Summary record of the 2114th meeting

Topic:
<multiple topics>

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The object, in a nutshell, was to govern activities carried on under the jurisdiction of a State which caused transboundary harm. It could even be argued that a single article, imposing an obligation on every State not to cause injury or harm to its neighbours through its activities, would suffice.

66. Consequently, liability should have as its basis not risk—in which event the topic would be impossible to deal with, since any activity, for example the construction of a dam or a nuclear plant, involved a modicum of risk—but harm. In determining liability, it was necessary to take account, apart from risk, of such factors as causation, foreseeability and presumption of negligence (res ipsa loquitur) to see whether the victim had contributed to the harm caused, so as to mitigate the harshness of strict liability. He would therefore encourage the Special Rapporteur to set out the criteria which took account of those elements and which could supplement those already mentioned in his fifth report (A/CN.4/423). The Special Rapporteur should also consider how liability was to be determined. Only then could the Commission deal with the procedural rules, assuming that such rules were required.

67. It had been suggested that consideration of the present topic should be extended to certain aspects of environmental law. While he conceded that there were certain similarities between the two fields, the latter was much broader than the former, since it covered, for instance, maritime spaces, outer space, the Arctic and the Antarctic, the ozone layer, and conservation of water and other natural resources. The Commission might also wish to make environmental law a separate agenda item, which it could study with the assistance of experts. It would not be advisable, however, to make it an adjunct of the topic under consideration.

68. Lastly, it would not be advisable, in his view, to refer the draft articles to the Drafting Committee at the present stage.

The meeting rose at 6.05 p.m.

2114th MEETING

Wednesday, 7 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arango-Ruiz, Mr. Barbosa, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodriguez, 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. Razzafindralambo, Mr. Reuter, Mr. Roucouzas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.


[Fifth report of the Special Rapporteur (continued)]

Articles 1 to 17 (continued)

1. Mr. DÍAZ GONZÁLEZ said that, like Mr. Beesley (2110th meeting), he saw the present topic as an exercise in the progressive development of international law. The Commission must therefore be willing to study related topical issues of concern to States, precisely because its aim was to develop the law to govern certain activities, to seek to prevent the harm they might cause, and to ensure that such harm did not go unpunished.

2. However, the draft articles raised problems of legal definition and of legal methodology and language. As Mr. Reuter (ibid.) had said, the length of time the topic had been on the Commission’s agenda did not warrant so hasty a dispatch of the draft articles as to obscure those fundamental problems. The Special Rapporteur, in attempting to define the fundamentals of the topic, had looked for a foothold and had introduced the concept of activities involving risk. Yet such activities themselves were not prohibited by international law. That was a difficulty which had to be resolved; there could be no question of merely producing a set of draft articles and leaving it to the Drafting Committee to solve the fundamental problems. In defining obligations, whether of negotiation or of prevention, the Commission must determine the purpose of those obligations and hence determine the basis of the liability involved.

3. It had been suggested that a link should be forged between the concept of risk and the concept of harm, so that liability would not be based solely on risk, and that meant devising an appropriate legal régime. In positive law, special régimes were elaborated in the context of specific agreements or conventions, perhaps under the auspices of judicial or arbitral machinery, as in the Trail Smelter case. Reference had already been made to the conventions on the peaceful use of nuclear energy, on pollution of the seas by oil or other contaminating substances, and on space objects. In all those cases, the liability was strict liability, arising only when harm was caused, and State responsibility could be incurred only if the State had failed in its duty of diligence. Liability for risk, however, could arise only where there was an internationally wrongful act. The scope for

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


\(^5\) For the texts, see 2108th meeting, para. 1.

\(^6\) See 2108th meeting, footnote 9.
applying that kind of liability was now diminishing, as States increasingly assumed new international obligations based on wrongful acts; but they had so far been manifestly reluctant to accept the principle of liability for risk arising from acts which were not prohibited.

4. The 1972 Stockholm Declaration7 and the 1982 United Nations Convention on the Law of the Sea placed more emphasis on the duty of States to prevent pollution than on establishing a new régime of liability. Those instruments confined themselves to stating the traditional obligation of States under general international law to act with due diligence. The cases so far cited in the Commission in support of a new liability régime did not seem convincing. For example, the arbitral award in the Trail Smelter case based liability on negligence, a violation of the duty of due diligence. The judgment of the ICJ in the Corfu Channel case referred, in similar vein, to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".8 It was difficult, therefore, to accept that liability could stem from acts or activities involving risk. In that sense, he agreed with Mr. Roucounas (2112th meeting) that it would be better to describe the activities not as lawful or unlawful, but as physical activities which had caused harm.

5. It was clear that there was much uncertainty in the Commission about the aims of the draft. He was himself quite prepared to assist in producing a draft convention on the environment, but that was not the same as a draft convention to regulate activities not prohibited by international law. As to terminology, Mr. Reuter had been right to say that the term "reparation" had a very specific legal meaning and consequences which could not attach to risk, and it would be better to replace it by "compensation" or "indemnification". But a compensation régime would have to allow for cases in which the benefits from the activity in question were shared: for example, the neighbouring State might derive benefit, as well as suffer harm, from the siting of a power station.

6. The Special Rapporteur's proposals were certainly worthy of further study, but the essential theme must be further clarified before the draft articles could be referred to the Drafting Committee. Some of the difficulties could be eased by clearer drafting, and he favoured Mr. McCaffrey's proposed reformulation of draft article 1 (2109th meeting, para. 13) for that reason. But draft articles 1 to 9 required further reflection as regards substance, so as to enable the Commission to decide exactly what was to be regulated. It would certainly be premature to refer the new draft articles 10 to 17 to the Drafting Committee until the Commission had reconciled its diverging approaches to the topic itself.

7. Mr. AL-KHASAWNEH said that the Special Rapporteur's fifth report (A/CN.4/423) demonstrated his logical rigour in analysing abstract concepts and his versatility in accommodating the major trends which had emerged in the Commission's debate at its previous session and in the Sixth Committee of the General Assembly.

