immunity *des Etats.*

28. The words "In accordance with the provisions of the present articles" at the beginning of paragraph 1 of article 22 were superfluous and could be deleted. The words "property in which a State has an interest" required further clarification, especially as to the nature of the interest and its importance. The words "property ... is protected by the rule of State immunity from attachment, arrest and execution" in the same paragraph were not sufficiently in line with two other provisions of the draft articles. First, according to article 7, paragraph 2, a proceeding before a court of a State was considered to have been instituted against another State so long as the proceeding sought to compel that other State to bear the consequences of a determination by the court which might affect its rights, interests, properties or activities. Secondly, article 6, paragraph 1, indicated not that property was "protected", but only that a State was "immune from the jurisdiction of another State"; the Commission might borrow that wording, which did not imply any idea of compulsory protection, in drafting paragraph 1 of article 22. A possible "order of a court", as referred to in paragraph 1, was, moreover, not a decisive element, since the problem

[9] *Yearbook ... 1983,* vol. I, p. 81, 1768th meeting, para. 4.

of attachment could arise before an order was issued, for example at a preliminary stage in proceedings in which the State objected to jurisdictional immunity.

29. In paragraph 1 (*a*) of article 22, it would be appropriate to include a safeguard clause stating that article 24 placed restrictions on the content of that subparagraph. The words "such" and "in question" in that subparagraph were superfluous. As to paragraph 1 (*b*), the Drafting Committee would have to decide whether the word "and", which was used in the phrase "in commercial and non-governmental service", should be retained or deleted. The wording of paragraph 1 (*d*) could be much simpler if express reference were not made to the identification of the property. It would be enough to state that the property had to be allocated for satisfaction of a final judgment or payment of debts incurred by the State.

30. Paragraph 2 of article 22 required only a few drafting amendments, which he would submit to the Drafting Committee.

31. In the title of draft article 23, the words "Modalities and effect of" could be deleted and the words "attachment and execution" should be replaced by the words "attachment, arrest and execution". Paragraph 1 of that article should begin with the words "Pursuant to the provisions of article 22, paragraph 1 (*a*)", thereby establishing a link between the two articles. In view of the importance of consent to attachment, arrest or execution, it would be logical to maintain the requirement that consent should be given in writing and not to allow oral consent. Paragraph 1 (*a*), which dealt with property forming part of a "commercial transaction", could be deleted; there was no need to include a reference to such property in article 23, which was directly related to article 22, paragraph 1 (*a*), which provided that the State concerned could consent to attachment, arrest or execution against the property in question.

32. Draft article 24 required only a few drafting changes. For example, the words "permanently immune" in the title should be replaced by the words "absolutely immune" or "totally immune", since time was not the decisive factor in that context. If the Commission decided to list the three principal forms of attachment, the word "arrest" should be added to the title. The words "Property of a central bank" in paragraph 1 (*c*) should, as already suggested, be replaced by the words "Funds of a central bank". The five categories of property referred to in paragraph 1 (*a*) to (*e*) were actually only a minimum list of the types of property that enjoyed absolute immunity from attachment, arrest and execution.

33. As to the term "State property", he pointed out that draft article 2, paragraph 1 (*f*), contained a definition that should meet the concern expressed by Mr. Ushakov.

The meeting rose at 1 p.m.

1921st MEETING

Monday, 8 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

Draft articles submitted by the Special Rapporteur[3] (*continued*)

Article 21 (Scope of the present part)

Article 22 (State immunity from attachment and execution)

Article 23 (Modalities and effect of consent to attachment and execution) *and*

Article 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

1. Mr. EL RASHEED MOHAMED AHMED said that the Special Rapporteur had stressed at the outset that property as such was not, strictly speaking, entitled to immunity: immunity attached to the State. It was therefore within the competence of the territorial courts to hear actions or to make orders in respect of the property at issue. As Mr. Reuter (1919th meeting) had pointed out, a State could not claim authority in the territory of another State. If a State acquired property in the territory of another State, then its property rights were determined by the internal law of that other State.

2. In international law, jurisdiction was based on the consent of a State when its rights were to be adjudged by the local courts. The principle involved was that of the equality of States and, although that principle had not undergone any significant change, there was a tendency to apply the concept of restricted or functional immunity.

3. To simplify the matter, the situation could be regarded as a struggle between sovereign wills. But since States had a tangible common interest, a balance had to be struck to accommodate their conflicting interests in an orderly and acceptable manner. On that point, he supported Mr. Flitan's plea (1920th meeting) for a pragmatic approach. If one agreed with Jenks that the concept of law must be looked upon "as the positive instrument of enlightened policy substituting the progress of international society for arbitrary power",[5] it became all the more pertinent to seek realistic and positive solutions.

4. He agreed with Mr. Yankov (1919th meeting) that draft article 21 did not give a comprehensive idea of the content of part IV, which it purported to introduce. Jurisdiction in the present context was based on consent, and the subsequent articles dealt with State immunity from attachment and execution, the modalities and effect of consent, and the types of permanently immune State property. Those fundamental concepts should be reflected in article 21, which defined the scope of part IV. He therefore proposed that, in that article, the words "its prior consent or its subsequent waiver of immunity" should be inserted after the words "immunity of one State". If that was not acceptable, he proposed, alternatively, that the words "and to the effect of prior consent or subsequent waiver of immunity upon them" should be added at the end of the present text of article 21.

5. Draft article 22 stated as a general rule that consent was a prerequisite for the exercise of local jurisdiction. Four exceptions to that rule were set out in paragraph 1 (*a*) to (*d*). The exception in paragraph 1 (*b*) had attracted a certain amount of criticism, some of which related to the difficulty of determining precisely what constituted "commercial and non-governmental service". The welfare State—which all developing countries claimed to be—engaged in commercial activity in order to overcome shortages of foreign currency and meet the needs of its population; but the fact that a State engaged in trading did not make it a trader in the true sense of the word.

6. The present trend was for States to carry on their commercial activities through State-owned corporations. In view of that situation, a distinction should be made between commercial services operated by a Government directly, and those operated by a Government indirectly. Where a commercial service was operated directly, consideration should be given to the public service factor. In that case, consent must be sought to found jurisdiction. On the other hand, if the service was operated by a government-owned corporation, consent would be presumed, if needed at all.

7. Paragraph 2 of article 22 specified that a State was immune even in respect of property in which it merely had an interest. The interest of the State might be very small, however, and it might not be appropriate then to regard the immunity as covering the whole of the property. Much would depend on whether the interest of the State in the property could be readily and precisely identified.

8. Draft article 23 dealt with the modalities and effect of consent to attachment and execution. The Special Rapporteur stated in his seventh report (A/CN.4/388, para. 19) that "immunity from attachment and execution is far more absolute than immunity from jurisdiction" and repeatedly stressed the need for an express and separate waiver for measures of execution. But that was not borne out by the present formulation of article 23, which ought to make a clear distinction between consent at the stage of initiating judicial proceedings and consent at the stage of execution. In the latter case, as the Special Rapporteur said, consent was "in no sense to be lightly presumed" (*ibid.*, para. 39).

9. He therefore suggested that article 23 should be redrafted in the light of those remarks. Paragraph 1 (*a*), which seemed to be a repetition of paragraph 1 (*b*) of article 22, should be deleted. Paragraph 2 could also be eliminated by introducing, at the beginning of paragraph 1, a proviso such as "Subject to the provisions of article 24".

10. As to draft article 24, he had at first had doubts about the existence of a category of "untouchable" property. If consent was the foundation of jurisdiction, it could not be said that, consent notwithstanding, certain property could not be attached. He was grateful to the Special Rapporteur, however, for his explanation that it was a matter of degree. The types of property mentioned in article 24 would appear to be beyond reach, of necessity or by law. Some, such as those mentioned in paragraph 1 (*a*), were protected by convention.

11. Consent in respect of some types of property might not be easily obtained and if presumed it could have far-reaching consequences that would not conduce to the maintenance of the international legal order. For example, under most constitutions, financial appropriation was the province of parliament or other representative bodies. Hence it could not be imagined that any Government could easily bind itself financially in advance, in any agreement. Thus consent could not go beyond the very first level of jurisdiction, namely the initiation of legal proceedings. When the stage of execution was reached, express consent would again be needed. On that

[5] C. W. Jenks, *A New World of Law?* (London, Longmans, 1969), p. 129.

understanding, article 24 could attract wider acceptance. Although the article was welcome as it stood, other types of property could well be added, for example the property of regional international organizations.

12. Mr. FRANCIS said that he supported the main thrust of the articles in part IV of the draft. He agreed with Mr. Flitan (1920th meeting) on the need to adopt a pragmatic approach to the topic and produce articles acceptable to the largest possible number of States, bearing in mind that most of them supported the principle of State immunity.

13. The topic under consideration was one of the 14 topics selected for codification by the Commission in 1949. Had the Commission taken up State immunity at that early stage, its work would probably have had to be reviewed 30 years later, more or less as had happened with the law of the sea. In the past decade there had been some important developments: a number of leading developed countries had begun to restrict State immunity in legislation and multilateral conventions. The Special Rapporteur had referred in his reports to that restrictive approach and had furnished evidence of it in State practice and judicial decisions, all of which were to the disadvantage of developing countries. That being so, the present work was of great interest, both to developing countries and to the world community as a whole.

14. Referring to part IV of the draft, he asked what should be the realistic expectations of developing countries, given the laws adopted by developed countries and the multilateral instruments concluded, which tended to restrict State immunity in important respects. He did not believe that developing countries could expect a complete reversal of the action taken by an important sector of the international community; but they should try to effect some compromise with a view to protecting their interests.

15. Turning to the individual articles, he suggested that the wording of draft article 21 should be simplified. That could be done by broadening the definition of "State property" in paragraph 1 (*f*) of draft article 2 to include property in the "possession or control" of a State or in which it had "an interest". Article 21 could then be shortened to read:

> "The present part applies to the immunity of one State's property from attachment, arrest and execution by order of a court of another State."

16. He then proposed that a new article be inserted after article 21, to state the important general proposition that waiver of immunity by a State in order to have a suit heard did not, by itself, expose that State's property to execution in the same forum. It was important to state that principle, because there had been conflicting decisions on the matter in national courts, and the proper place to state it was in part IV of the draft.

17. He agreed with the essential content of draft article 22, but thought that its drafting could be greatly simplified. Some guidance could be had from article 22, paragraph 3, of the 1961 Vienna Convention on Diplomatic Relations and article 25, paragraph 3, of the 1969 Convention on Special Missions, which both referred to the "premises" of a mission. He supported the suggestion by Mr. Tomuschat (1920th meeting) that paragraph 1 (*b*) of draft article 22 should be harmonized with paragraph 1 (*a*) of draft article 23.

18. He approved of draft article 23 in general terms, but its wording could be simplified. For example, paragraph 2 could be eliminated by introducing a proviso in paragraph 1.

19. He felt uneasy about the general formulation of draft article 24, because of certain judicial decisions. One example was the 1980 decision by a United States District Court upholding the attachment of the bank account of the Embassy of the United Republic of Tanzania on the ground that, by submitting to arbitration, the foreign State had waived its immunity from execution (see A/CN.4/388, para. 114). Decisions of that sort illustrated the need for an article such as he had proposed for insertion after article 21, proclaiming the principle of freedom of State property from execution even after a judgment had been entered.

20. Another case of the same kind had occurred in 1976 in the Federal Republic of Germany, where the Provincial Court of Frankfurt had upheld the attachment of assets belonging to the Central Bank of Nigeria, on the ground that those assets were not devoted to the public service of the Nigerian State.[6] Protection of the assets of its central bank from attachment and execution was vital to a developing country, for the central bank was the centre of all economic activity and interference with the management of its funds could spell disaster. In the light of those examples, it was essential to provide adequate protection for the financial institutions of developing countries.

21. Referring to paragraph 1 of article 24, he expressed doubts about the use of the word "final" before "judgment" in the introductory clause. The use of that adjective appeared to expose State property to unnecessary attachment at low levels of jurisdiction. With regard to paragraph 1 (*e*), he wished to place on record his support for the protection of national cultural heritages.

22. Mr. RAZAFINDRALAMBO said that the immunity of States from arrest and execution relating to their property was of particular importance and was probably more closely connected with the principle of the sovereign equality of States than was immunity from jurisdiction. As the Special Rapporteur had shown in his excellent seventh report (A/CN.4/388), there were no great differences in the current practice of States concerning immunity from arrest and execution. While execution measures came after the judicial proceedings, conservation measures or provisional attachment might be carried out during the proceedings. It should be noted, in that context, that arrest and other measures of constraint might result from a decision that was not necessarily judicial, as in cases of requisition, confiscation, detention and even sequestration. All those measures led to the same result. Like Mr. Ushakov (1920th meeting), he wondered why the scope of part IV of

[6] See *International Law Reports* (Cambridge), vol. 65 (1984), p. 131.

the draft had not been extended to measures of constraint other than attachment and arrest. The Special Rapporteur recognized that arrest could be effected by either judicial or administrative machinery (A/CN.4/388, para. 117).

23. In the matter of immunity from arrest and execution, the practice of States seemed to be characterized by a certain uniformity and constancy. As the Special Rapporteur had observed, the jurisprudence of the common-law countries and the Roman law countries clearly confirmed the distinction between immunity from jurisdiction and immunity from execution. That distinction had been established by multilateral treaties, in particular the 1961 and 1963 Vienna Conventions on diplomatic relations and on consular relations. The countries of the third world had always firmly defended that distinction, even when they were in the position of plaintiffs. The 1965 Washington Convention,[7] concluded under the auspices of IBRD and setting up ICSID, had maintained the principle of that distinction at the urging of third world countries and had been confined to simplifying the enforcement procedure.

24. The numerous exceptions to the principle of immunity from jurisdiction, often due to the demands of the economic development of States, which induced them to waive that immunity, should find their indispensable counterpoise in the application of the principle of immunity from arrest and execution. In that respect, he certainly supported the conclusion reached by the Special Rapporteur in his seventh report, namely that

> ... the taking, even as a judicial sanction, of property constituting the cultural heritage of a nation or the pillage of natural resources over which a State is entrusted with permanent sovereignty cannot be condoned by mere judicial confirmation by a municipal tribunal. (*Ibid.*, para. 44.)

25. The structure of part IV of the draft, which comprised four articles, was clear and logical. Those four articles raised no problems of substance. The comments made by other members of the Commission on the drafting were mostly justified; he himself intended to make some proposals to the Drafting Committee.

26. The measures of constraint referred to in draft article 21 did not seem to be entirely differentiated and were not complete, as he had already observed. With regard to the French terms, *saisie-exécution* was only one form of *saisie*, so that it would be better to use the words *immunité de saisie et d'exécution* (immunity from attachment and execution). Moreover, there were other forms of *saisie* (attachment) ordered by non-judicial authorities, such as administrative, governmental, or even legislative or parliamentary authorities.

27. Draft article 22, paragraph 1, stated the principle of immunity from attachment, arrest and execution and set out a number of exceptions in subparagraphs (*a*) to (*d*). The text of subparagraph (*b*) should be re-examined having regard to the wording of draft article 19 (Ships employed in commercial contract" in paragraph 1 (*g*) of article 2 of the draft. It would be advisable to emphasize not only the nature, but also the purpose of commercial use. If the exception stated in paragraph 1 (*a*) of article 22, which related to consent, was read in conjunction with the exceptions stated in paragraph 1 (*b*) to (*d*), it appeared to be distinct from the latter exceptions, so that consent did not appear to be necessary, for instance, for the application of paragraph 1 (*b*). But draft article 23, which dealt with consent, provided that a State could consent not to invoke its immunity provided that the property in question formed "part of a commercial transaction" or was "used in connection with commercial activities". It followed that consent would only be possible in the cases covered by that condition, that was to say in relation to a commercial activity, although article 22 seemed to dispense with the need for consent in that particular case, in which there would be no immunity. Perhaps the Special Rapporteur could clarify that point.

28. The wording of article 22 should be harmonized with that of article 21, and the notion of State property should be extended in accordance with the definition given in draft article 2, paragraph 1 (*f*).

29. The comment he had made on draft article 22 also applied to draft article 23, namely that, in French, since *saisie-exécution* was only one form of *saisie*, it would be better to use the words *saisie et exécution* (attachment and execution). The disparity noted between paragraph 1 (*b*) of article 22 and paragraph 1 (*a*) of article 23 seemed to explain why some members of the Commission wanted the latter provision to be deleted. But, in his opinion, if a deletion was necessary it was rather paragraph 1 (*b*) of article 22 that should be deleted, to improve the balance of the article. He also wondered why, in paragraph 1 of article 23, the Special Rapporteur had not dealt with the case of renunciation of immunity by a unilateral act, which seemed quite possible.

30. In regard to draft article 24, which provided for exceptions to the provisions of article 23, he noted that the principle of immunity from attachment, well known in internal law, was based on concern to safeguard the higher interests of the individual or the public interest, and hence on the need to avoid disruption of those activities of the State which pertained to its sovereignty. The possibility of derogating from the application of immunity by means of consent seemed to be more dangerous for developing countries, whose economic, financial or political situation might induce them to consent to renounce their immunity from attachment or execution in agreements which they judged essential for their economic development. In his report (*ibid.*, para. 115), the Special Rapporteur noted a more marked tendency than in the past to allow attachment of foreign State property. Consequently, he (Mr. Razafindralambo) fully supported the principle affirmed in article 24. He merely wondered whether the immunity of certain property prescribed by national law should not be a residual provision; that was to say that, in addition to the cases of immunity from attachment provided for in article 24, the cases recognized under national law might perhaps also be included.

---

[7] See 1916th meeting, footnote 12.

31. As to the wording of article 24, and in particular its paragraph 1 (*a*), he too was in favour of placing regional international organizations on the same footing as universal organizations. He saw no contradiction between paragraph 1 (*a*) and the possibility of waiving the immunities established by the codification conventions, since those were personal immunities, not immunities in respect of property. Paragraph 1 (*c*) seemed clear and sufficiently flexible to cover all sorts of property, not only the funds of central banks. Paragraph 1 (*e*) was entirely necessary, although it was open to question whether that provision should not be extended to certain property, considered *in globo*, in respect of which States could rely on the principle of permanent sovereignty over their natural resources. The attachment of property of that kind would completely paralyse the economic life of a country having serious economic difficulties. It was not without reason that IMF and several international banks had refrained from taking certain measures against countries heavily indebted to them. As to paragraph 2, he did not see that it served any useful purpose.

32. Mr. MALEK observed, first of all, that the draft articles under consideration faced one apparently insurmountable obstacle to the acceptance of their underlying principle. Some speakers had indeed maintained during the discussion that the rule of the jurisdictional immunity of States, being based on the sovereignty or sovereign equality of States and thus admitting of no limitation, unless subject to the principle of reciprocity, remained intact in all cases and all circumstances. But the Special Rapporteur did not seem to be discouraged by that trend of opinion, which was bound to make the draft articles rather insecure where acceptance was concerned, and was continuing to seek compromise solutions, even going so far as to recommend modification of the basic article, article 6, in order to come closer to the different views expressed.

33. He then referred to the statement made by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, para. 139) that, until a fairly recent date, "international law was still essentially and exclusively of European origin". At the present time, which was characterized by a universalist movement in international law, the diversity of social factors was opposed to the universality of legal rules. That antagonism had produced, between States, several bodies of international law. In his seventh report (A/CN.4/388, para. 66), referring to the 1972 European Convention on State Immunity, the Special Rapporteur observed that reaffirmation of the classic position was based on "mutual confidence within a close community" which was "further strengthened by an undertaking on the part of each contracting State to honour a judgment given against it". How many States within the universal community would be willing to give such undertakings?

34. The Special Rapporteur had also noted a marked strengthening of restrictive practice and the absence of practice confirming absolute immunity. In his sixth report (A/CN.4/376 and Add.1 and 2, para. 46), he had said it was "high time an absolute view was cited so as to present firm opposition to the restrictive trends" and he had raised the question "how to slow down, arrest or even reverse the trends so as to maintain what jurisdictional immunities there might still be for States and their property". In the Special Rapporteur's opinion, the solution was to speed up the work under the present programme; and it was under that programme that it was planned to enumerate as precisely as possible the various fields considered to constitute exceptions to the rule of immunity. In the course he had given on that subject at The Hague Academy of International Law in 1980,[8] Sir Ian Sinclair, too, had noted the tendency to recognize and apply the restrictive theory, although none of the arguments advanced in its favour was entirely satisfactory. According to him, courts sometimes tried to define the acts for which States could not claim immunity, but the problem could perhaps be more easily resolved by seeking to define more closely the cases in which, even under the restrictive theory, immunity should still be accorded. The Special Rapporteur appeared to consider that that process could be useful in elaborating part IV of the draft articles. In that part, the immunity of States was indeed the rule, except under certain conditions and in certain cases. Part IV went even further, since it protected certain categories of State property in all circumstances against any measure of attachment or execution.

35. Draft article 21 would be useful only if it defined the scope of part IV as precisely as possible. It should therefore deal more specifically with the question of the title of the foreign State to the property which the rule of immunity was intended to protect, and with the different kinds of measures which could be taken against it.

36. The Commission should also improve the wording of draft article 22, which was not very felicitous. The first phrase of paragraph 1, which referred to the "present articles", was rather confusing, since it was not clear which articles were meant. Was it the articles of part IV or those of the whole draft? Also, was that phrase really necessary? The rule of immunity was not stated satisfactorily either. The text of paragraph 1 was purely informative, and that of paragraph 2 seemed to be worded better in that respect.

37. He was in favour of retaining the whole of draft article 23 and approved the substance of draft article 24, although he proposed that in paragraph 1 (*e*) the words "and religious" should be added after the word "cultural".

38. For the time being, part V of the draft only made him wonder why the immunities of sovereigns and heads of State were dealt with under the heading "Miscellaneous provisions". A partial reply was given in paragraph 118 of the seventh report (A/CN.4/388); he suggested that the difficulties described in that paragraph should be overcome by amending the title of part V or by placing draft article 25 at the end of part IV, where it would not be out of place.

---

[8] "The law of sovereign immunity. Recent developments", *Collected Courses of The Hague Academy of International Law, 1980-II* (Alphen aan den Rijn, Sijthoff & Noordhoff, 1981), vol. 167, pp. 197 *et seq.*

39. Mr. OGISO expressed his appreciation for the Special Rapporteur's comprehensive and instructive seventh report (A/CN.4/388). Referring first to draft article 22, he noted that the Special Rapporteur had divided the régime governing State immunity into two parts: immunity of the State from the jurisdiction of local courts in general, and immunity of the State from attachment and execution. He also noted that the Special Rapporteur had stressed that immunity from attachment and execution was more absolute than State immunity in general, and that waiver of immunity from the proceedings of local courts did not entail waiver of immunity from attachment and execution.

40. The Special Rapporteur had considered State practice at some length and, in his seventh report (*ibid.*, para. 47), referred to the vacillation in judicial practice, which was an indication of the difficulties inherent in the topic. According to the explanations given in his report, the Special Rapporteur seemed to believe that immunity from attachment and execution was based on the fundamental requirement of consent, with a few limited exceptions. The exceptions enumerated in paragraph 1 (*a*) to (*d*) of article 22, however, were linked by the word "or", which seemed to mean that, in the case of the property referred to in paragraph 1 (*b*), (*c*) and (*d*), consent was not required. It was not certain, in his view, that there was any uniform practice, particularly in regard to property that was, in the words of paragraph 1 (*b*) of article 22, "in use or intended for use by the State in commercial and non-governmental service". Most of the State practice to which the Special Rapporteur referred in his report related to claims arising out of the operation of ships, for which consent was not required, particularly where an interim order of a court was concerned. It might therefore be more in keeping with prevailing State practice and with international treaties such as the 1926 Brussels Convention[9] to confine the provision in paragraph 1 (*b*) to ships and their cargoes, rather than to refer to property in general.

41. In draft article 21, the phrase "or in which it has an interest" seemed to broaden the scope of State immunity unduly. Supposing, for example, that a State had shares in a company against whose property an attachment order was made, could that State invoke immunity by alleging that it had an interest in the property if it had only a minority holding? Or supposing that a State had a third mortgage on certain property and a person with a first mortgage on the same property decided to foreclose his mortgage, could that State stop the foreclosure proceedings by invoking State immunity? In view of the problems which could arise, he suggested that the words "control or in which it has an interest" should be replaced by the words "in which it has a controlling interest". The same remarks applied to article 22, paragraph 2, in which the same phrase appeared.

42. Draft article 23, which dealt with the modalities and effect of consent, had to be considered in the context of its relationship to article 22, which specified certain cases in which immunity could not be invoked, and to article 24, which listed various kinds of property in respect of which State immunity could not be waived. Bearing those relationships in mind, the proper place for paragraph 2 of article 23 might be in article 22, since the effect of article 24 was to limit the provisions of article 22. Moreover, since the purpose of article 23 was to clarify the modalities of the consent régime, he would suggest that the phrase "provided that the property in question, movable or immovable, intellectual or industrial" in paragraph 1 could be deleted, along with subparagraphs (*a*) and (*b*).

43. In draft article 24, paragraph 1, purely on a point of drafting, he wondered whether subparagraph (*a*) could not be qualified, in the same way as subparagraphs (*c*) and (*d*), by a clause which might perhaps read: "except an account earmarked for specific payments and not related to a diplomatic or consular purpose". If an embassy had such an account, that account should, in his view, be treated as an exception to subparagraph (*a*).

The meeting rose at 6 p.m.

---

[9] See 1915th meeting, footnote 7.

1922nd MEETING

Tuesday, 9 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Calero Rodrigues, Mr. Díaz González, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*,

(*Continued on next page.*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

1. Mr. MAHIOU said that the draft articles stated certain general rules, behind which there was a suggestion of internal proceedings as varied as they were complex. Several members of the Commission had stated that, in drafting the texts, it was necessary to take account of the different legal systems of States. As Mr. Reuter (1919th meeting) had observed, the procedural issues concealed a problem of substance: that of the meeting-point of jurisdictional immunities with the territorial sovereignty of States where the legal status of the property of other States was concerned. The Special Rapporteur had recognized that the principle of jurisdictional immunities was more strongly affirmed in part IV of the draft articles than in the preceding parts. He endorsed the Special Rapporteur's approach, although his own point of view on some aspects of the topic was rather different. While it could be said, as Mr. Reuter had done, that there was no rule of international law granting States the right to acquire and possess property in other States, it could also be held that there was no rule of international law prohibiting it. Doctrine was silent on that point, but practice showed that States did acquire and hold property in other States which could be protected by diplomatic, consular or other conventions relating, in particular, to property used for activities pertaining to sovereignty. Thus a State which allowed a foreign State to acquire or possess property in its territory did so advisedly; it knew that the other State was not an ordinary owner like any other, and it consented to restrict its territorial sovereignty and grant immunities to the other State. Hence that was a special situation.

2. Paragraph 1 (*a*) of draft article 22 should take account of article 23. He wondered whether a more appropriate place for that subparagraph would not have been in the introductory provision of paragraph 1, since unlike the following subparagraphs it did not relate to property. While he did not wish to reopen the argument about paragraph 1 (*c*), he thought it would be difficult to avoid referring to the problem of nationalization. To speak of a "proceeding to determine the question of ownership by the State" necessarily led to consideration of a delicate matter. He feared that the proceeding might conceal a legal jungle favourable to ambushes. It often happened that countries, especially developing countries, invoking the principle of the permanent sovereignty of States over their natural resources took nationalization measures, which were then contested. The claims of the former owner of the nationalized property, often described by him as "red", could lead to attachment of the goods concerned in the importing country. Such a proceeding could hamper or even paralyse the economy of the country which had carried out the nationalization, and could thus constitute a formidable weapon. It would be better to discuss that question in the Commission than to see it resurface in the Sixth Committee of the General Assembly or in other bodies.

3. He would like draft article 23 to be worded as simply as possible, because of its links with paragraph 1 (*a*) of article 22. Mr. Flitan (1920th meeting) had made some interesting suggestions on that point.

4. In regard to draft article 24, Mr. Yankov (1919th meeting) had noted that paragraph 1 (*a*) contained no reference to delegations to international conferences. Had the Special Rapporteur omitted them deliberately because they were unlikely to be in possession of property liable to attachment? He associated himself with those members of the Commission who had proposed that regional international organizations should also be included in the provision. He doubted whether paragraph 1 (*b*) need be as long as it was, but that was for the Drafting Committee to decide. The meaning of the restriction introduced in paragraph 1 (*c*) was not clear. The property of a central bank was sometimes allocated for specific payments, since the central bank might be responsible for administering the State's external debt; could the amounts thus allocated be attached? The same comment applied to paragraph 1 (*d*). Paragraph 1 (*e*) was acceptable subject to some redrafting. Since the object was to prevent a nation's cultural heritage from leaving the country, and since that heritage could be State property, private property or of mixed ownership, did immunity from attachment apply to the cultural heritage in general, whatever its ownership?

5. Mr. CALERO RODRIGUES, after congratulating the Special Rapporteur on his seventh report (A/CN.4/388), said he doubted whether part IV of the draft articles was really necessary. The title was somewhat misleading, because it referred to attachment and execution as well as to property, whereas the articles dealt with immunity from attachment, arrest and execution. The fact that immunity from measures of execution applied to property was secondary. As the Special Rapporteur rightly said in his report, the topic was State immunity, not property immunity. In that connection, he referred members to the last two sentences of paragraph 4 of the report. The Commission had not, however, been offered there a choice of alternatives: proceedings could be directed against a State *eo nomine* and could at the same time be aimed at depriving that State of its

(*Footnote 3 continued.*)

vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

property. It could be argued that the references to property in part IV were of no more significance than the references in other parts, and that part IV should deal basically, or even exclusively, with State immunity from measures of attachment, arrest and execution. Indeed, part IV could be limited to the single principle, developed by the Special Rapporteur in his report, that execution constituted a separate part of the proceeding and that jurisdiction for the proceeding as such did not necessarily imply jurisdiction for execution; hence a new and separate plea of immunity could be entered at that stage.

6. Since the difficulties generally arose not in court proceedings against a foreign State, but at the stage of enforcement of the judgment, the theory had been advanced that jurisdiction should not be exercised when there was no possibility of execution. That theory had found wide acceptance in Brazilian jurisprudence and the Supreme Court of Brazil had applied it to decline jurisdiction. Most courts, however, were content to exercise jurisdiction even when it was clear that their judgments could not be enforced. They accepted that execution was on a different level and hence also generally accepted that consent to proceedings did not mean consent to execution of the judgment. That was perhaps the main principle proposed in part IV of the draft, for the other elements were not new and, in his view, did not apply only to execution. The protection accorded to certain types of property under part IV, and denial of immunity for other types, should be prescribed more generally at the other stages in the proceedings. There seemed to be no valid reason why a court could pass judgment concerning, for instance, diplomatic property, only to be prevented from enforcing its judgment.

7. In his view, therefore, part IV could be dispensed with. The requirement of separate consent to execution could be included in the general principles, and the provisions aimed at protecting certain types of property by immunity could find a place in part II or part III. However, that would involve much rearrangement of the draft articles. He would therefore leave on record his reservations regarding the usefulness of part IV and turn to the draft articles themselves.

8. Draft article 21 was a scope article and, as such, would be useful only if it qualified the articles that followed in some way. Since it did not do so, he doubted whether it was necessary. If the article was to be retained, its drafting should be reconsidered with a view to reflecting the content of the other articles more accurately; but he would prefer its deletion.

9. Draft article 22, the key article, sought to define the precise nature of attachment, arrest and execution, but he doubted whether it really clarified those terms. For instance, what was the difference between trying to deprive a State of property and compelling it to vacate or surrender that property? As to the four exceptions to the basic rule, the first one, laid down in paragraph 1 (*a*), related to consent. But consent had already been dealt with in article 8 of the draft, so it would be advisable to follow the language of that article more closely. The other exceptions, laid down in paragraph 1 (*b*), (*c*) and (*d*), all related to the nature or situation of the property or the right of the State. Taking those exceptions in reverse order, if paragraph 1 (*d*) was intended to mean that immunity would not apply if property had been allocated by a State for the satisfaction of a final judgment or the payment of a debt in the particular case before the court, the language of that provision should be made clearer, so as to leave no room for doubt. The situation contemplated in paragraph 1 (*c*) was similar to that provided for in paragraph 1 (*a*) and (*b*) of article 15 of the draft, and he agreed that immunity could not be invoked, even at the execution stage. As to the exception under paragraph 1 (*b*) of article 22, he was a little puzzled. Article 22 provided that such property was not covered by immunity from attachment, arrest and execution, in apparent extension of the principle already stated in article 12 of the draft. As he understood draft article 23, paragraph 1 (*a*), however, it too applied to property "in use or intended for use by the State in commercial and non-governmental service", which, according to article 22, was not covered by immunity. Why, then, should a State consent to attachment, arrest, or execution if the property was not protected by immunity? Unless he had misunderstood the meaning of those provisions, he believed it would be enough to state the exceptions in article 22 and confine the content of article 23 to specifying that consent must be in writing and that it could be given by international agreement or in a contract or before the court, as provided in article 8 of the draft.

10. He was in two minds about draft article 24. While he agreed that all the types of property enumerated in that article should be immune from attachment, arrest and execution, he wondered whether States should in fact be required to limit their sovereignty by restricting their right to dispose of their own property. Yet the harsh realities of international life might well force States to do just that, against their own best interests, in which case article 24 might well afford their only protection. Despite persistent doubts, therefore, he was prepared to accept article 24 as drafted.

11. Chief AKINJIDE commended the Special Rapporteur for his excellent seventh report (A/CN.4/388), the broad lines of which he endorsed, although it did not go as far as he would have liked.

12. With regard to draft article 22, paragraph 1, he could not agree that the phrase "property in which a State has an interest" was too broad. It was important to remember that the reference was not to a trading company owned by a State, but to a State as such. The position could be illustrated by examples taken from West Africa. For instance, Senegal and Nigeria were engaged in a joint enterprise to exploit salt in Senegal: each State had invested a certain amount and drew a certain percentage of the earnings. It was thus an enterprise in which they had an interest as States and which was important for their survival. Guinea and Nigeria were likewise jointly engaged in exploiting iron ore for the economic benefit of both States and possibly of other States in the region as well. Benin and Nigeria operated, as States,

a joint enterprise for the manufacture of cement. The phrase in question might be inappropriate for the United States of America or for European countries, but it was highly appropriate for developing countries endeavouring in their own small way to become economically self-sufficient.

13. He agreed with Mr. Mahiou about paragraph 1 (*a*) of article 22 and did not understand why such a provision had been included. With regard to intellectual property, for instance, many of the component states of his own country spent 40 to 50 per cent of their budget on education, and about 95 per cent of the textbooks used were of foreign origin. Gradually, however, those states were acquiring the copyright of their textbooks and reprinting them locally, thus achieving a significant reduction in their education budgets. It was most unlikely that any developing country would sign a convention giving the consent referred to in paragraph 1 (*a*), since it would strike at the very basis of its development. He therefore considered that paragraph 1 (*a*) should be deleted.

14. On draft article 23, he simply endorsed the remarks made by Mr. Balanda (1920th meeting), Mr. Flitan (*ibid.*), Mr. Francis (1921st meeting) and Mr. Razafindralambo (*ibid.*).

15. As to draft article 24, he noted the criticism that had been made of the word "property" in paragraph 1 (*c*) and (*d*). Again, he would illustrate his views by referring to what happened in practice. In Nigeria, currency was printed and coins were minted under a highly successful arrangement with a foreign company. Because of that foreign element, the central bank owned two aircraft, which were often used to transport highly confidential materials. It was imperative for those aircraft to enjoy protection, for their attachment could have the effect of paralysing the national economy. Indeed, anything owned by a central bank, not only money, should have full protection, which was why he supported the all-embracing term "property".

16. It might also sometimes be necessary to determine which entities in a State were entitled to immunity. There had been cases of a developing country being ruled by two factions, each in possession of certain territory and machinery of government, and each recognized by powerful States. There was also the case of Governments-in-exile, which had occurred during the Second World War and might occur again. Possibly both situations could be dealt with in the commentary to article 24.

17. Mr. DÍAZ GONZÁLEZ said that the discussion had contributed many elements which would undoubtedly help the Special Rapporteur to recast the draft articles. Nevertheless, the Special Rapporteur deserved congratulations for having revealed himself, by his patience and wisdom, to be a true disciple of Buddha and for having, little by little, found solutions to problems which had seemed difficult at first sight.

18. He agreed with the comments already made suggesting that the wording of part IV of the draft articles should be brought into line with that of the three preceding parts. Like Mr. Ushakov (1920th meeting), he believed that article 6 was the text on which the whole draft was based. He had already had occasion to point out that it was sufficient to state, in paragraph 1 of article 6, that "A State is immune from the jurisdiction of another State", since it was not "in accordance with the provisions of the present articles" that the State enjoyed such immunity, but by virtue of the principle of State sovereignty. He had nevertheless joined the consensus on article 6, which had been adopted provisionally in order to enable the Commission to make progress.

19. He had no objection to accepting draft articles 21 to 24 on the understanding that they should be brought into line with the preceding articles, should be drafted more simply and should reflect more accurately the explanations provided by the Special Rapporteur in his seventh report (A/CN.4/388). In particular, attention should be given to the wording of paragraph 1 (*c*) of article 22, and the meaning of the word "control" should be clearly defined. He reminded members that the concept of "State property" had given rise to a long debate when the Commission had been elaborating the draft articles on succession of States in respect of matters other than treaties. That debate had yielded, if not a precise idea, at least a fairly clear one of what constituted State property.

20. Sir Ian SINCLAIR, after paying tribute to the Special Rapporteur, said that he had been somewhat alarmed by the remarks made by Mr. Ushakov (1920th meeting), who appeared to consider only the interests of the acting State, a State endowed with the attributes of sovereign power and clothed in the impenetrable armour of immunity, completely ignoring the interests of the territorial sovereign. The fact of the matter was that two sovereignties were involved: the sovereignty exercisable by the territorial State, or State of the forum, and the sovereignty exercisable by the State carrying on activities in the territorial State. Moreover, in all matters involving a claim to sovereign immunity, there was a third party which could not be ignored, namely the private party or entity which wished to pursue a claim against the foreign State and which was, or might be, frustrated by a plea of sovereign immunity. There was thus a triangular relationship in which the interests of the acting State, the territorial State, and the private claimant had to be acknowledged or reconciled.

21. Turning to draft articles 21 to 24, he observed that there was ample authority for the proposition that the immunity of foreign State property from attachment, arrest and execution was not absolute, but dependent upon the uses to which the property was being or had been put. It was only necessary to cite *X.* v. *Republic of the Philippines* (1977) and *Alcom Ltd.* v. *Republic of Colombia* (1984), cited by the Special Rapporteur in his seventh report (A/CN.4/388, para. 114), in support of that proposition. The analysis by the Federal Constitutional Court of the Federal Republic of Germany in *X.* v. *Republic of the Philippines* was particularly convincing in that it encompassed analyses of case-law from a wide variety of jurisdictions.

22. There was a clear distinction in English law between the related concepts of attachment, arrest and execution. Attachment meant the placing under

legal authority of specific identifiable property. In that context, a Mareva injunction might not constitute an attachment of property in the strict sense, inasmuch as it was an order *in personam* directed towards a particular natural or juridical person, requiring that person to retain certain funds within the jurisdiction. A Mareva injunction did not, strictly speaking, operate as an attachment of specific assets. That was certainly the view taken by the Court of Appeal in *Cretanor Maritime Co. Ltd.* v. *Irish Marine Management Ltd.* (1978).[5] In a later case, Lord Denning had taken a somewhat different view, holding that a Mareva injunction was comparable to the process of *saisie conservatoire* under French law. In view of that conflict of judicial opinion in the English courts, it would be unwise to regard the term "attachment" as necessarily covering a Mareva injunction. For that, if for no other reason, he tended to agree that the draft articles should not refer specifically to "attachment, arrest and execution", but should employ some more general wording. In his view, it would not be right to exclude Mareva injunctions from the scope of the draft articles on the purely technical ground that they did not operate as an attachment of specific property.

23. The term "arrest" likewise had a specific meaning in English law. In the context of Admiralty proceedings *in rem*, namely proceedings initiated by the service of a writ *in rem* against a ship, the mere service of the writ did not as such constitute an arrest. Application had to be made for a separate warrant of arrest if there was no appearance to the writ or if the claimant suspected that there might be no appearance. If there was an appearance, the normal procedure was for the owner of the ship, if it had already been arrested, to procure its release by giving security for the plaintiff's claim. Again, the use of the term "arrest" might not sufficiently comprehend the degree of constraint imposed on a ship by the service of a writ *in rem*, which reinforced his view that more general language was required.

24. Before concluding those general considerations, he wished to comment on the complaint by Chief Akinjide (1919th meeting) about the Mareva injunction issued against the Central Bank of Nigeria in the *Trendtex* case (1977).[6] In that case, it had been held by the Court of Appeal in London, in continuing the Mareva injunction, that no distinction could be made between immunity from jurisdiction and immunity from execution. That ruling seemed dubious to him. English law, following international law in that respect, had always acknowledged that immunity from execution was something quite distinct from immunity from suit. Accordingly, waiver of immunity from suit did not involve waiver of immunity from execution. He therefore supported the suggestion by Mr. Francis (1921st meeting) that a statement of the legal position in that respect be incorporated in the draft articles, in view of the occasional attempts by judges in the United Kingdom and elsewhere to embrace the facile principle that jurisdiction to sue carried with it jurisdiction to require execution of the judgment.

[5] *The All England Law Reports, 1978*, vol. 3, p. 164.

[6] See 1919th meeting, footnote 5.

25. It should also be noted that, in the United Kingdom, the *State Immunity Act 1978* had reversed the ruling handed down in the *Trendtex* case, in so far as that ruling related to the possibility of obtaining a Mareva injunction against a foreign central bank. The effect of section 14 (4) of the 1978 Act was that the property of a foreign State's central bank was not to be regarded as being in use, or intended for use, for commercial purposes, which would make it available for execution; the effect of that subsection, when read in conjunction with section 13 of the Act, was that relief could not in future be obtained against a foreign central bank by way of injunction or order for specific performance or for the recovery of land or other property, unless the foreign central bank specifically consented thereto in writing. In other words, full protection was henceforth extended to the property of a foreign central bank or monetary authority.

26. With regard to draft articles 21 to 24, he had to say that their formulation did not live up to the supporting materials put forward in the Special Rapporteur's report.

27. He shared the view expressed by Mr. Yankov (1919th meeting) and Mr. Calero Rodrigues that article 21 appeared to serve no useful purpose. The scope of part IV of the draft would be evident from the content of articles 22 to 24 and it was not necessary to define it in general terms in an introductory article.

28. During the discussion, a certain amount of criticism had been levelled at the use of the expression "property in its possession or control or in which it has an interest". The difficulties to which a formula of that kind could give rise were illustrated by the *Dollfus Mieg* case, which had been decided soon after the Second World War. Gold bars in occupied France had been seized by the Allied Forces and handed over to the Tripartite Commission for the Restitution of Monetary Gold. The ownership of the gold bars had not then been known and they had been deposited with the Bank of England by the Governments of the United Kingdom, the United States of America and France. Those Governments had not claimed ownership, but the gold bars had clearly been either property of which the three States were in possession or control, or property in which they had an interest. The Dollfus Mieg company had instituted proceedings against the Bank of England in the English courts, claiming title to the gold bars. At a later stage in the proceedings, the Governments of France and the United States had intervened and rightly claimed sovereign immunity, which was duly accorded.[7]

29. A situation of that kind could arise not only in the context of the exercise of jurisdiction by the courts of the forum, but also in the context of possible measures of execution. Other examples of that kind could be given, particularly shipping cases, where a State often asserted an interest in a ship in

[7] See *Dollfus Mieg et Cie S.A.* v. *Bank of England* (1950) (*The Law Reports, Chancery Division, 1950*, p. 333); *United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England* (1952) (*The All England Law Reports, 1952*, vol. 1, p. 572).

the context of *in rem* proceedings. He accordingly believed that inclusion of the phrase "property in its possession or control or in which it has an interest" was essential.

30. He supported, in general, the introductory provision of draft article 22, paragraph 1, but proposed that the formula "attachment, arrest and execution" should be replaced by a phrase such as: "judicial measures of constraint upon the use of such property, including attachment, arrest and execution". That amendment would have the incidental advantage of making it possible to dispense with paragraph 2, which appeared to have been included only to cover injunctions or other types of order which might not, strictly speaking, constitute attachment, arrest or execution.

31. He supported Mr. Malek's proposal (1921st meeting) to delete the opening words of article 22, paragraph 1, "In accordance with the provisions of the present articles". As a further drafting improvement to that paragraph, he suggested that the words "is protected by the rule of State immunity" should be replaced by the shorter formula "is immune".

32. Referring to the exceptions set out in subparagraphs (*a*) to (*d*) of paragraph 1 of article 22, he said that he would discuss the content of subparagraph (*a*) when he came to article 23. The exception in subparagraph (*b*) was clearly of the first importance. That exception, which related to property in use for commercial service, constituted an alternative to the exception in subparagraph (*a*), relating to consent. He strongly opposed the suggestion that the two subparagraphs should be combined, so as to make the conditions stated therein cumulative. The two conditions—consent and commercial service—should be kept separate.

33. He could not accept the drafting of subparagraph (*b*), in particular the use of the conjunction "and" to link the concepts of "commercial" and "non-governmental" service. Such a formulation would seem to allow for the possibility of a governmental service which was solely commercial. He suggested that the reference to "commercial and non-governmental service" should be replaced by a more acceptable formula referring to "commercial use" or "use for commercial purposes".

34. On subparagraph (*c*), he reserved his position pending further explanations by the Special Rapporteur. With reference to Mr. Mahiou's remarks, however, he could say that he himself had doubts as to whether the provision could be used to cover the delicate question of nationalization. On subparagraph (*d*), he reserved his position pending clarification by the Special Rapporteur. At first sight, that provision did not seem necessary, in view of the content of subparagraphs (*a*) and (*b*). His conclusion on article 22 was, therefore, that it might be possible to shorten it considerably, reducing it to its essentials.

35. With regard to draft article 23, he observed that, judging by its title (Modalities and effect of consent to attachment and execution), the article contained material which was out of place. He was thinking in particular of the proviso at the end of paragraph 1, "provided that the property in question, movable or immovable, intellectual or industrial: (*a*) forms part of a commercial transaction ...", which was redolent of article 22, paragraph 1 (*b*). He saw no reason why consent should be limited to property to which immunity did not apply, and accordingly supported the proposal by Mr. Calero Rodrigues to delete that proviso and confine the provisions of article 23 to the modalities and effect of consent to attachment and execution, in accordance with its title.

36. He also urged that, in the final drafting of article 23, due regard should be had to the wording of article 8, on express consent to the exercise of jurisdiction. Moreover, in article 23, paragraph 1, it should be made clear that consent could also be given before the court.

37. Referring to draft article 24, he expressed concern about the effect of the introductory provision of paragraph 1, which appeared to place a limitation on the consent which a State might give. He felt strongly that no limitation should be imposed on State sovereignty in regard to the circumstances in which a State could give its consent to execution.

38. Article 24 should, in his view, be confined to listing the various types of State property which could not in any circumstances be regarded as being in use or intended for use for commercial purposes. Of some interest in that connection was the ruling given by the House of Lords in 1984 in *Alcom Ltd.* v. *Republic of Colombia*, the effect of which was to place a strict limitation on the interpretation by the courts of what constituted property used for commercial purposes (see A/CN.4/388, para. 114). Article 24 should accordingly be redrafted so as to present its provisions as an interpretation of what constituted property used for commercial purposes; the exceptions in subparagraphs (*a*) to (*e*) of paragraph 1 would then indicate the types of property which were not to be regarded as in use or intended for use for commercial purposes.

39. He understood the Special Rapporteur's reasons for using the formula "regardless of consent or waiver of immunity, the following property may not be attached ..." in article 24, paragraph 1. The intention was to avoid pressure being exerted on a developing country to give its consent or waiver in a contract. He believed, however, that the reformulation he had suggested would prove equally effective for that purpose.

40. He supported the suggestion that subparagraph (*a*) of paragraph 1 should be expanded to cover the property of regional international organizations. The wording of subparagraph (*b*) should be revised to confine it within proper limits. In a case in the French courts, a transaction relating to the supply of cigarettes to the Vietnamese army had been considered as an act *jure imperii*, not *jure gestionis*;[8] that sort of extensive interpretation of the concept of

[8] See *Gugenheim* v. *State of Vietnam* (Appeals Court, Paris, 1955) (*International Law Reports, 1955* (London), vol. 22 (1958), pp. 224-225) (judgment upheld by the Cour de Cassation, 1961 (*Revue générale de droit international public* (Paris), vol. 66 (1962), p. 654)).

