

Document:-
A/CN.4/SR.2121

Summary record of the 2121st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
1989, vol. I

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71. As to the definition of a "commercial contract", there had not been any comments on the "nature" criterion, but objections had been raised to the "purpose" test. In his own view, both criteria should be retained. In the example he had cited earlier of the purchase of cement, the purpose of the purchase had not been commercial but had related to the welfare of the State, in other words it had been a purpose connected with the public interest. There was an entity in his country which purchased commodities from abroad and was in part commercially motivated, namely the Nigerian National Supply Company Limited. He therefore endorsed the comments made by Mexico and Spain (*ibid.*) on paragraph 1 (b) of the adopted article 2 and paragraph 2 of article 3, respectively, as well as the Special Rapporteur's recommendation to retain the provision now contained in paragraph 3 of the new article 2. Similarly, the Federal Republic of Germany had rightly said (*ibid.*) that the draft articles should make provision for federal States.

72. It had been suggested, by the United Kingdom among others, that specific reference should be made in article 4 to the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and other relevant treaties on diplomatic law. In that respect, he would point out that not all of those instruments had been ratified by all States. Actually, the 1961 and 1963 Conventions, as well as the 1969 Convention on Special Missions and the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, made express provision for the jurisdictional immunity of diplomatic missions, consular posts, special missions, international organizations and international conferences. Generally speaking, however, he was satisfied with the wording proposed by the Special Rapporteur (A/CN.4/415, para. 50).

73. He also supported article 5, a provision on non-retroactivity which was customary in drafts of the present type. Nevertheless, the Government of Mexico had pointed out that some of the articles should apply retroactively because they set forth current principles of international law.

74. Article 6 was a core provision of the whole draft. The words "and the relevant rules of general international law", between square brackets, should be deleted. He was opposed to any suggestion that the draft should be made subordinate to the "general rules of international law", something which could open the door to restrictions on the principle of State immunity. Under its statute, the Commission was called upon to work on the progressive development and codification of international law. In the work in hand, care should be taken not to weaken all of the draft articles by making them subject to the principles of general international law.

75. The Special Rapporteur's reformulation of paragraph 1 of article 7 (*ibid.*, para. 79) removed the ambiguities in the adopted text. Paragraphs 2 and 3 should be transferred to the article on the use of terms, as should the provisions of article 11. As for the title of part III of the draft, it should be "Exceptions to State immunity", not "Limitations on State immunity".

76. Lastly, he had an open mind on the proposed new article 11 *bis* (*ibid.*, para. 122), for the same reasons as

those given by Mr. Al-Baharna (2118th and 2119th meetings).

77. The CHAIRMAN, in reply to a question by Mr. BARSEGOV, said that articles 12 to 28 would be discussed at the next session.

The meeting rose at 1.05 p.m.

2121st MEETING

Tuesday, 20 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded)* (A/CN.4/384,¹ A/CN.4/413,² A/CN.4/423,³ A/CN.4/L.431, sect. B)⁴

[Agenda item 7]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (concluded)

Articles 1 to 17⁵ (concluded)

1. Mr. BARBOZA (Special Rapporteur), summing up the debate and replying to Mr. Reuter's question (2110th meeting), "What's it all about?", said that, first, it was about fulfilling the Commission's mandate from the General Assembly: to prepare draft articles on international liability for the injurious consequences of acts not prohibited by

* Resumed from the 2114th meeting.

¹ Reproduced in *Yearbook* . . . 1985, vol. II (Part One)/Add.1.

² Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

³ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

⁴ Consideration of the present topic is based in part on the schematic outline submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session. The text is reproduced in *Yearbook* . . . 1982, vol. II (Part Two), pp. 83-85, para. 109, and the changes made to it are indicated in *Yearbook* . . . 1983, vol. II (Part Two), pp. 84-85, para. 294.

⁵ For the texts, see 2108th meeting, para. 1.

international law. Secondly, it was about trying to get out of the present situation, which Mr. Ushakov had described in 1982 as follows:

... There was, indeed, no general rule of international law that imposed a duty on a State to indemnify its nationals, another State or the nationals of that other State for injury suffered as the result of an activity not prohibited by international law which it had carried out. . . .⁶

That comment might have reflected the law and the feeling of jurists at the time, but it sounded prehistoric now.

2. With regard to his own idea of the future convention and its role, he pointed out that there was a series of conventions and rules regulating specific activities or the zones in which such activities took place, including the 1985 Vienna Convention for the Protection of the Ozone Layer,⁷ the 1979 Convention on Long-range Transboundary Air Pollution⁸ and the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal.⁹ The principles on which those instruments had been based had never been explicitly stated, however, and the problem of responsibility was merely touched on in the texts. For example, the Basel Convention provided for the signature of a protocol (art. 12); the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities¹⁰ contained rules on the liability of the operator (strict liability) and, subsidiarily, of the State of which the operator was a national and also provided for a protocol; the 1985 Vienna Convention stated no principles and its protocols did not mention responsibility; and the 1979 Convention expressly declined to deal with responsibility. Those lacunae had to be filled by means of a very general convention establishing general principles and a procedure that would apply to all the activities covered by draft article 1, in so far as the provisions of that article were not incompatible with those of specific conventions or protocols. Such conventions and protocols might deal with specific activities or with the same activities that were covered in article 1, but they would incorporate more detailed rules and have a more limited territorial scope. That would certainly be the case if such an instrument contained a list of activities to which the framework convention under consideration applied. The procedural stage required for the determination of the nature of an activity could then be eliminated: if an activity appeared in the list, it would come under article 1 and a specific régime would have to be found for it.

3. As to future work on the topic, he planned first to draft a chapter containing guidelines for negotiation and elaborating on the concept of compensation as a means of redressing the balance of interests, bearing in mind the costs-allocation theory. He also planned, as he had said (2108th meeting) in introducing his fifth report (A/CN.4/423), to deal with cases of widespread risk or harm, which required a different procedure because several not clearly identifiable affected States would then have to be notified by States of origin which themselves were not easily identifiable and because the participation of international

organizations, the possible interests of the international community and similar matters had to be taken into account.