8. His own views on the topic's basis in international law and on its viability had been expressed at the thirty-ninth session,9 and he did not wish to repeat them. Nevertheless, he recognized the importance of the considerations which had prompted some members of the Commission to revert to the fundamentals of the topic: the concern that the draft should be acceptable to States, an awareness of the varying degrees of recognition, in different legal systems, of its underlying concepts, and the terminology problems. Academic criticisms were no less persuasive: Brownlie had concluded that the project was "fundamentally misconceived . . . the contagion may induce a general confusion in respect of the principles of State responsibility".10 Akehurst11 had asserted that the failure to distinguish between the lawfulness of activities and the wrongfulness of acts committed in the course of those activities had led, especially in the field of the environment, to liability "ex delicto" being mistaken for liability "sine delicto", simply because the activity itself was lawful. Such basic concerns were troubling and called for an answer. The Special Rapporteur could perhaps follow the example of his predecessor by engaging in a constructive dialogue on the topic, with a view to reducing the conceptual differences.

9. In his report (ibid., para. 5), the Special Rapporteur introduced the concept of contingent or "conditional" fault. That was a legal fiction, and he personally doubted whether it could form a theoretical basis for liability for activities involving risk. Courts, even after harm had occurred, did not prohibit the activities in question, but merely required the payment of pecuniary compensation. Such practice did not square with the presumption that hidden fault was present all along, and that it was triggered only when the harm occurred. The concept of contingent fault also bore connotations of responsibility for wrongfulness: it should therefore be avoided, to avoid confusion with the consequences of State responsibility. A better theoretical basis for no-fault liability, if one were needed, might be the theory of unjust enrichment, which involved a compensatory régime based on notions of cost-allocation. That theory was indeed mentioned, albeit indirectly, in the report (ibid., para. 70).

10. The Special Rapporteur argued that polluting activities causing appreciable transboundary harm should be covered by the draft, since "general international law did not impose a prohibition which might exclude them from the topic" (ibid., para. 10). That argument did not seem a valid one. There was ample authority in support of the countervailing argument that, when there was a certainty of appreciable transboundary harm, State responsibility must be involved. Handl had stated:

... where States intentionally discharge pollutants in the knowledge that such discharge is bound to cause, or will cause with substantial certainty, significant harmful effects transnationally, the source State will clearly be held liable for the resulting damage. The causal conduct will be deemed internationally wrongful.12

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7 ibid., footnote 6.
8 ibid., footnote 10.
11 M. B. Akehurst, "International liability for injurious consequences arising out of acts not prohibited by international law", Netherlands Yearbook of International Law, 1985 (The Hague), vol. XVI, p. 3.
In his own view, responsibility would also be involved if gross negligence could be proved.

11. The report (ibid., paras. 6-7 and 12-14) spoke of the need to avoid the "dreaded" concept of "absolute liability". That was why, in his fourth report (A/CN.4/413), the Special Rapporteur had introduced the concept of activities involving risk. In the fifth report, however, he noted that an "important body of opinion in the Commission . . . prefers not to use the concept of 'risk' as a limiting factor" (A/CN.4/423, para. 12). He had therefore reintroduced the concept of liability for harm, while avoiding absolute liability by excluding harm caused by a single act. Yet liability for activities was, surely, liability for risk under a different name, a conclusion warranted by the statement in the report that "liability is linked to the nature of the activity" (ibid., para. 14). Moreover, both individual acts and acts which formed part of an activity gave rise to harm from the point of view of the innocent victim. There could be no justification for distinguishing between an act which formed an intrinsic part of an activity and an isolated act; nor would it be possible to determine, other than in an arbitrary manner, that an act was not intrinsically part of an activity.

12. As the Special Rapporteur rightly pointed out (ibid., para. 50), by comparison with a régime of liability for wrongfulness a causal or strict liability régime would be the least harsh solution for the State of origin. The differences between strict and absolute liability were essentially differences of degree: the latter involved fewer exonerations and fewer intervening factors in the chain of causation. The absolute liability régime was to be found in many multilateral treaties on specific subjects. In a review of those treaties, Goldie had concluded that "a more rigorous form of liability than that usually labelled 'strict' is now before us, especially in the international arena". For that reason, he himself could not agree with the Special Rapporteur's comment that absolute liability "would require a degree of solidarity found only in societies far more integrated than the present-day community of nations" (ibid., para. 4).

13. It was demonstrated elsewhere in the report (ibid., paras. 40 et seq.) that a régime of strict liability could well coexist in the same instrument with a régime based on wrongfulness, whether the obligations in the latter case were obligations of conduct or obligations of result. He was not sure, however, whether the standard of strict liability to be found in other international agreements on the same subject-matter within the meaning of draft article 4 could coexist with the less rigorous obligations enunciated in the present draft articles. Because article 4 waived the rule of lex specialis, the obligations contained in such agreements could be diluted if the States parties were also parties to the present articles. If that were to happen at a time of increasing awareness of the importance of environmental questions, the Commission's reluctance to admit a standard of absolute liability would be a step backwards.

14. The use of the same adjective, "appreciable", to describe both risk and harm was a source of confusion, since on a risk scala it meant detectable or foreseeable, by comparison with hidden or imperceptible risk. That interpretation was borne out by draft article (2) (a) (ii). A better word might be "detectable". However, on a harm scala the word "appreciable" clearly implied a point between minimal and massive and it would be much less confusing to replace it by "significant", which was more in keeping with relevant instruments, including recent ones.

15. As to the procedural obligations in chapter III of the draft and their enforceability, the comparable provisions in the draft articles on the law of the non-navigational uses of international watercourses were based on the assumption that such a watercourse was a self-contained ecosystem and that watercourse States could be easily identified "by simple observation in the vast majority of cases". No such identification was possible under the present draft articles, with their vast scope both ratione materiae and ratione personae. Since neither the affected State nor the State of origin would be readily recognizable in all cases, it was difficult to see how the procedural duties of notification, for example, could be applied. In that connection, he welcomed the reference in the draft to international organizations, which could play an important role, both by helping States to fulfil their obligations of prevention and in the task of fact-finding and facilitating the establishment of a compensatory régime. The bilateral nature of the procedural obligations would have to be modified to allow for more direct participation by international organizations.