"property of a military character" should be avoided. As to subparagaph (*c*), dealing with the property of a central bank, he had already pointed out that, in the United Kingdom, the *State Immunity Act 1978* adequately covered that point. He suggested that the Drafting Committee should examine whether the qualifications set out in subparagraphs (*c*) and (*d*) were really necessary.

41. As to paragraph 1 (*e*) he had reservations regarding the reference to the State's "distinct national cultural heritage". That expression could be taken to cover works of artistic or historical value which were in private hands. In many countries, the State imposed restrictions on the export of such works, although their character as purely private property was not affected. Property of that kind was clearly not covered by State immunity, and nothing should be said which might suggest that it was.

42. Mr. REUTER said that, as the topic was not simple, it would be vain to aim at simple texts. Besides, it was important to take account of the two trends which were emerging in the Commission, one favouring an extensive and the other a restrictive application of State immunity. Generally speaking it was the socialist States, and some States invoking the needs of developing countries, which defended the broadening of State immunity. Before referring the draft articles to the Drafting Committee, members should further clarify their positions, so as not to charge the Committee with too heavy responsibilities. In the view of some members, the State almost always enjoyed immunity, whereas territorial organizations and other entities having legal personality under internal law did not. Others, who defended the developed countries' position, held that the State enjoyed immunity in the exercise of all governmental functions, whether they were performed by the State itself or by decentralized agencies, whereas activities not involving the exercise of governmental authority did not entail immunity, even for the State. But there was also an intermediate position, defended by Mr. Balanda (1920th meeting), on which members of the Commission would do well to reflect further. A broadening of immunity could in fact be achieved by combining the two trends and providing that the State enjoyed general immunity, since it could act only as a State and could not engage in private activities, but that decentralized agencies also exercising governmental functions enjoyed immunity like the State. The draft articles opted for an intermediate solution of that kind. By according immunity to certain types of property and by using rather vague terms, they granted State immunity to activities carried on by certain entities other than States. Through the notions of property immunity and functional immunity, the Commission had succeeded in combining the two trends, which was rather heartening.

43. To arrive at a middle course did not seem impossible, if only compromises could be accepted. Failure would be regrettable, not only in view of the efforts made by the Special Rapporteur, but also for developing countries. The elaboration of a general convention would seem to be in those countries' interest, provided, of course, that its text was acceptable to them. Reliance on the conclusion of bilateral agreements would not be a satisfactory solution. That being so, it was essential to pursue to their logical conclusion the anxieties that had been expressed. For instance, Mr. Mahiou had raised the question of the treatment of goods in international trade following a nationalization. He himself was inclined to believe that titles of ownership established by a State after nationalization of movable property had international validity and were effective against third States.

44. In the last analysis, the only was of moderating certain State immunities was to reinforce the security of international trade. The immunity of State-owned ships confirmed that conclusion. But although he fully understood that, for the security of claims relating to shipping operations or to specific transactions in international trade, it did not seem possible to accept the immunity of State-owned ships, he was equally convinced that it was contrary to the interests of international trade for a State having general claims against another State to be able suddenly to arrest its merchant ships. Moreover, the Commission had not accepted State immunity for claims arising from responsibility. In that connection, he cited *The "Grandcamp"*, the case of a French ship sailing under the French flag whose cargo of ammonium nitrate had exploded in the port of Texas City in April 1947, killing the crew and destroying half the town. Under the Commission's draft articles, a State-owned ship which caused an accident engaging the owner's responsibility did not enjoy immunity. An example of that kind could open the way for possible compromise solutions.

45. Another example was that of land bought by a State from a person who was not the land's owner for the purpose of building an embassy. If the local courts decided that the State had not become the owner of the land, jurisdictional immunity was not applicable. If in the mean time, however, the embassy had been built on the land, there could be no question of issuing a writ of execution against the embassy, at the risk of seriously disrupting the diplomatic service. In such a case, immunity from execution had to be recognized. In practice, the State which had bought the land could ask for time to leave the premises and establish its embassy elsewhere. It was also possible that the State of the forum would enact a law after the event, which allowed it to expropriate the land and compensate the owner by arrangement with the foreign State. Consequently, it seemed difficult not to maintain an immunity from execution that was separate from immunity from jurisdiction. There could indeed be immunity from execution even in the absence of immunity from jurisdiction. It remained to be seen whether immunity from execution should only be limited according to immunity from jurisdiction.

46. In any case, it would be advisable to reserve, at least in the commentary, the delicate problem of the measures which a State could take in regard to property which normally enjoyed immunity, but which could in certain cases be deprived of it. So far as military equipment was concerned, a State in which a deserting soldier took refuge with a military vehicle would normally return the vehicle to the State of

origin. But the commentary should reserve the case in which a State was led to take measures against military equipment paid for but not yet delivered, following a decision to apply sanctions taken by the United Nations.

47. Lastly, on the subject of regional international organizations, he referred to the case of several States belonging to a monetary union and having a common issuing bank. It had happened that one of the member States of such a union had seized all the banknotes of the issuing institution in its territory and put them in circulation, even though some of them had not been issued. Since banknotes enjoyed absolute immunity, it was essential to mention the property of a regional international organization.

48. In conclusion, he emphasized the need to determine the causes of the main differences of opinion in the Commission, to set limits to them and to work together in a spirit of mutual understanding.

The meeting rose at 1.05 p.m.

1923rd MEETING

Wednesday, 10 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*continued*)

1. Mr. USHAKOV said that, in political terms, he understood the position adopted by some members of the Commission and some Governments regarding cases involving persons, whether natural or legal: they always championed persons, contrary to the rules of international law or any well-established theory. For example, they had advocated protection of the interests of persons when the Commission had sought to define the term "State debt" in the draft articles on succession of States in respect of State property, archives and debts. In their opinion, the definition should have covered debts which, under a capitalist system, persons could contract towards the State, even though international law did not deal with relations between States and natural or legal persons. The draft definition had covered not only any financial obligation of a State towards another State or any other subject of international law, which had been acceptable because international law governed the resulting international relations, but also any other financial obligation, in other words any debt towards a State contracted by a natural or legal person. Obviously such a debt had to be paid, but it had to be paid in accordance with private international law, not public international law. The Commission had deleted the latter part of the definition, following a tied vote on the matter.

2. Some members had spoken of triangular relations between two States and a natural or legal person and had insisted on the need to protect the interests of the latter. When their attention was drawn to the fact that State sovereignty was essential in the circumstances and that, in the same way as a State could not be subject to the governmental authority of another State, it could not itself exercise its State power *vis-à-vis* another State, those members retorted that such considerations were purely theoretical and that account must be taken of practice. They argued that the State did not enjoy immunity for its commercial activities but that all its other activities were undertaken in the exercise of its sov-

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

ereignty. Those views were firmly founded in legal theory, since they reflected the distinction between *acta jure gestionis* and *acta jure imperii*. In the case of *acta jure gestionis*, the State was assimilated to a natural or legal person and was denied immunity. Such assimilation was not possible, however, since a State which engaged in commerce did not do so for the same reason as did a natural or legal person. Unlike the latter, it was not seeking to make any profit; its activity was undertaken solely in the interests of its population, of society, of the national economy. Accordingly, when an exception to the principle of immunity was proposed for ships "in commercial and non-governmental service", some members could not agree to the term "non-governmental", because it ran counter to the concept they had adopted of *acta jure gestionis*.

3. By denying States, and particularly developing countries, immunity for commercial activities, some people were seeking to avert possible rivalry between States and legal persons such as multinational corporations. In a capitalist system, such corporations would prefer to be assimilated to States rather than act as rivals. That none the less overlooked the fact that any rivalry was largely ruled out, for corporations of that kind were, commercially and financially, more powerful than States. States were not protected against multinational corporations: rather it was the reverse.

4. Some members of the Commission placed limits on the sovereignty of the territorial State or the receiving State, taking the view that any nationalization had to be recognized by other States, since it affected the interests of natural or legal persons. In his opinion, nationalization was a sovereign act by a State and had no reason to be in keeping with any rule of international law.

5. Lastly, some members seemed to consider that international law could be twisted when the interests of natural or legal persons, particularly large capitalist companies, were involved.

6. Mr. McCAFFREY commended the Special Rapporteur for his inductive and empirical approach to a difficult topic, one which involved unique problems that lay at the crossroads of public international law and private international law. It also involved interaction between different systems: the centralized economy system and the free enterprise system. It was a mistake to say that the purpose of the latter system was purely to benefit individuals; the free enterprise system was of benefit to society as well. All that could be said was that it achieved that purpose in a different way. Nor was it correct to suggest that private individuals engaging in trade benefited only themselves. Reference had been made during the discussion to the activities of multinational corporations. Corporations, however, belonged to those who had invested in them and by no means all of them were large investors. It was significant that developing countries not infrequently found it to their advantage not only to trade with multinational corporations, but also to engage in joint ventures with them. In view of those considerations, he urged the Commission to steer clear of discussions on the subject of rival economic systems, discussions which could only distract it from its work. The Commission's goal should be to try to harmonize the two systems as far as possible in connection with the topic under consideration.

7. The Special Rapporteur had demonstrated convincingly that over the years, and particularly over the past half-century, States had increasingly recognized in their relations with one another that there were some situations in which considerations of justice and fairness dictated that foreign States should not enjoy judicial immunity. At the same time, States had also recognized that their relations *inter se* were facilitated and tended to be more harmonious if they accorded, by way of comity, judicial immunity to other States in cases involving governmental or sovereign acts or functions. It was comity that explained how it was possible to reconcile the two sovereignties involved — that of the foreign State and that of the territorial State.

8. The present topic was of critical importance to many Governments, including that of the United States of America. In 1952, the United States Department of State had adopted a restrictive or functional approach to State immunity in the Tate Letter (see A/CN.4/376 and Add.1 and 2, paras. 160-161). That being so, it was of interest to consider the attitude of the United States in the reverse situation, in other words when faced by claims before foreign courts. The Department of Justice was responsible for defending such cases and, in the 1950s, had usually instructed the foreign lawyers retained by it to plead State immunity before the foreign courts. In the 1960s, it had become the practice of the Department of Justice to avoid claiming immunity in countries that followed the restrictive principle but to invoke immunity in those countries still holding to a more absolute doctrine. In the 1970s, the Department of Justice had decided not to plead sovereign immunity in foreign courts in cases where, under the Tate Letter standards, a foreign State would not be accorded immunity in the United States courts.

9. In 1976, the United States Congress had adopted the *Foreign Sovereign Immunities Act*. With regard to the question of execution, the position under the Act was not altogether simple. It attempted to strike a balance between the interests of the foreign State and those of the private individual seeking redress. The 1976 Act drew a distinction between the position of a foreign State and that of a foreign State agency or institution. With regard to the former, it allowed execution against property of the State used for commercial activities, with the important proviso that there was a connection between the property and the commercial act which had given rise to the claim on which the judgment was based. With regard to State agencies or institutions, on the other hand, execution was possible against any property of the agency or institution provided that it was engaged in commercial activities in the United States. Similar distinctions could be found in the draft convention adopted by the International Law Association at Montreal in 1982 (see A/CN.4/388, paras. 81-82). In reviewing the present draft articles, the Commission could perhaps

draw on those ideas, particularly the notion of establishing a link between the claim and the property for the purposes of execution.

10. One development worth mentioning was the proposal by the American Bar Association for amendments to the 1976 Act, a proposal which had now taken formal shape as Bill No. S. 1071 submitted to the United States Senate. The general effect of the proposed amendments would be to expand the possibilities of enforcement against foreign States. The United States Government itself took a cautious view of the proposed amendments, mindful of the impact their adoption would be bound to have on foreign relations and of the exposure to reciprocity. The amendments were not at all certain of success, but the very fact that they had been submitted showed that the pressure in the United States was in the direction of greater enforcement possibilities and of more restricted State immunity.

11. Another recent development concerned the issue of enforcement of judgments in tort cases. A judgment awarding damages at tort had been rendered against a foreign State by a District of Columbia court in *Letelier* v. *Republic of Chile* (1980),[6] following which an attempt had been made to execute the judgment against that State's national airline. The Federal Court of Appeals had decided in November 1984 that the 1976 Act contained no provision for the enforcement of a judgment in tort cases, except where the judgment arose out of the commercial activities of the foreign State concerned. It would of course be very rare for a tort action to arise out of commercial activities. The Court had arrived at the remarkable conclusion that Congress had in that instance created "a right without a remedy".[7]

12. As to the seventh report of the Special Rapporteur (A/CN.4/388), he welcomed the emphasis placed on the fact that property was an object and not a subject of rights. In his introduction, the Special Rapporteur referred to "the general rule of State immunity from attachment, arrest and execution" (*ibid.*, para. 12). Elsewhere, the Special Rapporteur stated: "Proceeding from the assumption that a general rule is established in support of immunity from attachment, arrest and execution ..." (*ibid.*, para. 43). Cases in which State property was not immune thus appeared to be exceptions to that general rule.

13. In reality, it could equally well be affirmed that the general rule was the one which asserted the territorial sovereignty and jurisdiction of the State of the forum; cases of immunity in favour of a foreign State would thus appear to be exceptions to that general rule. As he saw it, no useful purpose would be served by trying to determine which of the two was the general rule and which was the exception. A more productive approach would be simply to recognize that there were cases in which immunity applied and other cases in which it did not.

14. The Special Rapporteur very appropriately distinguished carefully between immunity from attachment and execution and immunity from jurisdiction (*ibid.*, paras. 15-17). In that connection he drew attention to the former United States practice of initiating proceedings against a foreign State, or indeed against any foreign person, by attaching their property—something which was no longer possible under the law as it now stood. It was essential to keep immunity from jurisdiction separate from immunity from execution. With regard to pre-attachment, he favoured the solution indicated by the Special Rapporteur (*ibid.*, para. 37), but would like to know the basis for such a solution.

15. He agreed with those members who had suggested that draft article 21 was unnecessary and could be deleted. Its provisions raised more questions than they answered.

16. Draft article 22 constituted the core of part IV, but the text could be greatly simplified, a course that would also have the advantage of removing unessential elements that had given rise to difficulties. The words "In accordance with the provisions of the present articles", in paragraph 1, should be deleted and he supported Sir Ian Sinclair's proposal (1922nd meeting, para. 31) to replace the words "is protected by the rule of State immunity" by the shorter expression "is immune", which would additionally eliminate the undesirable reference to a "rule" of State immunity. He also endorsed Sir Ian's constructive suggestion (*ibid.*, para. 30) that the words "attachment, arrest and execution" in paragraph 1 should be replaced by "judicial measures of constraint upon the use of such property, including attachment, arrest and execution". Adoption of that idea would make it possible to delete paragraph 2 altogether.

17. It would be useful to learn whether paragraph 1 (*a*) of article 22 covered arbitral awards; if not, a special provision on that subject would be necessary. As to paragraph 1 (*b*), he agreed with those members who considered that the formula "commercial and non-governmental service" was unsatisfactory and suggested that it should be replaced by a reference to property used for commercial purposes. Paragraph 1 (*c*) was a constructive provision which went no further than did article 15 of the draft and could be retained subject to a review of its wording by the Drafting Committee.

18. The content of draft article 23 should be limited to the subject-matter described in the title. The extraneous material which had been introduced into it had the effect of restricting unduly the manner in which a State could give its consent; it would also encourage disputes with regard to the giving of consent. He accordingly proposed that the phrase "provided that the property in question, movable or immovable, intellectual or industrial" in paragraph 1, together with subparagraphs (*a*) and (*b*), should be deleted. Furthermore, the suggestion to make provision for consent to be given in the course of proceedings was a useful one.

19. Draft article 24 should be deleted. It introduced a wholly new idea, amounting in effect to a rule of *jus cogens*—a rule which would preclude a State from giving its consent to execution in respect of certain types of property. He knew of no authority on which to base such a new rule. If retained, article 24 was bound to raise more questions than it would answer.

20. In short, he proposed that part IV of the draft be confined to article 22, stating the basic substance of the matter, and a shorter version of article 23, dealing with the modalities and effect of consent to attachment and execution.

21. Mr. ARANGIO-RUIZ congratulated the Special Rapporteur on the clarity and wealth of information in his seventh report (A/CN.4/388) and previous reports. All that could be said about the draft articles under consideration seemed to have already been said and he would therefore confine himself to two questions.

22. First, a bill had been submitted to the Italian Senate on 11 March 1985, too late for the Special Rapporteur to take account of it in his seventh report. The text of the bill recast to some extent Act No. 1263 of 15 July 1926, which had enforced Decree No. 1621 of 30 August 1925. Under that Act, execution measures against foreign States required prior authorization by the Ministry of Justice. Before taking its decision, the Ministry had to determine whether or not reciprocity existed. The Act had not gone uncriticized, for it conflicted with the right of any subject of law under article 24 of the Italian Constitution to take legal action. In 1963, the Constitutional Court had stated that the procedure should not be regarded as a violation of article 24, since the preferential treatment granted to foreign States had been justified by the higher demands of the general interest, more particularly the exigencies of good political and economic relations between Italy and other States.

23. The Constitutional Court had none the less noted that the 1926 Act had not been acceptable in the light of a provision in article 24 precluding any possibility of appeal to the administrative authorities or courts by a subject of law who had suffered injury because no authorization had been given to proceed to execution against a foreign State. The twofold objective of the 1985 bill was to give satisfaction to the injured party without restricting the immunity of the foreign State and, indeed, to allow the opportunity for wider application of immunity. In that connection, the bill was intended—once it became a statute—to change the existing régime in two respects.

24. To begin with, in regard to the procedure for authorization, it established a need for co-operation between the Ministry of Justice and the Ministry of Foreign Affairs, since the latter was required to give a prior opinion. Secondly, reciprocity was not the only criterion that determined whether authorization was granted or refused: it was merely one of a number, because of the fact that the Ministry of Foreign Affairs was competent alongside the Ministry of Justice. Furthermore, the text expressly reserved the provisions of international conventions and stipulated that the Ministry of Foreign Affairs must "also" take into account "the existence of the condition of reciprocity". It followed that, according to the bill, any further relevant political and economic conditions had to be borne in mind. In addition, the bill contained two provisions in favour of the injured party. One provided an opportunity for the injured party to appeal against an order refusing authorization, and the other established that, where authorization was denied, the party receiving the benefit of a final judgment would have the right to claim against the Italian State compensation in proportion to the injury suffered as a result of the denial of authorization of execution. The treatment provided under the bill for foreign States included the same treatment for international organizations. In conclusion, the bill was intended to open a wider door to the possibility, for the executive branch of the Italian State, to take account of the special relations with given States, and notably of the particular needs of developing countries.

25. Before going into greater detail on the proper "ideal" for the community of States in the matter of State immunity, he wished to point out that, at the previous meeting, Sir Ian Sinclair had rightly added to the two poles constituted by the sovereign States involved in a case of immunity from execution a third pole, namely the interested party, a natural or legal person under internal law. In addition to that "third pole", and apart from it, he thought that two entities existed alongside each other in each State and hence that four public entities came face to face in each case. Each of the two States was, on the one hand, a "power" subject to the law of nations and, on the other, a legal person under internal law. The "power" exercised its activities in the arena of international relations as a sovereign, independent entity. However, when a foreign State left the domain of international relations and began to operate within the internal law of another State, it did so not exclusively as a "power", but also as a legal person, in the same way as the State on whose territory it came to operate. Naturally, in some respects it preserved its attributes as a "power" when it was present in the host State through an ambassador, a President, a military contingent, a warship or a military aircraft. Any possible dispute or any relationship entered into in that connection was then governed by the principle *par in parem imperium non habet*.

26. But when the State came to operate within the legal system of another State, it did not present itself only as a power. In order to establish legal relations of any kind in the other State, it became a subject of municipal law, and the principle *par in parem* did not play the same role within such a sphere. It followed that anyone dealing with the problems of immunity, namely the status of the foreign State under the rules of law and the jurisdiction of the territorial State, had to recognize that the day would have to come when foreign States would be placed in a situation at least comparable to the situation of the territorial State itself, which was subject to its own internal law, in other words its constitution, its legislation and its judiciary. If mankind was to move forward, it must move in that direction, any foreign State being subject to the jurisdiction of the territorial State, as well as that State itself, although it would be difficult to conceive of such a development as an immediate goal.

27. It would be advisable, in reviewing the draft articles, for the Commission to display the greatest caution. It had to take account of course of the needs of countries which were in a weaker position in

relation to others, but without granting pointless concessions to States whose situation did not call for such concessions. Once a better economic equilibrium had been achieved, the community of States could move towards the "ideal" solution with regard to immunity. He was quite favourable to the idea of attempting to accommodate the requirements of developing countries, but thought that future possibilities should not be prejudged by the Commission.

28. Mr. KOROMA, congratulating the Special Rapporteur on his excellent seventh report (A/CN.4/388), said that, in elaborating rules on State immunity, it was essential to take cognizance of the closely related law of economic development. Indeed, it was because of the expansion of trade between States in the nineteenth century that the issue of a broad, as opposed to a restrictive, theory of immunity had arisen. Moreover, if the law on the topic was to be both relevant and comprehensive, due regard must be paid to international legal instruments such as General Assembly resolution 1803 (XVII) of 14 December 1962 on the permanent sovereignty of States over their natural resources and the Charter of Economic Rights and Duties of States,[8] of which domestic courts and international judicial and arbitral tribunals had taken notice.

29. It would have to be decided whether part IV was necessary to the draft articles. Personally, he believed that it was, in the first place because it was a generally acknowledged principle that a State could not be sued in a foreign forum without its consent, although, in the case of attachment and execution, certain States applied the doctrine of restricted immunity for acts purported to be *jure gestionis*. In addition, immunity from jurisdiction and immunity from execution differed in terms of time and substance, and even procedurally. Part IV of the draft was also necessary because of the inconsistency of judicial decisions in the various cases that had come before national forums, and the consequent need to settle the law on the matter through international legislation. Unless that were done, individual courts and States would be left to determine the law according to their own value-judgments, which would hardly make for uniform law.

30. The Special Rapporteur had rightly pointed out (*ibid.*, para. 4) that, notwithstanding its title, part IV was exclusively concerned with State immunity. That immunity belonged to the State, not to its property, and accordingly, once a State had established its title to property under its own internal law, the State and its property were immune from suit in a foreign court. It was important to bear in mind that attachment of State property which took the form of a bank account of an embassy or deposits of a central bank could disrupt the functioning of that embassy or cut off the economic life of the State. Therein lay the importance of the rules of immunity from execution laid down in part IV.

31. As to draft article 21, he said it appeared to be settled law that waiver of immunity from jurisdiction was not tantamount to waiver of immunity from execution. Where jurisdiction was declined, however, it followed that there was also immunity from attachment, arrest and execution. The latter element therefore required separate treatment, possibly in a separate article. It would also be useful to define the terms "attachment", "arrest" and "execution" in article 2 of the draft. Furthermore, he would like to know whether the fact that the scope of draft article 21 was restricted to attachment, arrest and execution ordered by a court would not mean that property could be made subject to such measures pursuant to an executive or administrative fiat. If that was so, it should be made clear in the body of the article.

32. With regard to draft article 22, he said that, since the rule laid down was self-contained, there was no need for the opening phrase, "In accordance with the provisions of the present articles". Also, it was necessary to have a clear understanding of what was meant by the expression "commercial and non-governmental service" in paragraph 1 (*b*). It had been held in a number of decided cases that, where a State set up a company to exploit its own natural resources, and where such activities formed an integral part of its national development policy and the company acted by authority of national law, those activities were not to be regarded as commercial. It had likewise been held that, where a State or a group of States established terms and conditions for the removal of natural resources from their territory, such an activity could be regarded as governmental and not commercial. There was, however, a wealth of case-law in the area and it merited consideration.

33. In connection with draft article 23, it could not be assumed that, because an activity was regarded as commercial, there had been a waiver of immunity or consent to jurisdiction. For consent to operate, it had to be explicit, if not express. Consent also had to be based on law, and a genuine link between the suit and the forum was a particularly important factor.

34. As was apparent from draft article 24, consent to attachment and enforcement of execution did not confer a general licence to attach or levy execution against any type of State property regardless of its public or governmental purpose. The Special Rapporteur had thus rightly provided that certain State properties were permanently immune from attachment and execution. The list of property contained in article 24 should not, however, be considered as exhaustive.

35. The CHAIRMAN, speaking as a member of the Commission, joined previous speakers in complimenting the Special Rapporteur on his seventh report (A/CN.4/388). The topic, which was a sensitive one, had been developed mainly over the past 10 years: no doubt it would continue to develop in the coming decade in view of the initial interest in the matter, particularly on the part of developing countries.

36. He agreed with the broad framework of the Special Rapporteur's approach and, in particular, thought that part IV of the draft articles was necessary in order to deal with attachment and execution of property. It was important to bear in mind that part IV did not deal with a separate topic but with a part of State immunity that involved a different stage in

[8] General Assembly resolution 3281 (XXIX) of 12 December 1974.

the proceedings: precisely for that reason, a separate part was required. He noted in that regard that the definition of "jurisdictional immunities" given in article 2, paragraph 1 (*c*), was qualified by the terms of article 1, so that the scope of part IV was limited to immunity from measures of arrest and execution taken pursuant only to a decision or order of court.

37. In dealing with part IV it would be necessary to define State property more clearly and, in so doing, to take account of the provisions of draft article 2, paragraph 1 (*f*), articles 15 and 18, and draft article 19. The scope of part IV should also be clarified to take account of any other measures, in addition to attachment, arrest and execution, such as Mareva injunctions, by which State property might be affected. Draft articles 22 and 23 should be harmonized since they could give rise to two inconsistent conclusions. The main point was whether paragraph 1 (*a*) and (*b*) of article 22 provided for two separate alternatives or whether there was a link between the two provisions which was spelt out in article 23. Possibly the problem could be resolved by providing for implied consent and identifying the property to which it would relate.

The meeting rose at 1.05 p.m.

1924th MEETING

Thursday, 11 July 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*continued*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, ILC (XXXVII)/Conf.Room Doc.1 and Add.1)

[Agenda item 4]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*concluded*)

ARTICLE 21 (Scope of the present part)

ARTICLE 22 (State immunity from attachment and execution)

ARTICLE 23 (Modalities and effect of consent to attachment and execution) *and*

ARTICLE 24 (Types of State property permanently immune from attachment and execution)[4] (*concluded*)

1. The CHAIRMAN, speaking as a member of the Commission and continuing the statement he had begun at the previous meeting, said that draft article 22 was based on two assumptions, which the Special Rapporteur had stated in paragraph 83, subparagraphs (*a*) and (*c*), of his seventh report (A/CN.4/388). It was evident from those assumptions and from the part of the report dealing with draft article 23 that paragraph 1 (*a*) and paragraph 1 (*b*) of article 22 were closely connected. The first and last sentences of paragraph 85 of the report, which stressed the importance of consent, were, moreover, clarified by the introduction, in paragraph 88, of the notion of implied consent on which article 24, paragraph 1 (*c*) and (*d*), were also based. The basic thesis that consent should be clearly given for the purposes of the attachment of property was developed in paragraph 97 and the overall position was summed up in paragraph 102. The latter paragraph also advocated that the scope of consent should be specified, and that might explain the detail in which article 23, paragraph 1 (*a*), had been drafted.

2. Against that background, the normal interpretation would have been to read article 22, paragraph 1 (*a*) and (*b*), and article 23, paragraph 1 (*a*), together. The question that arose was, however, whether there was any special reason or justification for referring to article 22, paragraph 1 (*a*) and (*b*), as alternatives, particularly bearing in mind the controversy to which that approach had given rise in the Commission and to which it would undoubtedly give rise in the Sixth Committee of the General Assembly. Since an exception to State immunity from jurisdiction had been made in the case of commercial transactions, it would

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[3] The texts of the draft articles considered by the Commission at its previous sessions are reproduced as follows:

Part I of the draft: (*a*) article 1, revised, and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 99-100; (*b*) article 2: *ibid.*, pp. 95-96, footnote 224; texts adopted provisionally by the Commission—paragraph 1 (*a*) and commentary thereto: *ibid.*, p. 100; paragraph 1 (*g*) and commentary thereto: *Yearbook ... 1983*, vol. II (Part Two), pp. 34-35; (*c*) article 3: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnote 225; paragraph 2 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 35-36; (*d*) articles 4 and 5: *Yearbook ... 1982*, vol. II (Part Two), p. 96, footnotes 226 and 227.

Part II of the draft: (*e*) article 6 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1980*, vol. II (Part Two), pp. 142 *et seq.*; (*f*) articles 7, 8 and 9 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1982*, vol. II (Part Two), pp. 100 *et seq.*; (*g*) article 10 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 22 *et seq.*

Part III of the draft: (*h*) article 11: *Yearbook ... 1982*, vol. II (Part Two), p. 95, footnote 220; revised texts: *ibid.*, p. 99, footnote 237, and *Yearbook ... 1984*, vol. II (Part Two), p. 59, footnote 200; (*i*) article 12 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 25 *et seq.*; (*j*) articles 13 and 14 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 63 *et seq.*; (*k*) article 15 and commentary thereto adopted provisionally by the Commission: *Yearbook ... 1983*, vol. II (Part Two), pp. 36-38; (*l*) articles 16, 17 and 18 and commentaries thereto adopted provisionally by the Commission: *Yearbook ... 1984*, vol. II (Part Two), pp. 67 *et seq.*

[4] For the texts, see 1915th meeting, para. 4.

have been logical to make a similar exception in cases where consent was given to attachment or execution.

3. That proposition was supported by the State practice, legislation and case-law of the United States of America and the United Kingdom, where the law was moving in the direction of implied consent. He noted in that connection that funds attached as security pending, or in execution of, judgments fell into four broad categories: funds of an embassy or diplomatic mission; funds deposited by a central bank in a foreign State; assets of agencies or statutory corporations controlled by the State or in which it had an interest; and funds deposited by the State with a corporation or company of a foreign State.

4. Referring to the first of those categories, he noted that, since 1975, when the trend towards qualified immunity had emerged, there had been a number of cases concerning attachment of the funds of a diplomatic mission. In the United Kingdom, for example, in *Alcom Ltd.* v. *Republic of Colombia* (1984) (see A/CN.4/388, para. 114), the House of Lords had held that such funds were not to be regarded as funds used for commercial purposes and that they could, accordingly, not be subject to attachment or execution. That line of reasoning had, however, not been universally followed and there had been cases in which even "mixed" funds, used both for the running of a mission and for commercial transactions, had been attached. That was a sensitive matter, for as pointed out in a commentary[5] on the Court of Appeal decision in the *Alcom* case, certain diplomatic missions had had their embassy accounts attached as a consequence of that decision; others had moved or had threatened to move their accounts to the Channel Islands; and others had informed the Foreign Office that, on the basis of reciprocity, the property of United Kingdom missions abroad was liable to attachment. In the *Alcom* case, the Court of Appeal judgment had been reversed by the House of Lords, so that the funds of missions in the United Kingdom would appear to be immune. The Commission's task was, however, not to interpret national law, but to determine international law, wherever it might be applied, and specifically to determine whether consent should be required before the funds or property of a diplomatic mission could be attached or whether such funds should enjoy absolute immunity under article 24.

5. In referring to the second category of funds, namely funds deposited by a central bank in a foreign State, Chief Akinjide (1919th meeting) had spoken of Nigeria's experience in the matter and had cited a case in which a Mareva injunction had been issued to prevent the Central Bank of Nigeria from drawing on its funds pending the disposal of the case. The decision in that case had, however, been taken prior to the adoption by the United Kingdom of the *State Immunity Act 1978* and it was possible that, on a proper construction of that legislation, such funds would now be entirely immune from attachment, unless of course the bank set aside a separate portion of the funds for the specific purpose of satisfying the judgment or a creditor's interest.

6. The third and fourth categories related, as he had said, to funds belonging to State entities having their own legal personality, such as companies and corporations, and to funds of the State deposited with an agency of a foreign State.

7. The basic issue was therefore how to reconcile article 22, paragraph 1 (*b*), and article 23, paragraph 1 (*a*), and also to determine whether the attachment, arrest or execution of State property in any form should require express waiver of immunity or whether it would be possible to agree to implied waiver and, if so, what the limits of such implied waiver should be, bearing in mind State practice.

8. Turning to specific articles, he said that he saw no reason why draft article 21 should not be retained, with such drafting changes as might be necessary. The question of a separate waiver of immunity from execution could also be covered in article 21, or in a separate article.

9. The point he had already raised in connection with draft article 22 could be dealt with in one of two ways. The first would be to combine paragraph 1 (*a*) and (*b*), replacing the word "or" in paragraph 1 (*a*) by the word "and", and, if necessary, add a new provision, in article 22, article 23 or in a new article, to cover the element of implied waiver. The second solution would be to retain paragraph 1 (*a*) as it stood and to amend and make a separate provision of paragraph 1 (*b*), which would then take account of the ideas expressed in paragraph 88 of the Special Rapporteur's seventh report, of the terms of draft article 24, paragraph 1 (*c*) and (*d*), and of relevant State practice and legislation, and might read:

> "the property is specifically in use or intended for use by the State for a commercial contract or transaction and has been allocated for specified payments or earmarked for payments of judgment or any other debts."

That reformulation would mean that, if separate funds were placed in a bank as a security or guarantee, in connection with property specifically used for a commercial contract or transaction, those funds could be the subject of attachment or execution.

10. He fully agreed that article 22, paragraph 1 (*c*), required careful examination, particularly with regard to title to property pursuant to an act of State taking the form, for example, of the nationalization of natural resources, which should not be subject to question in the forum of the foreign State. Possibly that point, and also the point raised by Mr. Mahiou (1922nd meeting) could be covered by providing that paragraph 1 (*c*) would not apply to an act of a foreign State in respect of the resources or property of the territorial State. That was already partly covered in draft article 11, paragraph 2, but should be couched in more positive language in draft article 22, paragraph 1 (*c*).

11. If his proposed amendment to article 22, paragraph 1 (*b*), was accepted, paragraph 1 (*d*) would be covered and would no longer be necessary.

[5] H. Fox, "Enforcement jurisdiction, foreign State property and diplomatic immunity", *International and Comparative Law Quarterly* (London), vol. 34-1 (January 1985), p. 115, at p. 121.

12. If article 22, paragraph 1 (*b*), was dealt with separately, article 23, paragraph 1 (*a*), might have to be deleted. Paragraph 1 (*b*) and paragraph 2 of article 23 should, however, be retained.

13. He agreed with the substance of draft article 24, but considered that the wording, particularly of paragraph 1 (*a*), required examination. If his revised version of article 22, paragraph 1 (*b*), was accepted, article 24, paragraph 1 (*c*) and (*d*), might also be amended appropriately. It might also be possible to delete paragraph 2 of article 24, since its terms were in any event implied.

14. Mr. LACLETA MUÑOZ said that it would be quite tempting to support the view expressed by Mr. Calero Rodrigues (1922nd meeting), which accorded with that described in the Special Rapporteur's seventh report (A/CN.4/388, paras. 22-23), namely that immunity from jurisdiction went together with immunity from execution and that, in the absence of immunity from jurisdiction, a State could not claim immunity from execution, except of course in the case of express consent to the exercise of jurisdiction, which would not necessarily imply consent to execution. That position did, however, not really reflect the practice of States, as described by the Special Rapporteur. If it was asked whether any purpose would be served by a judicial decision that would not be executed, his own answer would be that every judicial decision exerted some kind of moral pressure on the parties concerned. He therefore found that, at least in conceptual terms, there was no valid reason why a distinction should not be drawn between immunity from jurisdiction and immunity from execution, particularly since such a distinction would reflect State practice.

15. He also did not think that the concept of sovereignty would prevent a foreign State from being subjected to the jurisdiction of another State in cases where the foreign State was not acting in the exercise of its sovereignty. It should be stressed, as Sir Ian Sinclair (1922nd meeting) had suggested, that, in the cases covered by the draft articles, a triangular relationship existed and that the interests at stake were not limited to those of the "author" State and the forum State. The view that immunity from jurisdiction should be limited had been gaining acceptance as a result of the need to protect the interests of private individuals, who were the third element in that relationship. Recognition of a foreign State's immunity from jurisdiction might place a private individual in a particularly unfair position by depriving him of any means of protecting his own legitimate interests.

16. As an example of how State immunity could work against legitimate private interests, he referred to a case in which a foreign State had been one of the owners of land that was located near a large city in Spain and was being used by a cultural agency of that foreign State. The agency had become a member of the owners' association and, under a system provided for by Spanish law, the association had agreed to pay the costs of developing the land in return for a long-term municipal tax exemption. When the time had come to divide the land development costs among the members of the association, the cultural agency, claiming that it was exempt from taxes under a cultural agreement concluded between Spain and its country, had stated that it had not derived any benefit from the land development operation and had refused to pay its share. The other owners had then instituted proceedings against it in the competent court, but, since the land in question had been registered as State property, State immunity had come into play.

17. Although article 21 might not really be necessary, it served as an introduction to part IV of the draft. It could be retained if it was redrafted in the light of the suggestion just made by the Chairman.

18. He would not comment at the present stage on the solutions that had been proposed with a view to harmonizing draft article 22, paragraph 1 (*b*), and draft article 23, paragraph 1 (*a*), but he could not agree with the idea of linking those two provisions or with the use, in article 22, paragraph 1 (*b*), of the words "in commercial and non-governmental service", which implied that governmental commercial operations could be protected by immunity. Article 23 should deal only with the formal aspect of consent and establish the modalities thereof.

19. Draft article 24 would be generally acceptable, subject to the drafting changes that would be required in order to make it clearer that a State did not have to waive the immunity to which it was entitled as a result of the inviolability of the types of property referred to in paragraph 1 (*a*). There was, moreover, no need to take account of property forming part of a State's "national cultural heritage", as referred to in paragraph 1 (*e*), in the draft articles under consideration.

20. Mr. USHAKOV said that if, in the event of a dispute, he made a deposit in his bank account as security against payment of debts which he might incur in the event that the dispute was not settled in his favour, it would be more than obvious that he intended to pay those debts and he could not see how his deposit could be subject to measures of attachment.

21. Sir Ian SINCLAIR said that, while he understood Mr. Ushakov's point, it was quite possible for a person who had made a deposit in a bank as security against payment of a judgment debt to change his mind after the judgment had been delivered. The question then would be whether that property was in fact available to meet the judgment debt and so capable of being seized.

22. Chief AKINJIDE said that, in his own country, there were two possibilities, irrespective of whether a private individual or a State was concerned. Either the money was paid into court pursuant to the order of the court or it was deposited with the court by the parties acting of their own volition. Once that had been done, neither party had control over the money, which was said to be *in custodia legis*. That being so, a defendant could not change his mind and prevent the money from being used to satisfy the debt.

23. The CHAIRMAN, speaking as a member of the Commission, pointed out that deposits by way of security could be paid into court or placed with a bank as collateral. However, the mode of deposit of

security had not been specified. The intention had simply been to provide for implied consent in the event that a problem arose in the course of the commercial contract or transaction.

24. Mr. USHAKOV said his point was that, if a deposit was made in a bank account for a very specific purpose, that meant that the party concerned had consented to pay its debts, not that it had consented to the attachment of that deposit. If the deposit was attached, the debts could not be paid.

25. The CHAIRMAN, speaking as a member of the Commission, said that, if a State gave an assurance that it would perform its obligations under a contract, there would be no question of attachment or execution. It was only where there was a difference as to the respective rights and obligations under the contract that a difficulty might arise. In such cases, the matter could perhaps be settled via diplomatic channels, although when the transaction was between a State and an individual or a corporation diplomatic relations would not usually apply. The point would, however, require further examination.

26. Mr. SUCHARITKUL (Special Rapporteur), summing up the debate, thanked members for their statements, which had been most gratifying in terms of both quantity and quality. He agreed that, particularly where developing countries were concerned, the alternative of no draft convention at all was to be eschewed.

27. The difficulties of the topic, which were manifold and, first of all, linguistic, derived not so much from the translation of the seventh report (A/CN.4/388) as from the complexity of the substantive legal systems involved and from the need to understand the niceties of a wide variety of procedural techniques. He could agree to all the proposals which had been made in that connection relating to languages other than English.

28. It was apparent that any hesitancy in the draft articles could easily result in conflicting conclusions. Some members considered that he had advocated no immunity; others thought that the extent of the immunity he was proposing was unwarranted; and yet others took the view that part IV of the draft articles was perhaps unnecessary, since it was already covered in earlier parts. He understood Mr. Ushakov's position (1920th meeting) very well, since in certain countries, such as the Soviet Union, the problem of jurisdictional immunities had not arisen much in practice, and he appreciated Mr. Ushakov's constructive efforts to propose a satisfactory solution. He was also gratified to note that Mr. Yankov (1919th meeting) agreed that the consent of States to the attachment of property was necessary and that Mr. Flitan (1920th meeting) considered that part IV represented an effort to restore a balance to the draft articles.

29. In formulating the draft articles, he had been somewhat hesitant owing to the uncertainty of recent developments in the law and to conflicting views and doctrine. He had at the same time been mindful of the need to steer a middle course between the interests of the sovereign State, the territorial State and the private individual.

30. He did not insist that article 21 was absolutely necessary, but had included it because it served to draw a line between immunity from jurisdiction proper and immunity from execution and, at the same time, to delineate the scope of part IV. He agreed, however, that the expression "by order of a court" was too narrow: the true intent was to provide for what Sir Ian Sinclair had termed "judicial measures of constraint upon the use of ... property" (1922nd meeting, para. 30).

31. As to the notion of State property, Mr. Reuter (1919th meeting) had expressed the view that it would be a great mistake to apply a definition of the kind proposed. That definition had, however, been borrowed from article 8 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives and Debts,[6] the authors of which, in choosing between the law of the successor State and the law of the predecessor State, had opted for the latter. He agreed, however, that his proposed definition was inappropriate, for what was at issue was property in a much wider sense. The question of ownership and title had to be settled under the *lex situs*, as in the case of immovable property acquired abroad, or under the law of the place where the property was registered, as in the case of a car imported for use by a diplomat residing in a foreign State, or under the rules of private international law.

32. Questions had also been raised with regard to the meaning of the expression "property in which a State has an interest". He wished to make it clear that the term "interest" as used in that context had nothing to do with the concept of a "controlling interest" in a company, a matter which was governed by company law. The question of the participation of a State in a company as a shareholder, whether with a controlling interest or not, was governed by article 18. In draft article 22, the term "interest" was used in the same sense as the French term *intérêt* in the expression *droits, avoirs et intérêts* and referred to the type of interest in property recognized by the property law of a particular country.

33. A good illustration of "property in which a State has an interest" was provided by the *Dollfus Mieg* case, mentioned by Sir Ian Sinclair at the 1922nd meeting. France, the United Kingdom and the United States of America had had an interest in the gold bars involved in that case. A State could thus have an interest in a property without having any title of ownership to it. Another interesting example was provided by *Vavasseur* v. *Krupp*,[7] which dated back to 1878 and related to cannon and ammunition which had been ordered by the Emperor of Japan for the Imperial Navy. Following a claim of breach of patent, an attempt had been made to seize the cannon and ammunition before they could be delivered to Japan. A United Kingdom court had, however, released the attachment because the Emperor of Japan had had an interest in the cannon and ammunition, having ordered and paid for them.

---

[6] A/CONF.117/14.

[7] *The Law Reports, Chancery Division,* vol. IX (1878), p. 351.

34. Situations that could arise in connection with the continental shelf provided a further example of interest without ownership. When two States could not agree on the delimitation of the continental shelf, they sometimes decided to treat the part of the continental shelf in question as a joint development area. The two States would thus have a real interest in that area, although ownership had not yet been established. There was no doubt, however, that the property in question was unattachable.

35. In reply to a question raised by Mr. Ushakov, he referred to an example of money earmarked for the payment of a particular debt. In 1961, an agreement concluded between Thailand and Japan on the repayment of certain wartime loans had contained a compromise settlement on the amount due with accrued interest. It had been agreed that the total amount would be paid, in instalments, into an account in the name of the Bank of Thailand, which had been entrusted with the task of dividing the amounts for payment to individual creditors. The case was thus one of the type referred to in article 22, paragraph 1 (*d*). It was worth noting that the position of property in such a case was quite different from that of money which had been paid into a court and over which the court had custody and control.

36. Since the concept of "attachment, arrest and execution" was meant to cover "judicial measures of constraint upon the use of property", the latter formulation might be included in article 22. It would then be clear that that article did not apply to confiscation or nationalization. The problems which arose in that connection were very real, but they were outside the scope of the present topic.

37. State practice with regard to immunity of State property from execution was by no means uniform. Some of the cases which had arisen in that connection involved problems of recognition and a distinction had to be drawn between recognition *de facto* and recognition *de jure*. In the case of recognition *de facto*, however, physical control was decisive. Thus, during the Spanish Civil War, when Bilbao had changed hands a change of ownership had been acknowledged for ships registered there.

38. It had been said that the main issue at stake was the fact that two sovereignties were involved. One sovereign chose to enter the territory of another when it introduced its property into that territory or acquired property therein. The case was one of the coincidence of two jurisdictions, which gave rise to a problem of priority of jurisdiction, not to a problem of exclusion of jurisdiction. A situation of that kind also occurred where foreign troops visited a country or were stationed in it under a treaty of alliance or some similar agreement.

39. The position was that, in principle, State property enjoyed almost absolute immunity, except for the possibility of waiver. In the draft articles, the term "consent" had been used in preference to the term "waiver". He had accordingly redrafted article 22, which would consist of a single paragraph. The concept of consent, which had been the subject of paragraph 1 (*a*), would be stated at the beginning of the article, which would begin with the words: "A State is immune without its consent in respect of its property, or property in its possession or control or in which it has an interest ...". As proposed by Sir Ian Sinclair, the immunity would be "... from judicial measures of constraint upon the use of such property, including attachment, arrest and execution ...". The exceptions provided for in the former paragraph 1 (*b*) and (*d*) would be combined to read: "unless the property in question is specifically in use or intended for use by the State for commercial and non-governmental purposes and, being located in the State of the forum, has been allocated to a specific payment or has been specifically earmarked for payment of judgment or any other debts". The former paragraph 2 would be deleted as a result of the introduction of the words "judicial measures of constraint upon the use ...". Paragraph 1 (*c*) would also be deleted, since the exception it provided for was already covered by articles 15 and 16.

40. It would be noted that he had retained in article 22 the words "commercial and non-governmental purposes", which had attracted some criticism during the discussion. Actually, those words had been taken from the 1926 Brussels Convention.[8] Similar wording was to be found in article 22, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[9] in article 9 of the 1958 Convention on the High Seas[10] and in articles 31 and 32 of the 1982 United Nations Convention on the Law of the Sea.[11] The well-known French authority on the law of the sea, Gilbert Gidel,[12] had, moreover, explained that the determination of the status of ships in public international law and the distinction between "public" and "private" vessels did not depend on the question of ownership: the test was, rather, whether a ship was being used in "governmental and non-commercial service", in which case it was a "public" vessel, or, instead, in "commercial and non-governmental service", in which case it was a "private" vessel. It was therefore appropriate to refer in draft article 22 to "commercial and non-governmental purposes" in order to show that the two requirements of "commercial" and "non-governmental" purposes were cumulative.

41. In accordance with the suggestion by Mr. Calero Rodrigues (1922nd meeting), he had redrafted article 23 to bring it into line with article 8 on express consent to the exercise of jurisdiction. Paragraph 1 of article 23 would now read:

"1. Subject to article 24, a State cannot invoke immunity from judicial measures of constraint upon the use of its property, or property in its possession or control or in which it has an interest, in a proceeding before a court of another State if the property in question is located in the State of the forum and it has expressly consented to the

---

[8] See 1915th meeting, footnote 7.

[9] United Nations, *Treaty Series*, vol. 516, p. 205.

[10] *Ibid.*, vol. 450, p. 11.

[11] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

[12] See G. Gidel, *Le droit international public de la mer* (Paris, Sirey, 1932), vol. 1, pp. 98-99.

exercise of judicial measures of constraint upon the property, which it has specifically identified for that purpose:

"(*a*) by international agreement; or

"(*b*) in a written contract; or

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

He had also drafted a new paragraph 2, which read:

"2. Consent to the exercise of jurisdiction under article 8 shall not be construed as consent to the exercise of judicial measures of constraint under part IV of the present articles, for which a separate waiver is required."