4. In addition, he planned to go into the question of responsibility for activities which caused harm to the "global commons" and to report thereon to the Commission. Obviously, that subject would bring into play very similar principles of responsibility; obligations of prevention, and possibly compensation, would have to be provided for. Implementation machinery might have to be adapted, since, in such cases, the "public order" of the international community would be affected and the harm would be done to zones belonging to no State in particular. Consequently, the role of the "affected State" would have to be played by an entity that was not directly affected—for example, an international entity or States acting as custodians of the community's public interest. That question was, *prima facie*, part of the topic, for it related to liability for injurious consequences, in the "global commons", of activities not prohibited by international law. It was by no means a matter of "environmental law" alone.

5. Summing up the debate itself, he said he believed that the revised draft articles 1 to 9, together with the comments on them in his report and the observations made during the discussion, could be referred to the Drafting Committee. However, he was not proposing that the new draft articles 10 to 17 be referred to the Drafting Committee, since they were of an exploratory nature. He would comment, in connection with both sets of articles, only on some of the main points that had been raised, leaving aside—though taking good note of—the wealth of comments of a purely drafting nature.

6. He had introduced the concept of risk in his fourth report (A/CN.4/413) because a criterion had been needed to limit the scope of the draft articles. In other words, harm triggered compensation, but compensation was due only if harm had originated in an activity involving risk. Prevention, however, was based on the concept of "appreciable risk". Since many members of the Commission and many representatives in the Sixth Committee of the General Assembly had reacted strongly against the role thus attributed to the concept of risk, he had broadened the scope of the draft in his fifth report by including activities involving risk that might cause harm, as well as activities that actually did cause harm. Harm thus continued to trigger compensation, but it might originate either in activities involving risk or in activities having harmful effects. Prevention was based on the concept of "appreciable risk" in the case of activities involving risk, and on the certainty or foreseeability of harm in the case of activities having harmful effects.

7. At the present session, only one member of the Commission had defended the concept of risk as a criterion for limiting the scope of the draft. The opposite position had been adopted enthusiastically by a great many members and with some reservations by other members, who would like separate consideration to be given to certain aspects of the activities referred to in article 1 or wanted the scope to be better defined by means of other forms of limitation, such as a list of activities.

8. Some of those who did not accept limitation by risk would prefer the scope to be even broader and to include isolated acts—acts not linked to any activity. One member

⁶ Yearbook . . . 1982, vol. I, p. 249, 1739th meeting, para. 47.

⁷ UNEP, Nairobi, 1985.

⁸ See 2109th meeting, footnote 12.

⁹ See 2112th meeting, footnote 6.

¹⁰ See 2111th meeting, footnote 14.

had said that periodic acts should be included. In fact, however, they were already included in the two types of activities in question, for nowhere was it said that acts constituting an activity had to be continuous.

9. He took it that the Commission wished him to go on exploring the enlarged approach to the question of scope, but Mr. Barsegov's position (2113th meeting) deserved comment.

10. Mr. Barsegov found that the inclusion in the draft articles of activities having harmful transboundary effects was not logical, since such activities could hardly be considered lawful. That was true on the plane of principles, and the principles deriving from the *Corfu Channel*¹¹ and *Trail Smelter*¹² cases were indeed based on the premise that a State had no right knowingly to use or to permit the use of its territory to cause harm in the territory of another State. In real life, however, there were two obvious derogations from that principle. The first was that, according to the threshold concept, the affected State had to accept harm if it was neither appreciable nor significant. The second was that, in the case of specific activities, there had to be a special prohibition in order for the basic principles to function smoothly, as illustrated by the activities of energy-producing or chemical industries, or the case of exhaust gases of automobiles or emissions from domestic heating appliances, etc. If such a prohibition did not exist, it was doubtful that international law would grant any right of action, so that, in practice, there was no such general prohibition. Those transboundary effects had somehow crept into lawfulness, however, and it would now be almost unthinkable to treat them as wrongful. If the problem raised by such activities was to be solved, each one would require agreement on a special régime that would be applicable to them in addition to the general régime to be established by the instrument the Commission was elaborating.

11. With regard to the concept of "conditional fault", whose inclusion in the report (A/CN.4/423, paras. 5-7) Mr. McCaffrey (2109th meeting) and Mr. Al-Khasawneh (2114th meeting) had objected to and in connection with which Mr. Thiam (2113th meeting) had identified a confession that the topic was part of responsibility for wrongfulness, he said that his intention had not been to introduce any theory of fault: he had only tried to show the mental process which was used in many legal systems to determine who was responsible whenever harm had occurred. He had used the expression "original sin" precisely in order not to refer to "fault".

12. Some speakers, such as Mr. McCaffrey, Mr. Hayes (2109th meeting), Mr. Shi (2110th meeting) and Mr. Njenga (2112th meeting), had expressed a preference for the word "activities" rather than "acts" and the great majority of members had not opposed the choice of the word "activities". Mr. Calero Rodrigues (*ibid.*), Mr. Al-Khasawneh and perhaps Mr. Francis (2111th meeting) would like isolated acts also to give rise to liability.

13. A number of suggestions had been made with regard to the terms "jurisdiction" and "control". Mr. McCaffrey preferred the expression "effective control" and Mr.

Bennouna (2112th meeting) objected to the inclusion in draft article 1 of the words "in the absence of such jurisdiction, under its control" because jurisdiction and control could be cumulative. Mr. Roucounas (*ibid.*) and Mr. Francis thought that the expression "jurisdiction and control" would suffice, while Mr. Razafindralambo (2113th meeting) preferred "jurisdiction and effective control". Mr. Graefrath (2111th meeting) wanted a definition of jurisdiction that was wider than the one based exclusively on territoriality. In reply to all those members, he said that the convention under preparation was not a convention on jurisdiction, that the use of such terms in other conventions had not given rise to problems and that the Drafting Committee now had enough material to find satisfactory wording.