16. On the question of postponing or not postponing the initiation of new activities, he disagreed with the Special Rapporteur (ibid., para. 112) that priority should be given to freedom of action. It must be remembered that, once appreciable physical harm had occurred, it would probably be beyond reparation, since an irreversible situation could have been created. To pay pecuniary compensation for past errors might satisfy the affected State, but could do little to alleviate damage to the environment. Moreover, the existence of the new activity would be a fait accompli, hindering the States concerned in their efforts to arrive at a specific régime. In the Nuclear Tests cases, the ICJ had ordered interim measures of protection, calling on the French Government to "avoid nuclear tests causing the deposit of radioactive fall-out" on the territories in question. It went without saying that, since the orders had not related to the merits, they had been without prejudice to the lawfulness or otherwise of the activity in question. Postponement of a new activity was also more in keeping with an old principle of Islamic law, which had been codified in article 30 of the Ottoman Civil Code as "The avoidance of harm has primacy over the acquisition of benefits", Dar'il maṣafidī awla min jābl'il manafī'ī (بَعْضُ المَاشِئِ الأَوْلِيَّة مِنْ جَبَلِ المَنَافِع).

17. As far as the duty to negotiate was concerned, negotiations might indeed be necessary, especially in a field where the lawfulness of the activities did not lend itself to hard and fast rules, but they were no substitute for substantive rules.

18. Commenting on the draft articles themselves, he wondered whether the phrase "throughout the process"; in

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13 L. F. E. Goldie, "Concepts of strict and absolute liability and the ranking of liability in terms of relative exposure to risk", ibid., p. 194.


article 1, meant that risk or harm during part of the process was excluded. The same query arose in relation to draft article 2 (a) (i) and (b). Both articles warranted reformulation. Careful drafting would also resolve the problem of multinational corporations and should take into account the questions of joint and of corporate liability.

19. The new title of draft article 3, “Assignment of obligations”, would avoid confusion with imputability in the matter of responsibility for wrongfulness. The revised draft article 6 appeared to be a better reflection of the maxim sic utere tuo ut alienum non laedas than did the previous text, which had recognized the protection of others only in relation to activities involving appreciable risk.

20. The requirement in draft article 7 that co-operation be in good faith was redundant, since co-operation in bad faith was a contradiction in terms. The modalities of co-operation should be set out in the language of similar provisions in the 1982 United Nations Convention on the Law of the Sea, particularly articles 202 and 197.

21. With regard to draft article 8, he recalled Mr. Ripphagen’s remark that, in linear logic, one could not speak of the duties of prevention and minimization. Since matters of liability and responsibility would be predicated upon whether the duties in question had been fulfilled, it was important to explain the meaning of the words “prevent” and “minimize”.

22. As to draft article 9, the term “compensation” was certainly more appropriate than “reparation” in the matter of liability for non-prohibited activities. He wondered whether the special régime yet to be elaborated would encompass more than pecuniary compensation. In his view, technical assistance should also have a place in it. In addition, courts might require that the activity in question be, if not suspended, at least carried on at a reduced level: the Trail Smelter case was just such a precedent, offering an example of what might be called “partial cessation”. The reference to negotiation in article 9 could not substitute for substantive rules, as he had already noted. All the elements he had mentioned should be studied carefully with a view to including them in a compensatory régime for lawful acts.

23. Mr. Beesley said that the Commission was bound to adopt a problem-solving, rather than a purely theoretical, approach. Opinions were divided. Some members wanted a set of articles based on harm, whereas others would prefer them to be based on risk. It was significant that advocates on either side had adduced arguments which could be used against their view. Clearly, the subjective approach adopted by members reflected—indeed ought to reflect—the different systems of law in which they had been trained. Nevertheless, he believed that it was still possible to find some common ground. Some progress had actually already been made. The Commission was, for example, overcoming the initial difficulty of how to deal with the problem of the “global commons”, whereas previously it had been maintained that it would be too complicated to address questions of liability as between States, let alone between a State and the international community as a whole. All members of the Commission were agreed, however, on the need for progressive development of the law.

24. The problem-solving approach had been advocated by Mr. Hayes, who had made an interesting suggestion (2113th meeting) to separate the two branches of the topic and formulate in two distinct chapters articles on liability without fault and articles on matters involving risk. For his own part, he had already (2110th meeting) cited precedents of arbitral tribunals finding liability without fault. For example, the decision in the Trail Smelter case had really been based on the concept of strict liability and not on negligence. There was also an impressive body of treaty law on absolute liability for particularly hazardous activities. It was doubtful whether any rule of customary law could be said to emerge from that corpus of law. Nevertheless, the strict liability approach alone would not lead to the formulation of a coherent set of draft articles. Account must necessarily be taken of strict, or no fault, liability on the one hand, and absolute liability on the other. The latter was provided for in a series of international conventions on international responsibility for damage caused by activities that were particularly dangerous.

25. Schneider had recently cited a number of international judicial and arbitral decisions based on the concept of strict liability and had also clearly shown that it was not interchangeable with the concept of absolute liability. Strict liability was based on harm, not on fault. As he himself saw it, there was either an existing or an evolving norm of strict liability for environmental injury, based on harm and not on fault. Nevertheless, it would not be advisable to lay too much stress on that point, since that would be likely to deepen the division of views in the Commission. Indeed, another author, Ian Brownlie, took the view that international law lacked a doctrine of strict liability in the absence of fault.

26. Absolute liability was imposed in straightforward terms by many multilateral conventions in respect of such matters as damage caused by nuclear installations, nuclear ships and space objects and certain kinds of oil-pollution incidents. The relevant instruments included the 1962 Convention on the Liability of Operators of Nuclear Ships, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1960 Convention on Third Party Liability in the Field of Nuclear Energy, the 1971 Convention relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material and the 1972 Convention on International Liability for Damage Caused by Space Objects. Naturally, there were some differences between the various treaties with regard to such matters as exonerations, but they clearly set forth the rule of liability without fault, and not responsibility founded on risk. However, it would be wrong to say that risk—and particularly exceptional risk—was not relevant to the topic and should not be taken into account in the draft articles.