That new paragraph would take account of the proposal by Mr. Francis (1921st meeting) and Sir Ian Sinclair (1922nd meeting) for a new article to follow article 21. He agreed with the substance of that proposal, but thought that it would be more appropriate to include it as paragraph 2 of article 23.

42. He had reformulated article 24, replacing the words "regardless of consent or waiver of immunity" in paragraph 1 by the words "Unless otherwise expressly and specifically agreed by the State concerned". That change of wording should remove any suggestion that a rule of *jus cogens* might be intended.

43. As to the list of types of State property which were immune from attachment and execution, he would be prepared to include the property of regional international organizations in paragraph 1 (*a*). Regional organizations were, however, not covered by the 1975 Vienna Convention on the Representation of States. Some regional organizations had, moreover, disappeared after a rather short life. Another problem was that the legal personality and capacity of regional organizations was not recognized under the internal law of all countries. In Japan and Thailand, for example, the law recognized the European Economic Community as a "person"; but the Community's legal personality was not fully recognized under French law.

44. With regard to property of a military character, as referred to in paragraph 1 (*b*) of article 24, he had used the words "defence agency of the State" to cover the case of a country like Japan, which, under its Constitution, could not have a military authority. The property covered by paragraph 1 (*c*) and (*d*) might be referred to in a single provision. He agreed that the term "national cultural heritage" in paragraph 1 (*e*) should cover religious property, which was unattachable under internal law.

45. The commentary to article 24 would explain that the types of State property covered did not include certain items which were unattachable under internal law. What he had in mind was, for example, the limitation which the law in most countries placed on the seizure and sale of personal possessions to recover debts: for humanitarian reasons, some such possessions were not subject to measures of execution.

46. In conclusion, he thanked all members of the Commission for their valuable contributions and useful suggestions. He would submit the revised texts of draft articles 21 to 24 to the Drafting Committee and suggested that those texts should be referred to the Committee for early consideration at the Commission's next session.

47. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested that the Special Rapporteur's revised drafts of articles 21 to 24 should be circulated informally to all members of the Commission. The work of the Drafting Committee would thereby be greatly facilitated.

48. Sir Ian SINCLAIR supported that useful suggestion and further proposed that the texts of the redrafted articles should be included in the Commission's report on the work of its current session, with an indication that they had not yet been considered either by the Drafting Committee or by the Commission itself.

49. Mr. SUCHARITKUL (Special Rapporteur) said that he agreed to the suggestions made by the Chairman of the Drafting Committee and by Sir Ian Sinclair.

50. Mr. YANKOV requested the Special Rapporteur to consider the possibility of working out an appropriate definition of the words "judicial measures of constraint upon the use of such property, including attachment, arrest and execution". The meaning of those words varied considerably from one system of internal law to another. There was in fact no common denominator for much of the terminology used in part IV of the draft.

51. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer articles 21 to 24 to the Drafting Committee for consideration in the light of the suggestions made and of the redrafts to be submitted by the Special Rapporteur. That decision would be taken on the understanding that the revised texts of draft articles 21 to 24 submitted by the Special Rapporteur would be included in the Commission's report on the work of its thirty-seventh session, with an indication that they had not been considered either by the Drafting Committee or by the Commission itself.

It was so agreed.

The meeting rose at 1.15 p.m.

1925th MEETING

Monday, 15 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (A/CN.4/370,[1] A/CN.4/391 and Add.1,[2] A/CN.4/L.383 and Add.1-3[3]

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited the Special Rapporteur to introduce his second report on relations between States and international organizations (second part of the topic) (A/CN.4/391 and Add.1).

2. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) reminded members that, on 26 June 1945, in San Francisco, the media had sent out a cry of hope to the four corners of the earth: "We the peoples of the United Nations ...". That had been the beginning of the preamble to the Charter of the United Nations. The peoples, still under the psychological shock produced by "the scourge of war, which twice in our lifetime has brought untold sorrow to mankind", had been seeking a means of preventing a repetition of that horror in the future. Until then, mankind had not witnessed such massive, technical and systematic destruction of the human race, perpetrated with such unimaginable cruelty: whole communities and peoples persecuted and condemned to programmed destruction; cities razed to the ground; the holocaust of thousands of civilians, mostly innocent children, by the most inhuman means of destruction invented by man—the atomic bomb. To avoid a repetition of that nightmare, the peoples had been determined "to practise tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest ...".

3. In short, they had been determined to preserve peace and security through understanding and co-operation between nations. But peace, security, liberty, justice and equity could exist only within an adequate legal framework, by which relations between States would be regulated and their co-operation guided and co-ordinated. That was why the Governments, but unfortunately not the peoples, had "agreed to the present Charter of the United Nations" and established "an international organization to be known as the United Nations".

4. Thus 40 years ago, with the creation of the United Nations, a vital stimulus had been given to the new subject of international law called an international organization. Since then, new international organizations had proliferated with varying success. During the same time as the 51 States which had signed the Charter were to see their number more than triple to reach 159, international organizations were to increase to their present number of more than 250 intergovernmental organizations, working in the most varied fields to pursue their separate purposes in international co-operation. The number of non-governmental organizations had reached about 2,500.

5. Such was the extent and importance of that phenomenon, which could be said to constitute one of the fundamental characteristics of the second half of the twentieth century, that it hardly seemed necessary to justify the view that the Commission could choose no better tribute to the work of the United Nations in its first 40 years than to take up the study of the legal status, privileges and immunities of international organizations, among which the United Nations held first place by reason of the importance of its functions, its universality and the magnitude of its work.

6. Of course, there had been international organizations before 1945. Their growth had been constant and continuous since the middle of the nineteenth century. But it had been only after the Second World War that the phenomenon had taken such an extraordinary form, with well-defined characteristics and increasingly perfected technical machinery, at both the regional and universal levels. The attempts to achieve inter-State and private co-operation in nearly all fields of human endeavour had led to the establishment of the most diverse international organizations with clearly defined functions and purposes.

7. As early as 1826, after the struggle for the independence of Latin America had ended with the victory of Ayacucho on 9 December 1824, Simon Bolivar, imbued with the ideas of the Abbé de Saint-Pierre, had convened the Congress of Panama to form a union of the new republics. Even though the Congress had failed in its main purpose, it had been one of the fundamental steps towards the establishment of the present Organization of American States. During the nineteenth century, States had had recourse to conferences and congresses—political, economic, diplomatic and technical—and multilateral treaties had resulted from those meetings with increasing frequency. A whole technique was to be gradually developed and perfected, until the holding of the Hague Conferences of 1899 and 1907, which had marked an important stage in the advent of the international organization with a universal vocation.

8. The long period of peace which had followed the Napoleonic wars in Europe had favoured increased co-operation between States and the consequent development of more advanced forms of conference and congress machinery. The secretariat of a periodic conference would become a permanent organ which, in addition to its functions as a secretariat, would sometimes assume supervisory and executive functions within the framework of conventions. The appearance of that institutional and permanent element had completed the transition from conference to international organization. The two categories of international organizations found at the starting-point of the phenomenon under consideration were the following: first, the river commissions: the Central Commission for the Navigation of the Rhine,

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

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

[3] *Ibid.*

provided for in the Final Act of the Congress of Vienna (1815) and set up by the 1831 Convention on the Navigation of the Rhine; and the European Commission on the Danube, set up by the Treaty of Paris in 1856; and secondly, the administrative unions of a technical nature, such as the International Telegraphic Union (1865), the International Office of Weights and Measures (1875) and the Universal Postal Union (1878).

9. The vast increase in the number of international organizations, particularly since 1945, was well known, and it had necessarily been followed by an increase in the number of staff required for the satisfactory operation of their permanent organs. That staff, constituting the international civil service, had in turn produced a series of legal and institutional relations, with legal rules applicable to them. The General Assembly of the United Nations had not been able to remain indifferent to the extent and importance of that international phenomenon, which had gradually created, in a relatively short time, what had come to be known as the law of international organizations. It was in response to the interest shown by the General Assembly that the study entrusted to the Commission on "the status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States" was being undertaken, on which he had the honour to submit his second report (A/CN.4/391 and Add.1).

10. He did not think it necessary to repeat what had been said in that report, but would rather refer to what, for one reason or another, had been omitted and try to explain the omissions. As members of the Commission would be able to see, he had tried to follow as closely as possible the Commission's directives and instructions, as expressed in its report on its thirty-fifth session.[4] In particular, he had tried to comply with the recommendations regarding prudence and pragmatism.

11. It would have been logical to start with the definition of an international organization; that would have made it possible to draft an introduction immediately and to define the meaning of the terms used in the draft articles. He had decided not to do so in order to avoid starting interminable discussions on theoretical and doctrinal questions, on which there were conflicting opinions in the Commission and the General Assembly, as was only natural. Clearly, the discussion on that question was only being postponed. Of course, the Commission had already attempted on other occasions to draft a definition acceptable to everyone. When it had discussed the draft articles on the first part of the topic and when it had discussed, on first reading, the draft articles on treaties concluded between States and international organizations or between international organizations, the Commission had held long debates on the subject (*ibid.*, paras. 23-25). In both cases, the attempt to draft a definition had been postponed. Various possible definitions had been drafted and proposed in the Commission and elsewhere, some more complete than others.

[4] *Yearbook ... 1983*, vol. II (Part Two), pp. 80-81, para. 277.

12. In any case, the Commission would have to clarify that question when it came to the part of the draft articles dealing with privileges and immunities proper, since they were accorded having regard to various characteristics peculiar to each organization. It would be necessary to make a general classification of international organizations according to their composition (universal or regional), their purposes and activities (political, technical etc.; general or specialized) and their powers (consultative, normative or executive), for instance, in order to avoid granting an immunity or a privilege which was not really necessary. He had in mind, among other comments, those made in the note of 10 March 1965 from the United Kingdom Minister for Foreign Affairs, contained in the Explanatory Report of the Committee of Ministers of the Council of Europe, of 26 September 1969, on the question under consideration. The Commission would anyway have to try to establish a functional typology in order to conform to the commonly stated criterion that the functions of an international organization constituted its real raison d'être.

13. He had not differentiated between universal and regional international organizations because the general idea was to be able to apply the draft articles to both types of intergovernmental organizations. Moreover, the decision on that point had been expressly left for a later stage.

14. In regard to the legal capacity of international organizations, which was discussed in the second report, it would be seen that no reference had been made to the "internal law" of those organizations. As was well known, international organizations, like every subject of law, had to act within a specific legal framework, which might fall within one of three categories: (*a*) the national law of States; (*b*) general international law; (*c*) the law of the organization. It was within one of those three categories that an international organization should, or could, exercise its powers. The concept of an "internal law" of international organizations had been elaborated in legal doctrine. International organizations often carried on their activities within a legal order which was peculiar to them and which included not only their organs, but also the rules of the organization. The main arguments advanced to justify the concept of "internal law" derived from the process of elaborating decisions which excluded the consent of States, and from the category of the objects of such decisions, some of which were individuals. Basically, it was necessary to distinguish between the law applicable *to* the organization and the law applicable *by* the organization. It was the latter which would constitute the "internal law" of the organization.

15. As Mr. Reuter had pointed out in one of his works,[5] the ICJ had considered that the Administrative Tribunal of ILO was an international tribunal only in certain respects.[6] The Court had also rejected the application to a decision of the United Nations

[5] *Institutions internationales*, 8th ed. (Paris, Presses universitaires de France, 1975) ("Thémis" collection), p. 262.

[6] *Judgments of the Administrative Tribunal of ILO upon Complaints Made against UNESCO*, Advisory Opinion of 23 October 1956, *I.C.J. Reports 1956*, p. 97.

Administrative Tribunal of the theory of nullity of awards made in excess of the tribunal's competence.[7] It was obvious that all relations between an international organization and its staff were internal. So were the relations between organizations and representatives of States in regard to conditions of work of their organs, rules of procedure, etc. He had considered it advisable not to deal with the "internal law" of international organizations in the present study, but to remain within the sphere of international law proper. Nevertheless, he would be forced to make some references to such "internal law" when dealing with privileges and immunities.

16. Lastly, some reference must be made to the questionnaire on the practice of the United Nations, the specialized agencies and IAEA concerning their status, privileges and immunities, sent to those organizations by the Legal Counsel of the United Nations on 13 March 1978, in accordance with a decision of the Commission.[8] The first part of the study made by the Secretariat of the replies to that questionnaire concerned the United Nations, and the second part dealt with the specialized agencies and IAEA (A/CN.4/L.383 and Add.1-3).

17. As stated in the second report (A/CN.4/391 and Add.1, paras. 50 *et seq.*), the contractual capacity of the United Nations, which derived from Article 104 of the Charter and was expressly recognized in article I, section 1 (*a*), of the 1946 Convention on the Privileges and Immunities of the United Nations,[9] had not met with any opposition in practice and had been fully recognized. The same could be said to apply to the specialized agencies and IAEA.

18. From an examination of the replies to the questionnaire, it could be concluded that the contractual capacity of the United Nations, the specialized agencies and IAEA had been recognized both by State organs on which those organizations had to rely for the performance of their contracts, and by official bodies, private enterprises and individuals with whom the organizations wished to enter into contractual relations. In the cases in which difficulties had arisen, they had related mainly to the modalities of application of the law and in no case to denial of the legal capacity of the organizations concerned.

19. Similar conclusions could be reached in regard to the capacity to acquire and dispose of movable and immovable property, with the sole exception of the reservation made by Mexico when acceding to the Convention on the Privileges and Immunities of the United Nations in 1962, which had been worded as follows: "The United Nations and its organs shall not be entitled to acquire immovable property in Mexican territory, in view of the property regulations laid down by the Political Constitution of the United Mexican States";[10] a similar reservation had been made by Indonesia in its instrument of accession to the same Convention, in which it had referred to national laws and regulations.[11]

20. The capacity to institute legal proceedings had never been challenged in regard either to the United Nations, or to the specialized agencies or IAEA. Article I, section 1 (*c*), of the Convention on the Privileges and Immunities of the United Nations expressly referred to the capacity of the United Nations "to institute legal proceedings". That capacity had been fully recognized by the judicial and other authorities of States. Similarly, both the United Nations and the specialized agencies could initiate proceedings before the ICJ in the form of a request for an advisory opinion, in accordance with Article 96 of the Charter of the United Nations and Chapter IV of the Statute of the Court. In its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had unanimously held that, in view of the powers necessary for the performance of its functions, the United Nations had the capacity to bring an international claim with a view to obtaining reparation for damage caused to the Organization.[12] The Court had also held, by 11 votes to 4, that the United Nations had the capacity to bring a claim for injuries caused to its agents or to persons entitled through them.[13] Lastly the Court had held, by 10 votes to 5, that a conflict between a claim brought by the United Nations and a possible claim by the State of which its agent was a national could usually be prevented because the United Nations could base its claim only upon a breach of obligations due to itself. If a reconciliation of claims was necessary, it must depend upon considerations applicable to each particular case, and upon agreements to be made between the Organization and individual States.[14]

21. With regard to the capacity to conclude treaties, innumerable international agreements had been concluded by the United Nations, the specialized agencies and IAEA with other subjects of international law, that was to say with States, between themselves, or with other intergovernmental organizations. For the United Nations, of course, the capacity of the Organization and its organs to conclude treaties or agreements was provided for in various provisions of the Charter: for instance, Article 43 empowered the Security Council to conclude agreements with Member States concerning armed forces, assistance and facilities necessary for the maintenance of international peace and security.

22. Article 63 of the Charter authorized the United Nations to conclude agreements with the specialized agencies. In its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had concluded that:

Practice—in particular the conclusion of conventions to which the Organization is a party—has confirmed this character of the Organization, which occupies a position in certain respects in detachment from its Members, and which is under a duty to

[7] *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Advisory Opinion of 13 July 1954, *I.C.J. Reports 1954*, p. 56.

[8] See *Yearbook ... 1978*, vol. II (Part Two), p. 146, paras. 152-153.

[9] United Nations, *Treaty Series*, vol. 1, p. 15.

[10] United Nations, *Multilateral Treaties Deposited with the Secretary-General. Status as at 31 December 1984* (Sales No. E.85.V.4), p. 37.

[11] *Ibid.*

[12] *I.C.J. Reports 1949*, p. 187.

[13] *Ibid.*

[14] *Ibid.*, p. 188.

remind them, if need be, of certain obligations. ... The Convention on the Privileges and Immunities of the United Nations of 1946 creates rights and duties between each of the signatories and the Organization ...[15]

As members of the Commission would know, it was on that basis that Sir Gerald Fitzmaurice, Special Rapporteur for the topic of the law of treaties, had proposed that the Commission should consider adopting a provision recognizing the capacity of subjects of international law other than States to conclude treaties if they were invested with that capacity by treaty or by international custom. The Commission had not followed that suggestion and had decided at its eleventh session, in 1959, that the articles in the draft would apply only to treaties between States. Nevertheless, Sir Humphrey Waldock, who had succeeded Sir Gerald as Special Rapporteur, had observed in his first report that the Commission had

> ... fully accepted that international organizations may possess treaty-making capacity and that international agreements concluded by international organizations possessing such capacity fall within the scope of the law of treaties. ...[16]

The remaining information on that subject was to be found in the documents of the Commission relating to the draft articles on the law of treaties between States and international organizations or between international organizations, for which Mr. Reuter had been Special Rapporteur.

23. In conclusion, it must be admitted that simply to affirm that international organizations were juridical persons was not sufficient to define the legal régime governing them. It was also necessary to determine the extent of the legal capacity of international organizations as such. On the assumption that they were subjects of law distinct from States, the legal régime applicable to States could, of course, in regard to international organizations, serve only as a model, one which clearly could not be applied either in general form without the necessary adaptations, or in its entirety without the restrictions necessary in each particular case.

24. Such was the basis of the theory that international organizations, although subjects of law, were so by the will of States, which were the primary subjects of international law, whereas international organizations were only secondary subjects.

25. The CHAIRMAN thanked the Special Rapporteur for his lucid introduction of his second report (A/CN.4/391 and Add.1) on a topic which had not yet been studied as intensively as it deserved, because of the Commission's involvement in more urgent matters.

26. It would be recalled that at the Commission's thirty-fifth session, in 1983, the Special Rapporteur had submitted a preliminary report (A/CN.4/370); his second report elaborated on the legal status, privileges and immunities of international organizations. The importance of those matters had been clearly brought out by the Special Rapporteur in his introduction, which had linked the topic under consideration with its first part and with the draft articles on the law of treaties between States and international organizations or between international organizations,[17] which were to be submitted for final consideration to the United Nations Conference to be held for that purpose in Vienna in February/March 1986.

27. He took it that, in introducing his second report, the Special Rapporteur had also submitted title I of the draft articles, for which he was proposing two alternatives. In alternative A, article 1 comprised two paragraphs: paragraph 1 dealt with the legal personality of international organizations and paragraph 2 with their capacity to conclude treaties. In alternative B, the two matters were dealt with in two separate articles. Those provisions read as follows:

TITLE I

LEGAL PERSONALITY

ALTERNATIVE A

Article 1

1. International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(*a*) contract;

(*b*) acquire and dispose of movable and immovable property; and

(*c*) institute legal proceedings.

2. The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

ALTERNATIVE B

Article 1

International organizations shall enjoy legal personality under international law and under the internal law of their member States. They shall have the capacity, to the extent compatible with the instrument establishing them, to:

(*a*) contract;

(*b*) acquire and dispose of movable and immovable property; and

(*c*) institute legal proceedings.

Article 2

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

28. Mr. SUCHARITKUL, congratulating the Special Rapporteur on his comprehensive report (A/CN.4/391 and Add.1), observed that, during the consideration of the preliminary report submitted by the previous Special Rapporteur, the late Mr. Abdullah El-Erian, he had raised the question of the need to refer to municipal law, that was to say internal legislation and judicial decisions.[18] The source materials that had been collected were useful and the analysis most pertinent.

29. He agreed with the Special Rapporteur's general approach, in particular his decision not to deal at the present stage with the problem of defining an international organization. He also agreed on the

[15] *Ibid.*, p. 179

[16] *Yearbook ... 1962*, vol. II, p. 30, document A/CN.4/144, para. (11).

[17] For the texts of the draft articles, adopted by the Commission at its thirty-third and thirty-fourth sessions, see *Yearbook ... 1982*, vol. II (Part Two), pp. 17 *et seq.*

[18] See *Yearbook ... 1978*, vol. II (Part One), pp. 272-273, document A/CN.4/311 and Add.1, para. 69.

need to make an assessment of the international legal personality of international organizations. Objectively, that assessment must be made on the basis of criteria pertaining to international law. Admittedly, the coming into being of an international organization must depend on the political will of the member States which formed it. The Charter of the United Nations made that point quite clear, and so did the constituent instruments of other international organizations. The international legal personality of an organization was thus traceable to the relevant law of that organization.

30. The proliferation of international organizations, however, gave rise to certain difficulties. Those organizations and their constituent instruments were so varied in style and in wording that it was not easy to establish clear-cut criteria. It was not easy even to pin-point the moment at which an international organization came into being. That being so, he welcomed the flexible attitude adopted by the Special Rapporteur in not confining the study of the topic to international organizations of a universal character. In the first place, such an international organization could, in fact, well be less than universal. Furthermore, regional organizations were undoubtedly a class of international organizations and entitled to be treated as such. In international law, there was no limitation on the number of members of an international organization. He knew of at least one international organization which had come into being with only two members—Indonesia and Pakistan. At the other end of the spectrum there was the United Nations, with more than 150 members.

31. With regard to the legal status of international organizations, their first attribute was, of course, that of international legal personality, or legal capacity in public international law. That was the capacity with which the international organization was invested to enable it to undertake the activities assigned to it by its member States. That legal capacity, which reflected the organization's legal personality, was to a large extent limited to the functions and purposes for which the organization had been set up. In that limited sense, the organization could have the capacity to conclude treaties; and those were precisely the treaties covered by the draft articles which were to be submitted to the United Nations Conference due to be held in 1986. The capacity to conclude treaties was thus an expression of legal personality at the level of public international law.

32. But there were further complications. They related to organizations such as the United Nations which had a number of organs: the Secretary-General, the General Assembly, the Security Council, the Economic and Social Council, the Trusteeship Council and the regional economic commissions. Those separate organs could each be invested with a certain measure of international legal capacity to conclude treaties on behalf of the United Nations. Such treaties would be concluded in the first place with the host State, in regard to the status, operation and staff of the organ in question.

33. Thus it was clear that, if a certain type of international legal personality was going to be accorded to international organizations, it would necessarily be different from that of States. One important difference was that, for the purpose of concluding treaties and for other purposes under international law, States were equal among themselves. International organizations, on the other hand, could conclude treaties only within the limits of their capacity, which was determined by the law of the organization.

34. A matter of even greater importance—particularly for practical purposes—was the application of municipal law. Every organization had to have a headquarters and a secretariat; its operations within the host State inevitably brought it into contact with the internal law of that State. The organization needed the capacity to enter into contracts, the capacity to own movable and immovable property and the capacity to institute legal proceedings. Those attributes were possible only within the framework of the internal legal system of the host country. It was thus apparent that, while recognition of the legal personality of an international organization by its member States was necessary, recognition of its legal capacity by the internal law of the country in which it was established was even more vital.

35. It was essential to approach the whole notion of international organizations on a pragmatic basis, preferably adopting the inductive method. Much would be learned from examining the practice of States that were hosts to international organizations, such as the United States of America, Switzerland, the Netherlands, France and Italy. The Commission should examine that practice with care and ascertain the type and extent of the privileges and immunities actually accorded by host States. The examination would show that the privileges and immunities granted to international organizations and those who served them were not uniform. Theoretically, it was not disputed that an international organization as such, and its secretariat as an organ of the organization, were entitled to a certain status and to some privileges and immunities. Those privileges and immunities were, however, accorded solely for the effective functioning of the organization and not for the benefit of any individual. In practice, difficulties arose in regard to the actual recognition of privileges and immunities. As in diplomatic practice, the officials concerned were usually issued with an identity card by the host State, to indicate their immunity from arrest and detention. Full diplomatic immunity, however, was enjoyed by only a very few international officials, such as a Secretary-General or chief executive officer and his deputy.

36. Another matter that was worth studying was the status of various organs of the United Nations and their staff, and of the ICJ, its Registrar and its judges. In fact, the members of the Commission themselves also came within the scope of the present topic.

37. He would give the Special Rapporteur some documents relating to a regional international organization, which he hoped would be useful to him. It was interesting to note that ASEAN had been set up as a regional organization in 1967, with no headquarters or secretariat of its own. The Ministerial Conference of ASEAN met annually in the capital of

one of its five member States in turn, and the Ministry of Foreign Affairs of the host State was responsible for servicing the conference. In the very first year of its existence, ASEAN had concluded a treaty with ECAFE concerning a study on areas of regional co-operation. It was thus clear that ASEAN had international legal capacity; but legal capacity within each member country was also necessary for the meetings of its organs. After a decade of existence, ASEAN had established its headquarters in Indonesia in 1976, and it would be interesting to examine the extent of the privileges and immunities accorded under Indonesian law to the organization and its secretariat. It was not perhaps necessary for ASEAN to have the capacity to own land, but it certainly needed the capacity to occupy premises and to conclude contracts under internal law.

38. He found the Special Rapporteur's proposals for title I very helpful. It would also be useful if he could draw some line of demarcation between the spheres of international law, the internal law of the host State and the law of the organizations, which governed the constitutional limitations imposed upon them.

39. Mr. REUTER commended the Special Rapporteur for his second report (A/CN.4/391 and Add.1) and for the spirit in which he had dealt with the subjects discussed in it. The Commission seemed inclined to make a specific study of the privileges and immunities of international organizations, although the Special Rapporteur had rightly evoked various other aspects of the law of international organizations, so as not to mutilate so wide a subject at the outset.

40. In devoting the first part of the topic of relations between States and international organizations to the treaties to which international organizations were parties, the Commission had begun with the easiest subject-matter. Indeed, once it was accepted that international organizations concluded conventional instruments governed by public international law, there must necessarily be rules of general international law applicable to such instruments, since they could not be subject to the law of a particular organization or of a particular State. Except on certain points, those rules were very similar to the rules governing treaties between States.

41. When studying the first part of the topic, the Commission had not considered the question of the capacity of international organizations to conclude treaties. It had endeavoured to establish the rules applicable when international organizations concluded treaties, without ever aspiring to define their capacity to do so, as it had in the case of States. In the matter of legal capacity, the attributes of each organization were made to measure rather than ready-made, as the Special Rapporteur had observed. Several other questions had been deliberately left aside, either by the United Nations Conference on the Law of Treaties held in Vienna in 1968 and 1969, or during the preparation of the draft articles on the law of treaties between States and international organizations or between international organizations. Was there a transmission of functional obligations between the States and international organizations? What happened to the obligations of an international organization when it disappeared? Did the identity of an international organization subsist when it underwent important changes, such as the withdrawal of its principal members? A question of that kind had arisen in regard to article 36 of the 1969 Vienna Convention on the Law of Treaties, which concerned treaties providing for rights for third States. If States concluded a treaty containing an offer to a third State, which consented to it, did that offer continue to bind an original party to the treaty which had denounced it?

42. All those questions were relatively simple compared with the basic questions which the Commission would now have to take up. Perhaps it would be compelled to draw up general rules on the international responsibility of organizations—a matter which it had deliberately left aside up to now. It would in any case have to determine whether there were general rules applicable to international organizations in regard to privileges and immunities. On that point the Special Rapporteur had adopted a rather reserved attitude. He himself had long considered that the situation varied from one international organization to another. It had seemed to him that the subject lent itself only to studies in comparative law on the privileges and immunities of different international organizations, from which it was obvious that no general rule could be derived. At the present time, he could accept that, whatever the status of international organizations, certain privileges and immunities appeared to be so fundamental that they existed in any case. For quite apart from any legal theory, an international organization represented a mode of collective action by States. But States enjoyed privileges and immunities that could be essential for international organizations, such as the right to secrecy. All international organizations, even those which did not enjoy the right to conclude treaties, had a right to secrecy, whether it was expressly mentioned in their statute or not. Several questions relating to the secrecy of international organizations were likely to come before national courts. For instance, damages had been awarded against INTERPOL by a United States court for having communicated information on criminal activities concerning accused persons, who had finally been acquitted and had considered themselves injured by the communication of that information.

43. When the time came, the Commission would have to decide either to confine itself to a few extremely general rules, perhaps only one rule, or to make a study of a few international organizations such as the United Nations and the specialized agencies, in order to establish a greater number of common rules. It was the latter method that the Commission had followed in preparing the draft articles on the representation of States in their relations with international organizations.

The meeting rose at 4.45 p.m.

1926th MEETING

Tuesday, 16 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Jacovides, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/370,[1] A/CN.4/391 and Add.1,[2] A/CN.4/L.383 and Add.1-3[3]

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

TITLE I (Legal personality)[4] (*continued*)

1. Sir Ian SINCLAIR, thanking the Special Rapporteur for an extremely lucid and succinct report (A/CN.4/391 and Add.1), said that he shared Mr. Reuter's doubts (1925th meeting) as to how to proceed on the topic as a whole. He also had serious doubts whether international organizations should be categorized in such a way as to suggest that there were differing scales of privileges and immunities.

2. The difficulty of the topic was heightened by the wide variety of international organizations. Apart from organizations which were universal or quasi-universal in scope and had a broad political function, such as the United Nations, and the specialized agencies, which were also universal or quasi-universal but had responsibility in particular fields, such as WHO, FAO and ITU, there were a number of other organizations which did not have universal membership and whose functions were of interest to particular groups of States, consisting for example of producers or consumers of a given commodity, such as the International Tin Council. In addition, there was a series of regional organizations, some of which might be operational or quasi-operational, as well as various types of development banks in particular regions. Whether or not it would be possible to distil any general rules of international law applicable to that wide range of international organizations would have to remain an open question pending further progress on the topic, and the Special Rapporteur had been wise to concentrate for the time being on the question of international legal personality, where the differences between various types of international organizations were not so great.

3. Commenting on draft article 1 as submitted by the Special Rapporteur in his second report, he said that it was not clear whether the first sentence of the article might not imply that there could be cases in which international organizations would not enjoy legal personality under the internal law of non-member States. In that connection, he noted that the Special Rapporteur gave an example in his second report (A/CN.4/391 and Add.1, para. 52) of a case in which a non-member State, Switzerland, of an international organization, the United Nations, had expressly recognized the legal personality of that Organization. If, however, no such express recognition were given in the case of an international organization with limited membership, such as a bank engaged in raising loans on the private market in non-member States, it would seem that the rules of private international law rather than those of public international law might come into play. In such a case, the international organization in question would have the capacity to contract and to sue and be sued in its own name as a matter not of public international law, but of private international law.

4. The point could perhaps be met if the first sentence of article 1 ended with the words "legal personality" to avoid any implication that an international organization which enjoyed legal personality under the internal law of its member States would not do so under the internal law of non-member States.

5. The supplementary study prepared by the Secretariat (A/CN.4/L.383 and Add.1-3) contained a wealth of useful information, but it might be expanded to cover the question of the status, privileges and immunities of international organizations other than the United Nations, the specialized agencies and IAEA.

6. Mr. ARANGIO-RUIZ commended the Special Rapporteur for his excellent second report (A/CN.4/391 and Add.1) and his clear and concise oral introduction.

7. Other members had already warned the Commission not to adopt too general a position with regard to the legal status of international organizations and, in particular, their privileges and immunities, stating that it might be too ambitious to try to codify the rules which would apply to all organizations without distinction. His own warning was that the Commission had to be careful about the wording of draft article 1, which appeared to be intended as an introduction to the question of privileges and immunities. It established rules which related to legal personality and legal capacity of international organizations and which were based on the wording of existing international instruments and rulings by the ICJ.

8. The first problem to which article 1 gave rise arose out of the use of the words "International organizations shall enjoy legal personality under international law". That rule would certainly apply to the United Nations and the specialized agencies, but he was not sure it would be applicable in the case of other international organizations. The question of

---

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

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

[3] *Ibid.*

[4] For the text, see 1925th meeting, para. 27.

the legal personality of such other organizations would therefore have to be discussed at much greater length. That rule also gave rise to problems because of the implications to which the Special Rapporteur rightly referred in his second report (*ibid.*, para. 69), when he cited the following excerpt from the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*:

> ... the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone ...[5]

9. Since he did not have enough time to explain why he could not agree with the reasons the ICJ had given in support of its opinion that the United Nations possessed international personality and had the right to claim reparation, he would simply point out that personality under international law had its origin in custom, or rather in the unwritten law deriving from the practice and deep-seated convictions of States. That was also true in the case of the personality of international organizations, except in the minds of those who established such organizations on the basis of mistaken ideas as to the nature of legal entities in internal law and the origin of their personality, as well as on the basis of a false analogy between international organizations, on the one hand, and legal entities in internal law, on the other. The most important mistaken idea of that kind was that legal entities in internal law were created by acts deriving from the will of private individuals and having the effect that such entities came into being as organizations which were placed at a higher level than their members or their beneficiaries and which acquired legal personality corresponding to the functions which the act of the private individuals concerned attributed to them as legal entities.

10. That idea was mistaken for much the same reason as it would be wrong to say that immovable property or paternal authority over children could be transferred in internal law purely and simply as a result of acts performed by private individuals on the basis of the rule that contracts were binding on the parties. The fact was that property or paternal authority was transferred in accordance with the law. The same was true in the case of the establishment of legal entities or organizations under internal law: an organization did, of course, come into being as a result of an act by one or more private individuals, but such an act was subject to rules of law relating specifically to the establishment of such an entity, to the powers which the organs of the entity would have in respect of its members or its beneficiaries, and to the personality which the entity would enjoy. That was also true in the case of subdivisions of States: a region, department or municipality was set up as a result of the exercise of governmental authority or legislative or constitutional power. What was involved in internal law was thus not simply an autonomous act based on the equivalent of the principle *pacta sunt servanda*, but, rather, a process of organization, for internal law was the law of a group of individuals who were governed by institutions, and if existing institutions were destroyed they would immediately be replaced by other institutions. Organization was thus one of the basic features of any national society.

11. The same was unfortunately not true, however, in the case of international society. An international organization, which was in a sense in a higher position than its member States as an international legal person, could not come into being simply as a result of its constituent instrument, for that agreement, which was concluded by the founding members of the organization, applied only to them. In itself, it could require them to grant the organization personality under their internal law and it could even make it an obligation for them to conduct their relations *inter se* as though the organization enjoyed personality under international law, but it could not, in itself, create *erga omnes* effect, namely the organization's personality under international law.

12. According to Hans Kelsen, it was incorrect to say that a State could come into being *de facto* or on the basis of a treaty. It had, for example, been said that a State could be established by means of a legal instrument, but he did not think that that was really true. A legal instrument simply made it an obligation for the contracting parties to ensure that, in a particular territory, a State would, for instance, be free to establish institutions and adopt a constitution, such as the Libyan Constitution, which had been drafted under United Nations auspices. Libya had, however, gained independence not as a result of an enabling act by the United Nations: it had gained independence because it had in fact been independent. The same was true of international organizations: the United Nations had acquired its personality not merely because 50 States had signed the Charter, but, rather, because the Charter had determined what attitude States should take towards the United Nations and what respect they should show for it, since it was in the interests of the Member States that the Organization should be as independent as possible for the purpose of international relations.

13. He did not think that any analogy was possible between the Holy See, on the one hand, and the United Nations, on the other. The Holy See was not an international organization, but a State like any other and one of the primary subjects of international law. Between 1870 and 1929, the Holy See had, however, enjoyed the hospitality and respect of the Italian State and had been located in Italian territory. Similarly, the United Nations was located in the territory of the United States of America and enjoyed the respect of the host State, as well as legal personality. That, however, was the result of a rule of unwritten law, of the attitude of States, not a result of the Charter of the United Nations. If it was true that a mere legal instrument was enough to establish an international organization, it would be too easy to establish one and have it acquire legal personality for the purpose of international relations.

14. He thus agreed with the conclusion which the ICJ had reached in the above-mentioned advisory opinion, namely that the United Nations was entitled

[5] *I.C.J. Reports 1949*, p. 185.

to claim reparation as a legal person distinct from the national State of the victim of the wrongful act which had given rise to responsibility,[6] but he did not agree with the reasons which had led to that conclusion.

15. With regard to the problem of the responsibility of international organizations, to which Mr. Reuter had referred at the previous meeting, he said that, in such a case, the issue was, rather, responsibility in respect of an international organization and that, like Mr. Reuter, he could not take a position on such a sensitive issue. The problem would be to determine whether responsibility for a wrongful act could be attributed to an international organization composed of a group of States and, if so, whether those States could be made to share that responsibility. Caution was called for in that regard as well. At the current stage, he would only say that international organizations enjoyed personality which was not as functional as that of legal persons under internal law, but was, rather, primary personality of the same type as that enjoyed by States, since it was as a result of the practice of States that organizations acquired their position and their legal capacity.

16. As to the question whether or not there was a general rule of international law which attributed personality to some organizations, he would be inclined to say that custom or an unwritten rule took shape for each organization when it had achieved some degree of independence and, in particular, some degree of universality.

17. For all those reasons, he was of the opinion that the Commission should proceed cautiously and confine its task to what was really essential, namely the privileges and immunities of international organizations, and that it should not take too clear-cut a position on the way in which international organizations acquired personality or on the existence or non-existence of general rules to that effect. The exact opposite was, of course, true in the case of the personality of an international organization under internal law: such personality was not only an essential attribute of the possessor of privileges and immunities, but also gave rise to less complex problems than did the question of personality under international law.

18. The second problem to which article 1 gave rise was that it established a close link between legal personality under international law and legal personality under internal law. The article thus appeared to indicate that the capacity in question was capacity under international law as well as under internal law. That impression was confirmed by the words "to the extent compatible with the instrument establishing them" in the second sentence, which might establish an even closer link than the one established by the fact that the two types of legal personality were referred to together in the first sentence. In any event, it was obvious that the second sentence referred not to capacity under international law, but to capacity under internal law, and that there were two entirely distinct and separate types of personality and capacity: personality and capacity under international law, which derived from customary international law, and personality and capacity under internal law, which could, of course, be the subject-matter of an international obligation of the States which had established an organization, but were primarily an internal law matter giving rise to obligations under internal law or under unwritten international rules and thus came within the sphere of private international law, just as capacity to institute legal proceedings came within the sphere of international civil procedural law.

19. Account also had to be taken of the personality of international organizations within the framework of their own internal legal order—a very important point to which the Special Rapporteur had drawn attention (1925th meeting) in referring to international civil servants and the legal system governing relations between the members of the secretariat of an international organization. He was not sure that he entirely agreed with the Special Rapporteur about the position of representatives of States. Although the members of the Commission, who served in their personal capacity, did to some extent form part of the United Nations and were in a sense subject to its internal legal order, he was not sure what the position of representatives of States would be.

20. The third problem to which title I gave rise related to capacity to conclude treaties, dealt with in alternative A, article 1, paragraph 2, and in alternative B, article 2. In principle, such capacity was, unless otherwise restricted, also *erga omnes*. What then was the significance of the fact that such capacity "is governed by the relevant rules" of the organization? Those rules determined which organ or organs of the organization were competent to conclude treaties on behalf of the organization, and the situation was exactly the same in the case of States. But the relevant rules of the organization had nothing to do with the right to conclude treaties with third States. Leaving aside the question of the freedom of any third State to conclude or not to conclude a treaty with an international organization, unless a rule of *jus cogens* required it to do so, that right depended on the existence of a rule of general international law. It would thus not be enough to refer to the constituent instrument of an international organization, except in so far as capacity to contract was concerned.

21. Mr. MALEK commended the Special Rapporteur for his excellent second report (A/CN.4/391 and Add.1), which was particularly clear and concise and contained valuable information that should enable the Commission to formulate rules governing the legal capacity of international organizations. He also thanked the Secretariat for its supplementary study (A/CN.4/L.383 and Add.1-3), which would help the Commission in its work on the legal status, privileges and immunities of international organizations.

22. The Special Rapporteur had stressed that the Commission's discussions should relate to the legal status, privileges and immunities of international organizations, their officials, experts and other persons engaged in their activities not being representatives of States. In his report (A/CN.4/391 and Add.1, para. 14), he noted that, according to one view expressed in the Commission "a few problems should be selected for consideration at the first stage, such as

[6] *Ibid.*, p. 187.

those concerning international organizations, and ... the much more delicate problems, such as those relating to international officials, should be left till later"; but he had not really indicated what the exact scope of the topic should be. In view of the complexity of the issues at stake, the Special Rapporteur appeared, moreover, to be determined to proceed as cautiously as possible. That might explain why he recommended (*ibid.*, para. 27) that no decision on the question whether the Commission should also deal with international organizations of a regional character should be taken until the study had been completed.

23. The report under consideration dealt essentially with the legal capacity of international organizations. The Special Rapporteur referred (*ibid.*, para. 54) to five categories of instruments which granted or recognized the legal personality and capacity of international organizations and reviewed (*ibid.*, para. 55) the replies to the questionnaire on the topic sent to various international organizations, concluding (*ibid.*, para. 56) that "international organizations are recognized, although in some instances with certain limitations, as having legal personality and capacity and that, in practice, both internationally and internally, no major difficulties have been encountered in using such powers". Title I on the legal personality of international organizations, as submitted by the Special Rapporteur, should accordingly not give rise to any problems and the two alternatives could be referred to the Drafting Committee. The information contained in the second report on the legal personality of international organizations, as well as the information which the Special Rapporteur had provided in his oral introduction (1925th meeting), might, moreover, serve as a basis for the drafting of the commentary to those provisions.

24. Mr. CALERO RODRIGUES thanked the Special Rapporteur for his clear and concise second report (A/CN.4/391 and Add.1), which contained a complete survey of international practice, doctrine and jurisprudence.

25. Title I as submitted by the Special Rapporteur would serve as a useful introduction to the draft articles by laying the foundations for the granting and recognition of the privileges and immunities of international organizations. International organizations and their officials had to be granted privileges and immunities because they enjoyed legal personality and had the capacity to perform certain acts.

26. The question whether title I could be applied to all international organizations would, however, require further consideration. It would, for example, have to be determined whether organizations which had been established by a small number of States, whose constituent instruments were not entirely clear and which were not recognized by all States, also enjoyed legal personality and were entitled to privileges and immunites. He was sure that the Special Rapporteur would, in due course, let the Commission know whether the privileges and immunities with which he intented to deal would apply in the same way to all international organizations.

27. In his view, the words "International organizations shall enjoy legal personality" in the first sentence of article 1 went somewhat too far and should be replaced by the words "International organizations may enjoy legal personality". It would thus be clear that some international organizations might not enjoy legal personality.

28. The answer to the question whether a separate article should be devoted to the capacity of an international organization to conclude treaties would depend on how many articles the Special Rapporteur intended to include in the draft. In that connection, he said that he could not agree with Mr. Arangio-Ruiz that the words "The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization" meant that those rules would determine whether or not an organization could conclude treaties. Such a determination would, rather, be made by the States which negotiated a treaty, and the treaty would, moreover, contain provisions stating whether or not an organization was allowed to become a party to it. The wording proposed by the Special Rapporteur simply meant that an international organization could conclude treaties only if it was authorized to do so by its internal rules. Since the Commission had already spent enough time on theoretical considerations, it should adopt a pragmatic approach to its work and accept article 1, paragraph 2, in alternative A or article 2 in alternative B.

29. Mr. YANKOV thanked the Special Rapporteur for his concise second report (A/CN.4/391 and Add.1) and for his efforts to bring a somewhat theoretical topic into the realm of law-making.

30. The topic had a prominent place in modern international law and had gone through two major historical stages. The first had covered the period prior to the First World War. The second had begun in 1945 with the establishment of the United Nations and had been very rich both in practice and in doctrinal studies. He nevertheless had the impression that those studies had not brought the topic to the level of rules and regulations to govern the functions of international organizations, their relations with States and their relations with one another.

31. In dealing with international organizations, the Commission had to proceed cautiously, since there was a wide variety of organizations and each one had its own particular features as far as legal capacity, international status and legal personality were concerned. The Special Rapporteur himself had adopted a cautious approach in defining the scope of the topic and determining which organizations should be covered.

32. Like Mr. Calero Rodrigues, he believed that, although the Commission would inevitably have to deal with general and theoretical issues, its main task would be to discuss the practical problems involved in the legal personality and legal capacity of international organizations, their privileges and immunities and their rights and obligations under international law and under the legal systems with which they might come into contact.

33. With regard to the legal capacity of international organizations, he agreed with the general approach taken by the Special Rapporteur. Attention

should, however, be given to such features of international organizations as the right of representation. Some international organizations had only a very limited right of legation, but others, like the United Nations, enjoyed it to the full. For example, United Nations Headquarters had the largest diplomatic corps in the world.

34. Another question to be taken into account was that of responsibility *vis-à-vis* international organizations and the responsibility of those organizations in respect of damage caused to others. There were already a number of judicial precedents and treaties relating to that question, including the 1972 Convention on International Liability for Damage Caused by Space Objects.[7] The 1982 United Nations Convention on the Law of the Sea[8] also contained provisions (article 139) on liability for damage caused by activities in ocean space, including marine research activities carried out by an international organization. There would obviously be a gap in the present draft if it did not deal with the question of the responsibility of international organizations.

35. With regard to draft article 1 as submitted by the Special Rapporteur, he noted that the Commission still had to discuss the question of legal capacity under internal law, which had to be examined not only from the point of view of the internal law of the member States of an organization, but also from that of the internal law of non-member States. He therefore suggested that the terms of article 1 should be broadened, since subparagraphs (*a*), (*b*) and (*c*) probably did not cover enough ground.

36. As to the next stage of work on the topic, he thought that the Special Rapporteur should submit an outline of the entire set of draft articles. Experience had shown that it was always useful to have an idea of the form the entire draft would take.

37. Mr. McCAFFREY, congratulating the Special Rapporteur on his concise and lucid second report (A/CN.4/391 and Add.1), said that the topic was a very difficult one, especially if an attempt was to be made to harmonize the rules applicable to all international organizations. Since there was a wide variety of organizations and each one was, in a sense, unique, a cautious and functional approach had to be adopted, as indeed the Special Rapporteur had realized. Sir Ian Sinclair (1925th meeting) had, moreover, pointed out that it might not be possible to distil general rules that would be applicable to all international organizations. The legal capacity of an international organization should therefore be such as to give effect to the purposes for which its member States had established it.

38. As to the question of international legal personality, he agreed with Mr. Arangio-Ruiz that, while the United Nations and possibly its specialized agencies certainly enjoyed such personality to the fullest extent, that was not necessarily true of other international organizations.

[7] United Nations, *Treaty Series*, vol. 961, p. 187.

[8] *Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 151, document A/CONF.62/122.

39. Referring to article 1, paragraph 1, in alternative A, he supported the suggestion by Mr. Calero Rodrigues that the words "International organizations shall enjoy legal personality ..." should be replaced by the less categorical formula "International organizations may enjoy legal personality ...". That wording would cover the case of organizations that were not endowed with international personality by their constituent instruments.

40. He also suggested that paragraph 2 of article 1 should be amended to read: "An international organization my conclude treaties only if it is allowed to do so by its constituent instrument." The present text, which stated that the capacity of an international organization to conclude treaties "is governed by the relevant rules of that organization", could be taken to mean that the participation of an international organization in a treaty was not a matter to be decided by the parties to that treaty, whereas it was in fact the parties to a treaty that decided whether they wished to allow participation by an international organization.

41. Mr. BALANDA, congratulating the Special Rapporteur on his second report (A/CN.4/391 and Add.1) and thanking the Secretariat for its useful supplementary study (A/CN.4/L.383 and Add.1-3), said it was unfortunate that, because time was so short, the Commission would probably be unable to discuss all the important issues at stake and to give the Special Rapporteur the instructions he might need for the preparation of his next report.

42. Even though the trend now was to invite special rapporteurs to be cautious and pragmatic in order to avoid protracted discussions of a doctrinaire, theoretical nature, his own view was that the Commission should define the notion of an international organization at the outset and not leave that task until later, as the Special Rapporteur had suggested. The second report did, of course, indicate (A/CN.4/391 and Add.1, paras. 20-21) how some writers had defined that notion, but the Special Rapporteur himself might try to work out a clear and precise definition.