14. As to the dual applicability of the régimes of causal liability and responsibility for wrongfulness, he agreed with Mr. McCaffrey that their coexistence would depend on the way the primary rule was formulated. In his opinion, however, both of the examples given by Mr. McCaffrey (2109th meeting, para. 21) related to responsibility for wrongfulness. Whether the primary rule was that "State A shall exercise due diligence to prevent harm to State B" or that "State A shall ensure that no harm is caused to State B", there was a prohibition on causing harm. The primary rule in causal liability should in fact be expressed as follows: "State A may cause a certain amount of harm to State B, provided that it pays compensation for the harm."

15. In reply to a comment made by Mr. Calero Rodrigues, he referred to the conclusions set out in his report (A/CN.4/423, para. 47): if two States were signatories to both the future convention on the law of the non-navigational uses of international watercourses and the future convention on international liability, and if draft article 16 [17], on pollution, of the articles on watercourses¹³ remained in its present form, then, in accordance with draft article 4 under consideration, "the present articles shall apply subject to that other international agreement". Thus, in cases of appreciable harm caused by watercourse pollution, the prohibition provided for in the watercourses convention would apply if the harm resulted from the normal conduct of the activity in question. If it was the result of an accident, it would be the convention on international liability that applied.

16. On the subject of reparation, he did not agree with Mr. Tomuschat (2110th meeting) that draft article 9 established a set of secondary rules. In his view, the obligations in question were primary ones. The primary rule could be formulated more or less as follows: "Your activity will be permitted if the harm it causes is compensated for." The secondary rule came into effect only if reparation was not made, i.e. if the primary obligation to make reparation was violated.

17. Mr. McCaffrey, Mr. Reuter, Mr. Al-Qaysi, Mr. Eiriksson, Mr. Francis, Mr. Yankov, Mr. Díaz González and Mr. Al-Khasawneh preferred the word "compensation" to "reparation". In his fourth report (A/CN.4/413), the word "compensation" had been interpreted as referring almost exclusively to monetary payments and that was why he had subsequently used the term "reparation", which might partly take the form of some action by the State of origin

¹¹ See 2108th meeting, footnote 10.

¹² *Ibid.*, footnote 9.

¹³ *Yearbook* . . . 1988, vol. II (Part Two), p. 26, footnote 73.

to help eliminate or alleviate the consequences of the injury to the affected State, for example if it possessed appropriate technology which the affected State did not have. But the members he had just named preferred the word "compensation" because, in a field completely different from that of responsibility for wrongfulness, it was appropriate to use different terms. He was very satisfied with that reflection, because it showed that most members of the Commission now agreed that causal liability was entirely different from responsibility for wrongfulness, which had not been the case two years previously. Only Mr. Solari Tudela (2112th meeting) continued to prefer the word "reparation", which he believed had the merit of recalling that the present topic had originated in the consideration of the topic of State responsibility.

18. The substance of the concept of reparation or compensation, meaning the redress of the balance of interests involved, had, however, not given rise to any major objections—quite the contrary. Mr. Bennouna wanted equity to be mentioned, but equity was an amorphous concept. The concept of the balance of interests would be explained in detail later, as he had indicated in his fourth report (A/CN.4/413, para. 49), and in accordance with sections 6 and 7 of the schematic outline. The question whether what was involved was a "redress" or a "readjustment" of that balance, a point raised by Mr. Bennouna and Mr. Al-Qaysi (2112th meeting), would also be discussed later.

19. Some speakers, including Mr. Hayes and Mr. Bennouna, had insisted that draft article 2, on the use of terms, must be provisional, since some terms would have to be redefined and new ones might have to be included. Others—Mr. Yankov (2113th meeting), Mr. Roucouas and Mr. McCaffrey—had found some of the terms used, and particularly the word "places", unusual. Yet that word was used to convey precisely the same meaning in the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water,¹⁴ article I, paragraph 1, of which referred to "any place under its jurisdiction or control".

20. Some members of the Commission, such as Mr. Barsegov and Mr. Reuter, were opposed to the use of the expression "innocent victim", while others—Mr. Hayes, Mr. Pawlak (2111th meeting) and Mr. Eiriksson (2112th meeting)—had endorsed it. The Drafting Committee would no doubt find a satisfactory solution.

21. With regard to obligations of prevention, Mr. Shi, Mr. Bennouna and Mr. Solari Tudela had said that they would prefer the violation of procedural obligations and possibly also of obligations of prevention by a State not to engage its responsibility for wrongfulness. Mr. Francis had said that no machinery should be set in motion before the obligation to make reparation had been violated, in accordance with the solution adopted by the previous Special Rapporteur in the schematic outline. Actually, that was one of the solutions he himself offered the Commission both in his fourth report and in his fifth report (A/CN.4/423, paras. 48-49 and 68) and it had not met with any express opposition. It could be introduced in the draft through an article stating that non-compliance with the obligations embodied in the corresponding articles would give no right

of action to the affected State; only the régime of the articles referring to compensation would then be applicable. He hoped that such a solution would satisfy Mr. Calero Rodrigues, who was opposed to "hard" obligations with regard to prevention.

22. Opinions were divided on the terms to be used to describe harm and risk. A considerable number of speakers, namely Mr. Ogiso (2110th meeting), Mr. Njenga, Mr. Al-Qaysi, Mr. Barsegov, Mr. Pawlak and Mr. Graefrath, had expressed a preference for the term "significant" rather than "appreciable" in the case of harm, and some of them had also wanted the term "significant" to be used in the case of risk. Mr. Njenga had said that risk should be discoverable by a "reasonable examination", while Mr. Al-Khasawneh had expressed a preference for the words "detectable risk". On the other hand, Mr. Hayes and possibly Mr. McCaffrey were in favour of the word "appreciable". The choice of terms was really of little consequence; the important thing was that there was no longer any question about the need for a threshold to define harm and risk.

23. In referring to draft article 4, Mr. Reuter, Mr. Tomuschat and Mr. Bennouna had drawn attention to the residual nature of the draft articles as a whole. Mr. Bennouna had said that article 4 should emphasize the pre-eminence of *lex specialis* even more clearly. He personally failed to see how the point could be made more clearly than it was in article 4, but if Mr. Bennouna had better wording to propose, the Drafting Committee would be grateful for it. Mr. Al-Baharna (2113th meeting), however, believed article 4 to be unnecessary, taking the view that the matter was already governed by paragraph 3 of article 30 (Application of successive treaties relating to the same subject-matter) of the 1969 Vienna Convention on the Law of Treaties.