27. Faced with all those difficulties, the Commission had to find a solution and he for one felt that it was possible to do so. The discussion should continue on draft articles 10 to 17 and the Drafting Committee should work on draft articles 1 to 9 in the light both of the debate and of the

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18 See 2108th meeting, footnote 9.
19 Ibid.
21 References to these Conventions are given in document A/CN.4/314, annex I.
suggestions on how to handle the twin issues of risk and fault. The Commission was the body best suited to deal with problems that were perhaps old in some contexts but none the less new in terms of law-making. A great deal would no doubt need to be done to overcome the difficulties involved. As a matter of method, work should be given to the Drafting Committee, even if the Committee did occasionally report back to the Commission with unresolved problems.

28. Lastly, he drew attention to some extracts from useful precedents on liability in such matters as outer space activities and the law of the atmosphere, copies of which he had informally made available to members. He said that it was useful to be informed of relevant activities being carried on outside the United Nations.

29. Mr. MAHIOU said that it was his intention to speak on the present topic at the next session. He would inevitably speak at length, because of the importance of the Special Rapporteur’s excellent fifth report (A/CN.4/423) and of the 17 draft articles submitted therein. The Special Rapporteur had brought the topic down to earth, away from the nebulous realm of theory. As a result, the Commission was now beginning to see more clearly the meaning and purpose of an extremely important subject. Meanwhile, he agreed that draft articles 1 to 9 should be referred to the Drafting Committee.


[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING

30. The CHAIRMAN recalled that, at the previous session, the Special Rapporteur had introduced his preliminary report on the topic (A/CN.4/415), in which he had analysed the comments and observations received from Governments (A/CN.4/410 and Add.1-5) on the draft articles on jurisdictional immunities of States and their property provisionally adopted by the Commission on first reading at its thirty-eighth session, in 1986. In that report, the Special Rapporteur had also proposed certain amendments to the draft articles in the light of the comments and observations of Governments. Due to lack of time, however, the Commission had been unable to consider the topic at the previous session.

31. The draft articles provisionally adopted on first reading read as follows:

PART I
INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to the immunity of one State and its property from the jurisdiction of the courts of another State.

Article 2. Use of terms

1. For the purposes of the present articles:
   (a) “court” means any organ of a State, however named, entitled to exercise judicial functions;
   (b) “commercial contract” means:
      (i) any commercial contract or transaction for the sale or purchase of goods or the supply of services;
      (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee in respect of any such loan or of indemnity in respect of any such transaction;
      (iii) any other contract or transaction, whether of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or in the internal law of any State.

Article 3. Interpretative provisions

1. The expression “State” as used in the present articles is to be understood as comprehending:
   (a) the State and its various organs of government;
   (b) political subdivisions of the State which are entitled to perform acts in the exercise of the sovereign authority of the State;
   (c) agencies or instrumentalities of the State, to the extent that they are entitled to perform acts in the exercise of the sovereign authority of the State;
   (d) representatives of the State acting in that capacity.

2. In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but the purpose of the contract should also be taken into account if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract.

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

1. The present articles are without prejudice to the privileges and immunities enjoyed by a State in relation to the exercise of the functions of:
   (a) its diplomatic missions, consular posts, special missions, missions to international organizations, or delegations to organs of international organizations or to international conferences; and
   (b) persons connected with them.

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

Article 5. Non-retroactivity of the present articles

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

Article 6. State immunity

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

Article 7. Modalities for giving effect to State immunity

1. A State shall give effect to State immunity under article 6 by refraining from exercising jurisdiction in a proceeding before its courts against another State.

2. A proceeding before a court of a State shall be considered to have been instituted against another State, whether or not that other State is named as party to that proceeding, so long as the proceeding in effect seeks to compel that other State either to submit to the jurisdiction of the court or to bear the consequences of a determination by the court which may affect the property, rights, interests or activities of that other State.

3. In particular, a proceeding before a court of a State shall be considered to have been instituted against another State when the proceeding is instituted against one of the organs of that State, or against one of its political subdivisions or agencies or instrumentalities in respect of an act performed in the exercise of sovereign authority, or against one of the representatives of that State in respect of an act performed in his capacity as a representative, or when the proceeding is designed to deprive that other State of its property or of the use of property in its possession or control.

Article 8. Express consent to the exercise of jurisdiction

A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to any matter if it has expressly consented to the exercise of jurisdiction by that court with regard to such a matter:

(a) by international agreement;
(b) in a written contract; or
(c) by a declaration before the court in a specific case.

Article 9. Effect of participation in a proceeding before a court

1. A State cannot invoke immunity from jurisdiction in a proceeding before a court of another State if it has:

(a) itself instituted that proceeding; or
(b) intervened in that proceeding or taken any other step relating to the merits thereof.

2. Paragraph 1 (b) above does not apply to any intervention or step taken for the sole purpose of:

(a) invoking immunity; or
(b) asserting a right or interest in property at issue in the proceeding.

3. Failure on the part of a State to enter an appearance in a proceeding before a court of another State shall not be considered as consent of that State to the exercise of jurisdiction by that court.

Article 10. Counter-claims

1. A State cannot invoke immunity from jurisdiction in a proceeding instituted by itself before a court of another State in respect of any counter-claim against the State arising out of the same legal relationship or facts as the principal claim.

2. A State intervening to present a counter-claim in a proceeding before a court of another State cannot invoke immunity from the jurisdiction of that court in respect of the principal claim.

PART III
[LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

Article 11. Commercial contracts

1. If a State enters into a commercial contract with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial contract fall within the jurisdiction of a court of another State, the State is considered to have consented to the exercise of that jurisdiction in a proceeding arising out of that commercial contract, and accordingly cannot invoke immunity from jurisdiction in that proceeding.

2. Paragraph 1 does not apply:

(a) in the case of a commercial contract concluded between States or on a Government-to-Government basis;
(b) if the parties to the commercial contract have otherwise expressly agreed.

Article 12. Contracts of employment

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for services performed or to be performed, in whole or in part, in the territory of that other State, if the employee has been recruited in that other State and is covered by the social security provisions which may be in force in that other State.

2. Paragraph 1 does not apply if:

(a) the employee has been recruited to perform services associated with the exercise of governmental authority;
(b) the proceeding relates to the recruitment, renewal of employment or reinstatement of an individual;
(c) the employee was neither a national nor a habitual resident of the State of the forum at the time when the contract of employment was concluded;
(d) the employee is a national of the employer State at the time the proceeding is instituted;
(e) the employee and the employer State have otherwise agreed in writing, subject to any considerations of public policy conferring on the courts of the State of the forum exclusive jurisdiction by reason of the subject-matter of the proceeding.