43. The Special Rapporteur had been right to focus primarily on practice. In that connection, account had to be taken of the important question of relations between an international organization and its member States, since the question of the legal personality of the organization could arise in that context. As to the organizations to which the draft would apply, the Special Rapporteur noted (*ibid.*, para. 27) that the Commission had provisionally decided to take account of all international organizations, whether of a universal or of a regional character. He also proposed to deal only with intergovernmental organizations (*ibid.*, para. 26). That approach might, however, not take account of the fact that some treaties did not establish genuine international organizations. That was, for example, the case of the intergovernmental agreement establishing the Council of the Entente States, an African organization which was intended only as a forum where heads of State and Government could meet and discuss, and which

was not an international organization, since it had no organs which could express a will distinct from that of the member States.

44. In his second report (*ibid.*, para. 6), the Special Rapporteur mentioned the difficulty of applying the general rules of international immunities to international organizations set up for the purpose of engaging in commercial activities. In that connection, he pointed out that, whenever States established an international organization in order to engage in an activity at the international level, they did so in the general interest, which might of course be of a commercial nature. The fact that an international organization engaged in commercial activities did not, however, mean that it was not performing an international public service, and it was precisely because it performed such a service that it required protection.

45. The Special Rapporteur also referred (*ibid.*) to the "responsibility of States to ensure respect by their nationals for their obligations as international officials". Such wording could not, however, be interpreted to mean that States had an obligation to ensure that the conduct of their nationals met the standards of the international organizations by which they were employed. It should, rather, be interpreted in the light of Article 100, paragraph 2, of the Charter of the United Nations, according to which each Member of the United Nations undertook not to seek to influence international officials in the discharge of their responsibilities.

46. Several members of the Commission had said that it was questionable whether general rules on the legal status of international organizations could be codified, since there was such a wide variety of organizations. Some had called for caution, while others had even expressed doubts about the chances of success of such an undertaking. Since writers such as Flory had, as a result of extensive research, succeeded in identifying some of the common features of international organizations, however, it should be possible to codify the general rules that applied to international organizations, regardless of the purpose for which they had been established.

47. Legal personality was one common feature of every international organization. In his view, it would be going too far to say that any international organization whose constituent instrument did not expressly recognize that essential attribute lacked legal personality. When States established an international organization, they did so for the purpose of jointly carrying out a particular activity at the international level; without legal personality and capacity, an organization would be unable to carry out the activities for which it had been set up. If it was denied legal personality, it would be stillborn. The two alternatives for title I as submitted by the Special Rapporteur would provide a satisfactory solution to the problem.

48. In several parts of his second report, the Special Rapporteur referred to the "regulatory functions" of international organizations, but that term might not be generally acceptable because it had different meanings. In the law of the European Communities, for example, "regulatory functions" were not the same as "directives" and, according to some writers, "regulatory functions" were the general administrative functions performed by the organs of international organizations in carrying out their activities.

49. His own preference was for alternative B, according to which article 1 would deal with the legal personality of international organizations and article 2 would relate to their capacity to conclude treaties. It might, however, have to be specified that capacity to contract, acquire and dispose of movable an immovable property and institute legal proceedings was exercised "in accordance with internal law", since it could be exercised only in the territory of a State and States could not be required to amend their legislation to take account of the existence of international organizations. In Zaire, for example, the rule that land could belong only to the State would have to apply to international organizations as well.

50. Moreover, in order to afford international organizations greater protection, the draft should include a specific provision on the question of the types of donations which an organization would be allowed to receive. The sensitive and thorny problem of the international responsibility of organizations would also have to be discussed, and the Commission would have to choose between the régime of responsibility which applied to States, the régime provided for by the internal law of the State in whose territory an international organization engaged in its activities, or some other régime *sui generis*.

The meeting rose at 1.10 p.m.

1927th MEETING

Wednesday, 17 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (*continued*) (A/CN.4/370,[1] A/CN.4/391 and Add.1,[2] A/CN.4/L.383 and Add.1-3[3]

[Agenda item 9]

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

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

[3] *Ibid.*

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

TITLE I (Legal personality)[4] (*continued*)

1. Mr. USHAKOV said that he was opposed to the two draft articles submitted by the Special Rapporteur, which seemed to him to be not only unnecessary, but even harmful. The provision proposed as paragraph 2 of article 1 in alternative A, and as article 2 in alternative B, was identical with article 6 of the draft articles on the law of treaties between States and international organizations or between international organizations.[5] It should be noted, first of all, that that provision, which stated that "the capacity of an international organization to conclude treaties is governed by the relevant rules of that organization", could not be adopted in that form without the definition of "relevant rules" which also appeared in those draft articles. Secondly, it was obvious that such a provision added nothing to the draft articles in preparation and that the discussions to which it might now give rise could unnecessarily call in question draft articles which the Commission had adopted by consensus and which were to serve as the basis for the United Nations Conference to be held in 1986. Members of the Commission who now expressed different opinions on the provision reproduced from article 6 of that draft would really be speaking on a text that had already been adopted. Those who had not been members of the Commission when article 6 had been drafted could, if they wished, express their opinions on it at the Conference. In any case, it did not seem to be the intention of the Special Rapporteur to make a counterproposal for the draft article already adopted.

2. It was quite wrong to affirm, as the Special Rapporteur did in the opening sentence of draft article 1, that international organizations enjoyed legal personality under the internal law of their member States. Every State was completely free to accept or not to accept, in its internal law, the legal capacity of other States or of international orgaizations. The recognition by a State of the legal capacity of international organizations, or of some of them, could depend on legislation enacted by that State or on commitments to other States to recognize that capacity in its internal law. International law did not impose any such recognition on States.

3. The Special Rapporteur maintained that the need to recognize the legal capacity of international organizations, particularly those carrying on operational or commercial activities, was supported by Article 104 of the Charter of the United Nations, according to which "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". It should be noted that the legal capacity to be granted to the Organization under that provision was limited to what was necessary for the exercise of its functions and the fulfilment of its purposes. In most Member States, the United Nations did not carry on activities which required recognition of its legal capacity by internal law. For instance, the Soviet Union, as a party to the Charter of the United Nations, would be required to recognize the legal capacity of the United Nations only in so far as that might be necessary to the Organization for the exercise of its functions and the fulfilment of its purposes under Soviet civil law, which was not the case in practice. In short, if the Commission focused its debate on the question whether international law required States to recognize the legal capacity of international organizations in their internal law and whether it was regularly necessary to grant that capacity to international organizations, it would be evading the real problems.

4. What remained of the opening sentence of draft article 1 was the provision that international organizations enjoyed legal personality under international law, a statement which was only a truism and did not advance the Commission's work in any way. For if international organizations did not enjoy legal personality under international law and if, consequently, they were not subjects of international law, the topic of relations between States and international organizations would not come under international law at all and the Commission's work on it would be meaningless. To reaffirm that international organizations enjoyed legal personality under international law and were subjects of international law, when that had been expressly stated in draft articles prepared by the Commission which had become international conventions, could only result in sterile discussions, in particular on the question whether all international organizations had that status.

5. Similarly, the Commission should be careful not to discuss questions that were foreign to the topic under study, such as the responsibility of international organizations. It should confine itself to the legal status of international organizations and their officials in the territory of host States. An international organization was not an abstraction; the question of its legal status arose as soon as it carried on activities in the territory of a "host State", within the meaning of that term as defined in article 1, paragraph 1 (15), of the 1975 Vienna Convention on the Representation of States. According to that definition, a "host State" meant the State in whose territory an organization had its seat or an office, or where a meeting of an organ or a conference was held. The discussion should not relate to the legal personality of international organizations under international law, but to the legal status of organizations in the territory of host States, in other words to their rights and obligations. In that regard, a certain number of questions, including the status of various missions and delegations, had already been settled in the draft articles on the first part of the topic, which had become the 1975 Vienna Convention.

6. Lastly, he warned the Commission against any attempt to define the expression "international organization". If it departed from the cautious attitude it had adopted so far, which had led it to define that expression as meaning an intergovernmental organization, it might end by giving a legal definition of a State.

[4] For the text, see 1925th meeting, para. 27.

[5] See 1925th meeting, footnote 17.

7. Mr. LACLETA MUÑOZ congratulated the Special Rapporteur on his second report (A/CN.4/391 and Add.1) and his excellent oral introduction (1925th meeting).

8. The rules which the Commission was now trying to formulate had mostly emerged after the Second World War, as a result of the multiplication of international organizations and the increasing importance of their international functions. As the Special Rapporteur had recommended, the approach to the subject should be prudent and pragmatic. For the time being, therefore, the expression "international organization" shoud not be defined. Although difficult to draft, such a definition would probably be of some value; and it would in any case be necessary to specify which international organizations were covered by the draft articles.

9. That question was clearly linked with the legal personality of international organizations and with the question whether some entities which described themselves as international organizations could really be so defined. Many international conferences set up permanent organs, which were sometimes just secretariats. That might apply to the Preparatory Commission for the International Sea-Bed Authority established by the United Nations Conference on the Law of the Sea.[6] The basic criterion for distinguishing an international organization from other entities should be the existence of an independent will of the organization and of permanent organs competent to express that will.

10. The problem of the legal personality of international organizations and the wider problem of the international organizations which should come within the scope of the draft raised many difficulties. Should the Commission confine its draft to international organizations of a universal character or should it extend the scope of the articles to include regional international organizations? If it limited the category of international organizations to be included, it might be easier to identify some common rules. Another difficult question to settle was that of the inclusion of operational international organizations, in particular those which carried on commercial activities. Moreover, the draft articles should not be confined to the legal status and the privileges and immunities of international organizations and their officials; they should settle questions such as the right of international organizations to active and passive representation, their responsibility and their headquarters agreements.

11. Of the two alternatives proposed by the Special Rapporteur he preferred alternative B, which provided for two articles dealing, respectively, with the legal personality of international organizations under international law and under the internal law of their member States, and with the capacity of international organizations to conclude treaties. Subparagraph (*b*) of article 1 appeared too general, since certain States did not recognize the capacity of foreigners or international organizations to acquire movable and immovable property, whatever their legal personality under international law and their capacity to act in other matters under internal law. Perhaps each of the subparagraphs (*a*), (*b*) and (*c*) of article 1 could be made into a separate article.

12. Lastly, he hoped that the Special Rapporteur would submit a general plan of the draft articles to the Commission.

13. Mr. REUTER observed that Mr. Ushakov had raised the very important question of the possible relationship between the draft articles under consideration and the draft articles on the law of treaties between States and international organizations or between international organizations already adopted by the Commission,[7] which were to be submitted for final consideration to the United Nations Conference to be held in 1986. He (Mr. Reuter) was to participate in that conference as an expert consultant, and it would then be his duty to give a faithful account of the reasons why the Commission had adopted the draft articles in their present form. It could be seen from the discussions in the Sixth Committee of the General Assembly that States interpreted the provisions of that draft in rather different ways. When he came to describe the position of the Commission to the conference he would try to state the views of all members of the Commission. If asked to do so, he would also explain his personal point of view; but he did not think that at the present stage he should discuss such delicate matters as the definition of an international organization or the capacity of international organizations to conclude treaties. His silence as a member of the Commission should not be interpreted as a lack of interest on his part.

14. Mr. FRANCIS congratulated the Special Rapporteur on his excellent report (A/CN.4/391 and Add.1) and his lucid oral introduction (1925th meeting). As he saw it, the topic was not in itself a difficult one; the difficulty lay in the great caution the Special Rapporteur would have to exercise in handling it.

15. So far as international organizations of a universal character were concerned, there was ample documentation to enable the world community to do without a codified set of rules. But because—particularly outside the United Nations system—there was such a great variety of other organizations, it had become urgently necessary to codify the law on the present topic. There was enough common ground in the constituent instruments of the United Nations and the specialized agencies and, despite the diversity of practice in regard to organizations outside the United Nations system, enough common elements to produce a harmonious draft for all purposes. In undertaking that task, the Commission should not shy away from the element of progressive development as part of the means of elaborating an acceptable final product.

16. He supported the excellent suggestion made by Mr. Yankov (1926th meeting) that the Special Rapporteur should submit an outline of the whole draft

[6] See Final Act of the Third United Nations Conference on the Law of the Sea, adopted on 10 December 1982, annex I, resolution I (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), p. 145, document A/CONF.62/121).

[7] See 1925th meeting, footnote 17.

at the Commission's next session, in order to indicate the direction in which it would be working. An outline of that kind would be extremely useful to the Commission, and he felt sure that the Special Rapporteur would not fail to act on Mr. Yankov's constructive suggestion. He also supported the suggestion that provision should be made in the draft articles for the right of representation of international organizations.

17. Noting that the report emphasized the general limits of the topic (A/CN.4/391 and Add.1, para. 2), he expressed the hope that the Special Rapporteur would consider widening those limits. The Special Rapporteur listed (*ibid.*, para. 33) three categories of subjects of international law other than States, introducing them with the words: "These new subjects of international law are". That wording gave the impression that the enumeration was exhaustive, which was not the case. For instance, he had noticed that the Holy See, as distinct from the Vatican City State, did not fall into any of the three categories; it might therefore have been more appropriate to say: "Some of these new subjects of international law are".

18. Despite the forceful and persuasive arguments put forward by Mr. Ushakov, he could agree to discussion of the responsibility of international organizations as part of the topic under study. As a matter or progressive development, there was room to deal with the responsibility of international organizations in relation to States at least, and at some stage in the Commission's work it was bound to find that it could not ignore that issue. Moreover, the responsibility of organizations could not conveniently form the subject of a separate study and was therefore suitable for attachment to the present topic.

19. As to draft article 1 submitted by the Special Rapporteur, he shared the view that the opening statement that "International organizations shall enjoy legal personality ... under the internal law of their member States" would affect non-member States as well. On that point, he approved of the solution proposed by Sir Ian Sinclair (1926th meeting). He also supported the suggestion made by Mr. Balanda (*ibid.*) and Mr. Lacleta Muñoz that the substantive provisions should be made into separate articles.

20. It had been suggested during the discussion that the capacity of international organizations should be qualified by a reference to the internal law of the State concerned. The main problem was that of the ownership of immovable property, from which non-nationals, and hence international organizations, were excluded under the law of certain States, some of which were hosts to international organizations. Without making a formal proposal on that point, he would suggest that the reference to "movable and immovable property", in article 1 (alternative A), paragraph 1 (*b*), might conveniently be replaced by the more general term "property". Clearly, a formulation must be found which would avoid placing any international organization at a disadvantage, but which at the same time would not create difficulties for States whose national law—sometimes embodied in their constitution—debarred aliens from owning immovable property.

21. As to article 1 (alternative A), paragraph 2, which was equivalent to article 2 in alternative B, on the capacity of international organizations to conclude treaties, it was clearly well founded and should have a place in the draft articles. He found that article 1 of alternative A had all the essential elements which an article of that kind should contain.

22. Mr. TOMUSCHAT said that the Special Rapporteur's most valuable report (A/CN.4/391 and Add.1) went directly to the heart of the issues to be considered. He agreed with the Special Rapporteur that the Commission should avoid theoretical disputes, since its task was to provide answers, not to ponder the question whether answers were possible.

23. The first task was to determine the real needs, in other words the shortcomings of the present position under international law. It was not enough to state that the first part of the topic was covered by the 1975 Vienna Convention on the Representation of States and that, logically, the seccond part should now follow. As to the status of missions accredited to international organizations of a universal character—the main subject-matter of the 1975 Vienna Convention—there was a definite gap in the instruments governing their privileges and immunities. The same was not true, or at least not to the same extent, of the privileges and immunities of international organizations themselves.

24. Normally, the status of an international organization in relation to its member States and to the host State was clearly defined in its statutes. Great care was generally taken to set out the rules according to which the organization was to be granted special treatment. The question therefore arose who would be the beneficiaries of the rules to be embodied in the draft articles, and what would be their target area. Possibly there were still some gaps in the relevant constituent instruments. At the universal level, however, he believed that the Commission would almost inevitably create problems of conflict of laws.

25. Perhaps the conclusion to be reached was that the main beneficiaries would be those international organizations whose constituent instruments did not sufficiently cover the complex issues of status, privileges and immunities. The question would then arise at what level those privileges and immunities should be established. A typology could, of course, be worked out on an empirical basis. That task would be facilitated by the excellent study prepared by the Secretariat (A/CN.4/L.383 and Add.1-3). Reference could also be made to the work of Mr. Reuter and to the study by Flory mentioned by Mr. Balanda (1926th meeting). Nevertheless, discrepancies were bound to appear because the definition of privileges and immunities was a highly political matter. What was granted to one organization might be denied to another. International organizations were not all equally attractive to host States, especially in financial terms. For all those reasons, the only viable and useful course was to aim only at a minimum standard.

26. Referring to draft article 1, he noted, with regard to the international aspect of legal personality, the Special Rapporteur's suggestion to depart from the cautious language of the ICJ (A/CN.4/391 and Add.1, paras. 69-70). The Special Rapporteur believed that, in the present state of international law, legal personality was enjoyed by all international organizations. That proposition, however, might not be consistent with the basic rule of the law of treaties that no obligation could be imposed on third States. That was why the majority of present-day writers held that the legal personality of international organizations *vis-à-vis* non-member States depended on recognition. He was not sure that the formulation of a general principle on the objective legal personality of international organizations would not place a burden upon third States, and therefore supported the suggestion that, in the opening sentence of article 1, the words "International organizations shall enjoy ..." should be amended to read "International organizations may enjoy ...".

27. As far as private-law capacity was concerned, it was not perhaps correct to speak of legal personality "under the internal law" of member States. The view could, of course, be held that the legal personality of an international organization was established by virtue of the domestic law of each and every one of its member States. A better approach, however, would be to establish such legal personality under the draft articles themselves, laying down, at the same time, a minimum content for that personality and imposing on States the obligation to recognize an organization's specific capacity to act as a legal person within the framework of the national legal order. He therefore suggested that the words "under the internal law" should be replaced by the words "for the purposes of the internal law". That formulation would accord with the treaty provisions of EEC, which distinguished between international personality, on the one hand, and private-law capacity, on the other. A similar distinction should be made in the draft article under discussion.

28. In accordance with the Special Rapporteur's proposed alternative B, title I should comprise two articles. Article 2 would specify the content of international legal capacity, *inter alia* the capacity to conclude treaties. As to the "relevant rules" of the organization, they constituted a general limitation which applied to all activities; it was not advisable to specify that limitation only in connection with treaty-making power, since it would apply also to other acts, including unilateral acts.

29. As he saw it, the draft articles conferred legal personality on international organizations, but general recognition of that personality was invariably dependent on the internal rules and practices of the organization concerned. The draft articles could not purport to create a norm whereby an international organization could escape the limitations which its founders had placed upon it.

30. In conclusion, he supported the request by Mr. Yankov (1926th meeting) that the Special Rapporteur should submit, at the next session, a provisional outline of the entire set of draft articles.

31. Mr. THIAM congratulated the Special Rapporteur on his second report (A/CN.4/391 and Add.1) and encouraged him to proceed with the prudent and moderate approach he had chosen to adopt in his work on an extremely complex and difficult topic.

32. The Commission had already debated at length the problem of international organizations when it had considered the question of treaties concluded between States and international organizations or between international organizations, and it had always come up against the same difficulties. Africans were very much alive to that problem, for international organizations were a privileged instrument of co-operation in a continent where co-operation was imperative, because of underdevelopment and the small size of certain territories. There were many difficulties, but he would mention only a few of them.

33. The first difficulty was the diversity of international organizations. The Special Rapporteur would certainly have to indicate the limits he intended to set to his topic, since the complexity of the problems varied according to the nature of the organization, its object and the extent of its activities. The second difficulty related to the fact that the subject-matter was alive and changing, so that it was difficult to know what could already be codified and what should be left to develop further. There was a third difficulty which in fact reflected the title of the topic itself: "Relations between States and international organizations". Those relations had always been uneasy, being marked by reservations, suspicion and distrust, while at the same time being rendered necessary by international life itself and developments in it. Thus States were inclined to regard international organizations as a necessary evil: they must be accepted and kept under control; they must be grudgingly granted the powers and competence necessary for their functions. Thus the Commission would have to proceed neither too boldly nor too timidly, with much realism and a little idealism.

34. As to article 1 (alternative A) submitted by the Special Rapporteur, he noted that paragraph 1, which dealt with the legal personality of international organizations, had two aspects: international and internal. It was difficult to see how those two aspects could be distinguished, except in theory. The international aspect was simply what was stated in that paragraph. So far as internal law was concerned, he thought it was nevertheless extremely difficult not to grant an international organization an internal capacity even if it were restricted: for an international organization was supposed to act, to fulfil its obligations and to have the means to carry out its mission.

35. On the other hand, he understood that in some countries, as Mr. Ushakov had observed, internal law might be in conflict with the activities required of an international organization. For example, with regard to the capacity to contract and to acquire and dispose of movable and immovable property, there was no doubt that, if the legal system of a country did not permit a foreigner to own property or to enter into private-law contracts, a problem arose and it would be necessary to see how it had been settled. He was

uncertain about capacity to institute legal proceedings, since there were cases in which an international organization was required to appear in court, for instance in the event of a traffic accident involving one of its vehicles. If an international organization could not even apply for reparation for damage sustained, what could it do?

36. He wondered how an international organization could be deprived of all means of action under internal law once it had been granted the right to exist and to have a headquarters. In that respect he made no distinction between the headquarters of the general secretariat of an international organization and its branch offices. The problem should be studied further, but it was difficult to see how it could be stated right away that an international organization could not institute legal proceedings in a country if it had interests to protect there. He subscribed to the underlying principle of the paragraph, even if it would have to be restricted. In any case there was a necessary minimum which the Commission should try to preserve.

37. Paragraph 2 of article 1, or article 2 in alternative B, reproduced a provision which the Commission had already adopted. Unless that provision was called into question at another conference, the Commission need hardly discuss what was its own child.

38. The CHAIRMAN, speaking as a member of the Commission, said that the Special Rapporteur was to be commended for his excellent report (A/CN.4/391 and Add.1).

39. Although the Commission had completed its work on other aspects of the topic, it still had to deal with the question of the privileges and immunities of international organizations, on which progress was long overdue. Before taking up the substantive aspects of those privileges and immunities, it was necessary to consider the technical questions of legal personality and capacity, and to determine the precise scope of the topic. So far as the latter was concerned, it was important to bear in mind the wide variety of international organizations, which ranged from organizations of a universal character and regional organizations to organizations with restricted membership and consultative bodies having no established institutions.

40. One question which added to the complexity of the subject was whether the privileges and immunities of an organization were affected by its object and purpose, which might be political, cultural, economic, scientific or operational. The Special Rapporteur had therefore been wise to suggest that, for the time being, the scope of the topic should be restricted to international organizations of a universal character (*ibid.*, para. 27), as was the 1975 Vienna Convention on the Representation of States. If that suggestion were accepted, there would be no lack of material or practice from which certain broad principles concerning privileges and immunities could be derived.

41. As to the usefulness of the topic, although it was admittedly already partly covered by existing conventions, the draft articles would not be dealing with any specific organization, but would be laying down general principles in regard to the privileges and immunities of international organizations of a universal character: regional international organizations and other new bodies could consult those general principles for guidance. Given the increasing interdependence of the nations of the world, the pace of economic development and the inevitable increase in the number of international organizations, it was important to have a standard by which to be guided and he, for one, had no doubt about the usefulness of the study; nor did he think it was beyond the capacity of the Commission to handle it.

42. He had been impressed by the source material referred to in the report (*ibid.*, para. 54), and noted that the Special Rapporteur had also relied on replies to the questionnaires circulated by the Secretariat and on the study prepared in 1967 and updated in 1985 (A/CN.4/L.383 and Add.1-3). So far as institutions of a universal character were concerned, he drew attention to the 1982 United Nations Convention on the Law of the Sea,[8] in particular to Annex IX, articles 4 and 5. The history of that Convention was highly relevant to the topic under consideration, since the questions of privileges and immunities and legal capacity had been given detailed consideration at the Third United Nations Conference on the Law of the Sea, chiefly in connection with the question whether international organizations could become parties to the Convention. Annex IX had been drafted to deal specifically with the competence of international organizations to become parties to the Convention. Furthermore, an international organization of a universal character, the International Sea-Bed Authority, had been set up, which in turn had an organ called the Enterprise, whose functions were primarily economic. The privileges and immunities of the Authority and the Enterprise were referred to in articles 176 to 183 of the Convention and also in Annex IV, article 13.

43. There was no need, in his view, to be worried about the substantive scope of the draft articles, which should deal mainly with matters of general interest that concerned all international organizations. The questions of legal capacity to conclude treaties, of responsibility and of succession, for example, should be dealt with only in so far as they had a direct bearing on the privileges and immunities of international organizations, and there again it might be useful to refer to the United Nations Convention on the Law of the Sea.

44. The Special Rapporteur had made a good start, but it would be helpful if, as had been suggested, he could prepare an outline of the draft to show what it would cover.

45. The two alternatives proposed by the Special Rapporteur for title I of the draft articles were both acceptable, but for the sake of clarity he would prefer alternative B, which dealt with the legal personality of an international organization and with its capacity to conclude treaties in two separate articles. The proposed article 2 of alternative B simply recognized the capacity of an international organization to

[8] See 1926th meeting, footnote 8.

conclude treaties, without which there could be no headquarters agreement: the language used was identical with that of article 6 of the draft articles on the law of treaties between States and international organization or between international organizations.[9] He had no objection on that score, but considered that any modification of the article should await the outcome of the United Nations Conference on that topic to be held in 1986.

46. In regard to article 1 of alternative B, the main issues were the legal personality and capacity of international organizations, as opposed to the sources of such personality and capacity, and the question whether such sources should be specified in the draft. The international legal personality of an international organization, which was deemed to be separate from that of its member States, was generally provided for by Governments in the statutes of the organization or in a treaty. The legal capacity of an international organization, on the other hand, depended on its object and purpose. In his view, therefore, the point would be covered if, in line with the wording of Article 104 of the Charter of the United Nations, article 1 was reworded to read: "An international organization shall have international legal personality and shall enjoy such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes, and in particular the capacity to: ...". Subparagraph (*c*) could, if necessary, be amended to read "be a party to legal proceedings". It would not then be necessary to mention international law and internal law, since international law would be covered by the term "international legal personality" and the effect of internal law would depend on the extent to which it was relevant. It might, for instance, have indirect relevance as a means of regulating legal capacity, the source of which was a treaty or the constituent instrument of the international organization concerned. In such a case, member States would be under an obligation to apply those instruments and might adopt implementing legislation for the purpose. Alternatively, provision might be made for such rights to be exercised in conformity with local law, which would become relevant but would not be a direct source of the capacity or personality.

The meeting rose at 12.45 p.m.

[9] See 1925th meeting, footnote 17.

1928th MEETING

Wednesday, 17 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Illueca, Mr. Jacovides, 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. Yankov.

International Law Seminar

1. The CHAIRMAN invited Mr. Giblain, Director of the International Law Seminar, to address the Commission.

2. Mr. GIBLAIN (Director of the International Law Seminar) thanked the Chairman for giving him an opportunity to address the Commission on the International Law Seminar, which had held its twenty-first session at Geneva from 3 to 21 June 1985. During those three weeks, 24 participants, chosen by a selection committee from among some 60 candidates, had followed the deliberations of the Commission and attended a series of lectures given by members, which had been much appreciated.

3. A report on the activities of the twenty-first session of the Seminar had been deposited with the secretariat for the Commission's consideration, so he would confine himself to adding a few particulars. Of the 24 participants in the twenty-first session of the Seminar, 17 participants from developing countries far distant from Geneva had been awarded fellowships to cover their travel and subsistence expenses. Those fellowships had been financed from voluntary contributions by States, but since 1980 the amount of those contributions had been decreasing, as had also the number of contributing States. Contributions had fallen from $US 30,000 in 1981 to $10,000 in 1985. At the beginning of 1985, before the meeting of the selection committee, the Seminar had had in hand a total amount of $46,000, of which $35,000 had been allocated to the 1985 fellowships, so that only $11,000 remained for the 1986 session. Assuming that the contributions for 1986 would not fall below the level for 1985, the Seminar would have $21,000 for fellowships, whereas in 1985 it had spent $35,000 for 17 candidates. Consequently, it would no longer be able to award fellowships to candidate from developing countries distant from Geneva and the balanced representation of different nationalities would be impaired.

4. In order to enable the Seminar to continue its activities and to achieve the purpose for which it had been instituted, while maintaining a balance among the participating nationalities, he believed that a special appeal should be made for contributions from a larger number of States by 15 March 1986, the date of the next meeting of the selection committee.

5. The CHAIRMAN said that the matter raised by the Director of the International Law Seminar was naturally of concern to the Commission, one of whose regular activities was to assist the Seminar. Members would doubtless wish to reflect on the information provided by Mr. Giblain, so that ways and means of providing for the Seminar in future years might be considered when the Commission came to examine the relevant section of its draft report on the current session.

6. Sir Ian SINCLAIR said he agreed that discussion of the matter should be deferred until the consideration of the draft report, but he wished to put on record his alarm at the situation reported by Mr. Giblain, particularly in regard to candidates from developing countries. It would be helpful if a paragraph on the Seminar's financial position were

included in the report, giving warning that, unless more contributions were forthcoming, it might not be possible to hold a Seminar of the same quality in 1986.

The law of the non-navigational uses of international watercourses (A/CN.4/393,[1] A/CN.4/L.382, sect. F)

Agenda item 7

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

7. The CHAIRMAN invited the Special Rapporteur, Mr. McCaffrey, to introduce his preliminary report (A/CN.4/393) on the topic.

8. Mr. McCAFFREY (Special Rapporteur) said that the report he was submitting to the Commission was a preliminary one in that it was merely a very modest effort to prepare the ground for future work by indicating the current status of the Commission's work on the topic and suggesting lines of further action. The report contained no substantive proposals and only made recommendations concerning the point at which work on the topic should be resumed. In another sense, however, although it was the first by the present Special Rapporteur, the report was by no means preliminary: it could not be said to offer the first, or even an early opportunity for the Commission to consider the topic. That being so, he would confine himself to outlining the historical and other reasons for his recommendations on how the Commission might proceed, summarizing those recommendations and offering some suggestions concerning the points which any discussion of the report might usefully address.

9. In its report on its thirty-first session,[2] the Commission had recognized that water was as vital for life as air, that it was a universal substance which moved over, through and under national boundaries, and that it was subject to depletion and degradation. It had noted that demand for water would continue to grow with the upsurge in world population, the spread of industrialization and urbanization, the expansion of agriculture and increasing needs for power, and had generally recognized that problems of fresh water were among the most serious confronting mankind. It was therefore imperative that the international community should progressively develop and codify the appropriate principles of international law, lay down procedures for its application and establish institutions for its continuing development. In attempting to carry out that task, the Commission had always borne in mind the interplay between two fundamental principles of international law: on the one hand, the sovereignty and independence of States, and on the other, the necessity for co-operation among States resulting from their interdependence.

10. In its resolution 2669 (XXV) of 8 December 1970, the General Assembly had recommended that the Commission should take up the study of the law of the non-navigational uses of international watercourses. The Commission had included the topic in its general programme of work in 1971 and placed it on its active agenda in 1974. The Commission's work thus far could be divided into two stages, which were, however, not completely separate from one another. In the first stage, starting with the topic's inclusion in the Commission's general programme of work in 1971 and ending with the consideration in 1979 of the first report of the second Special Rapporteur, Mr. Schwebel, the Commission had carefully considered the best approach to adopt, thus laying the foundations for the second stage, which had begun in 1980 and continued up to the present. During that second stage, the Commission had decided on its general approach and had provisionally adopted the first six articles of the draft (see A/CN.4/393, paras. 2-9).

11. The watershed year appeared to have been 1979, when comments on Mr. Schwebel's first report in the Commission and in the Sixth Committee of the General Assembly had led him to submit a set of draft articles which had formed the basis for the six articles provisionally adopted in 1980. Comments on the first report had revealed that the "framework agreement" approach enjoyed broad support. Under that approach, States would be free and even encouraged to conclude specific agreements tailored to the special characteristics and needs of particular international watercourses. The predominant view in the Commission and in the Sixth Committee had been that the draft should lay down the general principles and rules governing the non-navigational uses of international watercourses in the absence of agreement between the States concerned, and provide guidelines for the negotiation of future specific agreements. At the end of the debate at its thirty-second session, in 1980, the Commission had decided that it should first proceed to the codification and progressive development of general principles and rules, rather than of rules pertaining to specific uses of watercourses. A set of draft articles dealing with some of the general principles and rules governing the subject had accordingly been provisionally adopted at that session (*ibid.*, para. 5).

12. In its report on its thirty-second session,[3] the Commission had drawn attention to the fact that, from the outset of its work on the topic, it had recognized the diversity of international watercourses and the fact that their physical characteristics and the human needs they served were subject to geographical and social variations similar to those found in other connections throughout the world. It had also recognized, however, that certain common watercourse characteristics did exist and that it was possible to identify certain principles of international law already existing and applicable to international watercourses in general.

13. The evolution of the Commission's work on the topic had not, of course, stopped in 1980. At its thirty-fifth and thirty-sixth sessions, in 1983 and 1984, the Commission had considered a tentative but complete set of draft articles submitted by the third

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

[2] *Yearbook ... 1979*, vol. II (Part Two), p. 163, paras. 111-112.

[3] *Yearbook ... 1980*, vol. II (Part Two), p. 109, para. 95.

Special Rapporteur, Mr. Evensen, as a basis for discussion (*ibid.*, para. 10). The structure of the draft and the articles it contained had been generally based on the approach evolved under the guidance of the first and second special rapporteurs.

14. Thus the Commission had already devoted much time and effort to the determination of the most appropriate way of approaching the topic and to the elaboration of draft articles and commentaries. With the valuable guidance of the Sixth Committee and the assistance of no less than three previous special rapporteurs, it had taken certain decisions concerning both the methodology to be followed in formulating draft articles and the substantive approach it would adopt towards the codification and progressive development of the law on the topic.

15. Those considerations had led him, as the present Special Rapporteur, to believe that the Commission's future work on the topic should build as much as possible on such progress and agreement as had already been achieved, not only because of the time and effort already invested and of the concrete results obtained, but also because of the concern of Governments that the work should continue to move forward expeditiously. That concern had been reflected in the discussion in the Sixth Committee, at the thirty-ninth session of the General Assembly, on the Commission's report on its thirty-sixth session (see A/CN.4/L.382, para. 333), and in the statement made by the Secretary-General of the Asian-African Legal Consultative Committee as an observer at the Commission's 1903rd meeting.

16. The proposals advanced in the light of all those considerations were contained in paragraphs 50 and 51 of the preliminary report. It was proposed, first, that the articles referred to the Drafting Committee in 1984, namely articles 1 to 9 of the revised draft submitted by the previous Special Rapporteur, Mr. Evensen (A/CN.4/393, paras. 15-30), should be taken up by the Committee at the thirty-eighth session and should not form the subject of another general debate in the Commission. In addition, he would present in his second report a concise statement of his views on the major issues raised by those articles, so that members of the Commission might have an opportunity of studying those views and commenting on them. The main object of that proposal was, however, to avoid consuming too much of another precious resource—the Commission's time—in another discussion of draft articles 1 to 9 in plenary meeting.

17. The second proposal was based on the fact that the outline for a convention, if not the draft articles themselves, submitted by the previous Special Rapporteur had seemed broadly acceptable as a general basis for further work (see A/CN.4/393, para. 10). The gist of the proposal was that the Special Rapporteur, for the time being at least, should follow the general organizational structure provided by the outline in elaborating further draft articles. Since the nine draft articles referred to the Drafting Committee in 1984 comprised the first two chapters of the outline, the Special Rapporteur intended to take up, in his second report, at least some of the issues dealt with in chapter III. A similar course of action had been suggested in the Sixth Committee (see A/CN.4/L.382, para. 333).

18. Having had little opportunity yet to reflect upon the various important issues involved, he would not venture to make any specific substantive proposals at the present stage. Any reactions which members of the Commission might have to the general procedural proposals put forward in the preliminary report would be welcome; but while not wishing in any way to prejudice the right of members to express their views, he would prefer any substantive observations to be deferred, if possible, until the consideration of his second report at the Commission's thirty-eighth session. The reason for that preference related both to the shortage of time available for discussion at the present session and to the very limited time he had had to study the topic.

19. The CHAIRMAN thanked the Special Rapporteur for his introduction of his preliminary report (A/CN.4/393) and for his proposals, clearly set out in paragraphs 48 to 52 of the report, as to how the Commission's work on the topic might proceed at the current and next sessions. He invited members to comment on those proposals, bearing in mind the Special Rapporteur's request that substantive issues should be left aside until the next session.

20. Mr. CALERO RODRIGUES expressed his appreciation to the Special Rapporteur for an excellent report, presented in so short a time. He was confident that the Special Rapporteur would be equal to the important task assigned to him, building, as indicated in the report itself, as much as possible on progress already achieved and aiming at further concrete progress in the form of the provisional adoption of draft articles.

21. Mr. MALEK endorsed the appreciation expressed by Mr. Calero Rodrigues.

22. Mr. DÍAZ GONZÁLEZ associated himself with the congratulations addressed to the Special Rapporteur. He noted that, in approving the preliminary report, the Commission was already anticipating the discussion which would be required at the thirty-eighth session for the approval of the substantive report. He therefore reserved the right to express his doubts on certain passages of the preliminary report concerning, in particular, the decisions taken at the thirty-sixth session.

23. Mr. YANKOV, expressing his appreciation to the Special Rapporteur, said that he generally endorsed the considerations and proposals contained in paragraphs 49 and 50 of the preliminary report. Nevertheless, while agreeing that it was desirable to avoid a new general debate on articles already referred to the Drafting Committee, he did not think that comments on the general principles and methodology involved could be ruled out. As to the proposals contained in paragraph 51 of the report, he fully accepted them because the general outline for a convention proposed by the previous Special Rapporteur provided an excellent basis for further work.

24. Chief AKINJIDE associated himself with the remarks made by Mr. Calero Rodrigues and con-

gratulated the Special Rapporteur on the mastery of the topic and its history displayed in his preliminary report. He sincerely hoped that, in the arduous task before him, the Special Rapporteur would never lose sight of the fact that the non-use of international watercourses was a major source of famine in many developing countries.

25. Mr. FRANCIS, Mr. RIPHAGEN, Sir Ian SINCLAIR and Mr. SUCHARITKUL joined previous speakers in congratulating the Special Rapporteur on his excellent preliminary report and wishing him success in his future efforts.

26. The CHAIRMAN said that the sentiments placed on record by Mr. Calero Rodrigues were clearly shared by the Commission as a whole. The difficult and sensitive nature of the topic made the new Special Rapporteur's task particularly important, and the views expressed by members of the Commission reflected their confidence that, under his competent and fair-minded guidance, the work would be brought to an early and successful conclusion.

27. Mr. McCAFFREY (Special Rapporteur) thanked the previous speakers for their expressions of support, which he took to represent approval of the proposals set out in the concluding paragraphs of his preliminary report.

28. The CHAIRMAN, summing up the position with regard to the Commission's programme of work on the topic, said that, in the interests of maintaining an element of continuity with the work done up to 1984, it was suggested that at the thirty-eighth session, in 1986, the Drafting Committee should consider articles 1 to 9, which had been referred to it at the thirty-sixth session. The Special Rapporteur would also need time to consider those articles and, if he had any comments to make on them, would do so in the report which he would submit in 1986. Members of the Commission would then also be free to offer their own comments on any new views put forward by the Special Rapporteur concerning articles 1 to 9, but there should be no reopening of a general debate on those articles.

29. As to the Special Rapporteur's further work, it was suggested that he should take up first the study of chapter III of the outline for a convention. Members of the Commission should, of course, feel free to express their views on any concrete proposals included in the Special Rapporteur's second report. It should be noted that one member of the Commission had given notice that, at the next session, he proposed to comment on the substance of the preliminary report.

30. Mr. DÍAZ GONZÁLEZ said that, although it had been decided not to discuss the substance of the draft articles, that did not mean that they had been adopted. If the Special Rapporteur could propose amendments to the articles, members of the Commission should also be able to do so.

31. At the thirty-sixth session, the discussions on the topic had been very long, and it had been almost out of weariness that the Commission had referred the draft articles to the Drafting Committee, on the understanding that it would resume consideration of them at a later stage. Mr. Evensen, however, had not entirely shared the views of his predecessor, Mr. Schwebel, and had slightly modified the terms used. Thus the expression "international watercourse system" had been eliminated at a stroke and new concepts had been introduced, such as "equitable sharing", which called for caution. He therefore considered that the discussion was open for the next session, when each member would be able to propose any amendments he might consider useful, since, as he felt bound to stress once again, articles 1 to 9 had not been adopted.

32. The CHAIRMAN said he had not meant to suggest that no substantive discussion should be held in 1986 on the draft articles before the Drafting Committee; in that connection, he drew attention to the last sentence of paragraph 50 of the preliminary report. Neither had he referred to articles 1 to 9 as having been adopted by the Commission. In accordance with its usual practice, the Commission, having discussed articles 1 to 9, had referred them to the Drafting Committee for further consideration in the light of the discussion. It went without saying that, when the Drafting Committee reported back to the Commission, all views or reservations expressed by members would be taken into consideration before any decision was taken. As to the preliminary report now before the Commission, no member should feel prevented from commenting on its substance, either at the current session or at the next session.

33. Mr. KOROMA congratulated the Special Rapporteur on his report. He also endorsed the views expressed by Mr. Díaz González. Any statement of views made by the Special Rapporteur on draft articles 1 to 9 in his second report would invite discussion in the Commission and would presumably be taken into account by the Drafting Committee. Accordingly, he could see no contradiction between the position adopted by Mr. Díaz González and the procedure proposed by the Special Rapporteur.

34. Sir Ian SINCLAIR agreed with Mr. Koroma. He understood from the preliminary report that the Special Rapporteur was proposing to present, in his second report, a brief statement of his views on some of the conceptual problems already encountered by the Commission in its consideration of draft articles 1 to 9, and that any member of the Commission would then have ample opportunity to make his own comments.

35. Mr. ROUKOUNAS observed that a rather large volume of work had been entrusted to the Drafting Committee, for it included the working hypothesis adopted in 1980, articles 1 to 5 and X provisionally adopted in 1980[4] and draft articles 1 to 9 submitted by the previous Special Rapporteur (see A/CN.4/393, paras. 15-30). That was obviously a heavy load.

36. Faced with such a complex situation, the new Special Rapporteur should have an opportunity of expressing his views on his topic as a whole. He should define his position on the theoretical plane,

[4] See *Yearbook ... 1984*, vol. II (Part Two), pp. 84-85, para. 270.

for example, as certain members of the Commission had already said, and clarify some of the major issues before taking up the study of chapter III, on co-operation and management in regard to international watercourses. Perhaps the Special Rapporteur could concentrate his attention on the points which had raised difficulties in the Commission or in the Sixth Committee of the General Assembly. In any case, he should be encouraged to express his views freely on the points which he considered to be of decisive importance for the continuation of his work.

37. Mr. REUTER said that he agreed with Mr. Díaz González: the positions adopted by the previous Special Rapporteur on a number of issues should not be taken as final. The new Special Rapporteur had inherited a delicate situation, inasmuch as the draft articles had been referred to the Drafting Committee precisely because they were not ripe, so to speak. The Drafting Committee would necessarily have to hold a preliminary discussion to regularize the position.

38. For the continuation of the work on the topic, it would be helpful if the Special Rapporteur could submit his second report as early as possible, so that the Drafting Committee could examine it at the beginning of the thirty-eighth session and decide how to act on it.

39. Mr. McCAFFREY (Special Rapporteur) expressed his appreciation to those members of the Commission, in particular Mr. Díaz González, who had endeavoured to clarify the situation regarding the Commission's future consideration of the topic.

40. The proposals contained in his preliminary report represented an effort not only to observe the procedural customs of the Commission, but also to ensure the greatest possible degree of continuity in its work on the topic. Naturally, with a new Special Rapporteur, complete continuity was not possible. Consequently, he had thought that it would be appropriate for him to express his views on the main issues raised by draft articles 1 to 9 in his second report, and to give members of the Commission an opportunity to comment on them at the thirty-eighth session. That procedure would ensure full discussion of the issues involved, while at the same time enabling the Commission to maintain its rate of progress on the topic, which was an important and urgent one.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to the procedure proposed by the Special Rapporteur.

It was so agreed.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/394,[5] A/CN.4/L.382, sect. E)

[Agenda item 8]

PRELIMINARY REPORT OF THE SPECIAL RAPPORTEUR

42. Mr. CALERO RODRIGUES said that, as the Special Rapporteur, Mr. Barboza, was unable to be present to introduce his preliminary report (A/CN.4/394), the Commission would have to decide on the procedure it intended to adopt in dealing with the topic. Perhaps the Commission might take note of the report, even though it had not been introduced, so that the Special Rapporteur would know whether his proposals had been accepted or not.

43. The CHAIRMAN said that, while there were advantages in taking note of the report, as suggested by Mr. Calero Rodrigues, difficulties might arise if, during its consideration, concrete proposals were made requiring a response from the Special Rapporteur.

44. Mr. McCAFFREY said that he agreed to some extent with the suggestion made by Mr. Calero Rodrigues. He recalled, however, that in 1983 the previous Special Rapporteur, Mr. Quentin-Baxter, had suggested that his fourth report, submitted at the Commission's thirty-fifth session, should be considered at the following session, in conjunction with his fifth report.[6] Perhaps a similar procedure could be adopted in the present case. The Commission could take note of the report and express its appreciation to the Special Rapporteur for having complied with its recommendations, without itself adopting any further specific recommendation.

45. Sir Ian SINCLAIR said that he would be reluctant to examine the preliminary report submitted by the Special Rapporteur in his absence, particularly as it might give rise to substantive discussions. The wisest course might be for the Commission to indicate in its report to the General Assembly that it had received and taken note of the Special Rapporteur's preliminary report, but had been unable, for various reasons, to consider it further. The Special Rapporteur could then be invited to submit a further report to the Commission at its thirty-eighth session.

46. Mr. SUCHARITKUL said that he agreed with the suggestions made by Sir Ian Sinclair and Mr. McCaffrey. By taking note of the preliminary report, the Commission would not be preventing the Special Rapporteur from preparing a further report.

47. Mr. REUTER agreed that it was impossible to discuss a report in the absence of its author, especially as, in that particular case, the document went rather deeply into substance, unlike the report submitted by Mr. McCaffrey, for example, which was concerned only with method. Nevertheless, the report had been circulated and the Commission had received it. Perhaps the Commission could simply say in its own report that it had not been able to discuss the report "owing to the circumstances", without giving any further details. The "circumstances" would include a very real lack of time, since the report had been circulated late.

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

[6] *Yearbook ... 1983*, vol. II (Part One), p. 223, document A/CN.4/373, para. 75.

48. Mr. MAHIOU said he agreed with Mr. Calero Rodrigues that the Special Rapporteur should be encouraged to go ahead with his work. The preliminary report which he had submitted was much more than a note on methodology: it represented a reorientation and a closer scrutiny of the problems of the topic. The Special Rapporteur should be invited to specify his intentions and to clarify the subjects for reflection which he proposed to the Commission.

49. Mr. RIPHAGEN said he agreed with Mr. Reuter that the report went deeply into the substance of the topic. Since the Commission did not have time to discuss substantive issues, but could not endorse the report without such discussion, it should simply inform the Special Rapporteur that it looked forward to receiving his second report.

The meeting rose at 5.50 p.m.

1929th MEETING

Thursday, 18 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Relations between States and international organizations (second part of the topic) (*concluded*)* (A/CN.4/370,[1] A/CN.4/391 and Add.1,[2] A/CN.4/L.383 and Add.1-3[3])

[Agenda item 9]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

TITLE I (Legal personality)[4] (*concluded*)

1. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said that, before summing up the discussion, he wished to thank the members of the Commission for their indulgence towards him, their useful critical comments on his second report (A/CN.4/391 and Add.1) and their suggestions of sources to consult, in particular the work of the Third United Nations Conference on the Law of the Sea and the 1982 United Nations Convention on the Law of the Sea. He also thanked the secretariat for its assistance.

2. The comments made confirmed that the topic was not an easy one. To extract from particular rules a set of general rules applicable to all international organizations was obviously very difficult. Not only was there a diversity of international organizations, but each of them had its speciality, its manner of operating, its competence, its own character and its own law. It was from that multiplicity of factors that a minimum of common characteristics had to be derived in order to produce a well-articulated framework for the privileges and immunities of international organizations, which were undoubtedly at the very heart of the topic. It would, however, be difficult, if not impossible, to elaborate general rules on the privileges and immunities of international organizations without defining their personality, from which all else necessarily followed.

3. He noted that the viewpoint from which he had begun his study and from which he proposed to continue it had not provoked any strong opposition in the Commission.