24. Mr. Graefrath had said that the Commission could not maintain the presumption stated in paragraph 2 of draft article 3 without good reasons. Good or not, reasons in support of the presumption had been given in his fourth report (A/CN.4/413, paras. 62-70). He had acknowledged that the draft went "further in this respect than the *Corfu Channel* ruling", adding that "this is justified because of the nature of causal responsibility, which requires that the mechanisms of the draft should be more easily operative" (*ibid.*, para. 68).

25. The establishment of a requirement such as "the means of knowing" already imposed a restriction whose purpose was to take account of the situation of the developing countries. However, to place the burden of proof on the affected State, which might very well be another developing country, did not seem reasonable, particularly bearing in mind the dicta in the *Island of Palmas* case¹⁵ and the *Corfu Channel* case, namely that the territorial sovereignty of the State of origin prevented the affected State from entering the territory of the State of origin in order to gather the necessary evidence, which was of necessity in the hands of that State. In the *Corfu Channel* case, the ICJ had stated that "the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of

¹⁴ United Nations, *Treaty Series*, vol. 480, p. 43.

¹⁵ United Nations, *Reports of International Arbitral Awards*, vol. II (Sales No. 1949.V.1), p. 829 (arbitral award of 4 April 1928).

proof available to establish the knowledge of that State as to such events".¹⁶ Since that case had been one of responsibility for wrongfulness, in which the attribution of an act to a State was of necessity more complicated, and since causal liability required a simple method of assignment of obligations, there appeared to be good reasons for retaining the presumption in draft article 3.

26. Mr. Yankov had emphasized the international aspects of co-operation and had suggested that the Commission might draw on article 197 of the 1982 United Nations Convention on the Law of the Sea. Draft article 7 was, however, worded along much the same lines as article 197. Perhaps a reference to "regional" co-operation should be added to bring the two articles more into line.

27. Mr. Barsegov had found it illogical that co-operation by the affected State with the State of origin should be limited to cases of "harm caused by an accident" (art. 7), arguing that the State of origin could also be innocent in the case of activities having harmful effects. However, in the latter case, the State of origin would, by definition, know that the activity in question produced such effects. Its innocence should therefore not be taken for granted and it would seem excessive to require the affected State to co-operate in the event of harm caused by the State of origin to its own population and territory.

28. The possibility of introducing the participation of international organizations into the topic had, in general, been well received by the Commission and he had taken good note of the useful suggestions made in that regard.

29. The new draft articles 10 to 17 had given rise to many comments, the clearest message being that the Commission wanted a more flexible procedure and that it had many doubts about the similarity with the proposed régime for the non-navigational uses of international watercourses. Although a new set of articles would probably replace draft articles 10 to 17 in his next report, he wished to take up some of the points raised.

30. There were three possible solutions: a detailed procedure such as that proposed in articles 10 to 17, with well-defined obligations and measures; a more flexible, less compulsory procedure; and no procedure at all. The last solution was quite logical and was based on the deterrent effect of reparation. It seemed to be the solution favoured by Mr. Calero Rodrigues, who had said that he wanted to avoid any time-limit for notification; the absence of a time-limit would, of course, preclude the possibility of any procedure of a more or less compulsory nature. There was, however, one major drawback: not to require the participation of the affected State—a consequence of the absence of any procedure—would impair prevention. With the emphasis which the General Assembly and the Commission itself had placed on prevention, it would not seem possible to leave it out completely. Accordingly, the best solution seemed to be a more flexible procedure than that which he had proposed.

31. Some members of the Commission had pointed out that articles 10 to 17 did not take account of the case of

extended harm—for example, long-range pollution—of the risk of such harm or of harm to the "global commons". He would try to explore those areas in his next report.

32. Mr. Al-Qaysi and Mr. Graefrath had suggested that activities involving risk and activities having harmful effects should be dealt with separately. That suggestion was worth looking into, but several preliminary considerations would seem to militate in favour of only a partial separation of the articles dealing with each category. First, harm provoked by both types of activities had the same source: the State of origin. Secondly, the same assignment of obligations (art. 3) was valid in both cases. Thirdly, prevention was also applicable to activities having harmful effects in so far as it tended to keep the harm caused below the threshold of "appreciable" or "significant" harm. Fourthly, harm triggered liability in both cases. Fifthly, the affected States were affected in the same manner and, where any doubt existed as to who was affected, the same uncertainty existed for both types of activities. Sixthly, the same principles appeared to be applicable to activities involving risk and to those causing effective transboundary harm, namely freedom of action (art. 6), co-operation (art. 7), prevention (art. 8) and reparation (art. 9). Seventhly, the procedural obligations also did not seem to differ greatly in each case. The requirements with regard to assessment (art. 10) were identical, except that, in the case of activities involving risk, there also had to be an assessment of risk; and notification and information were applicable in both cases as well.

33. Mr. Al-Khasawneh took the view that the activities referred to in article 1 should not be initiated until the question of the applicable régime was settled. It seemed, however, that the majority of the members of the Commission accepted the solution proposed in the fifth report (A/CN.4/423, paras. 114-116).

34. Mr. Graefrath had made two points on the obligation to negotiate: first, that the obligation, as worded in draft article 16, was in fact an obligation to agree on a régime; and, secondly, that an obligation of consultation would be more in keeping with international practice. Mr. Bennouna thought that it would be unrealistic to oblige States to negotiate. Mr. Graefrath's first point was not in fact corroborated by international practice: an obligation to negotiate should not be confused with an obligation to reach agreement and was simply an obligation to sit at the negotiating table and negotiate in good faith with a view to reaching an agreement. That was what happened when a border line or fishing rights were negotiated. In the case under consideration, the object of the negotiations was a régime, because the conflict of interests to be resolved was permanent and the States concerned had to negotiate a régime extending in time. However, it might well be that consultations would be a better solution than negotiations when it came to establishing a régime. In the absence of agreement on a specific régime, the régime of the present articles would apply. However, reparation necessarily presupposed negotiations and, consequently, imposed an obligation to negotiate. He remained convinced that the obligation to negotiate was well established in international law. Reference to general international law might even be dispensed with if a specific article in the future convention imposed that obligation on the parties. The proposed solution would then not strictly depend on the soundness

¹⁶ *I. C. J. Reports* 1949, p. 18.

of any one position with regard to the theoretical problem under discussion.