Article 13. Personal injuries and damage to property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to compensation for death or injury to the person or damage to or loss of tangible property if the act or omission which is alleged to be attributable to the State and which caused the death, injury or damage occurred in whole or in part in the territory of the State of the forum and if the author of the act or omission was present in that territory at the time of the act or omission.

Article 14. Ownership, possession and use of property

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked to prevent a court of another State which is otherwise competent from exercising its jurisdiction in a proceeding which relates to the determination of:

(a) any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum; or
(b) any right or interest of the State in movable or immovable property arising by way of succession, gift or bona vacantia; or

(c) any right or interest of the State in the administration of property forming part of the estate of a deceased person or of a person of unsound mind or of a bankrupt; or

(d) any right or interest of the State in the administration of property of a company in the event of its dissolution or winding up; or

(e) any right or interest of the State in the administration of trust property or property otherwise held on a fiduciary basis.

2. A court of another State shall not be prevented from exercising jurisdiction in any proceeding brought before it against a person other than a State, notwithstanding the fact that the proceeding relates to, or is designed to deprive the State of property;

(a) which is in the possession or control of the State; or

(b) in which the State claims a right or interest,

if the State itself could not have invoked immunity had the proceeding been instituted against it, or if the right or interest claimed by the State is neither admitted nor supported by prima facie evidence.

Article 15. Patents, trade marks and intellectual or industrial property

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to:

(a) the determination of any right of the State in a patent, industrial design, trade name or business name, trade mark, copyright or any other similar form of intellectual or industrial property, which enjoys a measure of legal protection, even if provisional, in the State of the forum; or

(b) an alleged infringement by the State in the territory of the State of the forum of a right mentioned in subparagraph (a) above which belongs to a third person and is protected in the State of the forum.

Article 16. Fiscal matters

Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the fiscal obligations for which it may be liable under the law of the State of the forum, such as duties, taxes or other similar charges.

Article 17. Participation in companies or other collective bodies

1. Unless otherwise agreed between the States concerned, the immunity of a State cannot be invoked before a court of another State which is otherwise competent in a proceeding which relates to the participation in a company or other collective body, whether incorporated or unincorporated, being a proceeding concerning the relationship between the State and the body or the other participants therein, provided that the body:

(a) has participants other than States or international organizations; and

(b) is incorporated or constituted under the law of the State of the forum or is controlled from or has its principal place of business in that State.

2. Paragraph 1 does not apply if provision to the contrary has been made by an agreement in writing between the parties to the dispute or by the constitution or other instrument establishing or regulating the body in question.

Article 18. State-owned or State-operated 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 proceeding 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 19. 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 another State which is otherwise competent in a proceeding which relates to:

(a) the validy or interpretation of the arbitration agreement;

(b) the arbitration procedure;

(c) the setting aside of the award,

unless the arbitration agreement otherwise provides.

Article 20. Cases of nationalization

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

PART IV

STATE IMMUNITY IN RESPECT OF PROPERTY
FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint

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

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

(b) has been allocated or earmarked by the State for the satisfaction of the claim which is the object of that proceeding.
Article 22. Consent to measures of constraint

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

(a) by international agreement;

(b) in a written contract; or

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

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

Article 23. Specific categories of property

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

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

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

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

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

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

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

PART V
MISCELLANEOUS PROVISIONS

Article 24. Service of process

1. Service of process by any writ or other document instituting a proceeding against a State shall be effected:

(a) in accordance with any special arrangement for service between the claimant and the State concerned; or

(b) failing such arrangement, in accordance with any applicable international convention binding on the State of the forum and the State concerned; or

(c) failing such arrangement or convention, by transmission through diplomatic channels to the Ministry of Foreign Affairs of the State concerned or

(d) failing the foregoing, and if permitted by the law of the State of the forum and the law of the State concerned:

(i) by transmission by registered mail addressed to the head of the Ministry of Foreign Affairs of the State concerned requiring a signed receipt; or

(ii) by any other means.

2. Service of process by the means referred to in paragraph 1 (c) and (d) (i) is deemed to have been effected by receipt of the documents by the Ministry of Foreign Affairs.

3. These documents shall be accompanied, if necessary, by a translation into the official language, or one of the official languages, of the State concerned.

4. Any State that enters an appearance on the merits in a proceeding instituted against it may not thereafter assert that service of process did not comply with the provisions of paragraphs 1 and 3.

Article 25. Default judgment

1. No default judgment shall be rendered against a State except on proof of compliance with paragraphs 1 and 3 of article 24 and the expiry of a period of time of not less than three months from the date on which the service of the writ or other document instituting a proceeding has been effected or is deemed to have been effected in accordance with paragraphs 1 and 2 of article 24.

2. A copy of any default judgment rendered against a State, accompanied if necessary by a translation into the official language or one of the official languages of the State concerned, shall be transmitted to it through one of the means specified in paragraph 1 of article 24 and any time-limit for applying to have a default judgment set aside, which shall be not less than three months from the date on which the copy of the judgment is received or is deemed to have been received by the State concerned, shall begin to run from that date.

Article 26. Immunity from measures of coercion

A State enjoys immunity, in connection with a proceeding before a court of another State, from measures of coercion requiring it to perform or to refrain from performing a specific act on pain of suffering a monetary penalty.

Article 27. Procedural immunities

1. Any failure or refusal by a State to produce any document or disclose any other information for the purposes of a proceeding before a court of another State shall entail no consequences other than those which may result from such conduct in relation to the merits of the case. In particular, no fine or penalty shall be imposed on the State by reason of such failure or refusal.

2. A State is not required to provide any security, bond or deposit, however described, to guarantee the payment of judicial costs or expenses in any proceeding to which it is a party before a court of another State.

Article 28. Non-discrimination

1. The provisions of the present articles shall be applied on a non-discriminatory basis as between the States Parties thereto.

2. However, discrimination shall not be regarded as taking place:

(a) where the State of the forum applies any of the provisions of the present articles restrictively because of a restrictive application of that provision by the other State concerned;

(b) where by agreement States extend to each other treatment different from that which is required by the provisions of the present articles.