4. As to the specific comments made during the debate, he noted that Mr. Balanda (1926th meeting) had stressed the need to employ precise wording and the danger of using certain terms. Though not believing himself to be infallible, he must point out that in the original Spanish text of his second report he had not used the word *poderes,* the equivalent of the word *pouvoirs* which appeared in the third sentence of paragraph 6 of the French text. The original Spanish text had referred to *funciones.* Besides, paragraph 6, which listed some of the questions raised at the Commission's thirtieth session, was merely descriptive.

5. It had been said that it was necessary to produce a schematic outline and that it would have been preferable to elaborate a complete set of draft articles. But he had chosen to proceed little by little for the same reasons as had led the Commission, on several occasions, to prepare draft articles with prudence, after mature consideration. True, the previous Special Rapporteur for the topic of the law of the non-navigational uses of international watercourses had been able to submit a number of draft articles at once for consideration by the Commission—which, however, had been able to discuss only a few of them at one session—but that was because that topic had been under consideration for about 10 years. In the present case, he had not considered it necessary to submit an outline, because the Commission had approved the outline of the scope of privileges and immunities submitted by the previous Special Rapporteur in his preliminary report[5] and he had thought that the work would continue on that basis. However, if the Commission thought that a new outline would be useful for the continuation of the work, he would comply with its wishes.

6. The question of responsibility had also been raised during the discussion. Mr. Ushakov (1927th meeting) had said that the Special Rapporteur was not required to deal with responsibility, but he had in fact never mentioned it, either in his report or in his

* Resumed from the 1927th meeting.

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

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

[3] *Ibid.*

[4] For the text, see 1925th meeting, para. 27.

[5] *Yearbook ... 1977,* vol. II (Part One), pp. 153-154, document A/CN.4/304, paras. 70-74.

oral introduction. However, Mr. Reuter (1925th meeting) had referred to responsibility in general terms and Mr. Yankov (1926th meeting) had put a question about it. For his part, he had no objection to a study on responsibility being undertaken in the present context; he even thought that such a study should perhaps be made. Mr. Balanda had wondered whether responsibility in the present context came within the general framework of responsibility, or whether it was a special form of responsibility pertaining to international organizations. His own view was that it formed part of the topic of State responsibility. That being said, he would of course take account of all comments made on the question.

7. Having denied the personality and capacity of international organizations, Mr. Ushakov had proceeded to demonstrate that draft article 1 only stated a truism, namely that international organizations were subjects of international law. It might perhaps be a truism, but even truisms were relative; and, not long before, the socialist countries, in particular the Soviet Union, had not accepted that truism. Today, however, since the studies by Mr. Tunkin and Mr. Morozov, they recognized that international organizations had legal personality. He quite agreed with Mr. Ushakov that every international organization had its own legal personality, but he found it impossible to say that an international organization had legal personality but no legal capacity. Legal capacity derived from legal personality.

8. He did not intend to make a study of the commercial activities of international organizations, but would point out that an international organization—whether its capacity to contract was recognized or not—was compelled by force of circumstances to carry out purchase and sale transactions in various countries, for which it must necessarily have legal capacity to contract. He did not propose to devote himself to formulating rules governing only the commercial activities of international organizations; but the question whether or not international organizations had legal capacity to contract would certainly have to be settled.

9. In regard to the question raised by Sir Ian Sinclair (1926th meeting) concerning the capacity of certain economic, financial or commercial organizations to negotiate loans, for example, in non-member States, he drew attention to the wealth of case-law on the subject. The supplementary study prepared by the Secretariat (A/CN.4/L.383 and Add.1-3) showed that the United Nations, the specialized agencies and IAEA could contract loans. It might be preferable to deal with that question not at the present stage, but when considering the privileges and immunities of international organizations, because it would then be necessary to determine the law which should govern such transactions and to deal with the question of jurisdiction in the event of a dispute. In any case, the transactions of international organizations generally came under internal law unless the contracting parties decided otherwise.

10. As to the capacity of international organizations to conclude treaties, dealt with in alternative A, article 1, paragraph 2, and in alternative B, article 2, he wished to assure Mr. Ushakov that he had no intention of trying to draft a counter-proposal to the draft articles on the law of treaties between States and international organizations or between international organizations;[6] he would not presume to measure himself with Mr. Reuter, who had been entrusted with the study of that topic, and he had not lost his sense of proportion. He had merely transposed the content of an article already adopted by the Commission, in the hope that the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations, to be held in February/March 1986, would provide a clear idea of the intentions of States.

11. He fully agreed with the members of the Commission that the privileges and immunities of international organizations were at the very heart of the topic, and intended to devote his next reports to that matter.

12. As to the comments made concerning the form of the two alternatives of title I submitted, he had no firm position and would leave it to the Commission itself and the Drafting Committee to decide. It was customary for the Commission to refer draft articles which it had considered to the Drafting Committee, but if it decided otherwise he would have no objection.

13. The CHAIRMAN thanked the Special Rapporteur for his summing-up and asked whether members wished to refer title I to the Drafting Committee at the current session or to wait until the next session to allow time for further discussion.

14. Mr. YANKOV said that his statement (1926th meeting) had apparently been misunderstood. He had in fact suggested that the Special Rapporteur might wish to submit an outline of the proposed structure and content of the draft articles, and that it would be useful if he could submit a group of draft articles on a given issue, which the Commission could then consider as a unit.

15. Sir Ian SINCLAIR said it would be useful if mimeographed copies of materials received by the Secretariat on the status, privileges and immunities of international organizations other than the United Nations, the specialized agencies and IAEA could be made available to members.

16. He was somewhat hesitant about referring title I to the Drafting Committee, because the precise scope of the draft had yet to be determined.

17. Mr. BALANDA said that he had stressed (1926th meeting) the need to employ correct terms because the law governing international organizations had a terminology which could differ from one organization to another. He had drawn attention to the words *pouvoirs réglementaires* (regulatory functions) in paragraph 6 of the French text of the second report (A/CN.4/391 and Add.1), pointing out that the term was used by EEC and that several different forms of such regulation by Community institutions were distinguished, namely regulations, directives and decisions of Community organs. He had simply

[6] See 1925th meeting, footnote 17.

invited the Special Rapporteur to be very cautious in using terms which could cause misunderstanding before anything had been decided about the international organizations to be covered in the topic under study. However, he noted the explanation which the Special Rapporteur had given at the beginning of his statement.

18. As to what should be done with the text of the draft article or articles submitted, he shared Sir Ian Sinclair's perplexity. Since the Special Rapporteur had not outlined the nature of the international organizations he proposed to deal with, it would be difficult for the Commission to draw up any rules as yet. That being so, the proposed texts, especially the provision concerning the capacity of an international organization to conclude treaties, could hardly be referred to the Drafting Committee. The texts could be left in abeyance and the Commission could decide later, in the light of subsequent reports, which elements of legal personality—legal capacity in general and capacity to conclude treaties in particular—should be retained.

19. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) thanked Mr. Balanda for his advice, which he would certainly follow. He repeated that he had not used the word *pouvoirs* in his report, the original version of which was in Spanish; if a mistake had crept into the French translation he could not be held responsible. Moreover, as he had already pointed out, the paragraph in question was purely descriptive.

20. Mr. McCAFFREY said that he, too, thought it might be premature to draft a provision without knowing to what it would apply. It had been his understanding that, given the very limited time available for discussion of the topic, the Commission would engage in only a preliminary consideration of the issues raised in the Special Rapporteur's second report (A/CN.4/391 and Add.1). His own comments had therefore been confined to a few general remarks, as had those of other members. In any event, so far as article 2 in alternative B was concerned, the Special Rapporteur had pointed out that it would be necessary to await the outcome of the United Nations Conference to be held in 1986, and it was doubtful whether that article was ripe for referral to the Drafting Committee.

21. The CHAIRMAN suggested that the Special Rapporteur should be invited to bear member's comments in mind when preparing his third report, and to make specific suggestions on the scope of the draft articles. He also suggested that the draft article or articles should not be referred to the Drafting Committee until the topic had been further discussed at the Commission's thirty-eighth session.

It was so agreed.

22. In reply to a question by the Chairman, Mr. DE SARAM (Deputy Secretary of the Commission) said that the Secretariat would be pleased to provide members with copies of the materials received from organizations outside the United Nations system, before the Commission's thirty-eighth session.

23. Mr. FRANCIS said it might be useful to have some idea of the points that the Commission would take up at its next session. He assumed that it would confine itself to the question of scope and that any discussion of privileges and immunities would take place in that context.

24. The CHAIRMAN said that the Special Rapporteur would undoubtedly wish to concentrate on the privileges and immunities of international organizations; but several members thought that it would be useful to determine the scope of the draft articles before certain matters were discussed, and the Special Rapporteur had agreed to bear that in mind.

International liability for injurious consequences arising out of acts not prohibited by international law (*concluded*) (A/CN.4/394[7])

[Agenda item 8]

Preliminary report of the Special Rapporteur (*concluded*)

25. The CHAIRMAN reminded members that the Commission was required to take a procedural decision on item 8 of the agenda. A consensus had been reached in informal consultations on a short text for inclusion in the Commission's report, to the effect that the Commission had taken note of the Special Rapporteur's preliminary report (A/CN.4/394), but had been unable to discuss it at its thirty-seventh session, and that the Commission hoped that the Special Rapporteur would be able to present a new report which it would discuss at its thirty-eighth session, in 1986, along with his preliminary report. If there were no objections, he would take it that the Commission agreed to include that text in its report.

It was so agreed.

State responsibility (*continued*)* (A/CN.4/380,[8] A/CN.4/389,[9] A/CN.4/L.395, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[10] (continued)

Draft article proposed by the Drafting Committee

Article 5

26. The CHAIRMAN invited the Chairman of the Drafting Committee to present article 5 as proposed by the Drafting Committee (A/CN.4/L.395), which read:

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

* Resumed from the 1902nd meeting.

[8] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

[10] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

For the texts of articles 1 to 16 of part 2 of the draft as submitted by the Special Rapporteur, see 1890th meeting, para. 3.

Article 5

1. For the purposes of the present articles, "injured State" means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with part 1 of the present articles, an internationally wrongful act of that State.

2. In particular, "injured State" means:

(*a*) if the right infringed by the act of a State arises from a bilateral treaty, the other State party to the treaty;

(*b*) if the right infringed by the act of a State arises from a judgment or other binding dispute-settlement decision of an international court of tribunal, the other State or States parties to the dispute and entitled to the benefit of that right;

(*c*) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;

(*d*) if the right infringed by the act of a State arises from a treaty provision for a third State, that third State;

(*e*) if the right infringed by the act of a State arises from a multilateral treaty or from a rule of customary international law, any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it is established that:

(i) the right has been created or is established in its favour,

(ii) the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law, or

(iii) the right has been created or is established for the protection of human rights and fundamental freedoms;

(*f*) if the right infringed by the act of a State arises from a multilateral treaty, any other State party to the multilateral treaty, if it is established that the right has been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto.

3. In addition, "injured State" means, if the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], all other States.

27. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that article 5 was a definitional article, but one of great importance for the articles that would follow in part 2 of the draft. Most members of the Drafting Committee had agreed that it was necessary to include an article defining an "injured State", since the whole of part 2 on the content, forms and degrees of international responsibility would revolve round a clear understanding of which States could claim to be injured by the breach of an international obligation and thus invoke the consequences of State responsibility to be set out in the remaining articles of part 2. The purpose of article 5 was neither to define primary rules of international law, nor to provide an exhaustive list of situations in which a State could claim to be injured. It provided a general rule in paragraph 1, an indicative list in paragraph 2 and dealt with the rather special case of international crimes in paragraph 3.

28. He wished to pay tribute to the Special Rapporteur for his perseverance, ingenuity and flexibility in assisting the Drafting Committee to arrive at a text which commanded the general, if not unanimous, support of the Committee. It had not been possible, in the short time available, for the Committee to deal with the other articles on State responsibility referred to it, but he hoped that further progress on the topic would be made at the Commission's next session.

29. Members would recall that the Special Rapporteur had tried, in his original article 5, to indicate which States should be considered to be injured States in different situations, according to the origin of the obligation violated or of the right infringed. Opinions in the Commission had been divided.[11] Some members had supported the Special Rapporteur's approach; others had thought it essential for the article to include a general definition of an "injured State". Some had considered that the definition could take the form of an introductory clause, which would introduce the detailed provisions proposed by the Special Rapporteur. Others had believed that a general definition would suffice and had been opposed to specifications based on "sources". The opinion had also been expressed that, strictly speaking, the article was unnecessary.

30. The Drafting Committee had decided to combine a general definition with the detailed proposals of the Special Rapporteur. The general definition of an "injured State" appeared in paragraph 1; paragraphs 2 and 3 followed the original approach of the Special Rapporteur and indicated which State was to be considered the injured State in specific situations.

31. Since under part 1 of the draft one of the elements of an internationally wrongful act was conduct that constituted a breach of an international obligation, and since a breach of an obligation necessarily infringed a right or rights of another State or States, it was proposed that part 2 should lay down that a State whose right was thus infringed should be considered an injured State. That was the meaning of paragraph 1 of article 5, as adopted by the Drafting Committee.

32. That criterion for identifying an injured State as a State which had had one of its rights infringed had been incorporated in all the provisions proposed. The expression "right ... infringed by the act of another State" had been used throughout article 5.

33. Paragraph 2 had six subparagraphs, (*a*) to (*f*), and one of them, subparagraph (*e*), was subdivided into three. The subparagraphs proceeded from the simplest situation—the breach of an obligation imposed by a bilateral treaty, in which it was easy to identify the injured State—to the more complex situations that arose from the breach of an obligation under a multilateral treaty or a rule of customary international law. In between, situations were contemplated in which the obligation violated had its origin in a judgment or other binding dispute-settlement decision, in a binding decision of an international organ, or in a treaty provision in favour of a third State not a party to the treaty.

34. Referring to the provisions of paragraph 2, he drew attention to the opening words "In particular", which made it clear that the paragraph provided a non-exhaustive, indicative list identifying the "injured State" in various circumstances. That list was roughly based on the circumstances proposed by the

[11] Article 5 was considered by the Commission at its thirty-sixth session; see *Yearbook ... 1984*, vol. I, pp. 259 *et seq.*, 1858th meeting, 1860th meeting (paras. 33 *et seq.*), and 1861st and 1865th to 1867th meetings.

Special Rapporteur, but they had been rearranged in what was considered a more suitable order, moving from relatively simple inter-State relations to the more complicated.

35. Subparagraph (*a*) concerned infringement, by the act of a State, of a right arising from a bilateral treaty; in that case, the injured State was the other State party to the treaty. That could be considered the simplest case set out in paragraph 2 and it corresponded to subparagraph (*c*) of article 5 as submitted by the Special Rapporteur.

36. Subparagraph (*b*) covered the case in which the right infringed by the act of a State arose from a judgment or other binding dispute-settlement decision of an international court or tribunal. In that case, the injured State was the other State party to the dispute and entitled to the benefit of that right. Though based on subparagraph (*b*) of the text submitted by the Special Rapporteur, the new subparagraph contained the added proviso that for a State to be considered an injured State, it must be entitled to the benefit of the right arising from the judgment or decision. The purpose was to take into account the fact that not all parties to a dispute, or even all parties to a binding dispute-settlement procedure, were necessarily entitled to the benefit of a judgment or decision made by an international court or tribunal.

37. Subparagraph (*c*) was new and reflected certain comments made in the Commission on the importance of rights which might arise from a binding decision of an international organ other than a court or tribunal. In the event of such a right being infringed by the act of a State, the injured State was the State entitled to the benefit of such a right in accordance with the constituent instrument of the international organization concerned. In view of the variety of international organizations and the kind of binding decisions their organs might take, entitlement to the benefit of rights flowing from such decisions depended on the particularities of each organization. Accordingly, the clause "in accordance with the constituent instrument of the international organization concerned" had been included.

38. Subparagraph (*d*) concerned infringement, by the act of a State, of a right which arose from a treaty provision for a third State. In that case it was the third State which was considered to be the "injured State". The text corresponded to subparagraph (*a*) as submitted by the Special Rapporteur and was based on the law of treaties.

39. All the situations mentioned in subparagraph (*a*) to (*d*) were simple, or relatively simple: the right infringed by the breach of the obligation was easy to identify. A more complex situation resulted from the breach of an obligation created by a multilateral treaty or established by a rule of customary international law. In such a case it was possible, even likely, that not all the States parties to the treaty or bound by the rule had had a right infringed by the breach. Subparagraph (*e*) therefore distinguished three situations in which a State party to a multilateral treaty or bound by a rule of customary international law was to be considered an injured State:

(i) if the right infringed had been created by a multilateral treaty or established by a rule of customary international law in its favour;

(ii) if the infringement of the right necessarily affected the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty or bound by the rule of customary international law,

(iii) if the right had been created or established for the protection of human rights and fundamental freedoms.

40. The recognition in article 5 that a right for the protection of human rights and fundamental freedoms could be established by a rule of customary international law was held to be of considerable importance by the members of the Drafting Committee and to warrant the inclusion of an appropriate explanation in the commentary.

41. The provisions of subparagraph (*e*) of paragraph 2 dealt with both rights arising from a rule of customary international law and rights arising from a multilateral treaty. That, however, did not appear appropriate for the situation originally envisaged by the Special Rapporteur in subparagraph (*d*) (iii), namely that of a right stipulated for the protection of collective interests. Thus subparagraph (*f*) dealt with infringement, by the act of a State, of a right arising from a multilateral treaty, if it was established that the right had been expressly stipulated in that treaty for the protection of the collective interests of the States parties thereto. In such cases, the injured State was any other State party to the treaty. Although it could not be excluded that, in the future, rules of customary international law might establish rights for the protection of collective interests, or might even do so at the present time, it had been thought more prudent to restrict the situation to rights arising from a multilateral treaty, when such rights were expressly stipulated.

42. Lastly, paragraph 3, which dealt specifically with international crimes, stated that, if an internationally wrongful act constituted an international crime, all other States were to be considered as injured States. That seemed to be a necessary consequence of the concept of an international crime set out in article 19 of part 1 of the draft.

43. The Drafting Committee had considered the question whether, in the case of an international crime, all injured States should have the same right of response, or whether the response should be graduated according to the seriousness of the infringement of the right or interest in each case. It had been thought that, if that question was to be dealt with, the proper place to do so would be in the articles defining the legal consequences of international crimes. That was why paragraph 3 referred to articles 14 and 15, indicating that those articles, which established the framework for the responses of injured States, might indicate the distinctions that could be necessary. The reference had been placed in square brackets, because articles 14 and 15 had not yet been discussed and new articles on international crimes might conceivably be added to the draft. After consideration of those articles, the Drafting Committee

might find it necessary to reconsider the appropriateness of the phrase in square brackets.

44. Finally, the adoption of article 5 would necessitate slight adjustments to some of the articles provisionally adopted by the Commission at its thirty-fifth session, in 1983, as proposed by the Special Rapporteur in his fifth report (A/CN.4/380) and sixth report (A/CN.4/389). Accordingly, the Drafting Committee had added the following explanatory note at the end of the text of article 5 (A/CN.4/L.395):

As a result of its adoption of draft article 5, the Drafting Committee recommends the adoption of consequential changes to articles 2, 3 and 5 as provisionally adopted by the Commission at its thirty-fifth session, as proposed by the Special Rapporteur. Those changes are as follows: in articles 2 and 3, the references to "articles [4] and 5" should be amended to "articles 4 and [12]"; article 5 should be renumbered "article 4".

45. Mr. ARANGIO-RUIZ observed that the words "In addition" at the beginning of paragraph 3 of article 5 had a slightly restrictive character. They might be deleted and the paragraph amended to read:

"If the internationally wrongful act constitutes an international crime [and in the context of the rights and obligations of States under articles 14 and 15], 'injured State' means all other States."

46. Mr. USHAKOV said that he wished once again to explain his position on article 5, which he regarded as a minor provision, since it stated no rule, but merely a definition. In the Drafting Committee, he had participated in the drafting of paragraph 1, which he considered acceptable, although he had proposed different wording.

47. He could not, however, accept paragraph 3, according to which the expression "injured State", if the internationally wrongful act constituted an international crime, meant all other States. He found that provision strange and even ridiculous. It was impossible to maintain, for example, that when a State perpetrated an act of aggression, all other States were its victims and could claim reparation. Rights and obligations *erga omnes* certainly existed in general international law, but relations between States were, in the last analysis, always of a bilateral nature. Each act of aggression injured only one State. If several States were victims of an aggression, it split into as many acts of aggression as there were States. Those considerations had nothing to do with the fact that the organized international community could take measures, including coercive measures, against a State which committed a crime constituting a threat to the peace, a breach of the peace or an act of aggression. In such cases, States Members of the United Nations were clearly required to take the measures decided on by the Security Council against the aggressor State, but it did not follow that they could claim reparation from that State, since they were not States injured by the act of aggression. Hence paragraph 3 of article 5 was in flagrant contradiction with paragraph 1, which gave a general definition of "injured State" as meaning any State a right of which was infringed by the internationally wrongful act of another State.

48. He had not taken part in the drafting of paragraph 2 in the Drafting Committee, because he considered it unnecessary to illustrate the general definition given in paragraph 1. Furthermore, most of the examples given in paragraph 2 were inadequate or even absurd. Thus even the simple case referred to in subparagraph (*a*) was drafted in ambiguous terms. For the assertion that, if the right infringed by the act of a State arose from a bilateral treaty, "injured State" meant the other State party to the treaty implied that an act by any State could infringe the bilateral relations of other States, whereas those relations could be infringed only by one of the two States parties to the bilateral treaty.

49. Subparagraph (*c*) provided that, if the right infringed by the act of a State arose from a binding decision of an international organ other than an international court or tribunal, "injured State" meant the State or States which, in accordance with the constituent instrument of the international organization concerned, were entitled to the benefit of that right. To what kind of right did the provision refer? It did not refer to the rights and obligations which the constituent instrument of an organization might create for the organization and its members, but to a right to the benefit of which they were entitled and which arose from a binding decision of a non-jurisdictional international organ. Was it to be concluded that, if a member State of an international organization failed to pay its contribution in violation of a binding decision of an organ of that organization, all the other Member States were injured States because they were entitled to the benefit of a right? And if the Security Council decided that economic sanctions should be taken against a Member State, but some States refused to take such sanctions, did a right arise for the other Member States? Were all those States injured States, and to the benefit of what right were they entitled?

50. Subparagraph (*d*) referred to the case in which the act of "a State" infringed the right of a third State arising from a treaty provision for that third State. But the right of such a third State could not be infringed by just any State; the State infringing the right must be a party to the treaty containing the provision in question, which must create an obligation for it towards the third State.

51. Under subparagraph (*e*) (i), if the right infringed by the act of a State arose from a multilateral treaty or from a rule of customary international law, the injured State was any other State party to the multilateral treaty or bound by the relevant rule of customary international law, if it was established that the right had been created or was established in its favour. He wondered how a rule of customary international law or general international law could create or establish a right in favour of one or more particular States. With regard to the case covered in subparagraph (*e*) (iii), in which the right had been created or was established for the protection of human rights and fundamental freedoms, he wondered what right that could be. Under the International Covenants on human rights, for example, each party to those instruments undertook to intro-

duce into its national legislation provisions for the protection of its citizens, but no right for the other parties arose from that undertaking.

52. Mr. OGISO said that he had some observations to make on paragraph 2, subparagraph (*e*) (ii), of article 5. That provision referred to the infringement of a right arising from a multilateral treaty and stated that "the infringement of the right by the act of a State necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty ...".

53. First, the provision seemed unduly to widen the scope of the term "injured State". As he understood it, the provision meant that a State A could become an injured State if its enjoyment of its rights under a multilateral treaty was affected as a result of the infringement of the right of another State B, a party to the same multilateral treaty, by an internationally wrongful act of a State C.

54. Secondly, it was not easy in practice to establish that the enjoyment of a right of State A was affected; the term "affects" was so vague that the question whether the enjoyment of a certain right had been affected could well become the subject of a further dispute.

55. Thirdly, even assuming that such a fact could be established, he doubted whether it was appropriate to give to State A, whose enjoyment of a right had been affected, the status of an injured State to the same extent as to State B, whose right had actually been infringed. That seemed all the more inappropriate because an injured State was entitled, under draft article 6, paragraph 1, to require the State which had committed an internationally wrongful act to take the action specified in paragraph 1 (*a*) to (*d*) and paragraph 2 of that article. The injured State was further entitled to take countermeasures under draft article 8 and measures of reprisal under draft article 9, although they must not be manifestly disproportional to the seriousness of the internationally wrongful act. If a State which became an injured State only because its enjoyment of a right under a multilateral treaty had been affected was entitled to take such countermeasures and reprisals—which were somewhat loosely delimited in article 9—that might cause escalation of disputes.

56. He therefore urged that the definition of an "injured State" in article 5, paragraph 2 (*e*) (ii), be reviewed after the Commission had taken decisions on draft articles 6, 8 and 9. In order to make the situation clear, he suggested that subparagraph (*e*) (ii) should be placed in square brackets, with a footnote explaining the reason.

57. Mr. McCAFFREY said that, on the whole, he found paragraphs 1 and 2 of article 5 acceptable. He was opposed to paragraph 3, however, because he could not agree to the concept of a crime of a State, for the reasons he had given during the discussion. He did not believe that the proposed provision could make any constructive contribution to the Commission's work on State responsibility. Besides, it was his belief that any acts referred to as "international crimes" in article 19 of part 1 of the draft would in any case be covered by the examples given in paragraph 2 (*e*) (i) and (iii). Paragraph 3 was not only dangerous and far-reaching, but also unnecessary.

58. Sir Ian SINCLAIR said that article 5 as proposed by the Drafting Committee was not, in his view, entirely satisfactory, although he found the substance of paragraphs 1 and 2 broadly acceptable.

59. With regard to paragraph 1, however, and even more to paragraph 2, he was concerned about the fact that the Special Rapporteur's original language, defining an "injured State" in terms of the breach of an obligation by the author State, had been replaced by a less satisfactory formulation in terms of the infringement of a right. In normal circumstances, the breach of an obligation by one State involved an infringement of the right of another State, but that was not always the case. He therefore urged that, on second reading, the precise formulation of paragraphs 1 and 2 should be re-examined in the light of those remarks.

60. Unlike Mr. Ushakov, he believed that paragraph 2 was necessary. It served to particularize the definition of the term "injured State" in certain specific contexts and provided a non-exhaustive list of cases, from which the injured State could be identified more clearly than from the simple proposition stated in paragraph 1.

61. His main concern, however, related to paragraph 3, on which he entered a reservation. In the context of a situation in which an internationally wrongful act constituted an international crime—and the Commission would have to review the basis of that concept on its second reading of part 1—it was essential that the Commission should first formulate articles 14 and 15 before it could determine whether a definition of an "injured State" was necessary and, if so, what its precise content should be. In the case of an international crime, there would of course be a directly injured State and other States which would be, in a way, indirectly injured States, but the rights and obligations of those two categories of States were not, and could never be, identical.

62. It was precisely for that reason that the Drafting Committee had very properly placed the phrase "and in the context of the rights and obligations of States under articles 14 and 15" in square brackets for the time being. An indication was thus given that it was only when articles 14 and 15 were settled that the Commission would be able to establish the precise extent of the rights and obligations of other States as members of the international community and not as individual States.

63. For those reasons, he wished to place on record his strong reservation regarding the content of paragraph 3, which might well not be necessary at all, but which in any case could not be finalized until the Commission had adopted articles 14 and 15 and possibly other articles relating to the rather special case of international crimes. At that stage, the Commission would have to revert to paragraph 3 and might well decide to delete it.

The meeting rose at 1.05 p.m.

1930th MEETING

Thursday, 18 July 1985, at 3.10 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

State responsibility (*concluded*) (A/CN.4/L.395, ILC(XXXVII)/Conf.Room Doc.3, ILC(XXXVII)/Conf.Room Doc.7)

[Agenda item 3]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[1] (concluded)

DRAFT ARTICLE PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 5[2] (*concluded*)

1. Mr. JACOVIDES said that he would be interested to know what had been said in the Drafting Committee during its consideration of article 5, paragraph 3, which had been the subject of much criticism in the Commission. Regardless of the exact wording of the paragraph, the basic concept of an "international crime" as defined in article 19 of part 1 of the draft, though controversial, should be retained. He believed the majority of members of the Commission and of the international community as a whole shared that view. Moreover, in the interests of logic and consistency, any reference to that concept should be along the lines proposed by the Special Rapporteur in the original subparagraph (*e*).

2. Mr. LACLETA MUÑOZ said that, in the Drafting Committee, he had given his approval to a text which could not be entirely satisfactory to everyone, since it was the outcome of discussions and negotiations. He himself had reservations with regard to the concept of an "international crime" which was referred to in paragraph 3 and should, in his opinion, be interpreted in the light of the content of article 19 of part 1 of the draft. The words in square brackets in that paragraph were also of considerable importance. As other speakers had pointed out, although only one State was directly injured when an international crime was committed, all other States were also injured, at least indirectly. Despite his reservations, he would not object to the adoption of article 5 as it now stood.

3. Mr. ROUKOUNAS said that paragraphs 1 to 3 of article 5 progressed from bilateral relations to institutionalized multilateral relations.

4. It had been stated in the Drafting Committee that paragraph 2 was modelled on the law of treaties. Paragraph 2 (*d*), however, did not sufficiently bring out the legal link which included a third State in the contractual framework and which consisted, on the one hand, of the intent of the parties as expressed in the treaty, and, on the other hand, of the third State's acceptance. A more specific reference to the law of treaties should therefore be added, at least in the commentary, in order to give a clearer indication of the nature of that link.

5. Paragraph 2 (*e*) (i) and (ii) appeared to be cumulative and the alternative seemed to be only between subparagraph (*e*) (ii) and (iii). A State injured in respect of a right established in its favour, however, could not be expected to wait until it had been established that the infringement of that right by the act of a State had affected the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty. The word "or" should therefore be inserted at the end of subparagraph (*e*) (i).

6. Referring to the so-called origin of the obligations violated, he noted that, according to paragraph 1 of article 17 of part 1 of the draft, "An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation", and he drew particular attention to the word "other". The Drafting Committee had not taken account of the origin of an internationally wrongful act in article 5 and had, rather, referred to a bilateral or multilateral treaty and to customary international law, but not to the other possible sources of internationally wrongful acts and, consequently, of injury to States. The words "In particular" at the beginning of paragraph 2 nevertheless implied that that provision was not restrictive. If the implied reference was to article 17 of part 1 of the draft, it would suffice to mention that article in the commentary; some reference to that article was, however, essential.

7. As for paragraph 3 of article 5, the important question, in his view, was that of identifying the directly injured State and the indirectly injured State. That distinction had to be made, particularly where an international crime was concerned. It might be possible to draft a text which would be more accurate in legal terms and more in keeping with the Commission's wishes.

8. Mr. FLITAN said that the ideas expressed in article 5 were correct, but its wording would have to be improved on second reading. Paragraph 1, which

---

[1] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

For the texts of articles 1 to 16 of part 2 of the draft as submitted by the Special Rapporteur, see 1890th meeting, para. 3.

[2] For the text, see 1929th meeting, para. 26.

provided that the expression "injured State" meant any State a right of which was infringed by the act of another State, if that act constituted an internationally wrongful act, rightly referred to the infringement of a right and not, as some would have wished, to the "breach of an obligation", an expression which would be more appropriate in the case of an author State. The principle enunciated in paragraph 2 (*e*) was clearly stated in other instruments, in particular the 1969 Vienna Convention on the Law of Treaties.

9. As to paragraph 3, he was convinced that, for the purpose of defining an "injured State", it had to be made clear that what was involved was an international crime. Article 19 of part 1 of the draft referred expressly to international crimes and the Commission not only had to take account of that article, but also had to draw on all its consequences and defer to its provisions. The words in square brackets had been agreed on as a result of a compromise and had replaced the earlier formulation "subject to articles 14 and 15". Paragraph 3 would be re-examined during the Drafting Committee's discussion of articles 14 and 15. Part 2 of the draft would, moreover, have to include articles dealing with crimes other than aggression not mentioned in article 19 of part 1.

10. He did not think that paragraph 3 had to draw a distinction between the rights and obligations of the directly injured State and those of the indirectly injured State. Since its purpose was to define an injured State, it simply had to indicate that all other States had certain rights and certain obligations when a wrongful act which constituted an international crime had been committed. The words "In addition" at the beginning of paragraph 3 were, moreover, entirely appropriate because they drew attention to the fact that the situation referred to in paragraph 3 was different from those covered by paragraphs 1 and 2.

11. In conclusion, he said that article 5 had been considered at length in the Drafting Committee and that the proposed wording represented a compromise solution.

12. Mr. BALANDA said that he was somewhat concerned about the use of the words "human rights and fundamental freedoms" in paragraph 2 (*e*) (iii). There was no clear and precise definition of the concept of "human rights" and existing instruments in that field were concerned above all with "fundamental" rights and "fundamental" freedoms. In order to avoid any improper interpretation or misuse of that concept, he thought that it should be explained, if only in the commentary to article 5, that the term "human rights" meant fundamental rights and that the word "freedoms" meant fundamental freedoms.

13. Since the concept of human rights was now evolving and, in other parts of the world, consideration was also being given to the question of the rights of peoples, he did not think that the term "human rights" should be interpreted in too restrictive a manner; reference should also be made to the rights of peoples in order to make the draft articles more broadly applicable. If, for example, the Commission decided to characterize colonial domination as an international crime, that type of crime would be of concern as much to peoples and to other far larger entities as to individuals.

14. Mr. KOROMA expressed doubts regarding the wording of article 5, paragraphs 1 and 2, which, as they stood, were not very clear and appeared to give two definitions of the term "injured State". It should be possible to combine the two paragraphs without adversely affecting the article in any way.

15. Paragraph 3 might also be reworded to read: "In addition, 'injured States' means all other States, if the internationally wrongful act constitutes an international crime." That wording would flow logically from draft articles 14 and 15, under which only the most serious offences, such as aggression or massive violations of human rights, constituted international crimes. In such cases, the interests of the international community as a whole would be at stake.

16. Sir Ian SINCLAIR, referring to one of the points made by Mr. Roukounas, said that paragraph 2, subparagraph (*e*) (i), (ii) and (iii), were intended to be alternatives, rather than cumulative. Consequently the commas in subparagraph (*e*) (i) and (ii) should be replaced by semi-colons, in accordance with normal practice in English.

17. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, in the course of the Drafting Committee's consideration of article 5, Mr. Arangio-Ruiz had proposed that the words "In addition" at the beginning of paragraph 3 should be deleted. They had presumably been included to highlight the fact that the consequences of international crimes were in addition to those of international delicts. While he himself had not regarded the words in question as essential, he had not objected to their inclusion.

18. Mr. Ogiso (1929th meeting) had expressed some doubts regarding the reference in paragraph 2 (*e*) (ii) to the enjoyment of rights and the performance of obligations. As Mr. Flitan had explained, however, that wording had been taken from articles 41, 58 and 60 of the 1969 Vienna Convention on the Law of Treaties and was therefore not new. The concept of a "treaty provision for a third State", as contained in paragraph 2 (*d*) and referred to by Mr. Roukounas, had also been taken from the 1969 Vienna Convention, and specifically from its article 36.

19. Mr. Roukounas had also referred to the punctuation of paragraph 2 (*e*). In his own view, the text as it stood left no doubt that the State whose right was infringed was the injured State and it thus required no amendment.

20. It had not been deemed necessary to include a reference to article 17 of part 1 of the draft in paragraph 2, as Mr. Roukounas had suggested, since paragraph 2 was not intended as an exhaustive definition of the term "injured State". Article 17 was much broader in scope.

21. The words "human rights and fundamental freedoms" in paragraph 2 (*e*) (iii), to which Mr. Balanda had referred, were the ones normally used in international instruments. Since self-determination had, moreover, come to be considered as an individual human right, exercised collectively, the Drafting Committee had agreed that the Special Rapporteur should include a reference to that effect in the commentary to article 5.

22. Referring to Mr. Koroma's observations concerning the definitions of the term "injured State" in paragraphs 1 and 2, he said that the use of the words "In particular" at the beginning of paragraph 2 was intended to make it quite clear that the list of examples contained in the paragraph was not exhaustive. The Drafting Committee had originally intended to have the definition as an introductory clause to the other examples, but had then realized that it would be virtually impossible to include all the examples in one article and had decided to draft two paragraphs, one containing a general definition and the other setting out the most important examples. Nevertheless, in both paragraphs, an effort had been made to identify the injured State as the State whose right had been infringed.

23. As to paragraph 3, he said that the conclusion that, in the event of an international crime, all States were injured States flowed logically from article 19 of part 1 of the draft. Mr. Roukounas had proposed that a distinction should be drawn between directly injured and indirectly injured States, a point which had also been made in the Commission and in the Drafting Committee in respect of both international crimes and international delicts. The Drafting Committee had considered that, as far as international crimes were concerned, any distinction should be drawn in the articles dealing with the legal consequences of international crimes. That was why the reference to articles 14 and 15 had been included in square brackets.

24. Mr. REUTER, referring to the punctuation marks and the use of the word "or" in paragraph 2 (*e*) (i), (ii) and (iii), said that the French text, which had been drafted in conformity with treaty practice, was entirely acceptable.

25. Mr. LACLETA MUÑOZ said that he could find no fault with the punctuation and layout of the Spanish text of article 5, which were in conformity not only with correct usage, but also with legal practice.

26. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 5 provisionally on first reading, together with the consequential changes to other articles set out in the Drafting Committee's explanatory note (A/CN.4/L.395) and referred to by the Chairman of the Committee (1929th meeting, para. 44).

It was so agreed.

Article 5 was adopted.

Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (*concluded*) (A/CN.4/390,[3] A/CN.4/L.382, sect. C, A/CN.4/L.396, ILC(XXXVII)/Conf.Room Doc.2 and Add.1)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)*

ARTICLE 23 and ARTICLES 28 and 29 (*concluded*)

ARTICLE 23 [18] (Immunity from jurisdiction)

27. The CHAIRMAN invited the Chairman of the Drafting Committee to present article 23 [18] as proposed by the Drafting Committee (A/CN.4/L.396), which read:

Article 23 [18]. Immunity from jurisdiction

1. The diplomatic courier shall enjoy immunity from the criminal jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions.

2. He shall also enjoy immunity from the civil and administrative jurisdiction of the receiving State or, as the case may be, the transit State in respect of all acts performed in the exercise of his functions. This immunity shall not extend to an action for damages arising from an accident caused by a vehicle the use of which may have involved the liability of the courier where those damages are not recoverable from insurance.

3. No measures of execution may be taken in respect of the diplomatic courier, except in cases where he does not enjoy immunity under paragraph 2 of this article and provided that the measures concerned can be taken without infringing the inviolability of his person, temporary accommodation or the diplomatic bag entrusted to him.

4. The diplomatic courier is not obliged to give evidence as a witness in cases involving the exercise of his functions. He may be required to give evidence in other cases, provided that this would not cause unreasonable delays or impediments to the delivery of the diplomatic bag.

5. The immunity of the diplomatic courier from the jurisdiction of the receiving State or the transit State does not exempt him from the jurisdiction of the sending State.

28. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, by adopting article 23, the Commission would be in a position to forward to the General Assembly a complete set of draft articles, from article 1 to article 35, without gaps or provisions appearing in square brackets. At the Commission's next session, the Drafting Committee should be in a position to examine the remaining articles which had been proposed by the Special Rapporteur and referred to it, namely articles 36, 37 and 39 to 43. He paid tribute to the Special Rapporteur and to the members of the Drafting Committee for the dedication and spirit of co-operation they had shown in the work on the topic.

29. As in the case of the articles previously proposed by the Drafting Committee on the topic, article 23 bore two numbers, the first being the number originally assigned by the Special Rapporteur in his

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

* Resumed from the 1913th meeting.

set of draft articles and the second being the number which the article would bear once it had been adopted.

30. Article 23 had been the subject of considerable discussion.[4] At the thirty-sixth session, the Drafting Committee had been unable to agree on all the paragraphs of the article and had returned paragraphs 1 and 4 to the Commission in the form originally submitted by the Special Rapporteur, but in square brackets. After a thorough debate in the Commission, it had been decided to defer a decision on the article until the current session.[5] Taking account of that debate, as well as of the comments made in the Sixth Committee of the General Assembly (A/CN.4/L.382, paras. 141-159), the Special Rapporteur had proposed a revised version of article 23 in his sixth report (A/CN.4/390, para. 29)[6] and the article had again been referred to the Drafting Committee for consideration in the light of the debate held at the current session. The various positions maintained in the past with regard to the article had been set out in the Commission's report on its thirty-sixth session,[7] as well as in the Special Rapporteur's sixth report (*ibid.*, paras. 13-25). The main controversy had concerned the diplomatic courier's immunity from criminal jurisdiction (paragraph 1) and the question of his being required to give evidence as a witness (paragraph 4).

31. Paragraph 1, as currently proposed, represented a compromise between two schools of thought, one holding that the diplomatic courier should enjoy complete immunity from criminal jurisdiction and the other holding that the entire article was unnecessary and that, in particular, no immunity from criminal jurisdiction should be afforded the diplomatic courier. The Drafting Committee had opted for a version of paragraph 1 which followed the rule stated in paragraph 2 with regard to immunity from civil and administrative jurisdiction. Thus, under the current text, the courier enjoyed immunity from the criminal jurisdiction of the receiving State or transit State "in respect of all acts performed in the exercise of his functions". A functional approach had thus been adopted.

32. The Drafting Committee had recognized that the phrase "all acts performed in the exercise of his functions" might be susceptible to varying interpretations, but had entrusted the Special Rapporteur with the task of explaining the meaning and scope of the phrase in the commentary. In particular, it should be noted that the functional rule as currently presented should not be interpreted as sanctioning abuses by a diplomatic courier. Article 23 must be read together with articles 5, 10 and 12.

[4] The Commission considered article 23 at its thirty-fifth session, see *Yearbook ... 1983*, vol. I, pp. 167 *et seq.*, 1784th meeting (paras. 1-37), and pp. 256-258, 1799th meeting (paras. 12-29); and at its thirty-sixth session, see *Yearbook ... 1984*, vol. I, pp. 56 *et seq.*, 1824th meeting (paras. 22 *et seq.*) and 1825th meeting.

[5] See *Yearbook ... 1984*, vol. I, pp. 292 *et seq.*, 1863rd meeting and 1864th meeting (paras. 1-22). See also *Yearbook ... 1984*, vol. II (Part Two), pp. 41-42, paras. 188-193.

[6] See also 1903rd meeting, para. 1.

[7] *Yearbook ... 1984*, vol. II (Part Two), p. 21, para. 84, and pp. 29-30, para. 122.

33. As to presentation, the Committee had believed it more appropriate to maintain paragraph 1 as a separate paragraph dealing with immunity from criminal jurisdiction than to merge it with paragraph 2, which concerned immunity from civil and administrative jurisdiction. The subject-matters of the two paragraphs were quite distinct and the second sentence of paragraph 2 militated in favour of separate treatment of the two types of immunity from jurisdiction.

34. Some members had maintained their reservations on paragraph 1, as well as on the article as a whole, believing that it was an unnecessary provision given the adoption of article 16 on the personal protection and inviolability of the courier and in view of the uncertainty as to the meaning of the phrase "acts performed in the exercise of his functions".

35. Paragraphs 2 and 3 remained exactly as presented by the Drafting Committee to the Commission at the previous session.

36. As to paragraph 4, the Drafting Committee had adopted the revised version proposed by the Special Rapporteur in his sixth report. The essential point was that the courier could be required to give evidence as a witness in cases not involving the exercise of his functions, provided that that would not cause unreasonable delays or impediments to the delivery of the bag. An explanation would be given in the commentary to highlight the fact that the situation envisaged in paragraph 4 was quite distinct from the situations envisaged in paragraphs 1 and 2. Thus the courier could well be required to testify in a case involving an action for damages arising from an accident caused by a vehicle in the circumstances described in the second sentence of paragraph 2. In addition, the commentary would explain that nothing prevented a receiving State or transit State from requesting written testimony from a courier, in accordance with its internal procedural rules or with bilateral agreements providing for that possibility.

37. A minor change had been made to paragraph 5 as submitted to the Commission at its previous session. The word "Any" had been replaced by the word "The", in accordance with the wording of the relevant codification conventions.

38. The title remained as proposed by the Special Rapporteur.

39. Finally, he recalled that, when the Commission had taken up articles 28 and 29 as proposed by the Drafting Committee, it had decided to leave aside certain paragraphs linked to the question of immunity from jurisdiction, pending a decision on article 23. Those paragraphs were paragraph 3 of article 28 and paragraphs 3, 4 and 5 of article 29. In view of the text of article 23 currently before the Commission, the Drafting Committee recommended that the Commission should adopt the texts of those provisions without change.

40. Mr. USHAKOV said he still thought that the inclusion of the words "in respect of all acts performed in the exercise of his functions" in paragraph 1 would pave the way for future difficulties of interpretation. In his view, it was understood that the diplomatic courier, permanent or *ad hoc*, was always

engaged in the exercise of his functions. That view had, however, not been shared by all members of the Drafting Committee. He therefore formulated reservations with regard to the wording of paragraph 1 of article 23. If not for the contentious wording, he would be entirely willing to accept the article as a whole.

41. Sir Ian SINCLAIR said that, although he continued to be of the opinion that article 23 was unnecessary, he commended the efforts made by all members of the Drafting Committee to find a compromise solution to the problems to which the article as a whole, and in particular its paragraphs 1 and 4, gave rise. Some improvements had, of course, been made, especially in paragraph 1, in which the diplomatic courier's immunity from criminal jurisdiction had been qualified, and in paragraph 4, which was based on the revised text submitted by the Special Rapporteur.

42. Despite those improvements, however, article 23 was unnecessary because article 16, which provided for the courier's personal inviolability and freedom from arrest and detention, gave him all the protection he needed in order to perform his functions. It was also undesirable because it created a new category of persons, namely diplomatic couriers, who enjoyed immunity and such a step was not justified by any functional necessity, since the courier's functions were of a peripatetic nature.

43. He would not request a vote on article 23, but wished it to be recorded in the Commission's report to the General Assembly that, if the article had been put to the vote, one member at least would have voted against it. The same reservations logically applied to paragraph 3 of article 28 and to paragraphs 3, 4 and 5 of article 29, although he would not, of course, object to their provisional adoption by the Commission in the form recommended by the Drafting Committee.

44. Mr. McCAFFREY said that his position was similar to that just outlined by Sir Ian Sinclair. While he appreciated the efforts made by the Special Rapporteur, the Drafting Committee and the Commission to find a satisfactory compromise solution, he continued to maintain, as he had done consistently in the past, that there was no need for article 23 as a whole. His continuing doubts with regard to paragraph 1 were based not only on the fact that the protection afforded the diplomatic courier under article 16 appeared to make article 23 superfluous, but also on the fact that the limitation of the courier's immunity from criminal jurisdiction to "all acts performed in the exercise of his functions" gave rise to a difficulty already referred to in connection with articles 10 and 11, namely that of defining the temporal and substantive scope of the functions of the diplomatic courier. If, as some members apparently believed, the diplomatic courier should be considered to be in the exercise of his functions from the moment he became a courier until the moment he ceased to be one, the limitation provided for in paragraph 1 was of little use. While taking some comfort from the assurance that the Special Rapporteur would, in the commentary, explain the meaning which should be attached to the words in question and also elucidate the relationship between paragraph 1 of article 23 and articles 10 and 11, he continued to entertain doubts about the matter.

45. Mr. OGISO, recalling that the Chairman of the Drafting Committee had said in his introductory comments that article 23 had to be read in conjunction with article 5, 10 and 12, said that he would be prepared to accept the text proposed by the Drafting Committee if article 32, paragraph 1, were added to that list. It would then be clear that if, contrary to article 32, paragraph 1, the diplomatic courier intentionally carried in the diplomatic bag items such as narcotic drugs or weapons to be used for terrorist purposes, he was not performing his functions and that article 23, paragraph 1, would not apply. He would have no objection to the adoption of paragraph 1 on that understanding and could also accept paragraph 4 on the understanding that the words "involving the exercise of his functions" in that paragraph would be interpreted in the same way as the similar wording used in paragraph 1.