35. Mr. FRANCIS said that he was concerned about the relationship between the attribution of responsibility and negotiation. If State A refused to negotiate with State B, there had necessarily been a breach of an international obligation within the meaning of the draft articles. The Special Rapporteur's position on that point probably depended on what he thought about the non-attribution of responsibility before the point at which compensation was refused.

36. The question of the "global commons" was still outstanding. Should the Commission include it in the scope of the draft? The issue was a burning one, much more so than in 1982. Without prejudging the final decision, the Commission might consider that aspect of the topic. His own view was that a discussion should be held to determine what the concept covered.

37. Mr. Barsegov (2113th meeting), referring to a view once expressed by Mr. Ushakov, had recalled that, in the area under consideration, the law was non-existent. That comment by Mr. Ushakov was still true. The question of responsibility should therefore be left to a later stage, bearing in mind that the concept of wrongfulness did not enter into play in the present context. It was true that, if a State caused transboundary harm and deliberately pursued the activity which had caused it, it placed itself in a situation that was wrongful; but that was not the most common situation.

38. Mr. BARSEGOV said he had not recommended that the draft articles be referred to the Drafting Committee. He had so agreed only for the previous draft articles 1 to 10. However, the Special Rapporteur had proposed new texts which were based on entirely different foundations. He had asked the Special Rapporteur what his position was and, in particular, whether the earlier provisions, which were closer to Mr. Ushakov's ideas, were now out of date and, if so, in what way. The Special Rapporteur had replied that, in the absence of elements for codification, the aim was to develop international law.

39. Since the Commission had before it new texts based on completely new concepts, he intended to propose, at the time of the discussion of the report to the General Assembly, that the Sixth Committee be requested to consider whether that change served any purpose and whether the Commission should continue its work on the basis of "strict" or "absolute" liability for all transboundary harm resulting from a lawful activity, without taking account of the concept of risk.

40. It was still not clear precisely what activities were being discussed. The Special Rapporteur had spoken of motor vehicle traffic and domestic heating. Other activities that came to mind included the felling of trees in Siberia and Amazonia, and African agriculture, which was causing desertification. If those were the activities in question, that should be made clear to the Sixth Committee.

41. Mr. FRANCIS said he regretted the fact that the term "situations" was no longer used in draft article 1 and would welcome further explanations by the Special Rapporteur on that point.

42. With regard to the "global commons", he noted that article 1 referred to transboundary harm without indicating any precise limits: the scope of the draft could thus extend to those commons. In the circumstances, he proposed that the Commission, which appeared to agree on that point, should decide in principle to deal with the problem of the "global commons".

43. As Mr. Barsegov had once again stressed, article 1 was not yet ripe for consideration by the Drafting Committee. Since the activities involving risk referred to in that article could cause harm, risk did not have to be mentioned: it could very well be dealt with elsewhere, as another aspect of the topic.

44. Mr. BEESLEY said that it would be useful if the text of the Special Rapporteur's comments in summing up the debate could be circulated. He was concerned that the Commission was reopening an old debate, at the risk of going over arguments that had already been put forward, particularly on whether it should be codifying existing rules or working on the progressive development of international law. Rules in the matter did in fact exist and he was tired of quoting judicial decisions, treaties and conventions, not to mention Principle 21 of the Stockholm Declaration,¹⁷ which had been adopted by consensus 17 years earlier and the concept of the "global commons", in connection with which ideas had been developed in the 1982 United Nations Convention on the Law of the Sea that, although recent, were not altogether new.

45. Trusting in the spirit of compromise of the members of the Commission, he had referred at the 2111th meeting (para. 68) to a book containing a very pertinent analysis of the meaning of the expressions "strict liability" and "absolute liability", which in his view were not coterminous.

46. There were many activities which were not wrongful under international law but which did cause harm and the courts had already had occasion in that regard to rule on a whole series of obligations, including that of reparation. State practice therefore existed and differences of opinion among members of the Commission must not prevent progress being made on the topic. The Commission had been entrusted with a specific mandate that would enable it to make a major contribution to the study of the question of the "global commons" and of the topic as a whole.

47. The question whether the draft articles should be referred to the Drafting Committee despite the reservations of some members was one of method. That had been done, for example, in the case of the draft Code of Crimes against the Peace and Security of Mankind. Unanimity among the members of the Commission could not be counted on, for it was so rare as to be miraculous.

48. The CHAIRMAN said that, if the Commission wished to reopen the debate on the scope of the topic, it would have to change its programme of work. The Special Rapporteur had in fact submitted revised draft articles to the Commission, thus giving members an additional opportunity to discuss the scope of the topic, but he could just as well have submitted those texts to the Drafting Committee. In any event, the Drafting Committee would sooner or later have to deal with the problem, even if the Commission reversed the decision it had taken at its

¹⁷ See 2108th meeting, footnote 6.

previous session and did not refer the revised draft articles to it now. Moreover, it was obvious that the question could be raised again both in the Sixth Committee of the General Assembly and at the Commission's next session.

49. Prince AJIBOLA said that he shared the Chairman's views, even though it was quite natural for all members of the Commission to wish to comment on the statement the Special Rapporteur had just made in summing up the discussion. If the Commission should decide to reopen the debate on the scope of the topic, however, he reserved the right to speak on that question at length.

50. Mr. AL-KHASAWNEH said that, even if the Commission referred the draft articles to the Drafting Committee, there was nothing to prevent it from asking the Sixth Committee of the General Assembly about the concepts of strict liability and absolute liability, provided that it placed them in their proper context. In accordance with the dictum *fatum nomen est*, those two concepts suffered because of the names—"strict" and "absolute"—they had been given. Since he had been the only one to raise the question whether activities should be postponed until an appropriate régime had been established, the Special Rapporteur had been wrong to conclude (para. 33 above) that the Commission had reached some sort of agreement on that point. Moreover, at the 2114th meeting (para. 16), he had referred not only to Islamic law, but also to decisions by the ICJ concerning interim measures of protection; he had also cited recent articles in the *Netherlands Yearbook of International Law*.