32. He invited the Special Rapporteur to introduce his second report on the topic (A/4/422 and Add.1), which the Commission was to consider together with the preliminary report.

33. Mr. OGISO (Special Rapporteur) said that it was perhaps a little too soon after the adoption of the draft articles on first reading in 1986 to arrive at a fair assessment of the views of the international community on those texts, particularly since only 29 States had so far submitted comments and observations (A/4/410 and Add.1-5) and since his preliminary report (A/4/415) had not given rise to any substantial comment in the Sixth Committee at the forty-third session of the General Assembly. The purpose of his second report (A/4/422 and Add.1), there-
fore, was to elaborate on the preliminary report and suggest further amendments to some of the draft articles in the light of the comments and observations of Governments, with a view to facilitating the Commission's debate.

34. Referring first to part II of the draft (General principles), he said that basically the draft articles consisted of a general principle of State immunity, as laid down in article 6, and a number of exceptions or limitations to that principle, as provided for under articles 11 to 19 of part III. Although, on first reading, there had been a clear division of views in the Commission between those who favoured an absolute rule of State immunity and those who favoured a restrictive rule, it had been generally accepted that the principle of State immunity itself existed as a norm of customary international law. That conclusion had been seen as the justification for beginning the work on the topic.

35. In his preliminary report, he had not dealt in detail with judicial practice and domestic law, which had already been covered at length in the previous Special Rapporteur's eight reports. In response to requests by some members of the Commission, however, he had included in his second report a brief account of recent developments in general State practice concerning State immunity.

36. One point of view which had emerged from the comments by Governments was that a State was absolutely immune from the jurisdiction of a foreign court in practically all circumstances unless it had expressly consented to submit to such jurisdiction. According to that view, absolute immunity was a norm of general international law and States which did not abide by it violated international law. In judicial practice and under domestic law, however, the doctrine of absolute immunity had gradually yielded to the doctrine of restricted immunity. The process whereby domestic courts had adopted a restrictive view was examined briefly in his second report (ibid., paras. 5-9).

37. It was apparent from that brief review of State practice that the absolute theory of State immunity could no longer be said to be a universally binding norm of customary international law. It might be argued that States which had not consented to the modification of that norm could still rely on the doctrine of absolute immunity but, as the previous Special Rapporteur had pointed out in his sixth report, unless the advocates of the absolute doctrine provided concrete evidence of a judicial decision allowing immunity in cases where it would have been refused in countries practising restricted immunity, the restrictive trends could not be denied in the latter countries. In other words, they could not be denied simply by enunciation of an opposing doctrine or by mere declaration of an absolute principle. A crucial fact was that the judicial practice of the States which had upheld absolute immunity had radically changed.

38. Conversely, the question arose whether, under general international law, a State was now free to deny immunity to other States as it saw fit. If the rule of State immunity was governed by international law, it could be assumed that international law included a norm whereby the freedom of States to deny immunity to other States was limited. As the problem of the extent of such a limitation had not been resolved, however, it was not possible to arrive at a precise formulation of the general consensus. Indeed, advocates of the restrictive doctrine of State immunity had proposed that acts of foreign States could be divided into two categories—acts jure imperii and acts jure gestionis—the foreign State being entitled to immunity only with respect to the first category. Unfortunately, that distinction had proved difficult to implement in practice, which was apparently one reason why those who favoured the doctrine of absolute immunity were reluctant to accept the restrictive trend. In short, there was no single, generally accepted meaning of the phrase jure imperii or of acts jure gestionis, though a number of scholars supported the principle of restricted immunity. Nevertheless, in view of the clear trend towards recognition of the principle that the jurisdictional immunity of States was not unlimited, he considered that both categories of acts should be elaborated and defined in objective legal terms.

39. In his preliminary report (A/CN.4/415, para. 67), he had proposed the deletion from article 6 (State immunity) of the words between square brackets, "and the relevant rules of general international law". He had also suggested, in accordance with the proposal by the Government of Spain, that the point could be covered in the preamble to the future convention. It would not be entirely illogical, of course, given recent developments in favour of the doctrine of restricted immunity, to retain the phrase in question. The danger was that it might result in an increase in the exceptions to immunity and therefore to an undue restriction on acts jure imperii. If, for that and other reasons, it was agreed that the phrase should be deleted, he would propose the following new article 6 bis to maintain the balance between the two opposing views (A/CN.4/422 and Add.1, para. 17):

"Article 6 bis

"Notwithstanding the provision of article 6, any State Party may, when signing this Convention or depositing its ratification, acceptance or accession, or at any later date, make a declaration of any exception to State immunity, in addition to the cases falling under articles 11 to 19, according to which the court of that State shall be able to entertain proceedings against another State Party, unless the latter State raises objection within thirty days after the declaration was made. The court of the State which has made the declaration cannot entertain proceedings under the exception to State immunity contained in the declaration against the State which has objected to the declaration. Either the State which has made the declaration or the State which has raised objection can withdraw its declaration or objection at any time."

Such an article would not be inconsistent with the current trend in State practice towards the restrictive rule of immunity and might be conducive to the formation of a precise rule of customary international law based upon regular, uniform judicial practice among States. He realized, however, that, if draft article 6 bis were adopted and the bracketed phrase in article 6 were deleted, article 28 might have to be reviewed.

40. Turning to part III of the draft, members would recall that the Commission had retained two alternatives for the title, namely the expressions "limitations on" State immi-
41. In connection with article 11, on commercial contracts, he recalled that, in his preliminary report, he had proposed that paragraph 2 of article 3, which concerned the determination of a commercial contract, be replaced by the text of paragraph 3 of the proposed new article 2 (A/CN.4/415, paras. 29 and 39). He had made the proposal to take account of the views of a number of Governments which disagreed with the use of the purpose criterion to determine whether certain activities should be regarded as commercial. Those Governments also felt that paragraph 2 of article 3, in particular the phrase “if, in the practice of that State, that purpose is relevant to determining the non-commercial character of the contract”, was vague, unduly subjective and artificial. In his view, however, the purpose criterion was particularly necessary in cases such as famine relief and should be taken into account in cases concerning the relevant contracts.