46. Mr. REUTER said he was concerned that the Commission might appear to be doing nothing but handing out diplomatic immunities. Furthermore, if the members of the Commission were unable to agree on an interpretation of the 1961 Vienna Convention on Diplomatic Relations, and especially of the concept of "inviolability", he was at a loss to see how they could agree on the interpretation of a text which represented a purely stylistic compromise. The Commission should leave the task of interpretation to diplomats and concentrate on being as clear as possible. He was therefore unable to give his approval to paragraph 1 of article 23.

47. Mr. LACLETA MUÑOZ said that, if paragraph 1 of article 23 gave rise to difficulties, that was because it was inevitable that a text should be open to more than one interpretation.

48. The CHAIRMAN speaking as a member of the Commission, said that he could accept the text of article 23 as proposed by the Drafting Committee provided that the commentary made it clear that the words "all acts performed in the exercise of his functions" in paragraph 1 should be understood to mean "all acts performed by the diplomatic courier in the exercise of his functions".

49. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt article 23 [18] provisionally on first reading in the form proposed by the Drafting Committee.

Article 23 [18] was adopted.

ARTICLE 28 [21] (Duration of privileges and immunities)[8] *and*

ARTICLE 29 [22] (Waiver of immunities)[9] (*concluded*)*

[8] For the text proposed by the Drafting Committee, see 1911th meeting, para. 18.

[9] For the text proposed by the Drafting Committee, see 1912th meeting, para. 21.

* Resumed from the 1912th meeting, paras. 20 and 28.

50. The CHAIRMAN drew attention, as the Chairman of the Drafting Committee had done (paragraph 39 above), to the Committee's recommendation concerning the decision the Commission had to take, following the adoption of article 23, on articles 28 and 29 as proposed by the Committee (A/CN.4/L.396, note).

51. If there were no objections, he would take it that the Commission agreed, in accordance with the Committee's recommendation, to adopt without change paragraph 3 of article 28 [21] and paragraphs 3, 4 and 5 of article 29 [22].

Article 28 [21] was adopted.

Article 29 [22] was adopted.

The meeting rose at 5.30 p.m.

1931st MEETING

Friday, 19 July 1985, at 12.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

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

Co-operation with other bodies (*concluded*)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE ARAB COMMISSION FOR INTERNATIONAL LAW

1. The CHAIRMAN welcomed Mr. Ennaifer, Observer for the Arab Commission for International Law, and invited him to address the Commission.

2. Mr. ENNAIFER (Observer for the Arab Commission for International Law) said that many years of co-operation had strengthened relations between the International Law Commission and the Arab Commission for International Law, which hoped to see such co-operation develop still further. Such was also the wish of the Council of Ministers of the League of Arab States.

3. The International Law Commission had now begun the final stage of its work at the present session, having made good progress in the consideration of most items on its agenda. Such progress always had repercussions on the work of the Arab Commission for International Law, whose agenda had for the past three years included some of the topics before the International Law Commission: jurisdictional immunities of States and their property; the draft Code of Offences against the Peace and Security of Mankind; the law of the non-navigational uses of international watercourses; and relations between States and international organizations. The Arab Commission had adopted a procedure similar to that of the International Law Commission. It appointed a special rapporteur for each topic; the special rapporteur then submitted his conclusions for consideration by the Arab Commission; and the final report was eventually submitted to the Council of Ministers of the League of Arab States for adoption. The Arab Commission was endeavouring, with some success, to define a common approach which might be adopted by Arab countries during the consideration of those topics by the Sixth Committee of the General Assembly and at plenipotentiary conferences.

4. The law of the sea was, however, still the main topic of concern to the Arab Commission for International Law, which was trying to bring the regulations in force in the Arab States into line with the provisions of the 1982 United Nations Convention on the Law of the Sea, and in particular those relating to the delimitation of maritime zones, by formulating a set of standard rules which the Arab States would undertake to incorporate in their internal law.

5. Speaking also on behalf of the Chairman of the Arab Commission for International Law, he wished the International Law Commission every success in its work.

6. Mr. USHAKOV, speaking also on behalf of Mr. Flitan and Mr. Yankov, thanked the Observer for his account of the activities of the Arab Commission for International Law. He noted with pleasure that the agenda of the Arab Commission included some of the same items as that of the International Law Commission and he wished the Arab Commission success in its work.

7. Mr. EL RASHEED MOHAMED AHMED said that the Arab heritage in the human sciences, the natural sciences and international law, which had very ancient origins, had been inherited from Greek and Persian civilization and had then been passed on to Europe. The Arabs had thus made their own distinctive contribution to humanity in the form of the establishment of regular co-operation and contacts which would promote better understanding, the harmonization of all points of view and the unification of the world for the peace, happiness and development of all mankind.

8. Mr. MALEK, speaking on behalf of the members of the Commission from the Asian region and as a national of a country which was a member of the League of Arab States, congratulated the Observer on his interesting account of the work done by the Arab Commission for International Law on a wide variety of topics and in many fields of international law. He also welcomed the close relations and

---

* Resumed from the 1915th meeting.

co-operation between the International Law Commission and the Arab Commission and expressed the hope that those relations would become still closer. It would be very useful if the two bodies regularly took an active part in each other's work.

9. Mr. REUTER thanked the Observer for the Arab Commission for International Law for his statement. It was a well-known fact that Europe and the world in general were particularly indebted to the Arab countries for their contribution to the sciences, algebra, medicine, navigation, chemistry and even linguistics. He was happy to see that the Arab countries, old and young alike, attached so much importance to international law and were making regional efforts to unify it. The Arab countries did, of course, have their problems, just as the European countries had had for so many centuries. The Arab countries were therefore wise to try to settle their legal disputes first through negotiation and then by submitting them to the ICJ, from which they had long been absent. The example they were setting was most welcome. He was, moreover, sure that the International Law Commission could learn a great deal from the activities of the Arab Commission for International Law.

10. Mr. CALERO RODRIGUES, speaking also on behalf of the members of the Commission from the Latin American region, thanked the Observer for the Arab Commission for International Law for his statement and associated himself with the other members who had stressed the importance of co-operation between the two bodies, one working at a regional level and the other at the international level on some of the same topics. Increasingly deeper understanding between the two bodies would help to strengthen their co-operation.

Programme, procedures and working methods of the Commission, and its documentation (*concluded*)*

[Agenda item 10]

Recommendations by the Planning Group

11. The CHAIRMAN informed members of the Commission that the Enlarged Bureau had held a meeting that morning to consider two recommendations by the Planning Group, the first relating to documentation and the organization of the Commission's work and the second to the use by the Commission of conference services. The Chairman of the Planning Group had suggested that the Chairman of the Commission might wish to address a letter to the Chairman of the Committee on Conferences explaining that any underutilization of conference services at the beginning of the session had been due to the fact that informal meetings had been held in connection with the election of new members. A reference to both recommendations would be included, for approval, in the Commission's draft report.

* Resumed from the 1893rd meeting.

Jurisdictional immunities of States and their property (*continued*)* (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/388,[2] A/CN.4/L.382, sect. D, A/CN.4/L.397)

[Agenda item 4]

Draft articles proposed by the Drafting Committee

Article 19 (Ships engaged in commercial service) *and*

Article 20 (Effect of an arbitration agreement)

12. The CHAIRMAN invited the Chairman of the Drafting Committee to present articles 19 and 20 as proposed by the Drafting Committee (A/CN.4/L.397), which read:

Article 19. Ships engaged in commercial service

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship engaged in commercial [non-governmental] service cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the operation of that ship provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

2. Paragraph 1 does not apply to warships and naval auxiliaries nor to other ships owned or operated by a State and used or intended for use in government non-commercial service.

3. For the purposes of this article, the expression "proceeding relating to the operation of that ship" shall mean, *inter alia*, any proceeding involving the determination of:

(*a*) a claim in respect of collision or other accidents of navigation;

(*b*) a claim in respect of assistance, salvage and general average;

(*c*) a claim in respect of repairs, supplies, or other contracts relating to the ship.

4. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in any proceeding relating to the carriage of cargo on board a ship owned or operated by that State and engaged in commercial [non-governmental] service provided that, at the time the cause of action arose, the ship was in use or intended exclusively for use for commercial [non-governmental] purposes.

5. Paragraph 4 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor to any cargo belonging to a State and used or intended for use in government non-commercial service.

6. States may plead all measures of defence, prescription and limitation of liability which are available to private ships and cargoes and their owners.

7. If in any proceedings there arises a question relating to the government and non-commercial character of the ship or cargo, a certificate signed by the diplomatic representative or other competent authority of the State to which the ship or cargo belongs and communicated to the court shall serve as evidence of the character of that ship or cargo.

Article 20. Effect of an arbitration agreement

If a State enters into an agreement in writing with a foreign natural or juridical person to submit to arbitration differences relating to a [commercial contract] [civil or commercial matter], that State cannot invoke immunity from jurisdiction before a court of

* Resumed from the 1924th meeting.

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

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

another State which is otherwise competent in a proceeding which relates to:

(*a*) the validity or interpretation of the arbitration agreement,

(*b*) the arbitration procedure,

(*c*) the setting aside of the award,

unless the arbitration agreement otherwise provides.

13. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) said that, with the adoption of articles 19 and 20, the Commission would have completed its consideration of all the articles submitted by the Special Rapporteur for incorporation in part III of the draft, with the exception of article 11 (Scope of the present part), which the Drafting Committee would consider at a later stage, and the title of part III. Article 6 (State immunity) would also have to be considered further by the Drafting Committee, since it had not been possible to agree on a text in the limited time available.

14. Referring to article 19,[3] he said that it had been decided to separate the treatment of cargo from that of ships, so that paragraphs 1, 2 and 3 now related to ships, paragraphs 4 and 5 to cargo and paragraphs 6 and 7 to both. A number of drafting changes had been made in order to bring the article into line with articles already adopted and also for the sake of clarity. That explained, for example, why the words "which is otherwise competent" had been added in paragraphs 1 and 4.

15. Paragraph 1 provided for the case in which a State could not invoke immunity from jurisdiction before a court of another State which was otherwise competent. The Drafting Committee had decided that the expression "owns or operates" was sufficiently broad and that it was unnecessary to burden the text with additional expressions such as "possesses or employs". A full explanation would be given in the commentary. The expression "non-governmental" in paragraphs 1 and 4 had been placed in square brackets to indicate that the Drafting Committee had been unable to agree on what type of service by a ship would result in non-immunity. While some members considered that the term "commercial service" reflected the practice of States, others held that the expression "non-governmental" should be inserted to take account of the interests of developing countries that might own or operate ships engaged in service which, though of a commercial nature, should be regarded as governmental by virtue of its governmental purpose. The words "in any proceeding" were intended to cover all kinds of proceedings, including actions against the owner or operator of a ship, admiralty actions *in rem* and actions *in personam*. In the concluding phrase, the time factor had been retained and the words "intended exclusively for use" had been added to provide a safeguard against possible abuse: the intended use of a ship could be difficult to assess and it would be easier to ascertain an intent to use a ship exclusively for commercial [non-governmental] purposes. Some members considered, however, that the addition of the word "exclusively" would be contrary to State practice and would allow States far too much latitude to claim immunity.

16. Paragraph 2 conferred immunity from jurisdiction on certain categories of ships, such as warships and naval auxiliaries. The latter term, which had been introduced to cover ships such as supply ships and hospital ships, would be explained in the commentary. Further precision had been introduced with the phrase "used or intended for use in government non-commercial service", which was based on the concluding phrase of article 19, paragraph 1, and on the relevant articles of the 1926 Brussels Convention[4] and of the 1982 United Nations Convention on the Law of the Sea.[5]

17. Paragraph 3 provided examples of a "proceeding relating to the operation of that ship", as referred to in paragraph 1. It was based on article 3, paragraph 1, of the 1926 Brussels Convention, which had been cited by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, para. 204), and which, in the Drafting Committee's view, provided a useful indication of the types of action for which there would be no immunity from jurisdiction under paragraph 1. The technical aspects of maritime law, which were readily apparent from paragraph 3, would be explained in the commentary. The words "operation of that ship" were to be understood not in the sense of the actual physical operation of a ship, but more in the maritime law sense, since a claim in respect of repairs, supplies or other contracts relating to the ship, as provided for in paragraph 3 (*c*), could well arise even before the ship embarked upon its actual physical operation. Maritime liens and mortgages, for example, were thus not excluded.

18. Paragraph 4 dealt with the non-immunity of a State in certain proceedings relating to the carriage of cargo on board a ship owned or operated by that State. It was modelled on paragraph 1 and his earlier remarks pertaining to terminology and the use of square brackets applied.

19. Paragraph 5 conferred immunity on "any cargo carried on board the ships referred to in paragraph 2" and on "any cargo belonging to a State and used or intended for use in government non-commercial service". It was an important provision in that it maintained immunity, *inter alia*, for cargo intended for emergency operations, such as food relief and medical supplies.

20. Paragraphs 6 and 7, which were new, represented an attempt to strike a balance between the non-immunity of a State under paragraphs 1 and 4 and certain types of protection to be afforded to the State. Those paragraphs were based on articles 4 and 5 of the 1926 Brussels Convention and related both to ships and to cargo. Under paragraph 6, the State could plead the same measures of defence, prescription and limitation of liability as were available to

[3] For the revised text of draft article 19 submitted by the Special Rapporteur, see 1915th meeting, para. 2, and for the Commission's consideration thereof, see 1915th meeting (paras. 5-30) and 1916th to 1918th meetings.

Draft article 19 as originally submitted by the Special Rapporteur was considered by the Commission at its thirty-sixth session, see *Yearbook ... 1984*, vol. I, pp. 145 *et seq*., 1838th meeting (paras. 25 *et seq*.) and 1839th to 1841st meetings.

[4] See 1915th meeting, footnote 7.

[5] See 1924th meeting, footnote 11.

private ships and cargoes and their owners. Paragraph 7 provided that a certificate as to the character of the ship or cargo should be communicated to the court if any question in that regard arose in any proceedings. The certificate, which would serve as evidence of the character of the ship or cargo, should be communicated by the diplomatic representative or any other competent authority—such as a consul—of the State to which the ship or cargo belonged. Such a communication would, of course, be governed by the applicable rules of procedure of the forum State. Those points would be elaborated on in the commentary.

21. The title of the article had been amended to read "Ships engaged in commercial service", in keeping with the changes introduced in the body of the text.

22. One member had expressed reservations, in particular, with regard to those elements in the article which implied that the activities of the State could be divided between governmental activities and commercial activities.

23. Turning to article 20, he noted that the text proposed by the Drafting Committee was somewhat shorter than that originally submitted by the Special Rapporteur.[6] A number of changes had been made to introduce greater precision and bring the text into line with the wording of articles already adopted. The article thus revised consisted of a single paragraph dealing with the non-immunity of one State in a proceeding before a court of another State which related to certain aspects of an arbitration agreement which the former State had entered into, in writing, with a foreign natural or juridical person. The phrase "an agreement in writing with a foreign natural or juridical person to submit to arbitration differences ..." was intended to cover not only specific agreements on arbitration, but also clauses in agreements or *ad hoc* agreements providing for arbitration. In accordance with the wording of article 12 (Commercial contracts), the Drafting Committee had used the expression "differences relating to a [commercial contract] [civil or commercial matter]" rather than the longer formulation proposed by the Special Rapporteur.

24. As to the subject-matter of the differences which the parties agreed to submit to arbitration, the Drafting Committee had proposed two alternatives, both in square brackets. The second, namely a "civil or commercial matter", was supported by those members who considered that it covered not only differences relating to commercial contracts *per se*, but also differences relating to civil matters such as personal injury claims and assessment of damages. In the view of those members, since the State was free to agree to submit differences to arbitration, that freedom should not be restricted, even by implication, by limiting the article to differences that related to a commercial contract only. Other members, however, took the view that it was advisable to confine the subject-matter to a "commercial contract", as already defined in the draft. They contended that arbitration proceedings involved such contracts and that the use of the broader term "civil or commercial matter" could open the door to a wide interpretation by domestic courts that went well beyond what the State intended when it entered into the arbitration agreement; the article would be more acceptable, particularly to developing countries, if it were limited to differences relating to a commercial contract. Since the Drafting Committee had been unable to agree which formula to use, both had been placed in square brackets.

25. The operative part of the article, to the effect that a "State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent", avoided the more complicated language of the original text. The phrase "which is otherwise competent" had been included to ensure that it would be for the court of the forum State to satisfy itself that it was otherwise competent to entertain the proceeding in question.

26. Subparagraphs (*a*), (*b*) and (*c*) were virtually identical with those submitted by the Special Rapporteur, apart from minor drafting changes. The concluding phrase "unless the arbitration agreement otherwise provides" had been included to enable the parties to the agreement to incorporate provisions other than those specified in the article. Some members had, however, expressed reservations, since, under the law of some States, it was not certain whether the parties to such an agreement could waive the provisions of domestic law relating to the subject-matter jurisdiction of domestic courts or could purport to limit the jurisdiction of such courts.

27. It had been decided not to include a proviso to the effect that the article did not apply to arbitration agreements between States or between States and international organizations. It had been considered self-evident that such agreements fell outside the scope of the article, since the opening phrase referred expressly to a State which entered into an agreement "with a foreign natural or juridical person". That point would be emphasized in the commentary.

28. The title of article 20 had been couched in more specific terms to read: "Effect of an arbitration agreement".

29. One member had voiced his opposition to the article because, in his view, it dealt not with public international law matters but with matters of private international law and internal civil law, and the Commission was therefore not in a position to consider the question.

30. Mr. USHAKOV said that he could accept the text of article 19 as proposed by the Drafting Committee, even though he had some reservations concerning, in particular, paragraph 1. A ship operated by a State was, in his view, always engaged in government service and could therefore invoke immunity. If, as in the USSR and other countries, the State was the owner of the ship but authorized an entity distinct from it to use and operate the ship on a provisional basis, it still retained ownership of the ship under the law. He failed to see why an action could be brought against a State which owned a ship operated by an entity which was distinct from the

[6] For the text, see 1915th meeting, para. 3, and for the Commission's consideration thereof, see 1915th meeting (paras. 5-30) and 1916th to 1918th meetings.

State and did not enjoy immunity. That problem was not covered by paragraph 1 and he wished his reservation to be taken into consideration.

31. With regard to the words "nor to any cargo belonging to a State and used or intended for use in government non-commercial service" in paragraph 5 of article 19, he reaffirmed the principle that a cargo could not be divided into two parts, one in commercial service and the other not. In the case referred to in paragraph 5, cargo would always be regarded as being intended for use in government service.

32. He also had a reservation with regard to the wording of article 20, which suggested that a commercial arbitration award might be reviewed by certain courts. That was, in fact, not always so and he would therefore be grateful if the Special Rapporteur would explain, at least in the commentary, that such a possibility would depend on internal law.

The meeting rose at 1.05 p.m.

1932nd MEETING

Monday, 22 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Jurisdictional immunities of States and their property (*concluded*) (A/CN.4/376 and Add.1 and 2,[1] A/CN.4/L.382, sect. D, A/CN.4/L.397)

[Agenda item 4]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 19 (Ships engaged in commercial service) *and*

ARTICLE 20 (Effect of an arbitration agreement)[2] (*concluded*)

1. Mr. OGISO, referring to article 19, said that he was opposed to the inclusion of the expression "non-governmental", which appeared in square brackets in paragraphs 1 and 4 and could be interpreted to mean that a ship owned by a State and used in commercial service enjoyed immunity from the jurisdiction of the courts of another State. As a result, all commercial ships in service under a State trading system might claim immunity—and that would be quite unacceptable to him, particularly in the event of a collision for which a State-owned ship was responsible. In such a case, a merchant ship operating under the free-market system would, of course, be subject to local jurisdiction. The inclusion of the expression "non-governmental" could, moreover, give rise to an interpretation that was inconsistent with existing State practice and with international agreements such as the 1926 Brussels Convention.[3] In his view, therefore, that expression should be deleted from article 19.

2. Mr. ILLUECA said that, in his view, the Spanish text of article 19 had to be brought more closely into line with the English text. In paragraph 1, the words *o que lo explote* should therefore be replaced by the words *o que lo utilice con tal propósito* or by the words *o que lo emplee con tal propósito*. The words *procedimiento concerniente a la explotación de ese buque* in paragraphs 1 and 3 should be replaced by the words *procedimiento concerniente al funcionamiento de ese buque* and, in paragraphs 2 and 4, the words *explotados* and *explotado* should be replaced by the words *utilizados* and *utilizado*, respectively.

3. The Spanish wording of the proposed title of article 19, namely *Buques destinados a un servicio comercial*, differed both in form and in substance from the title originally submitted by the Special Rapporteur in his sixth report (A/CN.4/376 and Add.1 and 2, paras. 232-233), which referred to *Buques utilizados en servicio comercial*. As it now stood, the proposed title failed to make it clear that article 19 applied not to all ships, but only to ships engaged in commercial service and owned or operated by a State, in accordance with the classification presented by the Special Rapporteur in his sixth report (*ibid.*, paras. 128-131), which distinguished between "public vessels" and "private vessels". The title should therefore be amended to read: *Buques del Estado o buques que el Estado utiliza en servicio comercial* ("State-owned or State-operated ships in commercial service").

4. As an example of a situation where it was practically impossible to distinguish between a ship used by a State for governmental purposes and a ship used by that State for commercial purposes, he referred to a case which had occurred in 1973. At the time of the events leading to the overthrow of the Allende Government in Chile, two ships, one Cuban and the other Soviet, had been unloading in a Chilean port. Their captains had immediately decided to return to their home ports via the Panama Canal. When passing through the Canal, the two ships had been arrested and attached by order of a federal court of the United States of America in the former Canal Zone following a complaint by a Chilean agency. The Government of Panama had protested, claiming that, as a sovereign State, it recognized the jurisdictional immunity of the two ships, which were in the service of the Governments of two sovereign States, and that their attachment was contrary to the Canal's legal régime. Shortly thereafter, the federal court in question had received a note from the Department of State and the two ships had been released and allowed to proceed on their way.

---

[1] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[2] For the texts, see 1931st meeting, para. 12.

[3] See 1915th meeting, footnote 7.

5. Panama's position had not changed, but in 1976 the United States had adopted the *Foreign Sovereign Immunities Act*, a complicated legislative instrument embodying principles of restricted immunity that could be invoked as exceptions to the principle of absolute immunity.

6. Before adopting article 19, paragraph 2, which the Drafting Committee had based on paragraph 2 (*a*) of the revised text submitted by the Special Rapporteur,[4] the Commission should take account of the view expressed in the Sixth Committee of the General Assembly that the paragraph might be superfluous in the light of the provisions of article 6 (A/CN.4/L.382, para. 307). The Drafting Committee's aim had, in fact, not been to make the rule an exception to an exception, but, rather, to confirm article 3 of the 1926 Brussels Convention (A/CN.4/376 and Add.1 and 2, paras. 203-204) and to provide that the ships referred to in paragraph 2 enjoyed immunity from jurisdiction in accordance with article 6, which had been described in the Sixth Committee (A/CN.4/L.382, para. 245) as the key to the draft articles as a whole.

7. Article 6, which would serve as the basis for the régime of exceptions to State immunity to be dealt with in part III of the draft, must therefore clearly enunciate the fundamental principle that a State enjoyed immunity from the jurisdiction of another State in accordance with international law and that effect would be given to such immunity in accordance with the provisions of the articles which the Commission would eventually submit, together with its recommendations, to the General Assembly. It might then be possible to delete paragraph 2, as well as paragraph 5, of article 19, on the understanding that article 6 would make the principle of jurisdictional immunity applicable to the ships and cargo referred to in those paragraphs.

8. Mr. SUCHARITKUL (Special Rapporteur), replying to a question raised by Mr. Ushakov at the 1931st meeting, said that proceedings could be brought against a State which owned a ship that was operated by a separate entity because of the special nature of the proceedings *in rem* which were available in certain common-law countries and which invariably also entailed proceedings *in personam* against the owner and master of the ship. According to Mr. Ushakov, it should be possible to institute proceedings against the operator of the ship without involving the State or its jurisdictional immunity: there was no need to institute proceedings *in personam* against the State which owned the ship, particularly if the cause of action, such as a collision at sea or the carriage of goods by sea, involved its operation. Where, however, the proceedings related to repairs carried out on the ship or to salvage services rendered, it might be difficult, under certain legal systems, to show that the owner had not benefited from such repairs or services and that the operator alone was liable. To avoid unnecessary problems, it might therefore be advisable, in any proceedings against a State, to envisage the substitution of a more convenient defendant, such as the entity set up for the purpose of operating the merchant marine and intentionally made answerable for whatever causes of action might arise out of the operation of the ship. If that course were followed, a State which owned, but did not operate, a vessel could allow the operator to appear in its place to answer a claim. Indeed, under bilateral arrangements, there was a slowly emerging trend in that direction.

9. Another point that had been raised related to the rule of non-immunity embodied in paragraph 4 of article 19, and also to some extent in paragraph 1, relating to a cargo belonging to a State and used or intended for use for commercial non-governmental purposes. It had been said that it was difficult to see how property such as a ship or cargo could be State-owned and at the same time used for commercial and non-governmental purposes. Yet, under the rule in question, every use made by a State of its property had to be regarded as governmental and hence non-commercial. In the circumstances, it might be useful to state expressly in the commentary that there were instances, particularly in the case of developing and socialist countries, when States engaged directly in trade *inter se*.

10. Turning to article 20, he said that the commentary might refer to the fact that States were now competing among themselves in an effort to create the most favourable conditions for holding commercial arbitration proceedings in their territories. One method was to endeavour to curtail judicial control or interference. To that end, the United Kingdom and Malaysia, for example, had amended their legislation governing jurisdiction to supervise arbitration, while other countries, including Thailand and Australia, still upheld the primacy of judicial independence and maintained more or less strict judicial control over arbitration in civil, commercial and other matters which took place in their territories. It was thus possible that, in any given case, a court which was otherwise competent might decline to exercise supervisory jurisdiction or might be divested of such jurisdiction under new legislation or that the exercise of supervisory jurisdiction might have been excluded by the decision of the parties to adopt an autonomous type of arbitration, such as ICSID arbitration, or to regard arbitral awards as final and self-executing. Some courts might persist in asserting control over arbitration proceedings contrary to the wishes of the parties. Agreements to arbitrate were, however, binding on the parties, although their enforcement might require judicial participation at some stage.

11. Lastly, he said that he supported Mr. Illueca's proposed amendment to the title of article 19 and agreed that the Spanish text should be brought into line with the English text. A decision whether or not to retain paragraphs 2 and 5 of article 19 should, however, be taken only on second reading.

12. Sir Ian SINCLAIR, noting that he agreed with Mr. Ogiso's comments on article 19, said that, according to his understanding, the object and purpose of that provision was to place State-owned or State-operated ships engaged in commercial service on the same footing as privately owned ships and their cargoes. The inclusion of the expression "non-

[4] *Ibid.*, para. 2.

governmental" in paragraphs 1 and 4 would, however, only add to the confusion, since there was a danger that those provisions would be interpreted to mean that a ship in governmental service could enjoy immunity even if it was being operated solely for commercial purposes. The inclusion of that expression would also run counter to the trend of multilateral conventions, such as the 1958 Convention on the Territorial Sea and the Contiguous Zone,[5] articles 21 and 22 of which drew a distinction between rules that applied to government ships operated for commercial purposes and rules that applied to government ships operated for non-commercial purposes. He had no problem, however, with paragraph 2, which would be essential to overcome any difficulties of interpretation that might arise from paragraph 1 if, as he strongly suggested, the expression "non-governmental" was deleted.

13. The word "exclusively", appearing near the end of paragraphs 1 and 4 of article 19, was also unnecessary and might create confusion. It should be abundantly clear from the contract for the construction of a ship whether or not that ship was intended for use for commercial purposes.

14. As to article 20, he could accept the text proposed by the Drafting Committee and was in favour of the broader term "civil or commercial matter".

15. Mr. LACLETA MUÑOZ, commenting on some of the drafting points raised by Mr. Illueca, said that the Drafting Committee had deliberately decided to use the Spanish word *explotar* to translate the word "operate"in article 19. The word *operar* would, in the context, have been an Anglicism. The word *explotar* was, moreover, used in the text of the 1926 Brussels Convention. It might also have been possible to use the verb *utilizar,* as in paragraph 4, but any reference to the *funcionamiento* of the ship was to be avoided, since the meaning of that term was purely technical.

16. He shared the view that the expression "non-governmental" in square brackets in paragraphs 1 and 4 should be deleted, since it could be understood to mean that a ship operated in commercial service could enjoy immunity, an idea which would run counter to the trend which had been emerging since the 1920s and which was reflected in the 1926 Brussels Convention.

17. In article 20, however, the second of the two alternatives in square brackets should be retained so that the arbitration machinery would be as comprehensive as possible. In the Spanish text, the words *asunto civil o mercantil* would nevertheless be preferable to the words *negocio civil o mercantil.*

18. Mr. BALANDA said that, when the Commission had begun its consideration of exceptions to State immunity, it had requested the Special Rapporteur to take particular account of the purpose of commercial activities: the expression "non-governmental" had been included in article 19, paragraphs 1 and 4, in response to that request.

[5] United Nations, *Treaty Series,* vol. 516, p. 205.

19. In many developing countries, the State had to engage in certain activities and perform certain services because there were no private individuals who could do so. In such a case, if a State which owned a ship engaged in commercial activities with another State as its partner, it would be performing a public service. That point warranted particular attention, since the State could neither be prevented from performing the public service nor deprived of the means of doing so. Developing countries which were obliged to engage in commercial activities should therefore be regarded as performing a public service and should not be deprived of their *instrumentum,* since the commercial activities in question would come within the scope of the public service provided. However, if most of the members of the Commission took the view that the use of the words "a ship engaged in commercial [non-governmental] service" in paragraphs 1 and 4 would mean adding a new category of ships and, possibly, complicating international commercial relations, he might be willing simply to agree with the interpretation of the words "ships ... in government non-commercial service" in paragraph 2, which essentially met his concerns. A logical interpretation of that wording, which was used in the 1926 Brussels Convention, would take account of the particular situation of developing countries, since ships belonging to the State and performing a public service would be considered to be engaged in commercial non-governmental service.

20. Referring to article 20, he said that he had very strong reservations about the possibility of making an arbitration agreement applicable to all types of differences. For the sake of consistency with the philosophy of the text submitted by the Special Rapporteur and in order to avoid problems of implementation, exceptions to the fundamental principle of jurisdictional immunity should be limited to commercial activities as such.

21. Mr. RIPHAGEN said that he shared the doubts voiced with regard to inclusion of the expression "non-governmental" in article 19, paragraphs 1 and 4. He considered, however, that further study of the matter was required, given the special situation of ships in international law and the need, for instance, to distinguish between the concept of freedom of passage, which conferred some immunity on all ships, and the question of the commercial operation of ships and related proceedings.

22. He also had doubts about paragraph 5 and saw no reason why a ship "owned or operated by a State and used or intended for use in government non-commercial service", as provided for in paragraph 2, should not be governed by paragraph 4.

23. He had some difficulty with the English and French texts of paragraph 7, since the words "shall serve as evidence" did not correspond to the words *vaudra preuve.*

24. With regard to article 20, his preference was for the second alternative in square brackets, namely "civil or commercial matter". There was no immunity in that particular case because of the supervisory functions of the courts of the State where the arbitration took place and there was no reason to confine such immunity to commercial contracts.

25. Mr. TOMUSCHAT said he considered that the expression "non-governmental" in article 19, paragraphs 1 and 4, should be deleted, even though there would still be the question of who would qualify an activity in which a ship engaged as commercial or non-commercial.

26. He further considered that the words "other ships" in article 19, paragraph 2, were too broad; the ships in question should be defined more precisely, otherwise the rule embodied in paragraph 1 would be undermined.

27. With regard to article 20, he too considered that the second alternative in square brackets was preferable, although it might be necessary to revert to the matter later in the light of comments that would be made, particularly by specialists in matters relating to conflicts of laws.

28. Mr. RAZAFINDRALAMBO, referring to the use of the expression "non-governmental" in article 19, paragraphs 1 and 4, said that, in his country, commercial ships were owned and operated not by the State, but by commercial enterprises; the State was thus not directly involved. He nevertheless understood the concerns which had been expressed by Mr. Balanda, whose country, like some other third world countries, directly owned commercial ships and ran the risk of being involved in proceedings relating to their operation. He also agreed with Mr. Balanda about the interpretation of the words "ships ... in government non-commercial service" in paragraph 2. Since that wording, which was, moreover, similar to that used in the 1926 Brussels Convention, had so far not given rise to any problems, he did not see why the words "a ship ... in commercial [non-governmental] service" should do so. For the sake of symmetry, the expression "non-governmental" could therefore be retained in paragraphs 1 and 4 without any great harm.

29. In article 20, a choice had to be made between the two formulations in square brackets. He understood the position adopted by the members of the Commission who considered that article 20 would have few legal consequences for a State which had concluded in advance a written arbitration agreement. Once a State had entered into an agreement to submit a dispute to arbitration, it should not be able to invoke immunity from the jurisdiction of the courts of the other State. That position was logical. In developing countries, however, submitting to arbitration meant waiving immunity from jurisdiction. It was thus an exception to State sovereignty and it should, accordingly, be limited as much as possible. If the possibility of submitting to arbitration were greatly extended, the sovereignty of the State concerned might be seriously jeopardized. That was why developing countries wanted that possibility to be limited.

30. If article 20 were interpreted broadly, it might allow all civil and commercial matters to be submitted to arbitration. According to such a broad interpretation, moreover, article 20 would also apply to administrative matters. The problem was thus one of interpretation and it involved State sovereignty. He was therefore in favour of a restrictive interpretation of article 20, which should refer only to the submission to arbitration of differences relating to commercial contracts.

31. Mr. CALERO RODRIGUES (Chairman of the Drafting Committee) suggested, in the light of the discussion in the Commission, that Mr. Illueca's proposed amendment to the title of article 19 should be adopted. Also, for the sake of clarity, the expression "non-governmental" should be deleted from article 19, paragraphs 1 and 4, on the understanding that the words "government non-commercial service" in paragraph 2 of the article would be interpreted as qualifying "commercial service" in paragraph 1.

32. As to article 20, he considered that, since it was not possible at the current stage to decide in favour of either of the two alternatives in square brackets, the square brackets should be retained. He also suggested that the existing Spanish text should stand, but should be reviewed again on second reading.

33. Mr. SUCHARITKUL (Special Rapporteur said that he fully agreed with those suggestions.

34. Mr. USHAKOV said that the expression "non-governmental" had been placed in square brackets because of differences of opinion both in the Drafting Committee and in the Commission. Only a vote could settle the matter. It was, however, not the Commission's practice to proceed to a vote on first reading, since articles could be changed on second reading in the light, for instance, of comments by Governments. He had therefore accepted article 19 in its present form, with some reservations (1931st meeting). All members had had the possibility to do likewise. The reservations expressed would be reflected in the summary records of the meeetings. As for the title of the article, it was not definitive and could be amended.

35. Mr. FRANCIS said that he favoured Mr. Ushakov's suggested approach: it would be premature at the current stage to delete the square brackets in paragraphs 1 and 4 of article 19. The proper course would be to take a final decision in the matter on second reading, when a vote could be taken if necessary.

36. The CHAIRMAN suggested that the square brackets around the expression "non-governmental" in paragraphs 1 and 4 of article 19 should be retained and that the commentary should refer to the point raised by Mr. Balanda concerning the interpretation of paragraphs 1 and 2. He further suggested that the title of article 29 should be amended to read: "State-owned or State-operated ships engaged in commercial service". As to article 20, he suggested that the square brackets around the two alternative expressions should be retained, and that the Spanish text should not be modified, on the understanding that it could be revised later if necessary. Any reservations with regard to the square brackets used in the two articles would be reflected in the summary records of the meetings and in the commentaries to articles 19 and 20.

37. If there were no objections, he would take it that the Commission agreed to adopt articles 19 and 20 provisionally on first reading in the form proposed

by the Drafting Committee, taking into account his suggestions.

It was so agreed.

Articles 19 and 20 were adopted.

Draft report of the Commission on the work of its thirty-seventh session

38. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

CHAPTER I. ***Organization of the session*** (A/CN.4/L.386)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

39. The CHAIRMAN said that, in the third sentence, the square brackets around the words "sets out the articles and commentaries provisionally adopted by the Commission at the present session" should be removed, since the Commission had now adopted the articles in question. In the penultimate sentence, the words "and chapter VIII relates to international liability for injurious consequences arising out of acts not prohibited by international law" should be deleted, since there would be no separate chapter on that topic. In the last sentence, the words "Chapter IX of the report" should accordingly be replaced by the words "Chapter VIII of the report".

It was so agreed.

40. Mr. RIPHAGEN (Special Rapporteur) said that, in the third sentence, the words "the articles and commentaries" should be replaced by "the article and commentary", since only one article on State responsibility had been adopted.

Paragraph 2, as amended, was adopted.

Paragraphs 3 to 9

Paragraphs 3 to 9 were adopted.

Paragraph 10

41. Mr. CALERO RODRIGUES suggested that, in the first sentence, the words "on which topic the new Special Rapporteur had submitted a preliminary report" should be replaced by "to which reference is made in section A of chapter VIII".

It was so agreed.

Paragraph 10, as amended, was adopted.

Chapter I of the draft report, as amended, was adopted.

CHAPTER VIII [former chapter IX]. ***Other decisions and conclusions of the Commission*** (A/CN.4/L.394 and Add.1-3)

A. International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/L.394/Add.1)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B [former A]. Programme and methods of work of the Commission (A/CN.4/L.394 and Add.2)

42. The CHAIRMAN said that paragraphs 1 to 4 of section B (A/CN.4/L.394) would be considered later, together with paragraphs 5 to 13 of the same section (A/CN.4/L.394/Add.2).

C [former B]. Co-operation with other bodies (A/CN.4/L.394 and Add.3)

43. The CHAIRMAN said that the new subsection 1 dealing with the Arab Commission for International Law (A/CN.4/L.394/Add.3) would be considered later.

C.2 [former B.1]. Asian-African Legal Consultative Committee (A/CN.4/L.394)

Paragraphs 5 to 8

Paragraphs 5 to 8 were adopted.

C.3 [former B.2]. European Committee on Legal Co-operation (A/CN.4/L.394)

Paragraphs 9 to 12

Paragraphs 9 to 12 were adopted.

C.4 [former B.3]. Inter-American Juridical Committee (A/CN.4/L.394)

Paragraphs 13 to 16

Paragraphs 13 to 16 were adopted.

D [former C]. Date and place of the thirty-eighth session (A/CN.4/L.394)

Paragraph 17

Paragraph 17 was adopted.

Section D was adopted.

E [former D]. Representation at the fortieth session of the General Assembly (A/CN.4/L.394)

Paragraph 18

Paragraph 18 was adopted.

Section E was adopted.

F [former E]. Gilberto Amado Memorial Lecture (A/CN.4/L.394)

Paragraphs 19 to 21

Paragraphs 19 to 21 were adopted.

Section F was adopted.

G [former F]. International Law Seminar (A/CN.4/L.394)

Paragraphs 22 to 28

Paragraphs 22 to 28 were adopted.

Paragraph 29

44. Sir Ian SINCLAIR said that, in view of the appeal for funds made to all States in paragraph 30, it might be better to delete the last sentence of paragraph 29, referring to the small number of applications received from Asia.

45. The CHAIRMAN said that the last sentence of paragraph 29 merely stated the fact that Asia had not been equitably represented at the 1985 session of the International Law Seminar because of the small

number of applications received from that region. There was no link between that sentence and paragraph 30.

46. Mr. SUCHARITKUL said that the retention of paragraph 29 as it stood might encourage certain Asian countries to respond more favourably to the appeal made in paragraph 30.

47. Sir Ian SINCLAIR withdrew his suggestion.

Paragraph 29 was adopted.

Paragraph 30

48. The CHAIRMAN said that, in his statement to the Commission at its 1928th meeting, Mr. Giblain, the Director of the International Law Seminar, had supplied figures to show that, unless there was an increase in voluntary contributions, the Seminar might not have sufficient funds for its 1986 session. Mr. Giblain would be writing to Governments on that subject and he himself proposed to refer to it in his statement to the General Assembly.

49. Sir Ian SINCLAIR proposed the deletion, in the second sentence, of the words "at the very least in a symbolical manner".

It was so agreed.

Paragraph 30, as amended, was adopted.

Section G, as amended, was adopted.

The meeting rose at 1.20 p.m.

1933rd MEETING

Tuesday, 23 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

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

---

Draft report of the Commission on the work of its thirty-seventh session (*continued*)

1. The CHAIRMAN stated that the adoption of a paragraph of the report would be taken to include that of any footnotes attached to it.

CHAPTER VIII [former chapter IX]. *Other decisions and conclusions of the Commission* (concluded) (A/CN.4/L.394 and Add.1-3)

B [former A]. Programme and methods of work of the Commission (*concluded*) (A/CN.4/L.394 and Add.2)

Paragraphs 1 to 4 (A/CN.4/L.394)

Paragraphs 1 to 4 were adopted.

Paragraphs 5 to 13 (A/CN.4/L.394/Add.2)

Paragraphs 5 to 13 were adopted.

Section B was adopted.

C [former B]. Co-operation with other bodies (*concluded*) (A/CN.4/L.394 and Add.3)

C.1. Arab Commission for International Law (A/CN.4/L.394/Add.3)

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section C was adopted.

Chapter VIII of the draft report, as amended, was adopted.

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (A/CN.4/L.387 and Add.1)

A. Introduction (A/CN.4/L.387)

Paragraphs 1 to 9

Paragraphs 1 to 9 were adopted.

Paragraph 10

2. Mr. FLITAN (Rapporteur of the Commission) explained that paragraphs 1 to 19 of chapter II of the draft report were almost identical with paragraphs 10 to 28 of the Commission's report on its thirty-sixth session.[1] The same was true of the footnotes, except that, in footnote 17 to paragraph 10 of chapter II of the draft report under consideration, "July 1984" should be replaced by "July 1985".

3. Mr. THIAM (Special Rapporteur) said that the French text of footnote 17 should be brought into line with the English by replacing the words *n'avait pas repris* by *n'a pas repris*.

Paragraph 10, as amended, was adopted.

Paragraphs 11 to 17

Paragraphs 11 to 17 were adopted.

Paragraph 18

4. Sir Ian SINCLAIR proposed that the word "international" should be inserted before the words "criminal jurisdiction" in the first part of the penultimate sentence.

5. Mr. THIAM (Special Rapporteur) explained that the adjective "international" had been omitted because the competent court would not necessarily be international in character. It was therefore desirable not to confine the reference to an international court. He urged that the text should be retained as it stood.

6. Mr. RIPHAGEN pointed out that the penultimate sentence reflected the views of a number of members who had stressed the need for an international criminal jurisdiction.

7. The CHAIRMAN recalled that paragraph 18 described a discussion that had taken place at the thirty-fifth session, in 1983, and reproduced the language used in that regard in paragraph 27 of the

---

[1] *Yearbook ... 1984*, vol. II (Part Two), pp. 7 *et seq.*

Commission's report on its thirty-sixth session.[2] It was therefore inadvisable to depart from that language.

8. Mr. CALERO RODRIGUES said that he was one of the members referred to in the penultimate sentence. The position in 1983, as he recalled it, had been that the members in question formed two groups, the first believing that a code unaccompanied by penalties and an international criminal jurisdiction would be ineffective, and the second considering that, while a competent jurisdiction was necessary for that purpose, it need not be international in character. In the view of the latter group, it was enough that the code should indicate the competent national jurisdiction. He accordingly agreed with the Special Rapporteur that the sentence should be kept as it stood, so as to convey the views of both groups.

Paragraph 18 was adopted.

Paragraph 19

Paragraph 19 was adopted.

Paragraph 20

9. Mr. MALEK proposed the deletion, in the second sentence, of the words "in plenary".

It was so agreed.

Paragraph 20, as amended, was adopted.

Paragraphs 21 to 23

Paragraphs 21 to 23 were adopted.

Section A, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.387 and Add.1)

Paragraphs 24 to 32 (A/CN.4/L.387)

Paragraphs 24 to 31

Paragraphs 24 to 31 were adopted.

Paragraph 32

10. Mr. TOMUSCHAT proposed the deletion of paragraph 32, which was misleading. The paragraphs that followed contained the views of the Special Rapporteur, as well as the conclusions reached by the Commission itself, and not merely the latter as paragraph 32 suggested.

11. After an exchange of views in which Mr. THIAM, Mr. CALERO RODRIGUES, the CHAIRMAN (speaking as a member of the Commission), Mr. ARANGIO-RUIZ, Mr. McCAFFREY and Mr. FRANCIS took part, Mr. YANKOV proposed that the text of paragraph 32 should be amended to read:

"32. The following paragraphs reflect in a more detailed manner aspects of the work on the topic by the Commission at its present session."

It was so agreed.

Paragraph 32, as amended, was adopted.

[2] *Ibid.*, p. 10.

Paragraphs 33 to 43 (A/CN.4/L.387/Add.1)

Paragraph 33

12. Mr. DÍAZ GONZÁLEZ recalled that, during the Commission's consideration of the draft articles on State responsibility and the draft Code of Offences against the Peace and Security of Mankind, the Spanish-speaking members of the Commission had emphasized the need to make a distinction, in the Spanish texts, between the words *delito* (offence) and *crimen* (crime). Every *crimen* was a *delito*, but not every *delito* was a *crimen*. The members in question had stated repeatedly, particularly in regard to article 19 of part 1 of the draft articles on State responsibility,[3] that an offence was deemed to be an international crime if it was sufficiently serious to be classified as such. It was imperative to make that distinction, as the Rapporteur himself had done, in the Spanish text.

13. The CHAIRMAN suggested that the Commission should adopt paragraph 33 on the understanding that the Secretariat would ensure that due account was taken in all the language versions of the report of the distinction between an "offence" and a "crime".

Paragraph 33 was adopted on that understanding.

Paragraph 34

Paragraph 34 was adopted.

Paragraph 35

14. Mr. MALEK pointed out that the "general principles" formulated by the Commission at its second session, in 1950, were in fact the "principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal".[4] He proposed that that fact should be made clear by the inclusion of a footnote in paragraph 35 referring to the Commission's report on its second session.

It was so agreed.

15. Sir Ian SINCLAIR proposed the insertion of the words "in the context of its work on the Nürnberg Principles" after the words "general principles formulated by the Commission at its second session, in 1950".

It was so agreed.

Paragraph 35, as amended, was adopted.

Paragraph 36

16. Sir Ian SINCLAIR proposed that paragraph 36 should be reworded to read:

"Following the Commission's further discussion of that question, in which a number of members stressed the importance of formulating general principles in parallel with the list of offences, the Special Rapporteur once again pointed out that the principles which had already been formulated by the Commission would be supplemented, as appropriate, in the light of developments in international law."

[3] *Yearbook ... 1980*, vol. II (Part Two), p. 32.

[4] *Yearbook ... 1950*, vol. II, pp. 374-378, document A/1316, paras. 95-127.

Paragraphs 37 to 41

17. Mr. CALERO RODRIGUES, referring to paragraph 37, noted that the penultimate sentence, and in particular the phrase "a non-temporal element that has not been formulated", was not clear, although there was no difficulty with the French text.

18. Mr. USHAKOV said that, in the penultimate sentence of paragraph 37, the words "*jus cogens* also brings in a non-temporal element that has not been formulated" meant that the peremptory rules of law were retroactive. He could accept that as the Special Rapporteur's personal opinion, but not as the view of the Commission.

19. Sir Ian SINCLAIR, supported by Mr. McCAFFREY, proposed that the words "In his view" should be inserted at the beginning of the first sentence of paragraph 37, to make it clear that the views expressed did not reflect those of the whole Commission.

20. He fully agreed with Mr. Calero Rodrigues regarding the penultimate sentence of the paragraph.

21. Mr. THIAM (Special Rapporteur) said that he would gladly agree to Sir Ian Sinclair's suggestion that the words "In his view" should be inserted, since the opinions expressed were his own, although they had sometimes been shared by other members of the Commission.

22. By the expression "element that has not been formulated", he meant an element that was not expressed in any explicit manner.

23. Sir Ian SINCLAIR proposed that the penultimate sentence of paragraph 37 should be amended to read: "All that can be said is that there is no *lex* in international law to which the principle *nullum crimen sine lege* might be applicable, and that *jus cogens* also brings in a non-temporal and uncodified element."

24. Mr. TOMUSCHAT, supported by Mr. McCAFFREY, proposed that, to make it quite clear that the views stated in paragraphs 37 to 40 were those of the Special Rapporteur, the past tense should be used instead of the present.