51. The CHAIRMAN suggested that the question raised by Mr. Barsegov should be reflected in the Commission's report in order to draw the Sixth Committee's attention to the matter.

52. Mr. EIRIKSSON said that he basically agreed with the Chairman's point of view and that, at the appropriate time, the Commission could decide how the question was to be mentioned in its report. The Special Rapporteur had already outlined his conclusions before the previous draft articles 1 to 10 had been referred to the Drafting Committee. In 1988, the Sixth Committee of the General Assembly had endorsed those conclusions, which had also received very broad support in the Commission. However, since Mr. Barsegov had raised the question of strict liability, it might be better, as matters now stood, to say that a tentative solution had been found because the guidelines to be followed for negotiations on reparation or compensation still had to be formulated. The Special Rapporteur would have to deal with those questions as early as possible.

53. Mr. BEESLEY said that he agreed with Mr. Eiriksson and recalled that, when the Commission had referred the previous draft articles 1 to 10 to the Drafting Committee, several members of the Commission had particularly stressed that those texts were being so referred on the understanding that they would be reworded to take account of the three general principles referred to by the Special Rapporteur¹⁸ and taken from the study by his predecessor. Those same members had stressed that it was particularly necessary to take account of the principle that the innocent victim should not have to bear the loss. Although he welcomed the way in which the Special Rapporteur had

summed up the discussion, he had reservations about choosing one particular issue to submit to the Sixth Committee. If the issue was to be well received, it would have to be accompanied by reasoned and well-documented explanations on the distinction between absolute liability, which was built into a wide range of existing international conventions, and strict liability, which was a lesser burden and derived from the practice of States. In the final analysis, it would be better not to raise the issue. He himself had at least a dozen questions on which he would like answers from the Sixth Committee, but he believed that members of the Commission should first hold consultations before choosing one question rather than another from all those that could be put to the Sixth Committee.

54. The CHAIRMAN, having consulted several members of the Commission, said that, if there were no objections, he would take it that the Commission agreed to refer the revised draft articles 1 to 9 to the Drafting Committee.

It was so agreed.

55. The CHAIRMAN suggested that the Special Rapporteur be invited to draft the questions intended for the Sixth Committee of the General Assembly for the purpose of drawing its attention to some of the main problems on which its views would be welcome. The Commission would examine those questions during the consideration of its draft report, in which the comments made by Mr. Barsegov and Mr. Francis would also be reflected.

It was so agreed.

Jurisdictional immunities of States and their property
(continued) (A/CN.4/410 and Add.1-5,¹⁹ A/CN.4/415,²⁰
A/CN.4/422 and Add.1,²¹ A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR
(continued)

CONSIDERATION OF THE DRAFT ARTICLES²² ON SECOND READING
(continued)

56. Mr. OGISO (Special Rapporteur), summing up the debate on his first two reports, said that, since the summary records of the meetings on the topic had not all been available, he might unintentionally overlook some of the questions raised during the discussion. In order to save time, moreover, he would not systematically refer by name to all those who had spoken on one point or another.

57. In his second report (A/CN.4/422 and Add.1), he had explained the recent trend on the part of a number of States which had hitherto adhered to the principle of absolute immunity to change their positions in favour of restricted immunity. That trend was apparent not only in judicial

¹⁸ See *Yearbook* . . . 1987, vol. II (Part Two), p. 49, para. 194 (d).

¹⁹ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

²⁰ *Ibid.*

²¹ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

²² For the texts, see 2114th meeting, para. 31.

decisions, but also in new domestic legislation and in international agreements. Several members of the Commission had objected to his statement, in reiteration of a view expressed by Sir Ian Sinclair, that "it can no longer be maintained that the absolute theory of State immunity is a universally binding norm of customary international law" (*ibid.*, para. 10). In his own view, which was not substantially different from Sir Ian's, there was "no general consensus in favour of absolute immunity" (*ibid.*). His point was thus that, in the realm of State immunity, there was no theoretical consensus as to whether the absolute theory or the restrictive theory was the rule and that efforts should therefore be made to reach agreement on the areas of State activity to which immunity would not apply.

58. From that point of view, he welcomed the fact that several members had drawn attention to the need for a pragmatic approach and the fact that there had been no objection to that opinion. That seemed to indicate, at least at the present stage, that there was a general consensus on the method to be followed for the future consideration of the topic.

59. Mr. Koroma (2115th meeting) had made the point that the historical analysis contained in his reports had been restricted to Western developed countries; his predecessor had faced the same criticism. In the case of the African countries, however, it was very difficult to find examples of relevant judicial decisions and, except in South Africa, there was no domestic legislation on the topic. Since the subject was predominantly legal and technical, he had preferred to rely on court decisions and domestic legislation, where they existed, rather than on declarations of a political nature. He had had great expectations of the written comments and observations of Governments. Unfortunately, of all the African countries, only the Government of Cameroon had responded to the General Assembly's request for comments. He had duly taken account of that point of view, but could not deduce that it represented the view of the majority of countries in that part of the world.

60. A similar criticism had been expressed by Mr. Njenga (2117th meeting) with regard to the idea that the Asian-African Legal Consultative Committee favoured the restrictive theory of State immunity. According to paragraph (32) of the commentary to article 11 (formerly article 12), on commercial contracts, however, the position was that, in 1960, the Asian-African Legal Consultative Committee had adopted the final report of its Committee on Immunity of States in respect of Commercial and other Transactions of a Private Character, which had stated that all delegations except that of Indonesia had been of the view that "immunity to foreign States should not be granted in respect of their activities which may be called commercial or of private nature".²³ Similarly, in the statement he had made as an observer at the Commission's thirty-eighth session, Mr. Sen, then Secretary-General of the Asian-African Legal Consultative Committee, had said that: "Personally, he considered that a restrictive doctrine was perhaps not out of place, in view of the extension of governmental activity in numerous fields. The problem was to determine the extent to which restrictions would be

reasonable."²⁴ Although that statement was not the formal view of the Asian-African Legal Consultative Committee, it could not be interpreted as a position in favour of absolute immunity. He therefore invited Mr. Njenga to communicate to him the other relevant documents which he might need.