42. Nevertheless, the double criterion laid down in the paragraph in question related primarily to the nature of the contract and also to the relevant practice of a foreign State, something which would lead to uncertainties in application because “the practice of that State” would not necessarily be clear, and might thus tend towards the doctrine of absolute immunity. From a literal interpretation of the provision, it was apparent that the purpose test was to be used as a supplementary one in cases of doubt, but, as had been pointed out in the commentary, if after the application of the “nature” test, the contract or transaction appears to be commercial, then it is open to the State to contest this finding by reference to the purpose of the contract or transaction.  

43. The purpose of a contract would almost always be determined on a one-sided basis, according to the practice of the defendant State, as the United Kingdom had stated in its comments on paragraph 2 of article 3. In fact, the double criterion was designed to provide appropriate protection for developing countries in their national economic development endeavours. The need for the provision was undeniable, but a more balanced criterion could be ensured by the formula suggested for paragraph 3 of the proposed new article 2 (ibid.):

“In determining whether a contract for the sale or purchase of goods or the supply of services is commercial, reference should be made primarily to the nature of the contract, but if an international agreement between the States concerned or a written contract between the parties stipulates that the contract is for the public governmental purpose, that purpose should be taken into account in determining the non-commercial character of the contract.”

44. He would welcome further guidance from the Commission with regard to the proposed new article 11 bis (ibid., para. 122), since the question at issue was of crucial importance.

45. Turning to article 13, as the previous Special Rapporteur had indicated in his fifth report, the relevant provisions in recent codification instruments provided for the denial of immunity for illegal acts by foreign States causing death or personal injury or damage to or loss of property. Those enactments usually required territorial jurisdiction as a limiting factor in the application of the torts exception. Accordingly, the second territorial requirement in the article could be deleted.

46. As to the question of State responsibility, the illegality of the act or omission was not determined by the rules of international law. According to the commentary to article 13 (formerly article 14), “this exception to the rule of immunity is applicable only to cases or circumstances in which the State concerned would have been liable under the lex loci delicti commissi”. In other words, the applicable law was, in principle, the law of the forum State.

47. In a celebrated and apparently exceptional case, Letelier v. Republic of Chile (1980), an action in connection with the killing of the former Chilean Ambassador to the United States of America had been brought against Chile in a United States court under section 1605 (a) (5) of the United States Foreign Sovereign Immunities Act of 1976. Chile had claimed sovereign immunity on the ground that the killing consisted of a public act of political assassination. The court, however, had decided that jurisdiction might be asserted over a foreign State for its unlawful public acts. Sometimes a State might not take up a case based on rules of State responsibility under international law for political considerations, but it could not be said that it would be more appropriate for the victim to appeal to the local court against a foreign State under the law of the forum State.

48. Furthermore, while article 13 covered physical injury to the person and damage to tangible property, it could be argued that its scope was too wide to enlist the support of a sufficient number of States in its present form. The Commission’s intentions, as reflected in the commentary, were that article 13 should mainly cover accidents occurring routinely within the territory of the forum State. The article had been restored to its present form in 1984, after the previous Special Rapporteur had replaced it by a provision which had narrowed down its application to traffic accidents for which insurance coverage would normally be claimed. In any event, the Commission should reconsider the scope of the article in the light of the fact that, to date, liability cases connected with criminal offences had seldom been encountered in practice. If the scope of the article were so narrowed, draft article 6 bis (see para. 39 above) might become relevant as a factor of compromise.

49. Several countries, such as the United States, the United Kingdom, Singapore and South Africa currently had legislation concerning non-commercial tort. However, almost all relevant court cases prior to the enactment of such legislation had involved traffic accidents, and it was his understanding that the Letelier case might be the only one to which the exception of personal injury applied, resulting in non-immunity. He therefore wished to elicit the views of the Commission on the question whether, by

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narrowing down the scope of article 13 to traffic accidents, it could be rendered more acceptable.

50. Some developing countries had raised objections to article 15 because it would have a detrimental effect on their economic growth and development. In general, they thought it consistent with their national interest to refrain from enacting legislation to protect intellectual property, since free reproduction of any new technological advances in their countries might be for the benefit of society as a whole. It might be argued that the protection of intellectual property rights was one of the important requirements for the expansion of world commercial activity.

51. Article 15 did not itself in any way affect the competence of a State to select and implement its domestic policies within its territory. In fact, it placed two specific territorial restrictions on the proposed exception to State immunity. First, the alleged infringement must have occurred within the territory of the forum State; and secondly, the case must involve rights protected in the forum State. This, under article 15, a domestic court could not be empowered to decide infringement occurring outside the territory of the forum State. In that connection, the comment by the Mexican Government on subparagraph (a) (see A/CN.4/422 and Add.l, para. 160) was particularly relevant, and provided the correct interpretation of the article.

52. In his preliminary report (ibid., para. 191), he had proposed that the term "non-governmental" in article 18 be deleted. If it were retained, paragraphs 1 and 4 could be interpreted as meaning that a ship owned by a State and used in commercial service enjoyed immunity from the jurisdiction of another State. Thus, while all commercial ships in service under a State trading system might invoke immunity, commercial vessels operating under the free-market system, whether they belonged to industrially advanced States or developing States, would be subject to local jurisdiction. Such an uneven legal consequence was totally unacceptable to a significant number of States. Deletion of the term "non-governmental" would be consistent with the general trend in international conventions, such as the 1926 Brussels Convention on the immunity of State-owned vessels, the 1958 Convention on the Territorial Sea and the Contiguous Zone (art. 22) and the 1982 United Nations Convention on the Law of the Sea (arts. 31 and 32).

53. In that connection, two Governments had pointed out that it would be desirable to introduce into the draft articles the concept of segregated State property, in order to resolve problems relating to State-owned or State-operated ships in commercial service. In the light of those comments and the need for a new provision similar to draft article 11 bis as proposed in his preliminary report, he suggested that the following new paragraph 1 bis be incorporated in article 18 (A/CN.4/422 and Add.l, para. 26):

"If a State enterprise, whether agency or separate instrumentality of the State, operates a ship owned by the State and engaged in commercial service on behalf of the State and, by virtue of the applicable rules of private international law, differences relating to the operation of that ship fall within the jurisdiction of a court of another State, the former State is considered to have consented to the exercise of that jurisdiction in a proceeding relating to the operation of that ship, unless the State enterprise with a right of possessing and disposing of a segregated State property is capable of suing or being sued in that proceeding."