25. Mr. MALEK said that, if he had understood the Special Rapporteur correctly, the second sentence of paragraph 37 was concerned not only with the principle *nullum crimen sine lege*, but also with the principle *nulla poena sine lege*, in other words with the two aspects of the principle of the non-retroactivity of criminal law in general. He therefore proposed that the sentence should be reworded to read: "Consideration also had to be given to the scope of the principle of the non-retroactivity of criminal law in its dual aspect, *nullum crimen sine lege, nulla poena sine lege*."

26. Mr. ILLUECA, supporting Sir Ian Sinclair's proposal, said that it should be made clear, where appropriate, that the opinions expressed were those of the Special Rapporteur.

27. Mr. USHAKOV said that he could not agree with the way in which the Special Rapporteur had presented his conclusions and opinions as emanating from the Commission, not only in paragraph 37, but also in paragraphs 38, 39, 40 *et seq*. The paragraphs in question should be amended to make it quite clear by whom the conclusions had been reached.

28. Mr. THIAM (Special Rapporteur) said that he accepted full responsibility for the opinions he had expressed, which were his own. In cases where the opinions expressed were not those of the Commission, the Secretariat could easily add the words "in the view of the Special Rapporteur".

29. Mr. DÍAZ GONZÁLEZ said that, if the words "in the view of the Special Rapporteur" were added as and where appropriate, the situation would be quite clear.

30. Provided that paragraph 37 was retained as drafted, he could agree with Mr. Malek that, if the Commission had to discuss the non-applicability of statutory limitations to offences against the peace and security of mankind, it should start by considering the principles *nullum crimen sine lege* and *nulla poena sine lege*.

31. Moreover, he found the statement in the first part of the second sentence of paragraph 37 somewhat strange. The principle *nullum crimen sine lege, nulla poena sine lege* was accepted by virtually all States and formed the basis of the criminal codes of many countries, including his own. The fact that the victorious Allied Powers had disregarded it at the Nürnberg trial did not mean that the remaining States by which it had been applied had abandoned it. As the Special Rapporteur had said, a far more detailed discussion by the Commission would be required to ascertain whether it should follow the decision of the Allied Powers or whether it should continue to uphold that principle.

32. Sir Ian SINCLAIR said that he could not accept the second sentence of paragraph 40, which, as drafted, purported to state a conclusion by the Commission. He therefore proposed that the words "in the view of the Special Rapporteur" should be added in the first sentence, between the words "show that" and "criminal acts", and that the second sentence should be deleted.

33. Mr. YANKOV said that, while he had no objection to the reflection of the views of the Special Rapporteur, he considered that it was necessary also to reflect members' views if an objective picture of the debate in the Commission was to be given.

34. The CHAIRMAN said that the report should not reflect only the views of the Special Rapporteur, particularly since a broad understanding on the matter had been reached in the Commission.

35. Mr. THIAM (Special Rapporteur) said that he had no objection to the insertion of such words as "in the view of the Special Rapporteur" whenever the Commission deemed it necessary in order to make it clear that the view expressed was that of the Special Rapporteur and not that of the Commission.

36. With regard to Mr. Yankov's observation, he said that he could not repeat the views voiced by members of the Commission each year. In that connection, he would refer the Commission to para-

graph 35 of chapter II of the draft report, which stated clearly that the Special Rapporteur had referred to the conclusions of the Commission as reflected in paragraph 33 of its report on its thirty-sixth session.[5] However, if the Commission so wished, he was prepared to add a paragraph stating, once again, that some members of the Commission had been in favour of the immediate consideration of general principles, whereas others had been opposed thereto.

37. The CHAIRMAN suggested that a decision on paragraphs 37 to 41 should be deferred pending the redrafting of the text, which could be referred back to the Commission for adoption.

It was so agreed.

Paragraph 42

Paragraph 42 was adopted.

Paragraph 43

38. Mr. BALANDA, referring to the first sentence, proposed the deletion of the word "possibility", which would prejudge the issue. It was now recognized that the Commission had confined itself to considering the criminal responsibility of individuals without prejudice to the subsequent consideration of the criminal responsibility of States, which it could not avoid.

39. Mr. THIAM (Special Rapporteur) said that, while he was not opposed to that proposed amendment, he would point out that the word "possible" appeared in the conclusions adopted by the Commission on the draft Code of Offences against the Peace and Security of Mankind at its thirty-sixth session.[6]

40. Sir Ian SINCLAIR agreed with the view expressed by the Special Rapporteur. It was his understanding that the Commission wished to leave the matter open for the time being.

41. Mr. BALANDA said that he would not insist on the deletion of the word "possibility", although he did not agree with it.

Paragraph 43 was adopted.

42. Mr. ARANGIO-RUIZ, referring to a statement he had made at the 1887th meeting regarding the régime in his country at a certain point in its history, proposed that a new paragraph should be added to chapter II of the draft report, reading:

"One member of the Commission said that it was necessary to introduce into the code the express and specific condemnation, as a crime against humanity, of any act aimed—with or without external support—at subjecting a people to a régime not in conformity with the principle of self-determination and depriving that people of human rights and fundamental freedoms."

The meeting rose at 1.10 p.m.

[5] *Yearbook ... 1984*, vol. II (Part Two), p. 11.

[6] *Ibid.*, p. 17, para. 65 (*a*).

1934th MEETING

Wednesday, 24 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

---

Draft report of the Commission on the work of its thirty-seventh session (*continued*)

CHAPTER II. *Draft Code of Offences against the Peace and Security of Mankind* (continued) (A/CN.4/L.387 and Add.1)

B. Consideration of the topic at the present session (*continued*) (A/CN.4/L.387 and Add.1)

Paragraphs 43 *bis* to 88 (A/CN.4/L.387/Add.1)

Paragraph 43 *bis*

1. Sir Ian SINCLAIR proposed that, to bring the English text into line with the French, the words "could be achieved only" should be replaced by "could not be achieved".

It was so agreed.

2. Mr. McCAFFREY proposed that the word "liability" should be replaced by "responsibility", and that the same change should be made throughout the text wherever the reference was in effect to criminal responsibility.

It was so agreed.

Paragraph 43 bis, *as amended, was adopted.*

Paragraph 44

3. Mr. USHAKOV, referring to the second sentence, remarked that individuals could in themselves sometimes constitute organs, but certainly not authorities. He therefore proposed that the words "authorities of a State" should be replaced by "agents of a State".

4. Mr. BALANDA said that, while he understood Mr. Ushakov's concern, the latter's proposal would narrow the text considerably, in French at any rate. A prime minister or head of State, for example, was not an agent of the State but one of the authorities of the State, and the term "agents of the State" referred more to government officials. If, however, Mr. Ushakov's proposal were accepted, he would like it to be made clear in the commentary that "agents of a State" should be taken to mean the authorities of the State as well.

5. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt Mr. Ushakov's proposed amendment to the second sentence of paragraph 44.

It was so agreed.

Paragraph 44, as amended, was adopted.

Paragraph 45

Paragraph 45 was adopted.

Paragraph 46

6. Mr. TOMUSCHAT proposed that the words "writers and" should be deleted from the second and third sentences and that, as a consequential amendment, the footnote reference thereto should also be deleted. He also proposed that the paragraph should be couched in the past tense.

It was so agreed.

Paragraph 46, as amended, was adopted.

Paragraph 47

7. Mr. MCCAFFREY proposed the addition, after the word "genocide", in the second sentence, of the words "and terrorist acts, for example".

It was so agreed.

8. Sir Ian SINCLAIR proposed that the words "some private multinational corporations", in the last sentence, should be replaced by "some private criminal organizations operating transnationally", to cover organizations such as the Mafia.

9. Chief AKINJIDE said that, while he had no objection to Sir Ian Sinclair's proposal, he would prefer to retain the original text, which accurately reflected what had transpired during the debate in the Commission.

10. Following an exchange of views in which Mr. ARANGIO-RUIZ, Mr. BALANDA, Mr. CALERO RODRIGUES, Mr. DÍAZ GONZÁLEZ, Sir Ian SINCLAIR, Mr. THIAM (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that the last sentence should be reworded to read: "It was also stated that some private multinational corporations and criminal organizations had sufficient means to endanger the stability not only of small States, but of the great Powers as well."

It was so agreed.

Paragraph 47, as amended, was adopted.

Paragraphs 48 to 51

Paragraphs 48 to 51 were adopted.

Paragraph 52

11. Mr. CALERO RODRIGUES proposed that, to bring the English text into line with the French, the words "The majority of", at the beginning of the first sentence, should be replaced by "A large majority of".

It was so agreed.

12. Mr. YANKOV said that the second sentence, as it stood, could give the erroneous impression that the crimes and offences referred to were exhaustive.

13. Following a brief exchange of views in which Sir Ian SINCLAIR, Mr. SUCHARITKUL and Mr. THIAM (Special Rapporteur) took part, the CHAIRMAN suggested that the second sentence of paragraph 52 should be reworded to read:

"Just as the word 'crime' in internal law referred to such different acts as arson, armed robbery, murder, assassination, etc., the term 'offence against the peace and security of mankind' referred, despite its unity, to such different acts as aggression, terrorism, genocide, etc."

It was so agreed.

Paragraph 52, as amended, was adopted.

Paragraph 53

Paragraph 53 was adopted.

Paragraph 54

14. Sir Ian SINCLAIR proposed that the words "as opposed to lesser offences" should be added at the end of the second sentence.

It was so agreed.

Paragraph 54, as amended, was adopted.

Paragraph 55

Paragraph 55 was adopted.

Paragraph 56

15. Sir Ian SINCLAIR proposed that the words "which is a breach of an obligation", in the penultimate sentence, should be replaced by "which is the obligation breached".

It was so agreed.

Paragraph 56, as amended, was adopted.

Paragraph 57

16. Mr. MCCAFFREY proposed that the words "Such interests are", at the beginning of the second sentence, should be replaced by "Such interests were", to indicate that the view expressed was that of the Special Rapporteur.

It was so agreed.

Paragraph 57, as amended, was adopted.

Paragraphs 58 to 63

Paragraphs 58 to 63 were adopted.

Paragraph 64

17. Mr. DÍAZ GONZÁLEZ, referring to the Spanish text, said that the last sentence was meaningless since no distinction was made between *delito* and *crimen*, as in article 19 of part 1 of the draft articles on State responsibility.[1]

Paragraph 64 was adopted.

Paragraph 65

18. Mr. ARANGIO-RUIZ proposed that the first part of the second sentence should be amended to read: "These are acts seriously affecting the relations between States ...".

It was so agreed.

[1] See 1933rd meeting, footnote 3.

19. Mr. REUTER proposed that, to avoid undue repetition, the end of the same sentence after the word "stability", should be reworded to read: "which thereby constitute an offence against international peace and security".

It was so agreed.

Paragraph 65, as amended, was adopted.

Paragraph 66

20. Mr. CALERO RODRIGUES said that he was not certain about the third sentence, since, in international law, humanitarian law had a very special meaning.

21. Following an exchange of views in which Chief AKINJIDE, Mr. ARANGIO-RUIZ, Mr. KOROMA, Mr. REUTER, Sir Ian SINCLAIR and Mr. THIAM (Special Rapporteur) took part, the CHAIRMAN suggested that it should be left to the translation services to arrive at a form of wording that would avoid any connotation of humanitarian law but would reflect the idea of humanism or of an international law that was increasingly humane.

Paragraph 66 was adopted on that understanding.

New paragraph 66 *bis*

22. Mr. ARANGIO-RUIZ recalled that, at the 1933rd meeting, he had proposed the addition of a new paragraph in chapter II of the draft report. That paragraph, which Sir Ian Sinclair had suggested should become paragraph 66 *bis*, read:

"One member of the Commission said that it was necessary to introduce into the code the express and specific condemnation, as a crime against humanity, of any act aimed—with or without external support—at subjecting a people to a régime not in conformity with the principle of self-determination and at depriving that people of human rights and fundamental freedoms."

23. Mr. KOROMA, supported by Chief AKINJIDE and Mr. FRANCIS, proposed that the opening words of the text proposed by Mr. Arangio-Ruiz should be replaced by: "The view was expressed that it was necessary ...".

It was so agreed.

24. Mr. RAZAFINDRALAMBO said that the draft report was supposed to reflect views expressed in the Commission and that the position of Mr. Arangio-Ruiz had apparently not had the support of several members.

25. Mr. THIAM (Special Rapporteur) said that Mr. Arangio-Ruiz had indeed raised the matter (1887th meeting), and had referred to events that had occurred, mainly in Italy, during the Second World War. Since there had been no discussion, it would be more accurate to say "One member of the Commission ...". While the matter would undoubtedly be raised in the course of the Commission's consideration of the topic, it was as yet too soon to take a position on the substantive issue whether human rights violations inside a country amounted to offences against the peace and security of mankind.

26. Mr. ARANGIO-RUIZ said that the events to which he had referred had affected not only Italy and the Italian people, but all mankind. The Second World War would probably have taken a different turn and would probably have been shorter had certain people not seized power in Italy by force and against the will of the Italian people. An important issue was involved, not just an internal matter.

New paragraph 66 bis, *as amended, was adopted*

Paragraphs 67 to 73

Paragraphs 67 to 73 were adopted.

Paragraph 74

27. Mr. TOMUSCHAT proposed that the fourth sentence, which was in the present tense, be reformulated in the past tense.

It was so agreed.

Paragraph 74, as amended, was adopted.

Paragraphs 75 to 77

28. Mr. CALERO RODRIGUES, supported by Sir Ian SINCLAIR, proposed that the term "interference", in the title of the section and throughout the text of paragraphs 75 to 77, be amended to read "intervention", in conformity with the terminology used in the 1954 draft code itself.[2]

It was so agreed.

29. Mr. CALERO RODRIGUES noted that, while paragraph 77 attempted to summarize the views of some members on the subject of intervention, his own view was not adequately reflected. Accordingly, he proposed the insertion of an additional passage as follows:

"It was also said that intervention in the affairs of another State was necessarily translated objectively into certain specific acts, such as fomenting internal troubles or exerting political or economic pressure. It would be wise for the Commission not to inscribe 'intervention' as such as an offence in the code, but to break down the concept and list instead, as offences, specific acts which constituted intervention."

That wording had been taken from the relevant passages of the summary record of the 1880th meeting (paras. 37-38).

30. Mr. TOMUSCHAT proposed the insertion of a suitable passage to reflect his own views on the same issue.

31. After an exchange of views in which Mr. THIAM (Special Rapporteur), Mr. TOMUSCHAT and Mr. McCAFFREY took part, Mr. YANKOV proposed that two amendments be made to paragraph 77. First, the passage proposed by Mr. Calero Rodrigues should be inserted and, secondly, in order to take account of Mr. Tomuschat's point, the following sentence should be added:

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part Two), p. 8, para. 17.

"In addition, it was pointed out that acts of intervention did not have the character of seriousness which was the distinctive feature of offences against the peace and security of mankind."

It was so agreed.

Paragraphs 75 to 77, as amended, were adopted.

Paragraphs 78 and 79

Paragraphs 78 and 79 were adopted.

Paragraph 80

32. Mr. OGISO said that the second sentence of paragraph 80 appeared to reflect his views. He accordingly proposed that the word "solely", after the words "should relate", be replaced by "rather".

It was so agreed.

33. Sir Ian SINCLAIR proposed the addition of a third sentence, as follows: "Other members again expressed doubts about the relevance in present-day circumstances of the provision of the 1954 draft code."

It was so agreed.

Paragraph 80, as amended, was adopted.

Paragraph 81

Paragraph 81 was adopted.

Paragraph 82

34. Mr. THIAM (Special Rapporteur) said that the words "for all practical purposes was a matter of history", at the end of the second sentence, should be replaced by "which was now only of historical interest".

Paragraph 82, as amended, was adopted.

Paragraph 83

35. Mr. DÍAZ GONZÁLEZ, referring to the first sentence, said that the case of Namibia was not the only one that had been mentioned. He therefore proposed that the sentence should be reworded to read: "Other members, however, expressed the view that the case of Namibia and the various cases of colonialism persisting in all continents were sufficient proof that the question was a topical one."

It was so agreed.

36. Sir Ian SINCLAIR proposed that, in the second sentence, the word "absolutely" be replaced by "very", to conform with the French text.

It was so agreed.

37. Mr. TOMUSCHAT said that the language of paragraph 83 was too narrow. It was essential to cover not only colonialism, but also the forcible denial or deprivation of the right to self-determination. He accordingly proposed that the semi-colon appearing after the word "broadly", in the second sentence, should be replaced by a full stop, and should be followed by a third sentence beginning: "The view was also expressed that it was appropriate ...".

38. Mr. DÍAZ GONZÁLEZ said that that formulation would give the impression that colonialism was only a question of the self-determination of peoples. Some instances of colonialism had come about because States had been severed from territories annexed by other States as colonial territories. Colonial peoples acquired independence through the process of self-determination, but for colonial territories to do so they had to be returned to the States from which they had been severed.

39. The CHAIRMAN said that it would be taken that the notion of colonial domination was to be construed broadly. If there were no objections, he would take it that the Commission agreed to adopt the proposal made by Mr. Tomuschat.

It was so agreed.

Paragraph 83, as amended, was adopted.

Paragraph 84

40. Mr. CALERO RODRIGUES said that the last part of the second sentence of paragraph 84 gave the impression that the Commission had taken a decision on the question of including a provision on mercenarism in the draft code, whereas in fact the Commission had not considered the question. The report should reflect that situation accurately.

41. After an exchange of views in which Sir Ian SINCLAIR, Mr. McCAFFREY, Mr. BALANDA, Mr. OGISO and Mr. USHAKOV took part, Mr. THIAM (Special Rapporteur) said that the words "the Commission" should be replaced by "several members".

Paragraph 84, as amended, was adopted.

Paragraph 85

42. Mr. DÍAZ GONZÁLEZ said that paragraph 85 failed to reflect the point of view of those members who did not agree that measures of an economic nature taken by a State could be forcible ones, in which case they became part of aggression as defined by the General Assembly in 1974.[3] He therefore suggested that reference should be made to the fact that it had also been stated that economic measures, in addition to having a psychological impact, could constitute actual aggression which could threaten the stability of a Government and the lives and well-being of the people of a country.

43. Mr. McCAFFREY said that the Special Rapporteur had endeavoured, in paragraph 85, to give a concise account of the different views expressed during the discussion. Any member could, of course, ask for his views to be reflected in the report, although at the risk of its assuming voluminous proportions. However, the last sentence of the paragraph apparently met the concern of Mr. Díaz González, since it followed that the acts to which he had referred were identifiable with the offences covered by the code and, in particular, with intervention and aggression.

[3] General Assembly resolution 3314 (XXIX) of 14 December 1974, annex.

44. Mr. DÍAZ GONZÁLEZ said that paragraph 85 as worded reflected the views both of members who considered that there was no point in including economic aggression in the draft code, since it came under aggression as defined by the General Assembly, and of members who considered that economic aggression was covered by the various offences provided for under the code. His own view was that economic aggression should figure in the code as an offence against the peace and security of mankind—a view shared by other members of the Commission.

45. Mr. McCAFFREY suggested that a decision on paragraph 85 should be deferred to enable him to give some thought to whether it was necessary to have his views reflected.

It was so agreed.

Paragraphs 86 and 87

Paragraphs 86 and 87 were adopted.

Paragraph 88

46. Sir Ian SINCLAIR said that the wording of paragraph 88 depended on the final content of paragraphs 37 to 41, which had not yet been adopted. Consideration of paragraph 88 should therefore be postponed.

It was so agreed.

47. Mr. LACLETA MUÑOZ said that, having been unable to attend the discussion on the draft report until the present stage, he wished to voice serious doubts regarding the use, in Spanish, of the word *delito* instead of *crimen* both in paragraph 88 and in the body of the report. For reasons both of logic and of consistency with other draft articles, offences against the peace and security of mankind should be classified as *crímenes*. It should be remembered that the wording in question had been agreed by the General Assembly at a time when the Commission had still not made any distinction in its work on State responsibility between crimes and offences, and that the grounds on which that wording had been based were no longer valid.

The meeting rose at 1.15 p.m.

1935th MEETING

Wednesday, 24 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

---

Draft report of the Commission on the work of its thirty-seventh session (*continued*)

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** (continued) (A/CN.4/L.387 and Add.1)

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.387 and Add.1)

1. The CHAIRMAN invited the Commission to consider the paragraphs of section B still outstanding.

Paragraphs 36 to 41, 85 and 88 (A/CN.4/L.387/Add.1).

Paragraph 36 (*concluded*)*

2. The CHAIRMAN invited the Commission to consider the revised text of paragraph 36, which read:

"36. Following the Commission's further discussion of that question, in which a number of members stressed the importance of formulating general principles in parallel with the list of offences, the Special Rapporteur once again pointed out that the principles which had already been formulated by the Commission would be supplemented, as appropriate, in the light of developments in international law."

3. Mr. USHAKOV proposed the insertion of "in 1950" between the words "Commission" and "would be supplemented", near the end of the paragraph.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraphs 37 and 38 (*concluded*)*

4. The CHAIRMAN invited the Commission to consider the revised text of paragraph 37 and the text of paragraph 38, which read:

"37. The new rules that had emerged concerned, in the view of the Special Rapporteur, the non-applicability of statutory limitations to offences against the peace and security of mankind, the scope of the principles *nullum crimen sine lege* and non-retroactivity, and the applicability of *jus cogens* with its non-temporal element.

"38. Again, once a criminal act had been defined and characterized, the responsibility of its perpetrator and the extent of that responsibility brought into play a number of moral and subjective elements, such as intention, degree of awareness and motive, which did not necessarily form part of every offence, but only of some."

Paragraph 37, as amended, and paragraph 38 were adopted.

Paragraph 39 (*concluded*)*

5. The CHAIRMAN invited the Commission to consider paragraph 39 in the following form:

"39. Concepts such as complicity, the involvement of all the participants and the types of participation that might be punishable also called for

---

* Resumed from the 1933rd meeting.

serious reflection and meant that difficult choices would have to be made. Some offences, such as crimes against humanity, required a *concursus plurium ad delictum* and involved the theory of extenuating circumstances, justification and absolutory [absolving] excuses."

6. After a discussion in which Mr. McCAFFREY, Mr. KOROMA, Mr. ARANGIO-RUIZ, Mr. LACLETA-MUÑOZ, Mr. RAZAFINDRALAMBO, Mr. EL RASHEED MOHAMED AHMED, Mr. BALANDA, Mr. CALERO RODRIGUES and Mr. THIAM (Special Rapporteur) took part, Sir Ian SINCLAIR proposed that the words "and absolutory [absolving] excuses" should be replaced by "exculpation, etc.".

It was so agreed.

7. Mr. ILLUECA said that the appropriate word in Spanish would be *eximente.*

Paragraph 39, as amended, was adopted.

Paragraphs 40 and 41 (*concluded*)*

8. The CHAIRMAN invited the Commission to consider the revised texts of paragraphs 40 and 41, which read:

"40. The foregoing considerations showed that criminal acts should also be studied before any general principles could be formulated in order to avoid excessive abstraction and assertions not based on proven facts.

"41. The views of the members of the Commission were divided on these questions. It was suggested by some members that the Special Rapporteur might deal with the question of general principles more concretely in his next report, so that members of the Commission could address themselves to them more specifically, along with the other provisions relating to the introduction and the list of offences as elements of the future code of offences. The Special Rapporteur said that he would consider the general principles as soon as possible."

Paragraphs 40 and 41, as amended, were adopted.

Paragraph 85 (*concluded*)

9. The CHAIRMAN, referring to the discussion on paragraph 85 at the previous meeting, suggested that the words "highly interesting", in the first sentence, should be replaced by the word "extensive"; that the words "one which", in the same sentence, should be deleted; and that the following sentence should be added at the end of the paragraph: "It was also said that measures of an economic nature, in addition to their psychological impact, might constitute a form of aggression which could threaten the stability of a Government or the very life of the people of a country."

It was so agreed.

Paragraph 85, as amended, was adopted.

Paragraph 88 (*concluded*)

10. Sir Ian SINCLAIR, supported by Mr. ILLUECA, said that perhaps some further reference should be made in paragraph 88 to the Special Rapporteur's intention, mentioned in paragraph 41, to consider the question of general principles as soon as possible.

11. Mr. THIAM (Special Rapporteur) said that the question was of as much concern to him as to other members, since it recurred every year. He had nothing more to add at the present stage, however, since it was not possible to give serious consideration to the general principles until the list of offences had been dealt with. The authors of the 1954 draft code had followed the same course. As indicated in paragraph 41, he would consider the general principles "as soon as possible", but wished to reserve the right to decide when he could do so properly.

12. Mr. McCAFFREY said that he fully understood the Special Rapporteur's difficulty, but thought it might be desirable to indicate to the Sixth Committee of the General Assembly that the question of general principles was not to be left in abeyance indefinitely.

13. Sir Ian SINCLAIR suggested that the words "and to consider the question of general principles as soon as possible" should be added at the end of paragraph 88.

It was so agreed.

Paragraph 88, as amended, was adopted.

Section B, as amended, was adopted.

Chapter II of the draft report, as amended, was adopted.

CHAPTER V. ***Jurisdictional immunities of States and their property*** (A/CN.4/L.389 and Add.1 and Add.1/Corr.1, and Add.2 and 3)

A. **Introduction** (A/CN.4/L.389 and Add.1 and Add.1/Corr.1)

Paragraphs 1 to 8 (A/CN.4/L.389)

Paragraphs 1 to 6

Paragraphs 1 to 6 were adopted.

Paragraph 7

14. Mr. BALANDA, referring to the last sentence of the French text, proposed that, to avoid a repetition of the word *examen,* the words *la question du réexamen du projet* should be replaced by *reconsidérer le projet.*

It was so agreed.

15. Mr. SUCHARITKUL (Special Rapporteur) said that he had no objection to the French text being amended as proposed, but saw no need to alter the English text.

Paragraph 7 was adopted.

Paragraph 8

Paragraph 8 was adopted

Paragraphs 9 to 43 (A/CN.4/L.389/Add.1 and Add.1/Corr.1)

Paragraphs 9 to 13

Paragraphs 9 to 13 were adopted with minor drafting changes.

---

* Resumed from the 1933rd meeting.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraph 17

Paragraph 17 was adopted with a minor drafting change.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

Paragraph 20

16. Mr. McCAFFREY proposed the deletion, in the second sentence, of the words "promotion of the", before the word "private". In addition, in the fourth sentence, the words "basically dependent upon", before "the conceptual approach", should be replaced by "related to, although analytically distinct from".

It was so agreed.

17. Mr. REUTER pointed out that it would be more correct to use the present tense in the French text.

Paragraph 20, as amended, was adopted.

Paragraph 21

18. After a discussion in which Mr. FLITAN, Chief AKINJIDE, Mr. USHAKOV, Mr. LACLETA MUÑOZ, Mr. ILLUECA, Mr. ARANGIO-RUIZ and Mr. BALANDA took part, Mr. SUCHARITKUL (Special Rapporteur) said that the words "constitutional, and their domestic law", in the third sentence, should be replaced by "legal system". Moreover, in the fourth sentence, the phrase "or minimizing internal unrest, caused by lack of food or other basic commodities" should be deleted.

Paragraph 21, as amended, was adopted.

Paragraphs 22 to 26

Paragraphs 22 to 26 were adopted.

Paragraph 27

19. Mr. TOMUSCHAT said that the reference to the continental shelf in the last three sentences of paragraph 27 was confusing, since the continental shelf was in any case unattachable. The sentences in question could well be deleted.

20. Mr. MAHIOU said that he also had doubts about paragraph 27. The resources of the continental shelf could just conceivably be the subject of attachment, but not the shelf itself, which was part of the territory of the State.

21. Mr. LACLETA MUÑOZ said that it was a question not of ownership but of a sovereign right. The matter would have to be carefully reconsidered if the Commission was not to lay itself open to criticism from experts on the law of the sea.

22. Sir Ian SINCLAIR said that he too thought that the last three sentences in paragraph 27 should be deleted.

It was so agreed.

Paragraph 27, as amended, was adopted.

Paragraphs 28 to 32

Paragraphs 28 to 32 were adopted with minor drafting changes.

Paragraph 33

23. Mr. SUCHARITKUL (Special Rapporteur) said that the words "commercial and non-governmental", appearing in inverted commas in the third sentence of paragraph 33, should read "governmental and non-commercial"; the same mistake occurred elsewhere in the text of chapter V and should be corrected in each instance. In the last sentence of the paragraph, the words "or reference" should be replaced by "in references".

Paragraph 33, as amended, was adopted.

Paragraph 34

Paragraph 34 was adopted with minor drafting changes in the French text.

Paragraph 35

Paragraph 35 was adopted.

Paragraph 36

24. Mr. TOMUSCHAT said that the word "Court", in the last sentence of paragraph 36, should not be capitalized, for it now gave the impression that a specific court was meant.

It was so agreed.

Paragraph 36, as amended, was adopted.

Paragraphs 37 and 38

Paragraphs 37 and 38 were adopted.

Paragraph 39

25. Mr. THIAM, referring to the first sentence of the French text, said that several members—not *un membre*—had suggested additions to the list of types of State property that were immune from attachment and execution. The French text should therefore be brought into line with the English text and read *il a été suggéré que ...*.

It was so agreed.

26. Mr. RIPHAGEN, supported by Sir Ian SINCLAIR, said that the statement in the penultimate sentence of the paragraph to the effect that the legal personality of the European Economic Community was not fully recognized by some of the Community's member States was obviously incorrect. Accordingly, the words "including some member States of the Community" in that sentence should be deleted.

It was so agreed.

Paragraph 39, as amended, was adopted.

Paragraphs 40 to 42

Paragraphs 40 to 42 were adopted.

Paragraph 43

27. The CHAIRMAN suggested the addition of the words "which will take up these articles at the Commission's next session, in 1986", at the end of paragraph 43.

It was so agreed.

Paragraph 43, as amended, was adopted.

Section A, as amended, was adopted.

B. Draft articles on jurisdictional immunities of States and their property (A/CN.4/L.389/Add.2 and 3)

SUBSECTION 1 (TEXTS OF THE DRAFT ARTICLES PROVISIONALLY ADOPTED SO FAR BY THE COMMISSION) (A/CN.4/L.389/Add.2)

28. Mr. YANKOV suggested that document A/CN.4/L.389/Add.2, which contained only the texts of draft articles provisionally adopted by the Commission, should be considered as a whole rather than article by article.

It was so agreed.

Section B.1 was adopted.

SUBSECTION 2 (TEXTS OF ARTICLES 19 AND 20, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION) (A/CN.4/L.389/Add.3)

Commentary to article 19 (State-owned or State-operated ships engaged in commercial service)

Paragraph (1)

29. Mr. REUTER said that footnote 52 should be amplified to include the treaty signed with France in 1970.

30. Mr. LACLETA MUÑOZ, referring to the first sentence of the Spanish text, said that either the words *la práctica* or the words *el ejercicio* should be deleted.

31. Mr. KOROMA, supported by Chief AKINJIDE and Sir Ian SINCLAIR, proposed that the last sentence of the paragraph should be deleted because it was too categorical and possibly incorrect.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

Paragraph (2) was approved.

Paragraph (3)

32. Sir Ian SINCLAIR proposed the deletion, in the fourth sentence, of the words "owner and captain".

It was so agreed

Paragraph (3), as amended, was approved.

Paragraph (4)

33. Sir Ian SINCLAIR proposed that the third sentence should be amended to read: "In some countries, it is possible to proceed against another merchant ship in the same ownership as the ship in respect of which the claim arises, on the basis of what is known as sister-ship jurisdiction, for which provision is made in the International Convention relating to the Arrest of Seagoing Ships (Brussels, 1952)."

It was so agreed.

34. Mr. REUTER said that, in view of Sir Ian Sinclair's amendment, the last sentence was no longer necessary and could be deleted.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

35. Mr. TOMUSCHAT proposed that the first part of the second sentence should be replaced by: "This is apparent from the vivid account given by one author and confirmed by the fact that some maritime Powers felt it necessary to convene ...".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

36. Mr. YANKOV said that the words "United Nations Convention on the" should be inserted before "Law of the Sea", in the second sentence.

It was so agreed.

37. Mr. REUTER, referring to the term "double criterion", in the first sentence, said that members had not in fact agreed on the idea of such a criterion. As worded, the sentence seemed to suggest that the Commission took a position in the matter.

38. Mr. SUCHARITKUL (Special Rapporteur) suggested that the beginning of the first sentence might read: "The dichotomy of service of vessels classified according to a criterion of their use was adopted by the Convention ...".

39. Chief AKINJIDE said that it would be misleading to remove the reference to the criterion of "governmental non-commercial" use.

40. Sir Ian SINCLAIR said that, if the reference to "commercial and non-governmental" use was retained, the statement that the criterion had been adopted by the 1926 Brussels Convention would be incorrect. That Convention spoke only of commercial use and not of non-governmental use.

41. After a discussion in which Mr. ARANGIO-RUIZ, Mr. MAHIOU, Mr. BALANDA, Mr. USHAKOV, Mr. LACLETA MUÑOZ and Mr. McCAFFREY took part, Mr. SUCHARITKUL (Special Rapporteur) said that the words "adopted by the Convention and", in the first sentence, should be deleted. The first part of the second sentence should read: "The term 'governmental and non-commercial' is used in the 1926 Brussels Convention, and the term 'government non-commercial' in conventions ...". The word "services" in the same sentence should be placed in the singular, and the words "and non-governmental" should be deleted.

42. Mr. CALERO RODRIGUES proposed the deletion, in the first sentence, of the words "without the least hesitation".

It was so agreed.

Paragraph (6), as amended, was approved.

The meeting rose at 6.10 p.m.

1936th MEETING

Thursday, 25 July 1985, at 10.05 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, 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. Thiam, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

---

Draft report of the Commission on the work of its thirty-seventh session (*continued*)

CHAPTER V. ***Jurisdictional immunities of States and their property*** (continued) (A/CN.4/L.389 and Add.1 and Add.1/Corr.1 and Add.2 and 3)

B. Draft articles on jurisdictional immunities of States and their property (*continued*) (A/CN.4/L.389/Add.2 and 3)

SUBSECTION 2 (TEXTS OF ARTICLES 19 AND 20, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION) (*continued*) (A/CN.4/L.389/Add.3)

Commentary to article 19 (State-owned or State-operated ships engaged in commercial service) (*continued*)

Paragraph (7)

1. Mr. CALERO RODRIGUES said that the last part of the second sentence, namely "and considered treating 'commercial' and 'non-governmental' as cumulative", was not clear. In order to reflect more accurately the views of the members of the Commission referred to in the first part of the sentence, the last part of the sentence should be amended to read: "... and considered that 'commercial' and 'non-governmental' should be taken cumulatively".

2. After a discussion in which Mr. SUCHARITKUL (Special Rapporteur), Mr. USHAKOV and Mr. MAHIOU took part, Mr. RAZAFINDRALAMBO proposed that the word "should", in the amendment proposed by Mr. Calero Rodrigues, be replaced by "could".

It was so agreed.

The amendment was adopted.

3. Mr. CALERO RODRIGUES said that he failed to see what purpose was served by the statement, in the third sentence, that some members of the Commission had explained that "States, and particularly developing countries, might trade between themselves" without submitting to the jurisdiction of national courts.

4. After a discussion in which Mr. MAHIOU, the CHAIRMAN and Sir Ian SINCLAIR took part, Mr. MAHIOU proposed that the third sentence should be redrafted along the following lines: "Others again added that States, particularly developing countries, and other public entities could engage in activities of a commercial and governmental nature without submitting to the jurisdiction of national courts."

5. Mr. USHAKOV observed that States could engage in commercial activities not only with other States but also with foreign private persons.

6. Mr. BALANDA said that that was particularly true in developing countries.

7. Chief AKINJIDE pointed out that the real problems for a developing country arose in connection with trade with private persons or firms, including multinational companies, which accounted for the bulk of total external trade. Trade between the developing countries themselves was on a very modest scale. He therefore agreed with Mr. Ushakov and Mr. Balanda.

8. Mr. CALERO RODRIGUES supported Mr. Mahiou's amendment, which clarified the meaning of the third sentence, and proposed its adoption.

It was so agreed.

9. Mr. REUTER said that he was in full agreement with the principle thus laid down, but would point out that the decision could have serious consequences, since it recognized the possibility of engaging in international trade while avoiding the jurisdiction of any national court.

10. Mr. USHAKOV said that, because the third sentence had been amended, the fourth sentence no longer followed logically upon it.

11. After a discussion in which Mr. SUCHARITKUL (Special Rapporteur), Sir Ian SINCLAIR, Mr. BALANDA and Mr. KOROMA took part, Mr. RAZAFINDRALAMBO proposed that the word "Thus", at the beginning of the fourth sentence, should be replaced by "Furthermore".

It was so agreed.

12. Mr. SUCHARITKUL (Special Rapporteur) drew attention to the fact that the expression "government-to-government", in the fourth sentence, was a technical term, which covered State agencies as well as Governments proper.

Paragraph (7), as amended, was approved.

New paragraph (7 *bis*) and paragraph (8)

13. Mr. OGISO proposed the insertion, at the beginning of paragraph (8), of the following sentence: "Some members opposed the inclusion of the expression 'non-governmental' in square brackets."

14. Mr. LACLETA MUÑOZ, supporting Mr. Ogiso's proposal, said it should be made clearer that, while some members had been in favour of retaining the expression "non-governmental", others had taken the opposite view, and that the expression had been placed between square brackets as a compromise.

15. Mr. BALANDA said that the reason given in paragraph (8) for retaining the expression "non-governmental" was the one he himself had advanced when draft article 19, as proposed by the Drafting

Committee, had been adopted by the Commission (1932nd meeting). Care should be taken not to modify that part of paragraph (8).

16. Sir Ian SINCLAIR proposed, in order to reflect the views of Mr. Ogiso and others, including himself, the insertion of a new paragraph (7 *bis*) along the following lines: "Some members opposed the retention of the expression 'non-governmental' in square brackets in paragraphs 1 and 4."

17. Mr. USHAKOV pointed out that the members in question had been altogether opposed to the retention of the expression "non-governmental" in square brackets. The wording in the proposed sentence should perhaps be "... even in square brackets".

18. After a discussion in which Mr. SUCHARITKUL (Special Rapporteur), Mr. USHAKOV and Mr. LACLETA MUÑOZ took part, Mr. CALERO RODRIGUES proposed the insertion in a new paragraph (7 *bis*) of the words "which appeared", so as to read: "... the expression 'non-governmental' which appeared in square brackets in paragraphs 1 and 4".

19. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt Sir Ian Sinclair's proposal for a new paragraph (7 *bis*), as amended by Mr. Calero Rodrigues.

It was so agreed.

20. Mr. MAHIOU pointed out that the new paragraph could well take the form of a new sentence to be added at the end of paragraph (7).

21. Sir Ian SINCLAIR said that, as a consequential change following the addition of paragraph (7 *bis*), the opening words of paragraph (8), "While some members", should be amended to read "While some other members".

It was so agreed.

22. Mr. USHAKOV proposed that, in the opening phrase of paragraph (8), the words "retention of the words [non-governmental] in square brackets in paragraphs 1 and 4" should be replaced by "retention of that expression".

It was so agreed.

New paragraph (7 bis*) and paragraph (8), as amended, were approved.*

Paragraph (9)

23. Mr. REUTER said that the expression "in the light of", in the first sentence, was unsatisfactory, particularly in French. It should be altered to "in the framework of".

24. Chief AKINJIDE proposed that the words "in the light of" should be replaced by "against the background of".

It was so agreed.

25. Mr. DÍAZ GONZÁLEZ said that it would be preferable, stylistically, to say "transport of goods and passengers by sea", in the last part of the second sentence.

It was so agreed.

26. Mr. McCAFFREY proposed that the words "a wide field of maritime transport", in the fifth sentence, should be amended to "a wide field of maritime activities". The items listed immediately after those words included many activities outside the field of transport.

It was so agreed.

27. Mr. TOMUSCHAT suggested that the fourth, fifth and sixth sentences of paragraph (9) might be deleted, since they went into detail about the legal aspects of the carriage of goods by sea and did not really constitute a commentary to the provisions of article 19.

28. Mr. McCAFFREY urged that those sentences be retained. They were most important in explaining what was covered by the term "operator". In the Drafting Committee, he had insisted on the inclusion of such a full explanation in the commentary, so that he could accept the article.

29. Mr. YANKOV said that he, too, strongly favoured retaining those three sentences. Paragraph 3 of article 19 referred to the liabilities of carriers by sea, and hence the content of the sentences in question was pertinent to article 19. He proposed that the expression "dangerous products", in the sixth sentence, should be altered to "dangerous goods", so as to conform with the terminology in the relevant treaties.

It was so agreed.

30. Mr. LACLETA MUÑOZ said that it was inappropriate to say, in the penultimate sentence, that "The operation" of certain ships "is given some clarification" by the illustrations in paragraph 3 of the article. What was meant was that those illustrations shed light on the concept of such operation. The opening words of the sentence should be amended to: "The concept of the operation of ...".

It was so agreed.

31. In reply to a question by Mr. USHAKOV, Mr. SUCHARITKUL (Special Rapporteur) said that the purpose of the last sentence of the paragraph was to indicate that the term "State-operated", in article 19, was intended to cover ships in the possession or under the control of the State, bearing in mind that article 19 did not specifically refer to ships in State possession or under State control. A ship that was not owned but was merely requisitioned by the State would thus be covered by the terms of the article.

32. Sir Ian SINCLAIR said that the sentence was important in order to make it clear that "operation" covered "charter" in all forms.

33. The CHAIRMAN suggested that the last sentence should be reworded to read: "The expression 'State-operated ships' covers also the 'possession', 'control', 'management' and 'charter' of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise."

It was so agreed.

Paragraph (9), as amended, was approved.

Paragraph (10)

34. Sir Ian SINCLAIR proposed that, in the third sentence, the phrase "and which invariably entailed proceedings *in personam* against the owner and master or captain of the ship" should be replaced by "and which were directed to all persons having an interest in the ship or cargo". In the sixth sentence, the words "against the operation" should be replaced by "relating to the operation".

35. Mr. MAHIOU, referring to the first sentence, said that, as one of the members who had expressed a reservation, he would propose that the words "One member" should be replaced by "Some members".

36. Mr. BALANDA said that the words *de l'exploitation*, in the second sentence of the French text, should be replaced by *pour l'exploitation*.

37. Mr. LACLETA MUÑOZ said that Sir Ian Sinclair's remark regarding the sixth sentence also applied to the Spanish text.

38. To avoid any misunderstanding as to the intent, the words *era todavía*, in the second sentence of the Spanish text, should be replaced by *seguiría siendo* and the word *permitía* by *había transferido*. Also, the words *para el caso*, in the fourth sentence, were unnecessary.

39. In response to a question by Mr. OGISO, Mr. USHAKOV said that, unlike the common law, the Continental system of law rarely provided for the possibility of bringing an action *in rem*. It might conceivably be possible to envisage an action *in rem* against an entity separate from the State that operated a ship belonging to a State and did not enjoy immunity, but not against a State which owned but did not operate a ship, since that would give rise to legal and even political problems.

40. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to approve paragraph (10) with the amendments proposed by Sir Ian Sinclair, Mr. Mahiou, Mr. Balanda and Mr. Lacleta Muñoz.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

41. Sir Ian SINCLAIR proposed the deletion of the last sentence.

It was so agreed.

42. Mr. RIPHAGEN said that a comparison of paragraphs (11) and (16) of the commentary to article 19 might cause some confusion in the mind of the general reader. Possibly, therefore, some modification was required.

43. Mr. CALERO RODRIGUES suggested that the difficulty could be overcome by the insertion, in the first sentence of paragraph (11), of the words "for such purposes as to cope", between the words "distribution but" and "to relieve".

44. Following suggestions by Chief AKINJIDE and Mr. KOROMA, Mr. SUCHARITKUL (Special Rapporteur) said that the second part of the first sentence should be reworded to read: "even though such vessels may be employed occasionally for the carriage of cargoes for such purposes as to cope with an emergency or other natural calamities".

45. Mr. LACLETA MUÑOZ said that it was indeed advisable to amend the first sentence with a view to simplifying it, and also to delete the last sentence. In the penultimate sentence, a comma should be added after the word "dredgers", to make it clear that all the government ships referred to had to be owned or operated by a State and used or intended for use in government non-commercial service. In addition, the words *la inmunidad del Estado a los buques de guerra*, in the first sentence of the Spanish text, should be replaced by *la inmunidad del Estado en favor de los buques de guerra*, and the words *buques estatales*, in the second sentence, should be replaced by *buques de Estado*, which reflected a well-known concept.

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

46. Mr. McCAFFREY proposed that the first sentence should be reworded to read: "It is important to note that paragraphs 1 and 2 apply to both 'use' and 'intention to use'. "The second sentence should be deleted; it was unnecessary because the essence of paragraph (12) was that paragraphs 1 and 2 of article 19 applied both to use and to intention to use. Lastly, the penultimate sentence of the paragraph should be reworded to read: "Such arrest or attachment would not be permitted under the test of 'intended for use'."

It was so agreed.

47. Mr. BALANDA said that he would like to know whether the word "ship" (*navire*) also applied to boats (*bateaux*): in other words, was it to be given its broad or its technical meaning? From the technical standpoint, a ship was not a boat and, in the case of carriage by inland waterways, the internal law of some countries referred to boats, not ships. International trade via inland waterways was considerable and the rules relating to ships should apply *mutatis mutandis* to boats, as he had already stated in the Drafting Committee. It should certainly be possible to indicate at some point that the word "ship" also applied to boats.

48. Mr. USHAKOV said that, in his view, the French word *navire* was a generic term and applied also to boats. River traffic, however, was governed not by general international law, but by the internal law of the States concerned. The topic under consideration was concerned solely with ocean-going vessels.

49. Mr. SUCHARITKUL (Special Rapporteur) said that he would be hesitant about departing from the régime proposed in the draft and entering into undue detail on a matter that had already been covered elsewhere.

50. Mr. LACLETA MUÑOZ, referring to the Spanish text, said that the words *puede no estar efectivamente utilizado*, in the fourth sentence, should be replaced by *puede no ser efectivamente utilizado*; in the penultimate sentence, the words *el buque* should be added after the words *está destinado*; and, in the last sentence, the words *de guerra* should be inserted after the word *fragata*.

It was so agreed.

51. Chief AKINJIDE said that, given the differences in the various national systems of law, it might be advisable to explain in the commentary that the word "ships" included boats.

52. Mr. FRANCIS suggested that a footnote might be added to the effect that the term "ships" included non-ocean-going vessels.

53. Sir Ian SINCLAIR said that such a footnote would broaden the scope of the article considerably. He proposed instead that a new sentence should be inserted after the second sentence of paragraph (1) of the commentary, which had already been adopted (1935th meeting), reading: "The expression 'ship' in this context should be interpreted as covering all types of seagoing vessels, whatever their nomenclature and even if they are engaged only partially in sea-traffic."

It was so agreed.

54. Mr. TOMUSCHAT said that, if river boats were to be covered, the text would have to be revised, since paragraph (1) of the commentary referred expressly to maritime law. It was a very important matter, particularly for countries such as his own, and he wondered whether the issue could in fact be excluded from the scope of the draft.

55. The CHAIRMAN said that the question of scope could be taken up on second reading.

Paragraph (12), as amended, was approved.

The meeting rose at 1.05 p.m.

1937th MEETING

Thursday, 25 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

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

---

Draft report of the Commission on the work of its thirty-seventh session (*continued*)

CHAPTER V. ***Jurisdictional immunities of States and their property*** (concluded) (A/CN.4/L.389 and Add.1 and Add.1/Corr.1 and Add.2 and 3)

B. Draft articles on jurisdictional immunities of States and their property (*concluded*) (A/CN.4/L.389/Add.2 and 3)

SUBSECTION 2 (TEXTS OF ARTICLES 19 AND 20, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-SEVENTH SESSION) (*concluded*) (A/CN.4/L.389/Add.3)

Commentary to article 19 (State-owned or State-operated ships engaged in commercial service) (*concluded*)

Paragraph (13)

Paragraph (13) was approved.

Paragraph (14)

1. Sir Ian SINCLAIR proposed that the words "merchant fleet", at the end of the second sentence, should be replaced by the word "owner", in order to bring the text into line with that of paragraph (4) of the commentary to article 19.

It was so agreed.

2. Mr. OGISO proposed that the word "could", before "be released", in the third sentence, should be replaced by "would". Moreover, in view of the reference to actions to enforce a maritime lien or to foreclose a mortgage, the words "or otherwise" should be inserted after the word "admiralty" in the fourth sentence.