61. Turning to the comments to which the draft articles themselves had given rise, he noted that article 1 appeared to be generally acceptable. It had been said that article 6, which stated the basic idea of the draft as a whole, should come immediately after article 1. It had even been suggested that article 6 should form an integral part of article 1. He was prepared to refer those suggestions to the Drafting Committee, but would prefer to maintain the order of the articles as they stood so that the general principle embodied in article 6 and the limitations and exceptions provided for in articles 11 to 19 would not be too far apart.

62. With regard to the proposed new article 2 (A/CN.4/415, para. 29), most members supported the merger of former articles 2 and 3 and the new text had given rise to no objection. The Government of the German Democratic Republic had suggested in its written comments that the definition of the term "court" in paragraph 1 (a) should include a precise explanation of the expression "judicial functions" and Mr. Njenga had suggested in that connection that section 3 of the Australia's *Foreign States Immunities Act 1985* could serve as a reference. In his own view, however, it would be difficult to give a definition of that expression in the body of the article, not only because it would be tautological, but also because national systems were not all the same. He would therefore prefer to include an appropriate explanation in the commentary, since the matter should in any event be referred to the Drafting Committee.

63. With regard to paragraph 1 (b) (ii), which included among the organs of States entitled to immunity political subdivisions of the State which were entitled to perform acts in the exercise of the sovereign authority of the State, Mr. Tomuschat (2115th meeting) and some other members considered that the constituent states of a federal State should be entitled to immunity even if they did not act for or on behalf of the central Government. In their view, therefore, the expression *prérogatives de la puissance publique* should be rendered in English by "governmental authority". On that point, he would refer members to paragraph (3) of the commentary to article 3, which stated that the political subdivisions of a State included "the political subdivisions of a federal State or of a State with autonomous regions which are entitled to perform acts in the exercise of the sovereign authority of the State" and that "sovereign authority" was the nearest equivalent to the expression *prérogatives de la puissance publique*.²⁵ He would also refer members to paragraph (12) of the commentary to article 7, which stated that

there is nothing to preclude the possibility of such autonomous entities being constituted or acting as organs of the central Government or as State agencies performing sovereign acts of the foreign State. A constituent state of a federal union normally enjoys no immunity as a sovereign State, unless it can establish that the proceeding against it in fact implicates the foreign State. . . .²⁶

²³ *Yearbook* . . . 1983, vol. II (Part Two), p. 33.

²⁴ *Yearbook* . . . 1986, vol. I, p. 100, 1958th meeting, para. 37.

²⁵ *Yearbook* . . . 1986, vol. II (Part Two), p. 14.

²⁶ *Yearbook* . . . 1982, vol. II (Part Two), pp. 103-104.

Since, according to the commentary to article 3, “subdivisions of the State at the administrative level of local or municipal authorities do not normally perform acts in the exercise of the sovereign authority of the State, and as such do not enjoy State immunity” (para. (3)), he considered that the change of wording proposed by the members in question would involve a change of substance. When the matter was referred to the Drafting Committee, that point would have to be borne in mind.

64. Mr. Thiam and Mr. Bennouna (2117th meeting) had suggested that paragraph 1 (b) (iv) of the new article 2 be deleted. However, since proceedings brought against an ambassador, a diplomatic or consular official or any other representative of a Government might implicate the foreign State, and since such persons were not covered by paragraph 1 (b) (i) to (iii), they should be included among the persons who enjoyed State immunities as “representatives of the State”. The relationship between the present draft articles and the relevant Vienna Conventions was governed by article 4.

65. The two drafting points raised with regard to the definition of the expression “commercial contract”, in paragraph 1 (c) of the new article 2, should, in his view, be dealt with by the Drafting Committee. In subparagraph (c) (iii), however, it would be desirable to retain the word “commercial”, which covered contracts and agreements relating to a variety of activities, including manufacturing and investment, while excluding employment contracts, which were frequently cited as an example of non-commercial contracts that should be subject to the jurisdiction of the forum State. Mr. McCaffrey (*ibid.*) and Mr. Tomuschat had proposed that the expression “commercial contract” be replaced by “commercial activity”. He noted in that connection that, although the previous Special Rapporteur had used the expression “commercial transaction” in his preliminary report²⁷ and the expression “trading or commercial activity” in his second and fourth reports,²⁸ the provision adopted in 1983 as article 12 (now article 11) had been entitled “Commercial contracts”. He assumed that the title had been changed in the course of the Drafting Committee’s discussions at the 1983 session, but could not explain why or how. If, however, the majority of the members of the Commission were in favour of reconsidering the title “Commercial contracts”, he was ready to accede to their wish.

66. Eleven members had expressed support for his proposal for paragraph 3 of the new article 2, three had said that they were neutral—although they agreed that both the nature and the purpose of the contract should be taken into account—and four members had voiced criticism mainly because the new formulation was too rigid to cover unforeseen circumstances. That criticism deserved due consideration. While he thought that the actual wording should be left to the Drafting Committee, it might be desirable to add the following phrase at the end of the paragraph: “it

being understood that a court of the forum State may, in the case of unforeseen situations, decide that the contract has a public purpose”. He further proposed, in the light of a comment made by Mr. McCaffrey, that the first part of the paragraph be amended to read: “In determining whether a contract under paragraph 1 (c) is commercial . . .”. Again, that was a matter to be referred to the Drafting Committee.