Although the wording of that paragraph differed from that of draft article 11 bis, no change of substance was intended, and he hoped that the necessary adjustment would be made in the Drafting Committee.

54. One Government had suggested that the Commission should consider the question of State-owned or State-operated aircraft in commercial service. As he pointed out in his second report (ibid., para. 28), the matter was governed by international civil aviation treaties, including the Convention relating to the Regulation of Aerial Navigation (Paris, 1919), the Convention for the Unification of Certain Rules relating to International Carriage by Air (Warsaw, 1929), the Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft (Rome, 1933), the Convention on International Civil Aviation (Chicago, 1944) and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952). He inclined to the view that, apart from those treaties, there was no uniform rule of customary international law concerning the immunity of State-owned or State-operated aircraft. Moreover, there were few relevant legal cases which might constitute State practice. He would therefore suggest that the question of aircraft be dealt with along the lines set out in his report, in the commentary, rather than by introducing a special provision into article 18.

55. With regard to the two bracketed alternatives in article 19, the expression "civil or commercial matter" was preferable to "commercial contract". If implied consent was the rationale behind the article, there was no reason why denial of immunity in cases involving agreement to arbitrate should be linked with one of the exceptions, such as a commercial contract. Furthermore, the reference to a "civil matter" seemed to have the advantage of not excluding cases such as arbitration of claims arising out of the salvage of a ship which might not be regarded as solely commercial.

56. As to the reference to a court, article 19 used the words "before a court of another State which is otherwise competent", while the original proposal by the previous Special Rapporteur had been "a court of another State on the territory or according to the law of which the arbitration has taken or will take place" (ibid., para. 33). He himself preferred the latter formulation. Although it was sometimes said that arbitration was a particular procedure of dispute settlement distinct from adjudication by a court of law, the ordinary courts had played a supportive role in arbitration. In the light of such legal practice, article 19 introduced into the draft a denial of State immunity before domestic courts in proceedings relating to arbitration, even if one party thereto was a foreign State. Of course, the modalities of that supervisory function by domestic courts might vary with the relevant rules of each legal system. Under article 19, the supervision of arbitration extended over questions connected with the arbitration agreement, such as the interpretation and validity of that agreement, the arbitration procedure and the setting aside of arbitral awards. Some domestic legislation specified that an award could be set aside for reasons of public policy. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards provided that the setting aside of an award might
be ordered only by a court of the State in which the arbitration had taken place.

57. On the question of the extent of proceedings involving the exercise of supervisory jurisdiction by a court of another State, one Government had suggested that a reference to proceedings relating to the "recognition and enforcement" of an arbitral award should be added in subparagraph (c) of article 19 (ibid., para. 35).

58. With one exception, recent codifications did not regard the submission by a State to arbitration as a waiver of immunity from enforcement, but he had not had the opportunity to study the relevant part of the recent United States legislation in that connection. In State practice, it appeared that two conflicting views had been asserted as to whether, by entering into an agreement to arbitrate, a State could not invoke its immunity in proceedings relating to the enforcement of an award against it. In his opinion, the enforcement of arbitral awards was dealt with correctly in the draft articles, in spite of the comment by Australia suggesting the need for more explicit treatment (ibid., para. 37 in fine).

59. If the question was approached from the point of view that an application for enforcement served no useful purpose except as a first step towards execution, the plea of State immunity would be allowed in that proceeding to obtain the preliminary order in so far as the State's consent had not been given to the jurisdiction of the courts relating to actual execution. On the other hand, if one considered that—distinguishing recognition of an award from its execution—recognition was the natural complement of the binding character of any agreement to submit to arbitration and should not be impaired by considerations of sovereign immunity, the immunity would apply to the process of execution but not to the preceding recognition of the arbitral award.

60. In that connection, the French courts strictly distinguished recognition of arbitral awards from actual execution of the awards (ibid., para. 40). The method of dealing with applications to enforce arbitral awards against foreign States might be specific to France, but it would provide the Commission with useful guidance for rethinking the question. He therefore suggested that, to cover the case in which the State of the forum adopted domestic legislation admitting the same position as the French courts, the Commission could add a new subparagraph (c) to article 19, reading: "the recognition of the award", on the understanding that it should not be interpreted as implying waiver of immunity from execution.

The meeting rose at 1 p.m.

2115th MEETING

Thursday, 8 June 1989, at 10 a.m.

Chairman: Mr. Bernhard GRAEFARTH

Present: Mr. Al-Baharna, 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. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivas Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.


[Agenda item 3]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

CONSIDERATION OF THE DRAFT ARTICLES4 ON SECOND READING (continued)

1. Mr. OGISO (Special Rapporteur), continuing his introduction of his second report (A/CN.4/422 and Add.1), summarized the comments and observations received from Governments on part IV of the draft articles (State immunity in respect of property from measures of constraint).

2. Although most Governments held that immunity from measures of constraint was separate from jurisdictional immunity of States, some legal experts argued that allowing plaintiffs to proceed against foreign States and then withholding from them the fruits of successful litigation through immunity from execution might put them in the doubly frustrating position of being left with an unenforceable judgment and expensive legal costs. The Swiss Government had pointed out that the draft articles departed considerably from the 1972 European Convention on State Immunity. Yet the system under the European Convention was based on the obligation of States parties to abide voluntarily by the judgments rendered against them and it would be difficult to apply the same system elsewhere in its entirety. In addition to a waiver, the United Kingdom State Immunity Act 1978 permitted enforcement of a judgment or an arbitral award in respect of property which was in use or intended for use for commercial purposes. The United States Foreign Sovereign Immunities Act of 1976 established a general rule of immunity from execution with a number of exceptions, all of them referring only to commercial property. The general tendency in European countries was to permit enforcement with regard to commercial property, but to deny it in the case of property designated for public purposes. Article 21 of the draft had been worded along those lines. The only point remaining for consideration was whether the phrase "and has a connection with the object of the claim, or with the agency or instrumentality against which the proceeding was directed”, in subparagraph (a), should be deleted, as a number of Governments had suggested, in order better to reflect European practice. If that suggestion was not acceptable, the addition of the words "Unless