It was so agreed.

3. Mr. BALANDA, referring to the French text, said that the word *caution*, in the third sentence, should be replaced by *cautionnement*.

It was so agreed.

Paragraph (14), as amended, was approved.

Paragraph (15)

4. Mr. USHAKOV said that the second sentence, which presumably referred to the view he himself had expressed, should read: " ... it was difficult to see how property such as a ship or cargo could be State-owned and used by the State for non-governmental purposes".

It was so agreed.

Paragraph (15), as amended, was approved.

Paragraph (16)

5. Mr. SUCHARITKUL (Special Rapporteur) said that the words "commercial or non-commercial" should be inserted between commas between the words "cargo" and "carried" in the first part of the first sentence.

Paragraph (16), as amended, was approved.

Paragraph (17)

6. Chief AKINJIDE pointed out that the word "may", between the words "concerned" and "serve", in the penultimate sentence, should be replaced by "shall", so as to bring the text into line with paragraph 7 of article 19.

It was so agreed.

7. Mr. REUTER noted that paragraph 7 of article 19 followed closely the 1926 Brussels Convention, which he had criticized for its ambiguity. He would therefore like it to be reflected in the summary record that the French text of the article did not have precisely the same scope as the English text, since the phrase "shall serve as evidence" was not the same as *vaudra preuve*. It was too late, however, to alter the text of article 19 or the commentary thereto.

Paragraph (17), as amended, was approved.

The commentary to article 19, as amended, was approved.

Commentary to article 20 (Effect of an arbitration agreement)

Paragraph (1)

8. Sir Ian SINCLAIR proposed that the words "and to avoid unnecessary misimplications", at the end of the second sentence, should be deleted and that the beginning of the third sentence should be amended to read: "The article is based upon the concept of implied consent to the supervisory jurisdiction ...".

It was so agreed.

9. Mr. LACLETA MUÑOZ said that the Spanish text of the third sentence was badly phrased and should read: "... *jurisdicción supervisora del tribunal de otro Estado que sea competente en el caso concreto ...*".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraph (2)

10. Sir Ian SINCLAIR proposed the deletion of the words "The scope of", at the beginning of the first sentence. Moreover, in the second part of the second sentence, the word "are", between the words "members" and "more predisposed", should be replaced by "were", and the word "only" should be inserted between the words "exception" and "if".

It was so agreed.

11. Mr. RIPHAGEN wondered whether it was correct to imply, as did the second sentence of the paragraph, that investment disputes were not a commercial matter.

12. Mr. SUCHARITKUL (Special Rapporteur) said the view had been put forward in the Drafting Committee that investment disputes, since they involved Governments, formed a separate category of matters. However, for the sake of simplification, the phrase "such as investment disputes or industrial or labour relations", in the second sentence, could be deleted.

13. Mr. REUTER said that paragraph (2) covered three viewpoints: confining the exception to arbitration of differences relating to a commercial contract; confining the exception to arbitration of differences relating to a civil or commercial matter, but not in a broad sense; and confining the exception to arbitration of differences relating to a civil or commercial matter, while at the same time widening the scope of the exception. It was enough, however, to explain that there were two possibilities and to refer to commercial contracts and civil or commercial matters. The most important example given was that of civil liability, which was of paramount importance in shipping.

14. Mr. MAHIOU said that the three viewpoints could be reflected even if the examples were deleted. Indeed, it would be preferable to delete them, so as to avoid reflecting any difference of opinion about whether or not investments were a contractual matter. The phrase "such as investment disputes or industrial or labour relations" should therefore be deleted.

15. Mr. LACLETA MUÑOZ pointed out that, contrary to the statement in the first sentence, the scope of the draft articles was not designed to "cover arbitration", but in fact to deal with one of the consequences of the arbitration of a dispute.

16. Sir Ian SINCLAIR, recalling his position as stated both in plenary and in the Drafting Committee, said that he would prefer the second sentence of the paragraph to be maintained. The point raised by the previous speakers could be covered by deleting the word "Thus" at the beginning of the third sentence.

It was so agreed.

17. Mr. CALERO RODRIGUES proposed the deletion, in the second part of the second sentence, of the word "initially", between the words "limited" and "to differences".

It was so agreed.

Paragraph (2), as amended, was approved.

Paragraph (3)

18. Mr. ARANGIO-RUIZ said that he had reservations as to the terminology used in paragraph (3), but would be satisfied if the summary record of the meeting stated that supervisory jurisdiction was exercised not under a State's actual rules of private international law, but under its rules of international civil procedure.

19. Mr. USHAKOV proposed the insertion of the words "if any", between commas, between the words "court" and "to exercise" in the first part of the first sentence, and the deletion, in the second sentence, of the words "and prepared".

It was so agreed.

20. In his view, the words "in a proceeding relating to the arbitration agreement", at the end of the first sentence, should also be deleted.

21. Mr. BALANDA, referring to the French text, said that the end of the first sentence should read *d'arbitrage*.

It was so agreed.

Paragraph (3), as amended, was approved.

Paragraph (4)

22. Sir Ian SINCLAIR proposed that the words "still uphold the primacy of judicial independence,

maintaining", in the fourth sentence, should be replaced by "continue to maintain", and that the words "if not perfunctory" should be deleted.

It was so agreed.

23. Mr. McCAFFREY proposed that, for the sake of greater clarity, the words "at least in some jurisdictions", should be inserted, between commas, after the word "excluded", in the first part of the sixth sentence.

It was so agreed.

24. Mr. RIPHAGEN proposed the deletion of the words "and self-executory", in the second part of the sixth sentence.

It was so agreed.

25. Mr. MAHIOU, referring to the first sentence, proposed that the phrase "States are now competing to create conditions more attractive and favourable for parties to choose to have their differences arbitrated in their territory" should be replaced by "States are providing more attractive and favourable conditions for this purpose". Care should be taken to avoid any value-judgment of the conduct of States.

26. Mr. REUTER said that he supported Mr. Mahiou's proposal, which had the additional advantage of not implying that States could engage in commercial activities. The French word *surenchère,* used for the verb "to compete" in English, denoted a purely commercial approach. The second sentence, which read: "One of the attractions is an endeavour to reduce the possibility of judicial control or interference", should also be changed. It was not correct to speak of judicial interference or of States reducing the possibility of control. States retained the possibility of control, but provided the parties with a means of dispensing with it. It was therefore necessary to say that one of the attractions lay in the "simplification of control procedures" and in the fact that the parties were allowed to dispense with such control.

27. Mr. LACLETA MUÑOZ, referring to the fifth sentence, said that he failed to see how "the court which is otherwise competent ... may be without such jurisdiction". A court either did or did not have jurisdiction. It would be preferable to say: "Thus it is possible, in a given instance, either that the court which is otherwise competent may decline to exercise supervisory jurisdiction, or that there is no court which is otherwise competent ...".

28. Mr. ARANGIO-RUIZ said that the proposals made by Mr. Mahiou and Mr. Reuter were very judicious, but he would propose that the text should be still further simplified by the deletion of the second sentence.

29. Mr. SUCHARITKUL (Special Rapporteur) said that some of the points raised could perhaps be met by redrafting the first sentence in such a way as to omit any reference to States competing in order to encourage commercial arbitrations to take place in their territory. The beginning of the third sentence, reading "Thus, to compare and compete more favourably with other commercial arbitration centres", could be deleted.

Paragraph (4), as amended, was approved.

Paragraph (5)

30. Mr. THIAM, referring to the first sentence, proposed that the word "essentially" should be deleted, and that the first part of the sentence should speak simply of "submission to commercial arbitration".

31. Mr. SUCHARITKUL (Special Rapporteur) said that the beginning of the first sentence should read: "For the reasons indicated, submission to commercial arbitration under this article constitutes ...".

32. Sir Ian SINCLAIR said that the penultimate word of the paragraph should read "compromissory" and not "compromise".

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraph (6)

33. Mr. CALERO RODRIGUES proposed the deletion, in the third sentence, of the word "invariably".

It was so agreed.

34. Sir Ian SINCLAIR proposed the deletion, in the same sentence, of the words "or entry into effect".

It was so agreed.

35. Mr. LACLETA MUÑOZ said that the first sentence of the Spanish text was grammatically incorrect: the words *de un tribunal* should be replaced by *respeto de un tribunal* or *ante un tribunal.* Again, in the third sentence, the opening phrase should be amended to: *Sólo dentro de esta esfera* ..., so as to render the idea contained in the other language versions.

36. Mr. REUTER said that the opening phrase of paragraph (6), reading "Submission to arbitration is as such no waiver of immunity from the jurisdiction ...", was a contradiction in terms and unacceptable. In point of fact, entering an appearance in arbitration proceedings was as such no waiver of immunity from jurisdiction.

37. Mr. ARANGIO-RUIZ, referring to the first sentence of the French text, said that, to avoid giving the impression that it was the court that enjoyed immunity, the word *la* should be inserted before *juridiction.*

It was so agreed.

38. Mr. RIPHAGEN proposed that the words "is otherwise", in the sentence, should be replaced by "would otherwise be".

It was so agreed.

39. Mr. McCAFFREY proposed that the word "Submission", at the beginning of the first sentence, should be replaced by "Consent".

40. Mr. REUTER said that the expression "submission to arbitration" was obviously ambiguous. Often, a State which had been notified of arbitration proceedings entered an appearance to show that it did not submit to the arbitration or that it expressly maintained its immunity. Entering an appearance did not signify waiver by a State of its immunity from jurisdiction; in any event, such waiver had to be written into the terms of the undertakings by which it was bound. What mattered was the right of a State to enter an appearance in order to show the court that that court lacked jurisdiction. If that interpretation were not accepted, a procedure by default would develop, as had been the case before the ICJ; States would no longer be able to enter a defence, since, if they did so for the purpose of submitting that the court lacked jurisdiction, the inference would be that they had waived their immunity.

41. Mr. CALERO RODRIGUES, supported by Mr. KOROMA and Mr. REUTER, proposed that the word "submission" should be replaced by the word "consent" wherever it occurred in the paragraph.

It was so agreed.

42. Mr. REUTER said that the French text would more accurately reflect the sense of the English if the word *domaine*, in the third sentence, were replaced by *cadre*.

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraph (7)

43. Sir Ian SINCLAIR proposed the deletion of the second sentence, which was repetitious and obscured the meaning of the first sentence.

It was so agreed.

44. Mr. RIPHAGEN proposed that, as a consequential change, the beginning of the third sentence should read: "Also excluded from the article are ...".

45. Mr. ILLUECA pointed out that the word "national", in the first sentence, should be replaced by "natural". Also, in the Spanish text, it would be preferable to replace the term *persona física*, which could give rise to confusion, by *persona natural*.

46. Mr. LACLETA MUÑOZ proposed that the third sentence of the Spanish text should start with the words: *Tampoco están incluidos ...* .

47. Mr. MAHIOU proposed that, to establish the link with the first sentence following the deletion of the second, the first part of the third sentence should be reworded in French to read: *Ne sont pas visés les types d'arbitrage ...* .

48. The CHAIRMAN said that the Secretariat would harmonize in the different language versions the changes in the third sentence consequential upon the deletion of the second sentence, and would take account of the various suggestions made.

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraph (8)

49. Mr. CALERO RODRIGUES pointed out that the word "type", in the second part of the first sentence, should be placed in the plural.

50. Sir Ian SINCLAIR proposed that the second sentence should be amended to read: "They may be conducted under International Chamber of Commerce or UNCITRAL rules or they may take the form of other institutionalized or *ad hoc* commercial arbitration."

51. Mr. ARANGIO-RUIZ said that he would prefer to retain the idea that the types of arbitration referred to in the article could take any form.

52. Sir Ian SINCLAIR said that he would not insist on his proposal. The sentence could be improved without any loss of meaning by inserting the words "arbitration under" between the words "such as" and "International Chamber of Commerce".

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraph (9)

Paragraph (9) was approved.

The commentary to article 20, as amended, was approved.

Section B.2, as amended, was adopted.

Section B, as amended, was adopted.

Chapter V of the draft report, as amended, was adopted.

CHAPTER II. ***Draft Code of Offences against the Peace and Security of Mankind*** (concluded)*

53. Mr. LACLETA MUÑOZ pointed out that, in the course of the debate on chapter II of the draft report (1933rd to 1935th meetings), the Spanish-speaking members of the Commission had raised the question of the translation of the word "offence" into Spanish by *delito*, a question that arose even in the title of chapter II. It was a terminological problem that was a legacy of the discussions in the General Assembly at its second session, in 1947, and it would eventually have to be settled by the Sixth Committee of the General Assembly. For the time being, however, the Spanish-speaking members of the Commission would like a footnote to be added to the title of chapter II, explaining their position on the matter.

54. The CHAIRMAN said that account would be taken of that suggestion.

CHAPTER III. ***State responsibility*** (A/CN.4/L.390 and Add.1)

A. Introduction (A/CN.4/L.390)

55. Mr. FLITAN (Rapporteur of the Commission) introduced chapter III of the draft report (A/CN.4/L.390 and Add.1) and drew attention to various typographical errors in the different language versions.

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

* Resumed from the 1935th meeting.

Paragraph 6

56. The CHAIRMAN said that, since the Commission's report on its thirty-seventh session was a self-contained document, the text of the 12 draft articles submitted by the Special Rapporteur in his fifth report (A/CN.4/380) should be reproduced in footnote 11.

Paragraph 6 was adopted on that understanding.

Paragraphs 7 to 15

Paragraphs 7 to 15 were adopted.

Paragraph 16

57. The CHAIRMAN suggested that the words "In the discussions in the Commission" should be inserted at the beginning of the paragraph.

It was so agreed.

Paragraph 16, as amended, was adopted.

Paragraphs 17 and 18

Paragraphs 17 and 18 were adopted.

New paragraphs 18 *bis* and 18 *ter* and paragraph 19

58. Mr. ROUKOUNAS suggested that the following sentence should be added at the end of paragraph 19: "The question of injury (moral or material damage) was invoked in connection with reparation", the word *préjudice* being used in French to convey the English term "injury".

59. Mr. ARANGIO-RUIZ recalled that, in the general debate on the topic, he had raised (1900th meeting) the question of a distinction that might have to be drawn between classes of injured States. He would appreciate it if that point could be mentioned directly after that raised by Mr. Roukounas.

60. Further to a comment by Mr. BALANDA, Mr. RIPHAGEN (Special Rapporteur) said that a reference to the provision of alternative passage of a watercourse had certainly been made in the Commission. However, for the sake of simplification, he would be prepared to delete the passage in parentheses at the end of the first sentence of paragraph 19.

61. In addition, he had no objection to inserting two short paragraphs, paragraphs 18 *bis* and 18 *ter*, to cover the proposals made by Mr. Roukounas and Mr. Arangio-Ruiz.

New paragraphs 18 bis *and 18* ter *and paragraph 19, as amended, were adopted.*

Paragraphs 20 to 30

Paragraphs 20 to 30 were adopted.

Paragraph 31

62. Sir Ian SINCLAIR proposed that the words "Most members agreed", at the beginning of paragraph 31, should be replaced by "There was general agreement".

It was so agreed.

Paragraph 31, as amended, was adopted.

Paragraph 32

63. Mr. LACLETA MUÑOZ said that the Spanish text of paragraph 32 should be corrected because the last part contained a mistranslation which, although elementary, was important.

Paragraph 32, as amended in the Spanish text, was adopted.

Paragraph 33

Paragraph 33 was adopted.

Paragraph 34

64. Mr. BALANDA considered that the words *la propriété de l'expression*, in the French text of paragraph 34, were quite wrong. He proposed that they should be replaced by *la pertinence de l'expression.*

It was so agreed.

Paragraph 34, as amended in the French text, was adopted.

Paragraph 35

65. Sir Ian SINCLAIR proposed that the paragraph should read: "The basic purpose of draft article 11 was generally accepted, although some doubts were expressed as to the wording of subparagraphs (*b*) and (*c*) of paragraph 1."

It was so agreed.

Paragraph 35, as amended, was adopted.

New paragraph 35 *bis*

66. Mr. ARANGIO-RUIZ proposed the insertion of a new paragraph 35 *bis* reading:

> "The view was expressed that perhaps provisions should be included allowing for an 'intermediate' phase of amicable notification and discussions before any recourse to countermeasures against the author State."

Such a text would reflect his position more accurately than that appearing in paragraph 57. He would propose the deletion of paragraph 57 in due course.

It was so agreed.

New paragraph 35 bis *was adopted.*

Paragraphs 36 to 50

Paragraphs 36 to 50 were adopted.

Paragraph 51

67. Sir Ian SINCLAIR proposed the insertion of the words "by some members" after the word "expressed".

It was so agreed.

Paragraph 51, as amended, was adopted.

Paragraphs 52 to 56

Paragraphs 52 to 56 were adopted.

Paragraph 57

68. Mr. ARANGIO-RUIZ proposed the deletion of paragraph 57, for the reasons given in connection with the new paragraph 35 *bis.*

It was so agreed.

Paragraph 57 was deleted.

Paragraphs 58 to 60

Paragraphs 58 to 60 were adopted.

Section A, as amended, was adopted.

B. Draft articles on State responsibility (part 2 of the draft articles) (A/CN.4/L.390/Add.1)

Commentary to article 5

Paragraph (1)

69. Mr. ARANGIO-RUIZ, noting that the "author" State was referred to in the singular throughout the paragraph while the "injured" State was mentioned in both the singular and the plural, proposed that, in order to make the contrast less striking, the words "or States" should be added after "author State" in the second sentence.

It was so agreed.

70. Mr. LACLETA MUÑOZ said that, in the third sentence of the Spanish text, the words *al Estado* should be altered to *el Estado.*

It was so agreed.

Paragraph (1), as amended, was approved.

71. Mr. YANKOV proposed that, in the interests of uniformity of style, underlining of words solely for the purpose of emphasis should be dispensed with throughout the commentary.

It was so agreed.

Paragraphs (2) to (5)

Paragraphs (2) to (5) were approved.

Paragraph (6)

72. Mr. ARANGIO-RUIZ proposed that the words "what the States, as creators of the 'primary' rules, intended" should be replaced by "the content and scope of the 'primary' rules involved". He saw no need to go as far back as the creation of "primary" rules, especially where customary rules were concerned.

The meeting rose at 6.10 p.m.

1938th MEETING

Friday, 26 July 1985, at 10 a.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Ogiso, Mr. Riphagen, Mr. Roukounas, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Draft report of the Commission on the work of its thirty-seventh session (*continued*)

CHAPTER III. ***State responsibility*** (concluded) (A/CN.4/L.390 and Add.1)

B. Draft articles on State responsibility (part 2 of the draft articles) (concluded) (A/CN.4/L.390/Add.1)

Commentary to article 5 (concluded)

Paragraph (6) (*concluded*)

1. The CHAIRMAN recalled that the Commission had before it a proposal by Mr. Arangio-Ruiz to replace the phrase reading "what the States, as creators of the 'primary' rules, intended" by "the content and scope of the 'primary' rules involved".

2. Mr. RIPHAGEN (Special Rapporteur) said that the only difficulty with regard to that proposal was that the term "rebuttable presumptions" related to secondary, not primary, rules.

3. Mr. LACLETA MUÑOZ, agreeing with the Special Rapporteur, said that he did not know exactly what the term "rebuttable presumptions" covered, since there were in law only two categories of presumptions: presumptions *juris tantum* and presumptions *juris et de jure.* He therefore proposed that that term should simply be replaced by the word "presumptions".

4. Mr. ARANGIO-RUIZ supported that proposal.

5. Mr. CALERO RODRIGUES suggested that, to take account of the point made by the Special Rapporteur, the paragraph could be modified so as to refer not to the content and scope of the primary rules but to the intention expressed therein.

6. Following a brief discussion in which Mr. ARANGIO-RUIZ, Mr. RIPHAGEN (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN suggested that paragraph (6) should be amended to read:

> "(6) Accordingly, article 5 can only make presumptions as to what legal consequences are intended by the scope and content of the 'primary rule', involved."

It was so agreed.

Paragraph (6), as amended, was approved.

Paragraphs (7) to (9)

Paragraphs (7) to (9) were approved.

Paragraph (10)

7. Mr. CALERO RODRIGUES proposed the deletion, in the first part of the paragraph, of the word "bilateral", since it did not appear in article 36 of the 1969 Vienna Convention on the Law of Treaties to which paragraph (10) made reference.

It was so agreed.

Paragraph (10), as amended, was approved.

Paragraph (11)

8. Mr. LACLETA MUÑOZ, supported by Mr. DÍAZ GONZÁLEZ, proposed that in the

Spanish text the words *El fallo* should be replaced by *La parte dispositiva.* The same remark applied to paragraph (12) and to the penultimate sentence of paragraph (13).

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

9. Mr. ARANGIO-RUIZ said that the words "independent 'source'" and "create rights", in the penultimate sentence, were too strong. The aim should be to achieve a formulation which better reflected the relationship between the rule and the judgment under which the rule was applied.

10. Mr. TOMUSCHAT, agreeing with Mr. Arangio-Ruiz, proposed that the phrase "as an independent 'source' of rights and obligations", in the penultimate sentence, should be deleted and that the word "create" should be replaced by "establish".

11. Mr. YANKOV considered that there was little material difference between the words "establish", "create", and "determine". He would, however, propose that the word "only", in the same sentence, should be moved and placed before the words "as between".

It was so agreed.

12. Mr. LACLETA MUÑOZ suggested that the Commission should accept the amendments proposed by Mr. Arangio-Ruiz and Mr. Tomuschat, unless the Special Rapporteur had any objection.

13. Mr. CALERO RODRIGUES suggested that the word "entail", which was more neutral, should be used in place of "create", "establish" or "determine".

14. Mr. RIPHAGEN (Special Rapporteur) suggested that the Latin expression "*dictum*" should be used in the first sentence in all the language versions.

15. Mr. BALANDA, referring to the French text of the first sentence, said that he favoured the retention of the original word *dispositif.*

16. He also supported the suggestion made by Mr. Calero Rodrigues concerning the penultimate sentence.

17. Mr. FLITAN proposed, further to the suggestion made by Mr. Calero Rodrigues, that the word *établir* should be used in the French text of the penultimate sentence, since it covered the case of the creation of a rule and also that of the recognition of a rule.

18. Mr. LACLETA MUÑOZ said that he, too, was opposed to the use of the word "*dictum*" in the Spanish text of the first sentence, as Latin terms did not always have the same meaning in different legal systems.

19. He proposed that, to bring the Spanish text into line with the English, the first sentence should be reworded to read: *Normalmente, de la parte dispositiva se deducirá claramente cuál es el Estado autor y cuál es el Estado lesionado.*

20. Following further suggestions by Mr. CALERO RODRIGUES, Mr. KOROMA and Mr. RIPHAGEN (Special Rapporteur), the CHAIRMAN suggested that the penultimate sentence of paragraph (12) should be amended to read: "It follows that the judgment can determine rights and obligations only as between the parties to the dispute."

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

21. Further to a comment by Mr. KOROMA, Mr. RIPHAGEN (Special Rapporteur) explained that the words "the *dictum* of the judgment", in the penultimate sentence, should be understood to refer to the findings or conclusions of the court as set forth at the end of the judgment.

22. Mr. ARANGIO-RUIZ said that it would be preferable to avoid the word "*dictum*", since in international jurisprudence one judgment could contain a number of *dicta.*

23. Chief AKINJIDE said that, in the legal system with which he was most familiar, the word "*dictum*" did not have the meaning attributed to it by the Special Rapporteur.

24. Mr. TOMUSCHAT proposed that the word "*dictum*", in the penultimate and last sentences, should be replaced by "operative part", in line with the French and Spanish texts.

It was so agreed.

25. Mr. CALERO RODRIGUES wished it to be placed on record that the word "*dictum*" was perfectly acceptable to him. However, he had no objection to "operative part", although it was not as clear as *dispositif* in French.

26. Mr. KOROMA said that while he, too, was prepared for the time being to accept the term "operative part", the Commission should none the less revert to the matter on second reading.

Paragraph (13), as amended, was approved.

Paragraphs (14) to (16)

Paragraphs (14) to (16) were approved.

Paragraph (17)

27. Further to a comment by Mr. CALERO RODRIGUES, Mr. RIPHAGEN (Special Rapporteur) said that the phrase in the first sentence reading "where more than two States participate in the formation of a rule of international law" should be amended to read "where more than two States are bound by a rule of international law".

28. Mr. ARANGIO-RUIZ referring to the third sentence, said that he wished to place on record his doubts regarding the term "sovereign equality", since what was involved seemed to be more in the nature of "sovereignty" or "territorial sovereignty".

29. Mr. BALANDA said that "sovereign equality" was a recognized term of international law and should be retained. To avoid any confusion, he would propose deleting the word "sovereign" in the

term "sovereign rights" at the end of the third sentence. He did not believe it was the special Rapporteur's intention that only violations of rights involving the sovereignty of States should constitute an internationally wrongful act.

30. The CHAIRMAN suggested that, for the sake of clarity, the last sentence should be amended to read: "Subparagraph (*e*) (i) of paragraph 2 deals with this type of situation."

It was so agreed.

31. Mr. KOROMA appealed to Mr. Balanda not to insist on the deletion of the word "sovereign" from the term "sovereign rights" in the third sentence. He proposed that the word "universal", in the same sentence, should be deleted, and that the term "sovereign equality" should be replaced by "sovereignty".

32. The CHAIRMAN suggested that, in view of the lack of time, the Commission should take note of Mr. Koroma's proposal and review it at a later date.

It was so agreed.

33. Mr. LACLETA MUÑOZ said that he supported Mr. Balanda's proposal to delete the word "sovereign" from the term "sovereign rights". Again, he had no objection to using the expression "sovereign equality", even though it was incorrect and commonly employed. In actual fact, it was not equality that was sovereign but sovereignty that was equal: States were equal in their sovereignty, at least in law. States were equal and they were sovereign.

Paragraph (17), as amended, was approved.

Paragraph (18)

Paragraph (18) was approved.

Paragraph (19)

34. Mr. OGISO noted that the provisions of the 1969 Vienna Convention on the Law of Treaties as cited in paragraph (19) referred to relations between the parties to a multilateral treaty. Paragraph 2 (*e*) (ii) of draft article 5, however, dealt solely with the legal relations that would arise in the event of an "act of a State" rather than of an act of a State party. Furthermore, the expression "State party", which had been included in article 5 as originally submitted by the Special Rapporteur,[1] had been replaced by "a State", without any explanation. If, therefore, he was correct in assuming that the expression "act of a State", in article 5, paragraph 2 (*e*) (ii), referred to the act of a State party, he would propose that the following be inserted at the end of paragraph (19): "Since articles 41, 58 and 60 of the Vienna Convention on the Law of Treaties apply to relations only as between States parties to a multilateral treaty, paragraph 2 (*e*) (ii) should likewise be considered only in respect of the relations of States parties to a multilateral treaty. Consequently, the words 'act of a State' in paragraph 2 (*e*) (ii) should be interpreted as the 'act of a State party'."

[1] See 1890th meeting, para. 3.

35. Mr. RIPHAGEN (Special Rapporteur) said that it was clear from the the expressions "any other State party" and "the other States parties", appearing respectively in paragraph 2 (*e*) and paragraph 2 (*e*)(ii) of article 5, that the reference was to a group of States which were either parties to the multilateral treaty or bound by the relevant rule of customary international law. To meet Mr. Ogiso's point, however, the following passage could be included at the end of paragraph (19) of the commentary: "As is apparent from the use of the word 'other' in the *chapeau* of paragraph 2 (*e*) and in paragraph 2 (*e*) (ii), the expression 'act of a State' in that *chapeau* and in subparagraph (*e*) (ii) must be understood as meaning the act of a State party to the multilateral treaty or bound by the relevant rule of customary international law."

36. Mr. TOMUSCHAT wished it to be placed on record that, in his view, it was also important to refer in paragraph (19) to paragraph 2 (*b*) of article 60 of the 1969 Vienna Convention on the Law of Treaties, which was particularly relevant in that connection. He would not, however, insist on an additional reference.

37. The CHAIRMAN said that the Commission could discuss the point raised by Mr. Tomuschat on second reading.

Paragraph (19), as amended, was approved.

Paragraphs (20) and (21)

Paragraphs (20) and (21) were approved.

Paragraph (22)

38. Mr. ARANGIO-RUIZ, referring to the second sentence, proposed that the words "and other relevant instruments" should be inserted after "Universal Declaration of Human Rights".

39. Mr. TOMUSCHAT, also referring to the second sentence, said that the words "and recognized by treaty or customary law" should be inserted after the words "this Declaration". Again, a comma should be inserted between the phrase in parentheses and the word "must", near the end of the sentence.

40. Mr. ARANGIO-RUIZ said that he had some doubts about including a reference to customary law, which could give rise to lengthy discussion.

41. Mr. RIPHAGEN (Special Rapporteur) said that he shared the doubts expressed by Mr. Arangio-Ruiz, but considered that a reference could be added in the first part of the second sentence to United Nations conventions.

42. Mr. TOMUSCHAT suggested that the words "the rights enumerated in this Declaration" might be replaced by "the rights enumerated in these instruments".

43. The CHAIRMAN suggested that, in order to save time, members who had any reservations regarding a particular paragraph should place them on record, so as to avoid discussion on possible amendments to the report. In addition, any suggestions for editing changes or corrections relating to translation problems should be conveyed directly to the Secre-

tariat for action. If there were no objections, he would take it that the Commission agreed to adopt those arrangements.

It was so agreed.

44. Mr. ARANGIO-RUIZ handed the Secretariat the French text of amendments to paragraph (22) prepared by Mr. Calero Rodrigues, Mr. Lacleta Muñoz and himself.

45. Mr. RIPHAGEN (Special Rapporteur) said that the amendments thus proposed would be reflected in the English text of the second sentence of paragraph (22) as follows: first, the words "is certainly relevant" would be replaced by "and other relevant instruments are certainly pertinent"; secondly, the words "in this Declaration" would be replaced by "in these instruments"; lastly, the words "the respect of such a right" would be replaced by "the respect of such rights".

Paragraph (22), as amended, was approved.

Paragraphs (23) to (27)

Paragraphs (23) to (27) were approved.

Paragraph (28)

46. Mr. YANKOV said that, in his view, a statement should be included in the commentary to article 5 to explain why the phrase in paragraph 3 of the article reading "and in the context of the rights and obligations of States under articles 14 and 15" had been placed in square brackets.

47. Mr. FLITAN proposed that the following sentence should be added at the end of paragraph (28) of the commentary: "When the relevant draft articles are taken up, the Commission will examine the extent of the difference between the rights of the directly injured State and those of the indirectly injured State."

48. Mr. RIPHAGEN (Special Rapporteur) said that the following sentence should be inserted at the end of paragraph (28): "For this reason, the words 'and in the context of the rights and obligations of States under articles 14 and 15' are provisionally placed in square brackets."

49. Mr. MAHIOU, supported by Mr. LACLETA MUÑOZ, said that Mr. Flitan's proposal was interesting, but might lead to a substantive debate on the concepts of "directly injured State" and "indirectly injured State".

50. The CHAIRMAN said that due note would be taken of Mr. Flitan's proposal. If there were no objections, he would take it that the Commission agreed to approve paragraph (28) as amended by the Special Rapporteur.

It was so agreed.

Paragraph (28), as amended, was approved.

The commentary to article 5, as amended, was approved.

Section B, as amended, was adopted.

Chapter III of the draft report, as amended, was adopted.

CHAPTER VI. ***Relations between States and international organizations (second part of the topic)*** (A/CN.4/L.391)

51. Mr. DÍAZ GONZÁLEZ (Special Rapporteur), referring to paragraph 18 of chapter VI, said that the phrase following the reference to footnote 11 should be reworded to read: "on the basis of replies received to the questionnaire sent by the Legal Counsel of the United Nations to the legal counsels of the specialized agencies and IAEA, on the practice of those organizations concerning their status, privileges and immunities (A/CN.4/L.383 and Add.1-3)".

52. Also, further to a suggestion made by Sir Ian Sinclair, he said that a new subparagraph (*f*) should be added at the end of paragraph 20, reading:

> "(*f*) It would be useful if the Secretariat could submit to the members of the Commission, at its thirty-eighth session, copies of the replies to the questionnaire referred to in paragraph 17 (*f*) above."

The questionnaire, which was to be sent to the legal counsels of regional organizations, was similar to the one circulated to the legal counsels of the specialized agencies and IAEA.

53. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt chapter VI as amended by the Special Rapporteur.

It was so agreed.

Chapter VI of the draft report, as amended, was adopted.

CHAPTER IV. ***Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier*** (A/CN.4/L.388 and Add.1)

A. Introduction (A/CN.4/L.388)

Paragraphs 1 to 11

Paragraphs 1 to 11 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.388)

Paragraphs 12 to 18

Paragraphs 12 to 18 were adopted.

Paragraph 19

54. Mr. OGISO said that a fuller account should be given of the discussion on the proposal by Sir Ian Sinclair (1906th meeting, para. 7), referred to in paragraph 18. In particular, mention should be made of the question of the effect of an objection to a declaration, and of Sir Ian Sinclair's response in that regard (1910th meeting). Accordingly, three additional sentences along the following lines should be inserted at the end of paragraph 19: "One member raised the question of a possible objection to a declaration which might complicate legal relations within the new treaty régime. It was explained that the type of declaration which he had in mind was an option that would be contained in the draft articles themselves; such an option would be accepted in advance by the negotiating States and there could be no ques-

tion of any objection to it. Under general international law, objections were possible only to a unilateral reservation and not to a declaration accepted in advance by all the negotiating States." That formulation could well be shortened; he was simply concerned that the substance should be inserted in paragraph 19, so as to draw the attention of the Sixth Committee of the General Assembly to the matter.

55. After a brief discussion in which Mr. YANKOV (Special Rapporteur), Mr. OGISO and Mr. CALERO RODRIGUES took part, the CHAIRMAN proposed that paragraph 19 should be provisionally adopted on the understanding that Mr. Ogiso's proposal would be incorporated by the Special Rapporteur in a shortened form.

It was so agreed.

Paragraphs 20 to 28

Paragraphs 20 to 28 were adopted.

Paragraph 29

56. Mr. RIPHAGEN drew attention to the inaccuracy of the opening words of the third sentence, "In such cases". The practice mentioned in that sentence was not relevant to the second case mentioned in the previous sentence, namely that of non-recognition of a State.

57. Mr. YANKOV (Special Rapporteur) agreed that the practice in question applied only to the first case, namely that of absence of diplomatic or consular relations. He said that the words "In such cases" should be replaced by "In the first case".

Paragraph 29, as amended, was adopted.

Paragraphs 30 to 38

Paragraphs 30 to 38 were adopted.

The meeting rose at 1 p.m.

1939th MEETING

Friday, 26 July 1985, at 3.05 p.m.

Chairman: Mr. Satya Pal JAGOTA

Present: Mr. Arangio-Ruiz, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Riphagen, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov

---

Draft report of the Commission on the work of its thirty-seventh session (*concluded*)

CHAPTER IV. ***Status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier*** (concluded) (A/CN.4/L.388 and Add.1)

C. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier (A/CN.4/L.388/Add.1)

Subsection 1 (Texts of the draft articles provisionally adopted so far by the Commission)

Section C.1 was adopted.

Subsection 2 (Articles and commentaries provisionally adopted by the Commission at its thirty-seventh session)

Commentary to paragraph 2 of article 12 (The diplomatic courier declared *persona non grata* or not acceptable)

The commentary to paragraph 2 of article 12 was approved.

Commentary to article 23 [18] (Immunity from jurisdiction)

The commentary to article 23 [18] was approved.

Commentary to article 28 [21] (Duration of privileges and immunities)

Introductory paragraph

The introductory paragraph was approved.

Paragraph (1)

1. Mr. LACLETA MUÑOZ, referring to the penultimate sentence of paragraph (1) of the commentary to paragraph 1 of article 28 [21], observed that not all members of the Commission had been in agreement as to the exact point in time at which the diplomatic courier started to enjoy immunity. The sentence did not properly reflect the differences of view among the members.

2. Mr. FLITAN proposed that, to avoid the difficulties to which Mr. Lacleta Muñoz had referred, the first part of the penultimate sentence, reading "It was stressed in the Commission that", should be replaced by "Certain members of the Commission expressed the view that".

3. Mr. YANKOV (Special Rapporteur) said that his intention had been to reflect views expressed both in the Commission and in the Drafting Committee. Some members had insisted on the interpretation in question.

4. Mr. LACLETA MUÑOZ considered Mr. Flitan's amendment to the penultimate sentence acceptable and proposed its adoption.

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (6)

Paragraphs (2) to (6) were approved.

The commentary to article 28 [21], as amended, was approved.

Commentary to article 29 [22] (Waiver of immunities)

Paragraphs (1) to (7)

Paragraphs (1) to (7) were approved.

Paragraph (8)

5. Mr. OGISO proposed the addition, at the end of the paragraph, of the words "and communicated in

writing", to ensure consistency between the commentary and paragraph 2 of the article.

6. Mr. TOMUSCHAT suggested that the term "administrative proceedings", in the last sentence, might be made more specific by speaking of administrative courts or agencies.

7. Mr. YANKOV (Special Rapporteur) said that the wording proposed by Mr. Ogiso, while reflecting well-established practice, might be too limitative. However, he was prepared to accept the proposal. As to the question raised by Mr. Tomuschat, the nature of administrative proceedings depended on internal law, which varied considerably from one State to another. Consequently, the wording of the paragraph should be left as broad as possible.

8. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to adopt the proposal made by Mr. Ogiso.

It was so agreed.

Paragraph (8), as amended, was approved.

Paragraphs (9) to (11)

Paragraphs (9) to (11) were approved.

Paragraph (12)

9. Mr. McCAFFREY said that the wording of paragraph (12) implied that the Commission as a whole preferred the method provided for in paragraph 5 of the article, which he did not believe to be the case. He therefore proposed the deletion of the second and third sentences of paragraph (12).

10. Mr. YANKOV (Special Rapporteur) said that, to meet the concern expressed by Mr. McCaffrey, the word "may" had been used in the second and third sentences of the paragraph, the purpose being not to preclude other options. However, in order to emphasize further the non-categorical nature of the second sentence, the words "in some instances" might be inserted after the word "offer".

11. Mr. LACLETA MUÑOZ, referring to the second sentence, said that the comparison implicit in the phrase "It may offer more efficient remedies to solve problems" was awkward. It would be preferable to say simply "efficient remedies to solve problems".

12. Mr. CALERO RODRIGUES said that, while he tended to agree with the view expressed by the Special Rapporteur, the second sentence of paragraph (12) might be amended to read: "It may offer, in some instances, effective ways to resolve problems." In the third sentence, the word "more" could be deleted.

It was so agreed.

Paragraph (12), as amended, was approved.

Paragraph (13)

13. Mr. LACLETA MUÑOZ said that the expression "non-waiver of immunity" should be altered. It suggested that "non-waiver" was some form of institutionalized procedure, whereas the matter dealt with in the article was, of course, waiver itself.

14. Following a discussion in which Mr. RIPHAGEN, Mr. LACLETA MUÑOZ, Mr. McCAFFREY, Mr. CALERO RODRIGUES, Mr. YANKOV (Special Rapporteur) and Mr. TOMUSCHAT took part, the CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to amend the paragraph to read:

"(13) It was made clear in the Commission that the paragraph should be interpreted as referring to any stage of a civil action and that it therefore applied equally to cases in which a sending State did not waive the courier's immunity in respect of execution of a judgment."

It was so agreed.

Paragraph (13), as amended, was approved.

The commentary to article 29 [22], as amended, was approved.

Commentary to article 30 [23] (Status of the captain of a ship or aircraft entrusted with the diplomatic bag)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were approved.

Paragraph (7)

15. Mr. YANKOV (Special Rapporteur) said that the phrase "is under the obligation to", in the second sentence, could be replaced by "should". The kind of regulations in question usually existed, but it might be preferable to avoid suggesting that they should be compulsory.

16. Mr. OGISO proposed that the word "mail", used twice in the third sentence, should be replaced in each instance by "bag".

It was so agreed.

Paragraph (7), as amended, was approved.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were approved.

The commentary to article 30 [23], as amended, was approved.

Commentary to article 31 [24] (Identification of the diplomatic bag)

The commentary to article 31 [24] was approved.

Commentary to article 32 [25] (Content of the diplomatic bag)

Paragraph (1)

17. Mr. OGISO noted that the first sentence of paragraph (1) of the commentary stated that paragraph 1 of article 32 [25] was modelled almost exactly on the second part of paragraph 4 of article 35 of the 1963 Vienna Convention on Consular Relations. However, the Drafting Committee had deviated on one important point from article 3 (Use of terms) of the draft, which, in paragraph 1 (2), referred to "official correspondence, documents or articles intended ..." and not to "official correspondence, and documents or articles intended ...". Accordingly, it might be advisable to explain the reason for the change somewhere in the commentary, for the guidance of the Sixth Committee of the General Assembly.

18. Mr. YANKOV (Special Rapporteur) pointed out that paragraphs (3) and (4) of the commentary described in detail the Commission's deliberations on the wording of paragraph 1 of the article.

19. Mr. CALERO RODRIGUES proposed the deletion, in the first sentence of paragraph (1) of the commentary, of the words "almost exactly".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were approved.

Paragraph (5)

20. Mr. McCAFFREY said that the words "the latter", in the second sentence, should be replaced by the word "it".

It was so agreed.

Paragraph (5), as amended, was approved,

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 32 [25], as amended, was approved.

Commentary to article 34 [26] (Transmission of the diplomatic bag by postal service or by any mode of transport)

The commentary to article 34 [26] was approved.

Commentary to article 35 [27] (Facilities accorded to the diplomatic bag)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were approved.

Paragraph (5)

21. Mr. McCAFFREY proposed the deletion, in the first sentence, of the words "favourable or even preferential treatment in case of heavy traffic or other transportation problems or, also, the lifting or", in order to make the paragraph more realistic and to avoid misunderstandings.

22. Mr. CALERO RODRIGUES said that some provision should be made for the possibility of favourable treatment in cases of emergency.

23. Mr. ARANGIO-RUIZ proposed the deletion, in the first sentence, of the words "or even preferential", "heavy traffic or other" and "lifting or the", so as to meet the concern expressed by Mr. McCaffrey and Mr. Calero Rodrigues.

It was so agreed.

24. Mr. OGISO asked what precise meaning was to be attached to the expression "duties of abstention", in the first sentence.

25. Mr. YANKOV (Special Rapporteur) said that, in using that expression, he had wished to indicate that the authorities of the receiving State or transit State could abstain from the performance of duties which would otherwise affect the situation.

26. Mr. McCAFFREY thought that the expression "duties of abstention" could be replaced by "negative obligations".

Paragraph (5), as amended, was approved.

Paragraph (6)

Paragraph (6) was approved.

The commentary to article 35 [27], as amended, was approved.

Section C.2, as amended, was adopted.

Section C, as amended, was adopted.

B. Consideration of the topic at the present session (*concluded*) (A/CN.4/L.388)

Paragraph 19 (*concluded*)

27. Mr. YANKOV (Special Rapporteur), referring to the proposal made by Mr. Ogiso at the previous meeting concerning an addition to paragraph 19, said that the following passage could be added at the end of the paragraph: "One member raised the question of possible objections to the declaration under paragraph 3 of the proposal. He explained that such an optional declaration related to articles which themselves would be accepted in advance by the negotiating States concerned; there could be no question of any objection to it, since under general international law objections were possible to a unilateral reservation but not to a declaration of the type contemplated here."

Paragraph 19, as amended, was adopted.

Section B, as amended, was adopted.

Chapter IV of the draft report, as amended, was adopted.

CHAPTER VII. *The law of the non-navigational uses of international watercourses* (A/CN.4/L.392)

A. Introduction

Section A was adopted.

B. Consideration of the topic at the present session

Paragraphs 12 to 20

Paragraphs 12 to 20 were adopted.

Paragraph 21

28. Mr. BALANDA proposed the deletion, in the second sentence, of the words "was equal to this task, and that the Commission". In his opinion, the Commission had always been equal to its task.

It was so agreed.

Paragraph 21, as amended, was adopted.

Paragraph 22

29. Mr. ILLUECA, speaking on behalf of Mr. Díaz González, who was temporarily absent, proposed that it should be specified in the first sentence that articles 1 to 9 had been "provisionally" referred to the Drafting Committee, and, in the second sentence, that it would of course be open to members of the Commission to comment "both on these articles and" on the views expressed by the Special Rapporteur.

30. Mr. McCAFFREY (Special Rapporteur) said that, in drafting the paragraph, he had been guided

by the Commission's report on its thirty-sixth session, paragraph 280 of which contained no reference to the draft articles being provisionally referred to the Drafting Committee.[1] He had endeavoured to reflect in the first sentence of the paragraph the concern expressed by Mr. Díaz González. However, he would not object to the inclusion of a reference to the fact that one member had expressed a desire to discuss the draft articles, if that had indeed been the case.

31. Mr. YANKOV said that any referral of draft articles to the Drafting Committee was by definition provisional, since they were then referred back to the Commission itself. Consequently it was unnecessary to state as much in the report. With regard to the concern expressed by Mr. Díaz González, the words "raised by", in the first sentence, could be replaced by "raised during the consideration of".

32. Mr. USHAKOV said that every member was perfectly free to comment on articles, including articles already referred to the Drafting Committee.

33. Following a discussion in which Mr. RIPHAGEN, Mr. TOMUSCHAT, Mr. ILLUECA, Mr. CALERO RODRIGUES, Mr. USHAKOV, Mr. EL RASHEED MOHAMED AHMED, Mr. ARANGIO-RUIZ and Mr. McCAFFREY (Special Rapporteur) took part, Mr. CALERO RODRIGUES proposed that, in order to take account of the concern expressed by Mr. Díaz González, the words "and that further discussion on them was needed" should be added at the end of the first sentence of the paragraph, and that the second sentence should end with "articles 1 to 9".

It was so agreed.

Paragraph 22, as amended, was adopted.

Paragraph 23

Paragraph 23 was adopted.

Section B, as amended, was adopted.

Chapter VII of the draft report, as amended, was adopted.

34. Mr. McCAFFREY, referring to chapter VI of the Commission's report, adopted at the 1938th meeting, wished to place on record that he found it unusual that that chapter contained no account of the Commission's consideration (1925th to 1929th meetings) of the Special Rapporteur's second report (A/CN.4/391 and Add.1).

The draft report of the Commission on the work of its thirty-seventh session as a whole, as amended, was adopted.

Closure of the session

35. After an exchange of congratulations and thanks, the CHAIRMAN declared the thirty-seventh session of the International Law Commission closed.

The meeting rose at 5.25 p.m.

[1] *Yearbook ... 1984*, vol. II (Part Two), pp. 87-88.

كيفية الحصول على منشورات الامم المتحدة

يمكن الحصول على منشورات الامم المتحدة من المكتبات ودور التوزيع في جميع انحاء العالم . استعلم عنها من المكتبة التي تتعامل معها أو اكتب الى : الامم المتحدة ،قسم البيع في نيويورك او في جنيف .

如何购取联合国出版物

联合国出版物在全世界各地的书店和经售处均有发售。请向书店询问或写信到纽约或日内瓦的联合国销售组。

HOW TO OBTAIN UNITED NATIONS PUBLICATIONS

United Nations publications may be obtained from bookstores and distributors throughout the world. Consult your bookstore or write to: United Nations, Sales Section, New York or Geneva.

COMMENT SE PROCURER LES PUBLICATIONS DES NATIONS UNIES

Les publications des Nations Unies sont en vente dans les librairies et les agences dépositaires du monde entier. Informez-vous auprès de votre libraire ou adressez-vous à : Nations Unies, Section des ventes, New York ou Genève.

КАК ПОЛУЧИТЬ ИЗДАНИЯ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

Издания Организации Объединенных Наций можно купить в книжных магазинах и агентствах во всех районах мира. Наводите справки об изданиях в вашем книжном магазине или пишите по адресу: Организация Объединенных Наций, Секция по продаже изданий, Нью-Йорк или Женева.

COMO CONSEGUIR PUBLICACIONES DE LAS NACIONES UNIDAS

Las publicaciones de las Naciones Unidas están en venta en librerías y casas distribuidoras en todas partes del mundo. Consulte a su librero o diríjase a: Naciones Unidas, Sección de Ventas, Nueva York o Ginebra.

Printed in Switzerland
86-40397 (GE.85-65182)
August 1986—3,140

03500P

United Nations publication
Sales No. E.86.V.4

ISBN 92-1-133341-5
ISSN 0082-8289