67. Article 4 had met with little criticism and most of the members who had spoken on the subject agreed with his proposal to add the words “under international law” in paragraph 1. Some members, though in general agreement with the article, had sought clarification with regard to the legal relationship between immunity under the present articles and that conferred by the relevant Vienna Conventions. Other members, however, had expressed the view that those Conventions and the present articles were of an entirely different nature and Mr. Thiam had even said that the difference between the two régimes was so obvious that article 4 itself was unnecessary. Although he was unable to accept the latter view, he agreed in general that the two régimes could be applied separately. A number of members had also proposed that the privileges and immunities granted to heads of State *ratione personae* should be extended to other persons of high rank, such as heads of Government and ministers for foreign affairs. In that connection, he would point out that the privileges and immunities of diplomatic agents and related persons were covered by a special régime under the Vienna Conventions, whereas those of heads of State *ratione personae* were covered by the rules of customary international law. The privileges and immunities of the families of heads of State and other high-ranking officials were accorded as a matter of international comity. Although he was not particularly in favour of it, he would not object to the inclusion of a reference in paragraph 2 to those categories of persons whose privileges and immunities were not, strictly speaking, covered by international law. However, the Drafting Committee would no doubt take account in due course of the subtle difference between international law and international comity in that regard.

68. Article 5 did not call for any particular comment. With regard to article 6, many members had supported his proposal to delete the phrase in square brackets, “and the relevant rules of general international law”; 10 Governments had been in favour of its deletion and 10 against. His main reason for proposing the deletion of the phrase was the fear that it might be used by the courts of the forum State to interpret the present articles unilaterally, particularly with respect to limitations and exceptions, although some members had alluded to other reasons. Only Mr. McCaffrey had categorically objected to its deletion, although two other members had expressed some reluctance on that score. He believed, however, that the Drafting Committee should be allowed to work on the basis of the text adopted on first reading, on the assumption that the phrase in square brackets could be deleted eventually. Since Governments were divided on the point, however, and since the deletion of the phrase would mean a substantial sacrifice on the part of States which favoured restricted immunity, he had proposed two other possible solutions to the Commission—partly to compensate for that sacrifice and partly to take account of the situation of countries which had enacted legislation on State immunity, but also because some of

²⁷ *Yearbook* . . . 1979, vol. II (Part One), p. 227, document A/CN.4/323.

²⁸ *Yearbook* . . . 1980, vol. II (Part One), p. 199, document A/CN.4/331 and Add.1; and *Yearbook* . . . 1982, vol. II (Part One), p. 199, document A/CN.4/357.

the limitations or exceptions provided for under that legislation were not contained in the draft articles.

69. The first possible solution was that the paragraph suggested by Spain (A/CN.4/410 and Add.1-5) be included in the preamble to the future convention. While a few members had expressed their willingness to go along with that idea, more members had been opposed to it. In addition, the preamble was, by tradition, dealt with at the diplomatic conference. The second possible solution was to include the proposed new article 6 *bis* (A/CN.4/422 and Add.1, para. 17), to provide for the exceptions that might arise in future as a result of changes or developments in customary international law and also to fill any possible gaps between the present articles and domestic legislation. The second solution had not been accepted by any member and, accordingly, neither of the proposals could serve as a basis for discussion. He had not taken up Australia's proposed reformulations of the bracketed phrase in article 6 (A/CN.4/410 and Add.1-5) because they seemed to differ little in substance from the phrase itself. He trusted that the Drafting Committee would try to find a formula that would bridge the gap, at least for the time being, between the draft articles and domestic legislation, for example by way of an additional protocol.

70. Most members who had spoken on article 7 supported the proposed new text (A/CN.4/415, para. 79), apart from some comments concerning drafting and the possible deletion of paragraph 3. That paragraph had already been simplified by comparison with the adopted text, but he would have no objection if it were further simplified in the Drafting Committee.

71. With regard to article 8, while several members had supported his proposal concerning subparagraph (c) (*ibid.*, para. 93), others had proposed that it be reformulated in a less restrictive manner to provide for express consent through diplomatic channels. Although subparagraph (a) seemed to him to suffice in that regard, he had no objection to the matter being referred to the Drafting Committee. Mr. Koroma (2118th meeting), who did not accept the explanations concerning subparagraph (b) given in the preliminary report (A/CN.4/415, para. 89), had suggested that a fundamental change of circumstances due to *force majeure* should be contemplated. He personally was not very much in favour of that theory, because it placed undue reliance on the unilateral assessment of one party and because, historically, it had been abused before and during the Second World War, albeit in another context. He therefore maintained the views he had expressed in his preliminary report in that connection.

72. Lastly, with regard to article 9, the reservation which he had proposed should be added to paragraph 1 (*ibid.*, para. 100), namely "However, if the State satisfies the court . . . provided it does so at the earliest possible moment", applied only to subparagraph (b) and had been accepted by several members. A number of members had also accepted the proposed new paragraph 3 concerning the effect of the appearance of a representative of a State as a witness before a court of another State. A few members had opposed that paragraph, although the reasons for their objection were not apparent. For his own part, he continued to regard the additional paragraph as necessary. The suggestions of a

drafting nature made with regard to the article could be considered in the Drafting Committee.

The meeting rose at 1 p.m.

2122nd MEETING

Wednesday, 21 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Jurisdictional immunities of States and their property
(concluded) (A/CN.4/410 and Add.1-5,¹ A/CN.4/415,² A/CN.4/422 and Add.1,³ A/CN.4/L.431, sect. F)

[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

CONSIDERATION OF THE DRAFT ARTICLES⁴ ON SECOND READING
(concluded)

1. Mr. OGISO (Special Rapporteur), continuing his summing-up of the debate, said that one member had supported the suggestion by Australia (A/CN.4/410 and Add.1-5) to combine paragraphs 1 and 2 of article 10. It was a drafting matter and the best course would be to refer it to the Drafting Committee.

2. Some members had expressed doubts about the applicability of the proposed new paragraph 4 (A/CN.4/415, para. 107), which had its origin in a suggestion by the Government of Thailand. The purpose was to limit the effect of a counter-claim against a foreign State. Article 10 as adopted applied to counter-claims against a foreign State which brought suit, or intervened in an action, in a court of another State. Paragraphs 1 and 2 specified that, if a foreign State which was itself entitled to immunity instituted, or intervened in, a proceeding in the forum State and a counter-claim was entered against it, it would not be immune from that counter-claim if the matter arose out of the same legal relationship or facts as the principal claim.

¹ Reproduced in *Yearbook* . . . 1988, vol. II (Part One).

² *Ibid.*

³ Reproduced in *Yearbook* . . . 1989, vol. II (Part One).

⁴ For the texts, see 2114th meeting, para. 31.